

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

Circle Liquor,

Appellant,

v.

Case Number: C0201756

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a six-month disqualification of Circle Liquor (hereinafter Appellant), from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) as initially imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a six-month disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provides 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

The USDA conducted an investigation of the compliance of Circle Liquor, with Federal SNAP law and regulations from September 20, 2017 through October 11, 2017. In a letter dated November 22, 2017, Retailer Operations Division charged the Appellant firm with accepting SNAP benefits in exchange for merchandise which included common ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on three (3) out of three (3) compliance visits. The letter further informed the Appellant that the violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5).

In correspondence dated December 7, 2017, Appellant replied to the charge letter and generally stated that it did not remember selling merchandise with the SNAP benefits card. The cash register in the store only provides sold merchandise 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and this was said to have happen from September to October. Appellant asked for proof of receipt to cross reference and see if the transactions actually happened.

In correspondence dated April 2, 2018, Retailer Operations Division informed Appellant that on December 28, 2017, it was provided a response to its FOIA request, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and had not yet received a response to the letter of charges dated November 22, 2017. Appellant was informed that it had 10 calendar days from receipt of this letter in which to reply.

In an email correspondence dated April 18, 2018, Appellant replied to the charge letter and generally stated that after reviewing the pictures and receipts as well as the description, it looked like the violations did occur within the store and could have been one of the employees. Appellant stated that it would not have knowingly condoned using food stamps for other merchandise. The store policy was set since the beginning for employees and ownership. Appellant assured that it would never occur again and will make sure of that with the store employees.

After reviewing the evidence and the response from the Appellant, Retailer Operations Division issued a determination letter dated April 23, 2018. The determination letter informed the Appellant it was disqualified from the SNAP for a period of six months in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that Retailer Operations Division considered Appellant's eligibility for a hardship CMP under 7 CFR § 278.6(f)(1). Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the six-month disqualification 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 April 30, 2018, the Appellant requested an administrative review of the Retailer Operations Division's determination. The appeal was accepted and the implementation of the six-month disqualification was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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

The controlling statute in this matter is contained in the Food & 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) establish the authority upon which a period of disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, inter alia: “Coupons 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 food 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 1977, 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, inter alia: “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 when... the firm’s disqualification would cause hardship to Food Stamp [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.”

APPELLANT’S CONTENTIONS

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

1. I am asking for reconsideration in initiating a warning instead of disqualification as this store is very much dependent on the SNAP program for income.
2. I have enforced extensive training on SNAP policy and I assure that this will never happen again.

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

FNS initially authorized Circle Liquor as a convenience store on July 22, 2013. During an investigation from September 20, 2017 through October 11, 2017, the USDA conducted three (3) compliance visits at Appellant’s store. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated November 22, 2017. The investigation

report included Exhibits A through C which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were committed during three (3) of the three (3) compliance visits and involved the sale of one (1) 500 g bag of Foca laundry detergent, one (1) 450 ml container of Downy aroma floral fabric softener, one (1) 40 count box of Bounce outdoor fresh dryer sheets, one (1) package of Scott-Brite non scratch scrub sponge, one (1) 12.6 ounce bottle of Palmolive essential clean original dish soap, one (1) 16 ounce container of Rinso oven & grill cleaner lemon scent, one (1) 50 ounce container of Gain laundry detergent, one (1) 30 ounce container of Clorox regular bleach and one (1) 850 ml container Suavitel fresh primavera fabric softener. In its review request, Appellant did not refute the sale of common ineligible items during the investigation.

With regard to Appellant's contentions, they cannot be accepted as valid bases for dismissing any of the charges, or for mitigating the impact of those charges. As owner of the store, Appellant is liable for all violative transactions handled by either paid or unpaid store personnel. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food Stamp Act and the enforcement efforts of the USDA.

It is noted that FNS may send a warning letter in lieu of a disqualification only under specific circumstances. SNAP regulations at 7 CFR §278.6(e)(7) states that FNS should "send the firm a warning letter if violations are too limited to warrant a disqualification."

5 U.S.C. § 552 (b)(7)(E). As previously noted, the investigation report documents the exchange of nine (9) common ineligible items during three visits. Therefore, under agency guidelines, these violations do not meet the definition of "violations that are too limited to warrant a disqualification" and are evidence of carelessness on the part of ownership or management.

Additionally, it is important to clarify for the record that the purpose of this review is to determine if the earlier decision of the Retailer Operations Division, to disqualify Appellant from participation in the SNAP for a period of six months, was in fact a correct one. It is not within the scope of this review to consider what subsequent actions Appellant may have taken so that its store may begin to comply with program requirements.

CIVIL MONEY PENALTY

The Appellant contends that they are the only store in the neighborhood and a lot of people depend on us. With regard to this contention, the Retailer Operations Division considered Appellant's eligibility for a hardship CMP under 7 CFR §278.6(f)(1). The Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the six-month disqualification because there were at least 20 other SNAP authorized retail stores, within a one-mile radius of Appellant, including supermarkets and superstores selling as large a variety of staple foods at comparable prices.

CONCLUSION

The documentation presented by Retailer Operations Division provides through a preponderance of the evidence that the violations as reported occurred at the Appellant firm. 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 common nonfood items due to carelessness or poor supervision by the firm’s ownership or management.

The violations were determined by Retailer Operations Division to represent the first sanction for the firm and evidence carelessness and poor supervision. Therefore, the imposition of a six-month disqualification, the least severe penalty allowed by regulation, is appropriate.

It is therefore established that the violations as described in the letter of charges did in fact occur at the Appellant firm warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5). Based on the discussion herein, the decision to impose a six-month disqualification against Circle Liquor is appropriate and the action is sustained.

In accordance with the Act and regulations, the six-month period of disqualification shall become effective thirty (30) days after receipt of this letter. The Appellant may submit a new application for SNAP participation ten (10) days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that 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 you 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 (FOIA), 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.

Monique Brooks
Administrative Review Officer

July 31, 2018