

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

Chester Fastrup,

Appellant,

v.

Case Number: C0202406

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA) that Chester Fastrup (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a six month disqualification from the SNAP as imposed by the Retailer Operations Division (Retailer Operations).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.6(f)(1), 7 CFR § 278.6(a), and 7 CFR § 278.6(e) in its administration of the SNAP, when it imposed a six month period of disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

CASE CHRONOLOGY

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of October 23, 2017 through March 13, 2018. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on multiple separate occasions that warrant a six month disqualification period. The items sold are best described in regulatory terms as common nonfood items.

As a result of evidence compiled during this investigation, by letter dated April 6, 2018, Retailer Operations charged Appellant with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). Misuse of SNAP benefits was noted in Exhibits A, B, and D that warrants a disqualification as a SNAP retail food store for a period of six months. The letter also states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

One owner replied to the Charge letter April 13, 2018 and April 19, 2018. By Determination letter dated April 26, 2018, Retailer Operations informed Appellant that the violations cited in the Charge letter occurred at the firm and that a six month period of disqualification was warranted. The letter also stated that eligibility for a hardship CMP was not applicable as there are other authorized retail food stores in the area selling as large a variety of staple foods at comparable prices.

Counsel requested administrative review of this action by letter dated May 9, 2018. The appeal was granted by letter dated May 18, 2018. Counsel filed a FOIA request by email dated May 29, 2018. This office issued a correction letter dated June 6, 2018 noting the owners of record of Appellant. Counsel agreed to pay the FOIA fees by email dated June 12, 2018. The agency provided the FOIA reply dated June 13, 2018. By email dated June 15, 2018, counsel was noticed to provide information by July 9, 2018. Counsel provided a brief by email dated July 9, 2018.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the 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 argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). 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 § 278.2(a) states: “Coupons may be accepted by an authorized retail food store only from eligible households or the households’ authorized representative, and only in exchange for eligible food.”

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(a) states: “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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system.”

In addition, 7 CFR § 278.6(f)(1) provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP benefit households because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It states: “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to SNAP benefit 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.”

SUMMARY OF THE CHARGES

A report of the USDA investigation was provided to the Appellant as Exhibits with the Charge letter. The investigative report provides details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during three visits which warrant a six month disqualification. The violations involved the sale of common ineligible items such as hand wipes, soap and tissue in exchange for SNAP benefits.

APPELLANT’S CONTENTIONS

Consideration of all contentions has been made whether recapitulated here or not.

- Unfortunately a few of our employees have failed to follow the rules.
- At the time of the hiring, we train our employees on what the SNAP benefits include and not include and also have annually [sic] training for all employees and managers. You will find the attached documents that we have every employee read and sign.
- In regards to the case, 2 of the employees involved are no longer with the company, and the other employees still here have had additional training since we have been notified.
- The store manager has also had additional training because he failed to follow up policy and monitoring transactions.
- Going forward, actions will be taken with additional training and also quarterly training on the SNAP Program.
- We will do our best to keep all of our employees informed and training adequately so that this incident does not happen again.
- The Appellants adamantly deny any intentional violation of SNAP regulations on the part of the store.
- The store has a strict compliance policy and has never, over the past fifteen (15) years in which it has been a participant of SNAP, been previously accused of SNAP violations. Such strict compliance policies and training regiments are evidenced by the materials which are signed by the store’s employees prior to the commencement of their employment, titled “Operational Compliance Policy (Operator)” attached.

- The employees involved in the transactions set forth in the RIB investigations were operating specifically against their training and the store's regulations.
- The owners and management spoke to the employees as soon as said employees' SNAP violations became evident to management. One of the clerks involved in the alleged violations is no longer employed at the store and the remaining store personnel were immediately re-trained as to the proper SNAP regulations.
- The store's owners and management have now increased the SNAP regulatory and procedure training to occur quarterly, in addition to the initial training each employee receives.
- The store's management has also received additional training on proper SNAP policy and monitoring procedures.
- In light of the minimal violations coupled with the clear training and compliance programs of the store, as evidenced by the clerks' refusals to engage in any violations of SNAP regulations as well as the management's supervisory actions, it is more likely that the three investigations demonstrated a short-lived misunderstanding on the parts of the clerks concerning the difference between ineligible and eligible items, rather than a practice of selling ineligible items.
- The ineligible items alleged to have been purchased were all minor, common household items, consisting of wet wipes, bars of soap, and tissue packets, all of which would normally be expected to be found in a standard grocery shopping trip.
- Good compliance history should be given some weight when determining whether a six month disqualification is the appropriate sanction in this matter.
- The store's manager is not expected to directly oversee every transaction that processes on EBT.
- Therefore, despite the ultimate failure of the store's attempts to prevent violations as a result of human error, it is not fair to say that the store didn't oversee its personnel, especially as such proper oversight is demonstrated during one of the March 13, 2018 investigations. There were just no warning signs that management or ownership could have noticed.
- The store has a clear training policy, as evidenced by the operational handbooks signed by each employee prior to the commencement of their employment. Due to the intense training executed at the Store, the Appellants were under the belief and impression that all of their clerks were operating the register pursuant to Store policies.
- The Appellants ask that a warning letter be issued in lieu of a six month disqualification. There were only three ineligible items purchased by the Investigator – wet wipes, dial soap, and tissues – all of which are reasonably related to common household products. There was a clear misunderstanding on the part the clerks regarding the difference between eligible verse ineligible items.
- It is the Department's obligation to prove, by a preponderance of the evidence, that the Investigator's and/or Confidential Informant's allegations are correct and that the store violated SNAP regulations. Furthermore, the Department must show that such violations were the result of carelessness or poor supervision, neither of which appear to have taken place in this case.
- Accordingly, the Appellants would argue that the Department has not met its burden in proving by a preponderance of the evidence that such SNAP violations occurred nor that such violations were the result of management's carelessness or poor supervision.

