

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

Dixie Food Store,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0193441

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 Dixie Food Store (hereinafter “Appellant”) 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 Dixie Food 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, Dixie Food Store, was initially authorized for SNAP participation as a convenience store on October 19, 2009. Between November 28, 2016, and January 5, 2017, FNS conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigation report documented that personnel at Dixie Food Store accepted SNAP benefits in exchange for ineligible items on four separate occasions. According to the report, the Appellant firm sold coffee filters and a bar of soap in exchange for SNAP benefits, which benefits may only be used for the purchase of eligible foods.

In a letter dated April 12, 2019, the Retailer Operations Division charged the Appellant with violating SNAP regulations at 7 CFR § 278.2(a). The charge letter stated that the acceptance of SNAP benefits in exchange for ineligible nonfood merchandise warranted a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further stated that under certain conditions and in accordance with § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

In a letter dated April 16, 2019, the Appellant responded to the charges, acknowledging that violations occurred and accepting responsibility for them. The Appellant apologized for the mistakes that were made and requested a shorter penalty than six months because it claimed that a six-month disqualification would have a big impact on the firm's business. The Appellant argued that it has been authorized to accept SNAP for almost 10 years without any violations and has always tried to do things the right way. The Appellant requested one more chance and offered to have FNS monitor the store every week or month to prove that it will not commit any further violations.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated April 30, 2019. This letter informed the Appellant that it was the determination of the Retailer Operations Division that violations did occur as outlined in the charge letter 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 stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked May 2, 2019, the Appellant appealed the determination by requesting an administrative review. The request was granted and implementation of the disqualification 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, in part:

[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, in part:

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, in part:

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, in part:

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, in part:

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, in part:

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 November 28, 2016, and January 5, 2017, the Food and Nutrition Service completed four compliance visits at Dixie Food Store. The agency record indicates that a report of the investigation was provided to the Appellant as an

attachment to the April 12, 2019, charge letter. The investigation report includes Exhibits A through D, and provides full details on the results of each compliance visit. SNAP violations were documented during each of the four visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report states that the following nonfood items were purchased by an investigator using SNAP benefits:

- One 50-count box of coffee filters, Exhibit A
- One 50-count box of coffee filters, Exhibit B
- One 50-count box of coffee filters, Exhibit C
- One 90-gram bar of soap, Exhibit D
- One 50-count box of coffee filters, Exhibit D

The report indicates that in Exhibit B, the clerk on duty refused to sell the investigator a cigarette lighter, but did give the investigator the lighter for free. In Exhibit D, the clerk refused to sell the investigator a package a cigars, but gave them to the investigator for free. Also in Exhibit D, the clerk refused to allow an exchange of SNAP benefits for cash (i.e. trafficking). The report states that two different clerks conducted the violative transactions.

The charge letter states that the violations that occurred in Exhibits A, B, C, and D, warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5).

APPELLANT'S CONTENTIONS

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

- Appellant has worked at the store for almost 10 years. In the beginning, it was only the store owner and his wife who worked there, and they did not have anything go wrong at the store.
- The transactions occurred too long ago for the Appellant to review the closed-circuit TV system to see which staff member made the mistake of selling coffee filters.
- Appellant takes full responsibility for the mistakes and wants to apologize more than a thousand times.
- Appellant asks for one more chance at forgiveness for this “silly silly mistake” and insists that this type of mistake will never happen again.
- For many years, the firm has never misused its SNAP privileges even though customers have always tried.
- The Appellant has worked extremely hard to build its business. A six month suspension will hurt the business very much.
- While the store does not have big sales like 5 U.S.C. § 552 (b)(6) & (b)(7)(C) down the road, it provides convenience to its customers by having necessities that can be purchased with EBT.
- Appellant offers to have FNS monitor the store every day or every week or every month to prove that it will do better and be very conscious of selling only eligible items in exchange for SNAP benefits.

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 in this document.

ANALYSIS AND FINDINGS

The Appellant has not provided any evidence or documentation to counter FNS's investigation report. In both its response to the charge letter and its request for administrative review, the Appellant acknowledged that violations occurred and claimed full responsibility for them. The Appellant also repeatedly apologized for the mistakes that were made. Because the violations themselves do not appear to be in dispute, it is the determination of this review that a six-month disqualification is warranted. The balance of this review will address the Appellant's remaining contentions.

No Prior Violations

The Appellant contends that it has been in business for almost 10 years without any violations. It claims that for many years, it has never misused its SNAP privileges even though customers have routinely attempted to purchase ineligible items with their EBT cards. This contention implies that because of the firm's long history of compliance with SNAP rules, the disqualification penalty should be reconsidered or reduced.

With regard to this contention, the law is clear that when program violations occur, specifically the exchange of ineligible nonfood items for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management, a six-month disqualification is the required penalty, even on the first occasion. In this case, the sanction imposed by the Retailer Operations Division for these first-time violations is entirely in line with SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations. As such, a dismissal or reduction of the six-month disqualification is not appropriate.

Remedial Actions Taken

In its correspondence with FNS, the Appellant has repeatedly begged for forgiveness, stating that it would ensure program violations never happened again. The Appellant has even offered to have FNS regularly monitor the store so that it can prove it will do better and be more conscious about selling only eligible items in exchange for SNAP benefits.

With regard to these contentions, it must be stated 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 facts 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 that 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 after the discovery of program violations.

Hardship to Households / Civil Money Penalty / Hardship to Appellant

The Appellant contends that it has worked extremely hard to build its business and claims that a six month disqualification will hurt the firm very much. The Appellant further contends that while Dixie Food Store may not have big sales like nearby 5 U.S.C. § 552 (b)(6) & (b)(7)(C), it does offer convenience to its customers by stocking necessities that can be purchased with SNAP benefits. This latter contention implies that SNAP households will suffer hardship if the firm's disqualification is upheld.

With regard to the insinuation that SNAP customers will experience hardship as a result of the firm's disqualification, it is recognized that some degree of inconvenience to SNAP recipients is likely whenever a retail food store is disqualified and households are forced to use their benefits elsewhere. To address potential hardship situations that SNAP households might incur when a firm is disqualified, regulations at 7 CFR § 278.6(f) allow, in certain circumstances, for a civil money penalty to be imposed instead of disqualification. Paragraph (f)(1) of this regulation states that an alternative CMP sanction is allowed when the firm's disqualification would cause "hardship" to SNAP households. According to this regulation, hardship occurs when there is "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 Dixie Food Store, a convenience store, would not cause hardship to SNAP households because there are several other shopping options in the area. According to agency records, there are at least a dozen similarly-stocked or larger SNAP-authorized retail stores located within a one-mile radius of Dixie Food Store, including two full-line supermarkets less than half a mile away. There is also no evidence that Dixie Food Store sells its inventory at unusually low prices in comparison to nearby stores. Because hardship conditions do not exist in this case, a civil money penalty in lieu of disqualification is not an available option.

As to the Appellant's contention that a disqualification would cause hardship to the firm, there are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm itself. As such, the Appellant's request for a reduced sanction or dismissal of the charges cannot be granted.

CONCLUSION

Based on a review of all information in this case, this administrative review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at Dixie Food Store 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 appears to be specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for ineligible, nonfood merchandise, and in all other critically pertinent details. Therefore, pursuant to 7 CFR § 278.6(a)

and (e)(5), the decision to impose a six-month disqualification against the Appellant, Dixie Food 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 authorization 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

August 13, 2019