

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

Chan's Neighbourhood Store,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0194034

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a six-month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Chan's Neighbourhood Store by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it imposed a six-month disqualification against Chan's Neighbourhood Store.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that "[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

FNS records show that the Appellant firm, Chan's Neighbourhood Store, was initially authorized for SNAP participation as a small grocery store on May 16,

2016. Between January 10, 2017 and April 26, 2017, FNS conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigative report documented that personnel at Chan's Neighbourhood Store accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. According to the report, the Appellant firm sold trash bags, laundry detergent, household cleaner, copper scrubbing pads, and cigarettes in exchange for SNAP benefits, which benefits may only be used in exchange for eligible foods.

In a letter dated June 5, 2017, the Retailer Operations Division charged the Appellant with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). The charge letter stated that the violation of accepting SNAP benefits in exchange for ineligible nonfood items warrants a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further stated that under certain conditions and in accordance with 7 CFR § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

In response to the charge letter, the Appellant owner sent a letter, postmarked June 8, 2017, to the Retailer Operations Division. In its letter the Appellant did not dispute that the violations occurred, but contended that they were the fault of a friend whom the owner had allowed to run the store while she was attending college. The owner insisted that she did not know that violations were occurring until March 2017, when a customer mentioned that the person who was in charge of the store was involved in some irregular activities. The owner stated that she took the store back from the friend on April 15, 2017. The Appellant requested a second chance and indicated a willingness to provide affidavits to confirm the veracity of its response. It should be noted that no affidavits were ever submitted.

After considering the Appellant's response as well as the evidence in the case, the Retailer Operations Division issued a letter of determination dated June 20, 2017. This letter informed the Appellant that it was the determination of the Retailer Operations Division that the violations did occur as outlined in the letter of charges and that a six-month disqualification penalty would be imposed in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that consideration for a hardship CMP was given, but that the Appellant was not eligible for a CMP because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked June 29, 2017, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and implementation of the sanction has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. This means that an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 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 § 278.2(a) states, *inter alia*:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households... only in exchange for eligible food.

7 CFR § 271.2 states, *inter alia*:

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 § 278.6(a) states, *inter alia*:

*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.... **Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section.** [Emphasis added.]*

7 CFR § 278.6(c) states, *inter alia*:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination...

7 CFR § 278.6(e) states, *inter alia*:

FNS shall take action as follows against any firm determined to have violated the Act or regulations... The FNS regional office shall:

(5) Disqualify the firm for 6 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, *inter alia*:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm subject to a disqualification is selling a substantial variety of staple food items, and 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.

INVESTIGATION DETAILS

During an undercover investigation conducted between January 10, 2017 and April 26, 2017, the USDA completed seven compliance visits at Chan's Neighbourhood Store. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the June 5, 2017 charge letter. The investigation report included Exhibits A through G, which provided full details on the results of each compliance visit. SNAP violations were documented during four of the seven visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report noted that the following nonfood items were purchased by an investigator using SNAP benefits:

- One 15-count box of 13-gallon kitchen bags (brand unknown), Exhibit B
- One 330-gram bag of laundry detergent (*Tide* brand), Exhibit B
- One 15-count box of 13-gallon kitchen bags (brand unknown), Exhibit C
- One 330-gram bag of laundry detergent (*Tide* brand), Exhibit C
- One 24-fluid ounce bottle of cleaner (*Clorox* brand), Exhibit D
- One 330-gram bag of laundry detergent (*Tide* brand), Exhibit D
- One copper scrubbing pad (*Jolly Dude* brand), Exhibit D
- Four packs of cigarettes (*Newport* brand), Exhibit F

The report noted that in Exhibit G, the clerk on duty refused to allow two packs of cigarettes to be purchased with SNAP benefits. On another occasion, the investigator attempted to exchange SNAP benefits for cash (i.e. trafficking), but the clerk refused. This refusal is noted in Exhibit E. The report indicates that the

investigator did not attempt to commit any violations in Exhibit A. According to the report, the investigator attempted to purchase ineligible nonfood items on five separate trips to the store. Only once did a clerk on duty refuse the transaction.

The charge letter states that the violations that occurred in Exhibits B, C, D and F warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5). According to the report, two separate clerks conducted the four violative transactions during the investigation.

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant owner understands that the violations occurred and that she has to suffer the consequences. But the violations are not her fault, so she is hoping for a compromise.
- If the disqualification cannot be stopped, can it be a disqualification for three months instead? A six-month disqualification would hurt the business, as the owner has only recently taken over the store again.
- Even though there are other authorized retail stores in the area, it is not convenient for the customers in the area as 90 percent of them are not mobile.
- Appellant owner has learned her lesson and the violations will never occur again, as both she and her employee (her boyfriend) know the rules and regulations of SNAP.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The Appellant has not provided any information or documentation in opposition to FNS's investigation report. Rather, the Appellant appears to acknowledge that the violations took place, implying that the violations occurred while the owner was attending college and a friend was watching the store. Because the violations themselves do not appear to be in dispute, it is the determination of this review that program violations did occur as charged by the Retailer Operations Division. The balance of this review will address the Appellant's remaining contentions.

Appellant Owner Not Involved in Violations

The Appellant contends that the violations are not the fault of the owner, as they were committed during a time that she was attending college and had turned over responsibility of the store to a friend. That friend then hired his own employees. The owner stated that while she was attending college, she “barely” went to the store and had “no idea” what was happening there. After learning from a customer what types of activities were taking place at the store, the owner took the store back from the friend on April 15, 2017.