Appellant provided five copies of documents titled “Supplemental Nutrition Assistance Programs: Operational Compliance Policy (Operator)” and “Acknowledge and Receipt.” The Operational Compliance Policy (Operator) document addressed mandatory employee training via the SNAP Training Guide for Retailers, the FNS Training Video, the Policy of SNAP program rules, grounds for termination, written warnings, probationary status, corrective action for complaints of SNAP violations, and on-going compliance monitoring. Four of the Acknowledge and Receipt documents recorded employee name and hire date and were signed and dated by four employees. One of the Acknowledge and Receipt documents had an employee name with signature only.

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or to invalidate the determination made by Retailer Operations. This review is limited to what circumstances were at the basis of Retailer Operations’ determination when the sanction was imposed. Upon review, the evidence supports that Appellant established a record of selling nonfood items as defined by Section 271.2 of the regulations, on multiple occasions as noted in Exhibits A, B, and D furnished with the Charge letter. 7 CFR § 278.6(e)(5) specifies that FNS shall “disqualify the firm 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 nonfood items due to carelessness or poor supervision by the firm’s ownership or management.” Three violations are considered evidence of carelessness. Therefore, the violations in this case are not too limited to warrant a disqualification.

The owner(s) signed the FNS retailer application to become a SNAP authorized retailer which included a certification and confirmation that the owner would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” By signing this document the owner(s) confirmed that “I am aware that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal or disqualification from Supplemental Nutrition Assistance Program;” “It is my responsibility to ensure that the training materials are reviewed by all firm owners and all employees;” and “I accept responsibility on behalf of the firm for violations of the Supplemental Nutrition Assistance Program regulations, including those committed by any of the firm employees.”

Regardless of whom the owner(s) of a store may utilize to handle store business, the owner(s) is accountable for the proper handling of SNAP benefit transactions. The regulations establish that an authorized food store may be disqualified from participating in SNAP when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. To allow the store owners to disclaim accountability for the acts of persons whom the owners choose to utilize to handle Appellant’s business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA.

A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or mitigate the

impact of the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees. Ownership contends to have no prior sanctions and no prior warnings. That Appellant has not been previously sanctioned or warned could be the result of its not having been investigated. The regulations stipulate “FNS shall disqualify the firm 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 as the sale of common nonfood items due to carelessness and poor supervision by the firm’s ownership or management.” The carelessness is demonstrated by the number of violative passes by the USDA investigator. Further, the claimed “intense training executed at the Store” should have clarified that items such as tissue and hand wipes are not food. To claim that the non-food items transacted for SNAP benefits “are common household items would normally be expected to be found in a standard grocery shopping trip” makes it all the more compelling that Appellant train and monitor transactions so that these violations do not occur.

The owners contend that they provided SNAP training to the employees, and that two employees are no longer at the firm. This review is limited to what circumstances were at the basis of Retailer Operations’ sanction at the time the determination was made. It is not the authority of this review to consider what subsequent remedial actions may be undertaken so that a store might begin to comply with program requirements after violations have been charged. There are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty assessment based on after-the-fact corrective actions implemented subsequent to findings of program violations. Therefore, the contention that training has been done does not provide any valid basis for dismissing the charges or mitigate the penalty imposed.

As to the court cases cited by counsel, the administrative review process should determine whether FNS followed the Food and Nutrition Act and the regulations issued under the Act when it took action against the retailer. The administrative review officer is not responsible for determining whether any legal cases cited by counsel apply to Appellant’s situation. If the final agency decision is appealed to the federal district court, the judge is responsible for determining whether case law cited by counsel is on point and applicable to Appellant’s case.

CIVIL MONEY PENALTY

Contentions:

- If the store were disqualified from participating in SNAP, the participants would be severely burdened and endure grave hardship. While it would not be impossible for the participants to shop elsewhere, it would be of such inconvenience to them that it would ultimately be a burden.

Retailer Operations rendered a finding that it was not appropriate to impose a CMP in lieu of a six month period of disqualification. The record supports that authorized stores within a nearby radius of Appellant stock a variety of comparable staple foods at comparable prices. Thus, the evidence does not support that it will cause hardship for SNAP recipients if Appellant is disqualified.

CONCLUSION

Based on a review of the evidence, the record supports that the charged program violations did occur at Appellant. The responding owner did not initially dispute that the violations did occur. The formal USDA investigative record is specific, thorough, and fully documented 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.

The record documents that Retailer Operations considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) and properly denied it. Therefore, the six month disqualification of Appellant from participation as an authorized retail food store in the SNAP is sustained.

RIGHTS AND REMEDIES

This penalty shall become effective thirty (30) days after receipt of this decision. A new application for participation in the SNAP may be submitted ten (10) days prior to the expiration of the six month period of disqualification. Please contact the Retailer Center at 877-823-4369 with any questions regarding the SNAP application process.

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Section 279.7 of the regulations (7 CFR § 279.7) deals with your right to a judicial review of this determination. 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 owners reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it 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.

M. Viens
Administrative Review Officer

July 25, 2018