

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch**

Buddys Food Mart,

Appellant,

v.

Case Number: C0211184

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a six month disqualification against Buddys Food Mart (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), § 278.6(e)(5 and 6), and § 278.6(f)(1) in its administration of the SNAP when it imposed a six month period of disqualification against Appellant on October 15, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may . . . file a written request for review of the administrative action with FNS.”

CASE CHRONOLOGY

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period August 13, 2018, through August 16, 2018. The investigation determined that personnel at the Appellant firm accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. All four transactions were deemed clearly violative and warrant a six month disqualification period. The items sold are best described in

regulatory terms as common nonfood items and included items such as dishwashing detergent, laundry detergent, fabric softener, dryer sheets, clothing, plastic cutlery, and all-purpose cleaner.

The investigative report indicates that these violative transactions were handled by two different clerks and notes that the firm refused to exchange SNAP benefits for cash on two occasions (Exhibits C and D). The firm also overcharged the undercover agent by charging 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for a bottle of fabric softener that was priced at \$3.99.

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated September 13, 2018, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations “. . . warrant a disqualification period of six months (Section 278.6(e)(5)). The letter also states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).”

Appellant, through counsel, requested and was approved for an extension of time in responding to the charges. Appellant, through counsel, responded to the charges in a letter dated September 26, 2018. After giving consideration to the evidence, the Retailer Operations Division notified Appellant by letter dated October 15, 2018, that it determined that violations had occurred at the firm, and that a six month period of disqualification from participating as an authorized firm in SNAP was warranted. This determination letter also states that Appellant’s eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated “. . . you are not eligible for the CMP because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.”

By letter dated October 17, 2018, Appellant, through counsel, appealed the Retailer Operations Division’s decision and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review. No subsequent correspondence was received from Appellant.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Section 278.

In particular, Sections 278.6(a) and (e)(5) establish the authority upon which a six month disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 271.2 states that: Eligible foods means any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot food and hot food products prepared for immediate consumption.

7 CFR § 278.2(a) states that: Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food. Further, the citation specifies that coupons may not be accepted in exchange for cash, in payment of interest on loans, or for any other nonfood use.

7 CFR § 278.6(a) states that: FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations.

7 CFR § 278.6(e)(5) states that: a firm is to be disqualified for six months if it is to be the first sanction for the firm and the evidence shows that personnel of the firm have committed violations such as but not limited to the sale of common nonfood items due to carelessness or poor supervision by the firm's ownership or management.

7 CFR § 278.6(f)(1) states that: “FNS may impose a CMP as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to SNAP households because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices. FNS may disqualify a store which meets the criteria for a CMP if the store had previously been assigned a sanction. A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

APPELLANT’S CONTENTIONS

The following may represent a summary of Appellant’s contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- The firm is located in a low income area in Chicago’s south side. The owner is not involved in the firm as it is operated by her mother who is the only employee. She works every day and is the only cashier. The firm has operated since November 2017, but its lease has expired and the firm will be closing at the end of September 2018;
- The firm sells food and non-food items, but no tobacco or liquor. The one cash register produces itemized receipts and non-food items are separated by the cash register. The SNAP POS receipt only shows the purchase total and has no information as to the number of items purchased;
- The report contains erroneous identifying information on the cashier that raises serious questions concerning the accuracy of the report and if the alleged transactions even

occurred at the firm. The owner's mother is 44 years old, weighs over 240 pounds, is five feet four inches tall, and wears a head scarf that completely covers her hair;

- The firm's cash register was not working in August 2018 and therefore no customer would have received an itemized receipt. The report does concede that no cash register receipts were provided during the four visits. Since the POS receipt does not list the numbers of items purchased or contain a description of items or their prices, there is no documentary evidence. This further taints the overall credibility of the report and the ability of USDA to prove the transactions occurred as described;
- The sales prices for the items listed in the report are inaccurate. During the August 13, 2018, visit, the investigator alleges he purchased one bottle of Palmolive dishwashing detergent, a jar of Ragu pasta sauce, and a box of Creamette spaghetti for a total of \$5.48. However, the selling prices of the Ragu and Creamette total \$5.48 (\$3.49 and \$1.99). If the Palmolive had been purchased, the debit amount would have been greater than \$5.48. The report also shows NPI mean no price identified or indicated for the Palmolive and the Ragu, but every item in the firm has a price tag and a bar scan constituting another error or inconsistency. Appellant details similar price inaccuracies and erroneous information in each of the other visits made during the investigation; and,
- Based on the erroneous identifier information concerning the cashier, the lack of cash register receipts, and the multitude of errors and inconsistencies in the Investigative Reports concerning the items purchased and the amounts debited, the alleged violations are unsupported and should not be sustained, and the firm should not be disqualified from SNAP or fined.

Appellant submitted a copy of the charge letter with the investigative report, examples of cash register receipts, an example of a POS receipt, a copy of the owner's mother's driver's license, a photo of the mother, a medical form listing the mother's weight, and 14 photos of store stock with price tags that are the same items purchased during the investigation in support of these contentions.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not within the authority of this review to consider what subsequent remedial actions may have been taken or will be taken in the future so that a store may begin to comply with program requirements. While store ownership may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, the ownership is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. The FNS SNAP retailer application and reauthorization application both contain a certification page whereby applicants must confirm their understanding of and agreement with SNAP retailer requirements in order to complete the application/reauthorization process. Store ownership did certify its understanding and agreement

to abide by program rules and regulatory provisions when it initially applied to become a SNAP retailer. The certification page states that store ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time regardless of the amount of time the owner is present at the subject firm.

