

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

Convenient Store,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0195462

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 finding that a **six-month disqualification** from participation as an authorized retailer in the Supplemental Nutrition Assistance Program¹ was properly imposed against Convenient Store (hereinafter “Convenient Store” and/or “Appellant”) and its owner of record, by the Retailer Operations Division of the FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a) and (e) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a six-month disqualification against Convenient Store in a letter dated January 9, 2018.

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.

¹ Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

CASE CHRONOLOGY

The USDA conducted an investigation of the compliance of Convenient Store with Federal SNAP law and regulations which consisted of four (4) visits completed between July 13, 2017, and July 21, 2017.

The USDA-FNS Report of Positive Investigation (hereinafter, "Investigative Report") number TR39177 dated July 31, 2017 disclosed that on four (4) separate occasions Convenient Store personnel accepted SNAP benefits for merchandise that was ineligible for purchase with such benefits from a USDA Investigator. Identification information ascertained from the Investigative Report indicates that these SNAP violations were handled at Appellant firm by two (2) unidentified male clerks.

As a result of the evidence compiled during the USDA investigation, in a letter dated December 20, 2017, the Retailer Operations Division, charged Appellant with violating 7 CFR § 278.2(a) of the SNAP regulations.

The Retailer Operations Division record indicates Appellant's owner responded in a letter dated December 27, 2017 wherein it was explained immediate action had been taken upon being advised of the violations; and, a full review of the SNAP requirements had been completed. Appellant's owner indicated that hard work had occurred over the years to maintain compliance with SNAP, assuring similar oversights would not reoccur.

Following documented consideration of Appellant ownership's response the Retailer Operations Division issued a final determination letter, dated January 9, 2018, assessing a six-month disqualification from participation as an authorized retailer in the SNAP against Convenient Store.

In a letter dated January 18, 2018, received in the offices of the Administrative Review Branch on January 19, 2018, Appellant, through counsel, submitted an appeal of the Retailer Operations Division's assessment, requesting an administrative review of the action. The appeal was granted and implementation of the sanction has been held in abeyance, in accordance with 7 CFR § 279.4(a).

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 AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)², 7 USC 2023 and 278 of Title 7 of the Code of Federal Regulations (CFR).³

7 CFR § 278.2(a) “Use of Coupons”, states, in relevant part, “Coupons may be accepted by an authorized retail food store only from eligible households... only in exchange for eligible food.”

7 CFR § 271.2 defines **Eligible foods**” in relative part as “**Any food and food product** intended for human consumption **except** alcoholic beverages, tobacco and hot foods and hot food products prepared for immediate consumption...” (Emphasis Added)

7 CFR § 278.6 establishes the authority upon which a period of disqualification may be imposed against an authorized food store or wholesale food concern in the event that it has failed to comply with the Act.

7 CFR § 278.6(e) provides the following, in relevant part, with respect to penalties that may be assessed against firms determined to have violated the Act or regulations:

“...For the purposes of assigning a period of disqualification, a warning letter shall not be considered to be a sanction. A civil money penalty and a disqualification shall be considered sanctions for such purposes...”

7 CFR § 278.6(e)(5) applies to the period of disqualification under review, and specifies that FNS **shall**: [Emphasis added]

“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(e)(7), states, that FNS shall,

“Send the firm a warning letter if violations are too limited to warrant a disqualification.”

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 households because of the unavailability of a comparable participating food store in the area to meet their shopping needs.

7 CFR §278.6(f)(1) reads, in part,

² Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment through P.L. 113-79, enacted February 7, 2014.

³ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

“FNS may impose a civil money penalty as a sanction in lieu of disqualification 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.”

SUMMARY OF THE CHARGES

USDA conducts investigations of the compliance of retail food stores, in part, to ascertain the nature and extent of SNAP violations that may be occurring. In the instant case the Investigative Report dated July 31, 2017, reveals that a USDA Investigator completed four (4) total investigative visits at Convenient Store between July 13, 2017 and July 21, 2017.

The report materials were provided to Appellant as attachments to the charge letter dated December 20, 2017, and included exhibits A through D that provide detail of the investigative results.

The Investigative Report reveals SNAP violations were recorded during each of the four (4) reported visits, included as exhibits A, B, C, and D of the Investigative Report with the exchange of SNAP benefits for non-food items including bathroom tissue, soap (liquid and bar). The violations are documented to have involved two (2) unidentified male clerks. The Investigative Report further discloses that exchange of cash was refused in exhibit D, by one (1) of the unidentified male clerks.

The regulations establish that an authorized food store may be disqualified from participating in the program 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.

APPELLANT’S CONTENTIONS

In the letter postmarked January 18, 2018, Appellant, through counsel contends that:

- It is not believed the burden of proof regarding carelessness or poor supervision by the firm’s ownership and management as cited in the SNAP regulations, has been provided;
- The intent to violate is not supported with the evidence, providing belief that further examination of both the investigator and store personnel are required;
- The violations are *de minimus* therefore it would be more appropriate to provide a warning letter in lieu of imposing a disqualification; and,
- Financial hardship will result to Convenient Store from the imposition of a disqualification because 20 percent of Appellant’s revenue derives from SNAP.