With regard to these contentions, the record shows that the Appellant owner signed an application to participate as a SNAP retailer on March 22, 2016. By signing this application, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. The record clearly establishes that the Appellant owner agreed to abide by program rules, including taking responsibility for violations committed by any of the firm’s employees, whether paid or unpaid, new, full-time or part-time. An owner is not free of responsibility simply because he or she was not in the vicinity at the time the violations occurred or because he or she was uninvolved in the violations. Regardless of which clerks are operating the cash register at a given time or whom firm ownership authorizes to handle store business, the ownership of the firm is ultimately responsible for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of its employees would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA.

Therefore, the Appellant’s claim that the violations were not the fault of the owner does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Request for Reduced Penalty

In its request for administrative review, the Appellant requested a compromise with regard to the length of the disqualification. Because the owner had no involvement with the violations, the Appellant requested a three-month disqualification instead of six months because a six- month penalty would hurt the business.

With regard to this request, SNAP regulations at 7 CFR § 278.6(e)(5) dictate that when serious violations occur, such as the exchange of common nonfood items for SNAP benefits, a six-month disqualification is the required penalty, even on the first occasion, regardless of an owner’s lack of involvement in the violations and regardless of how the disqualification affects the Appellant’s business. As

noted earlier, the purpose of this review is to determine whether or not the Retailer Operations Division took appropriate action, consistent with SNAP regulations, in its imposition of a six-month disqualification against Chan's Neighbourhood Store. As long as the administrative action taken by the agency fully conforms to SNAP regulations, this review has no authority to dismiss or reduce a period of disqualification.

In this case, the sanction imposed by the Retailer Operations Division is in line with SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations. As such, the six-month disqualification against Chan's Neighbourhood Store cannot be modified.

With regard to the argument that the business may suffer financially, it must be noted that hardship to the firm itself or to its owners is not a factor when deciding whether or not the disqualification determination should be reversed or whether or not a lesser penalty, such as a civil money penalty, can be applied. It is recognized that some degree of economic hardship to the firm is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of possible financial hardship to either the firm or the firm's ownership resulting from the imposition of such a penalty.

To allow store ownership to be excused from administrative penalties based on a purported economic hardship would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA. Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with Program rules, but also to those retailers who have been disqualified from the Program in the past for similar violations. Therefore, the Appellant's contention that it may incur economic hardship as a result of the disqualification does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Remedial Actions Taken

The Appellant has stated that the owner has learned her lesson and the violations will never occur again, as she has taken back the store and both she and her boyfriend know the rules and regulations of SNAP. This contention implies that the Appellant has taken steps to ensure that the firm will comply with program rules in the future.

With regard to this contention, it is important to reiterate that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. This review is limited to the circumstances that existed at the time the violations were committed. It is not the authority of this review to

consider any subsequent remedial actions that may have been taken or will take place so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations or subsequent to the violations themselves. It is apparent to this review that the Appellant owner is genuine in her desire to rectify the mistakes that were made by the firm during the investigation. However, in determining whether or not the Retailer Operations Division appropriately applied Federal law and regulations, an appellant's sincere apologies or its promises to avoid future violations has no bearing on the case.

Therefore, the Appellant's contention that corrective action has taken place or that further remedial actions are planned does not provide a valid basis for dismissing the charges or for reducing the penalty imposed.

Civil Money Penalty

Although not requested by the Appellant, this review evaluated the Appellant's eligibility for a civil money penalty (CMP) in lieu of a six-month disqualification. SNAP regulations at 7 CFR § 278.6(f)(1) state that a CMP in lieu of a temporary disqualification is allowable when the firm's disqualification would cause hardship to SNAP households. According to this regulation, hardship is defined as "no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices."

It is the determination of this review that a disqualification of Chan's Neighbourhood Store, a small grocery store, would not cause hardship to SNAP households because there are other shopping options in the area. According to agency records, there are at least three similar or larger SNAP-authorized retail stores located within a one-mile radius of Chan's Neighbourhood Store.

The Appellant has contended that although there are other authorized stores nearby, 90 percent of the neighborhood's residents are not mobile, so the other stores are not convenient.

With regard to this contention, it is recognized that some degree of inconvenience for SNAP households is likely whenever a SNAP-authorized store is disqualified and the households are forced to use their SNAP benefits elsewhere. However, in accordance with regulation cited above, hardship exists only when there are no other authorized stores in the area selling as large a variety of staple foods at comparable prices. Therefore, pursuant to 7 CFR § 278.6(f)(1), a hardship civil money penalty in lieu of disqualification cannot be assessed in this case.

CONCLUSION

Based on a review of the evidence in this case, there is no question that program violations of 7 CFR § 278.2(a) did occur during a USDA investigation. All transactions cited in the letter of charges were either conducted or supervised by a USDA investigator and all are thoroughly documented. 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, including the exchange of SNAP benefits for ineligible, nonfood items, and in all other critically pertinent details. Pursuant to 7 CFR § 278.6(a) and (e)(5) the decision to impose a six-month disqualification against the Appellant, Chan's Neighbourhood Store, is sustained.

In accordance with the Act and regulations, the disqualification penalty shall become effective 30 days after receipt of this decision. A new application for SNAP participation may be submitted 10 days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. If a judicial review is desired, the complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

December 19, 2017