The investigative report shows that two employees working at the Appellant firm during the period under review transacted SNAP benefits for ineligible items on four separate occasions indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The transactions from the investigative report, including the store EBT POS receipts, have been matched to SNAP transactions posted on the dates in question and a review of the investigative report shows no errors or discrepancies. There was no indication of involvement by the firm's ownership or management. The acceptance of SNAP benefits for ineligible items is a violation of SNAP rules and regulations. The ineligible items sold were obvious nonfood items and would not readily be confused with eligible edible food items. SNAP regulations state that FNS shall disqualify a store for a six month period if it is to be the first sanction for the firm, and the evidence shows that personnel of the firm have committed violations such as the sale of common nonfood items in exchange for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management. A record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges. It is more likely than not that the violative transactions were the direct result of poor or no supervision by store ownership and the lack of an effective training program. This is supported by Appellant's statement that the store owner is not involved in the firm.

It is highly improbable, based on the readiness of the store employees to exchange SNAP benefits for ineligible items, that the only instances of SNAP violations were the four identified as part of the FNS undercover investigation and more likely than not that this represented an ongoing pattern of SNAP violations at the Appellant firm. As previously stated, store ownership is responsible for all SNAP transactions at the firm and therefore a certain minimal level of oversight and training on the part of ownership to ensure employees, especially new employees, are not violating SNAP laws or regulations is expected. It would be unusual and irresponsible for store ownership to not have a program of ongoing supervision of employee performance and conduct to ensure store employees were not stealing from the firm or conducting other activities that would jeopardize the licenses and income that the firm is dependent upon.

Regarding Appellant's contentions, it would be highly unlikely that the store owner's mother could be the only employee of a firm that is open 88 hours per week according to the store hours listed in the FNS store visit report conducted on January 13, 2018. This employee would have to wait on customers, purchase new inventory, restock, clean, and produce store reports to mention just some of the primary duties associated with operating a grocery store. These hours would also leave little or no personal time for the employee to do anything else such as attend religious services, purchase groceries, prepare meals, do laundry, clean her residence, etc. That this claim is inaccurate is further supported by the Report of Investigation that clearly identifies two separate store employees as having conducted the violative transactions and by the FNS store visit release form that was signed by a young man who stated he was a cashier. It is therefore more likely than not that Appellant's allegation of the firm having only one employee is not true.

Appellant also contends the store would be closing the end of September 2018 when its lease expired, yet FNS records show the firm processing SNAP transactions through October 18, 2018. The store visit report and numerous photos of stock show that most of Appellant's food stock is not individually priced, there is no optical scanner at the checkout, and there are no bar codes for store stock. It is questionable that the same jar of Ragu that Appellant claims is priced at \$3.49 is carried by the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) store, located just blocks away, for \$1.85 and at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for \$1.77.

Based on the firm's small store size and very limited inventory, it would likely not be cost effective for the firm to purchase a sophisticated POS system or spend the many hours needed to program each item into the system. This would be particularly true for a store whose lease was not being renewed in the near future. While Appellant submitted copies of three itemized receipts dated after the violative transactions, no other evidence was provided showing the firm had purchased and programmed a new POS system. Additionally, a review of the Retailer Operations Division's evidence consisting of dated store photos showing the same items listed in the Report of Investigation, POS receipts matching the amounts cited in the Report of Investigation, signed donation records from a local charity listing items received that match the items purchased in the Report of Investigation, and FNS SNAP transaction records that match the dates and amounts of the transactions listed in the Report of Investigation, shows no reason to doubt the integrity of the Report of Investigation.

Based on this discussion, the decision by the Retailer Operations Division to disqualify the firm for a six month period is the appropriate penalty in this situation and there is not any valid basis for dismissing the charges or for mitigating the penalty imposed. The regulations do allow SNAP retailers to pay a hardship CMP under certain conditions as explained in the next section.

CIVIL MONEY PENALTY

Appellant is not eligible for a trafficking CMP as these only apply in cases of permanent disqualifications.

A hardship CMP as an optional penalty in lieu of a six month disqualification was considered in this case. Such a finding is appropriate only if a store sells a substantial variety of staple food items and its disqualification would create a hardship to SNAP households because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices. FNS records show there are more than 40 comparably sized or larger SNAP retailers located within a 1.0 mile radius of the Appellant firm that includes several medium grocery stores and a large grocery store located in proximity to Appellant's location selling comparable foods with the closest medium grocery store located just two blocks away.

All of the comparable or larger stores stock adequate varieties of food in all four staple food categories and in perishables as required by FNS. The nearby comparable or larger stores appear readily accessible to SNAP recipients and offer a variety of staple foods comparable to, or better than, those offered by Appellant. Appellant does not carry any unique items or foods that cannot be found at other stores. It is recognized that some degree of inconvenience to SNAP benefit

users is inherent in the disqualification from SNAP of any participating food store as the normal shopping pattern of such SNAP benefit holders may be altered. Inconvenience, however, does not rise to the level of hardship required by the regulations.

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted by a USDA special agent and signed under penalty of perjury. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and accurate with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail. Accordingly, the determination by the Retailer Operations Division to impose a disqualification of six months against the Appellant firm from participating as an authorized retailer in SNAP is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations as there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. A new application for participation in SNAP may be submitted ten (10) days prior to the expiration of the six month disqualification period. When eligible, Appellant may reapply for SNAP authorization using the application instructions contained on the FNS retailer web site. Any questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

ROBERT T. DEEGAN
Administrative Review Officer

April 15, 2019