Further, a request for reconsideration of the imposition of a civil money penalty (CMP) in lieu of disqualification is made.

The preceding represents only a brief 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.

ANALYSIS AND FINDINGS

That SNAP benefits are not for the purchase of non-food items is clear in the “Act” and in the SNAP regulations, with noted exceptions, such as seeds used to grow food, and hunting equipment in remote areas of Alaska. This and other rules governing SNAP were provided to Appellant upon initial SNAP authorization in April 2015, and have been restated in various retailer notifications routinely provided to all SNAP authorized retailers.

Carelessness and Poor Supervision:

Materials requesting review indicate that it is not believed the burden of proof regarding carelessness or poor supervision by the firm’s ownership and management as cited in the SNAP regulations, has been provided. The Investigative Report provides that two (2) separate clerks violated SNAP policies allowing the purchase of bathroom tissue and soap in each of the four (4) exhibits. The Exhibit B materials indicate that the sale of an air freshener was refused, however the purchase of bathroom tissue was allowed. In Exhibit C, the same clerk as identified in Exhibit B is noted to have commented “I’m not supposed to let you have this” to the Investigator while still allowing the purchase of bathroom tissue.

No explanation is provided as to why bathroom tissue and soap were allowed when other products were not; therefore, it can only be surmised that the sale of ineligible items occurred due to carelessness or poor supervision. No evidence was advanced to support the training of the violating employees in SNAP regulation occurring prior to the violations.

Absence of Intent:

Although Appellant contends that the Investigative Report materials do not evidence the intent to violate SNAP regulations it is noted that “intent” is not required for the determination that violations of SNAP regulations have occurred. 7 CFR § 278.2(a) “Use of Coupons”, states, in relevant part, “Coupons may be accepted by an authorized retail food store only from eligible households... only in exchange for eligible food.” The exchange of nonfood items for SNAP benefits is clearly a violation of SNAP regulations. Although it is expressed that further examination of both the investigator and store personnel is required; there is nothing in the record to indicate that further examination of either party is warranted and/or required to complete the determination that SNAP violations, consisting of the exchange of nonfood items for SNAP, have occurred.

***De minimus* Violations:**

Appellant has indicated that it is believed that the exchange of bathroom tissue and soap for SNAP benefits is not an egregious violation, calling the incidents *de minimus*. It is noted on review that the SNAP regulations do not establish a minimum number of SNAP violations or

allow for consideration of the type of product in the imposition of disqualification as defined in 7 CFR § 278.6(e)(5).

Economic Impact:

Although it is understood that the disqualification of Appellant is likely to cause a negative economic impact; there is no allowance in the SNAP regulations for consideration of the economic impact on Appellant when imposing regulatory disqualifications.

Civil Money Penalty

7 CFR § 278.6(f)(1) reads, in part, “FNS may impose a civil money penalty as a sanction in lieu of disqualification 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.” The record reflects that the Retailer Operations Division has rendered a finding that pursuant to 7 CFR § 278.6(f)(1), it would not be appropriate to impose a civil money penalty in lieu of a period of disqualification on Appellant firm.

The Retailer Operations Division record reflects that Convenient Store is classified within FNS definitions as a convenience store; and, that there are 58 SNAP authorized firms within a one (1) mile radius of Appellant which include 331 competitor convenience stores, 16 small grocery stores, five (5) medium grocery stores, two (2) supermarkets; and two (2) superstores. The availability of alternative SNAP Authorized venues is verified with a review of the SNAP Retailer Locator tool located at <https://www.fns.usda.gov/snap/retailerlocator> .

Based on the availability of the alternative SNAP authorized retailers the Retailer Operations Division has determined that the temporary disqualification of Appellant would not create a hardship to customers.

It is recognized that some degree of inconvenience to SNAP customers is inherent from the temporary disqualification of any participating food store. Although the normal shopping pattern of such SNAP customers may be temporarily altered during the period of disqualification, the determination that the disqualification of Convenient Store would not create a hardship to customers, as differentiated from potential inconvenience is sustained and a civil money penalty in lieu of disqualification is found not to be appropriate in this case.

CONCLUSION

The charges of violations are based on the findings of a formal USDA investigation in which all transactions cited in the letter of charges were fully documented and evidentiary materials are included in the record that validate the report as provided. A complete review of this documentation has yielded no swaying error or discrepancy. The Investigative Report is specific and thorough with regard to the dates of the violations and the specific related facts.

The documentation presented by the Retailer Operations Division clearly provides a preponderance of the evidence that the violations as reported occurred at Appellant firm and, 7 CFR §278.6(e)(5) specifies that FNS **shall** “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.”

It is established that the violations as described in the letter of charges dated December 20, 2017, did in fact occur at Appellant’s firm, warranting a disqualification of six (6) months in accordance with 7 CFR §278.6(e)(5).

Based on the discussion above, the decision to impose a six-month disqualification against Convenient Store is proper and the action is sustained.

In accordance with the Act and regulations, **the six (6) month period of disqualification shall become effective thirty (30) days after receipt of this letter.** Appellant may submit a new application for SNAP participation ten (10) days prior to the expiration of the six (6) month disqualification period.

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.

NANCY BACA-STEPAN
Administrative Review Officer

June 11, 2018