

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

Dollar One Plus Food Mart,

Appellant,

v.

Case Number: C0199568

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 from 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 Dollar One Plus Food Mart.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulation 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 Dollar One Plus Food Mart with Federal SNAP law and regulations in July 2017. In a letter dated September 1, 2017, the Retailer Operations Division charged the Appellant store with accepting SNAP benefits in exchange for merchandise which included

ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on four (4) out of four (4) compliance visits. The letter further informed the Appellant that the chargeable violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5). The Appellant was informed it could respond to the charges within ten (10) calendar days following delivery of the charge letter. The charge letter was delivered to the store via UPS on September 7, 2017.

During a telephone conversation with the Retailer Operations Division on September 7, 2017, a store owner stated that an employee made a mistake selling ineligible items and the mistake would never happen again. The owner further stated that since receiving the charge letter, he has trained his employees on the rules and regulations of the SNAP and has posted signs accordingly.

After reviewing the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated October 19, 2017. 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 the Retailer Operations Division considered the Appellant's eligibility for a hardship civil money penalty (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 other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked October 21, 2017, the Appellant requested an administrative review of the Retailer Operations Division's determination. The request for review was granted. Upon acceptance of the administrative review request, implementation of the six-month disqualification was held in abeyance pending completion of this review.

The request for administrative review also contained a request for case information under the Freedom of Information Act (FOIA). As a result of the FOIA request, the administrative review was held in abeyance until the Appellant received the official agency response to the FOIA request. The Appellant received the official FOIA response on December 18, 2017. At that point, the Appellant was granted additional time up to close of business on February 8, 2018 to provide any additional contentions or evidence in support of the administrative review. As of the date of this decision, no additional information or evidence has been provided.

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, might 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 covered 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 disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, in 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 states that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the “Food and Nutrition Act of 2008, as amended, for the purchase of 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....

7 CFR § 278.6(e)(5) states, in part:

*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 non-food items due to carelessness or poor supervision by the firm’s ownership or management. [Emphasis added.]*

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'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.

SUMMARY OF THE CHARGES

During an investigation conducted in July 2017, the USDA conducted four (4) compliance visits at Dollar One Plus Food Mart. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated September 1, 2017. The investigation report included Exhibits A through D which provide full details on the results of each compliance visit.

The investigation report documents that SNAP violations were recorded during all four (4) compliance visits. The chargeable violations involved the sale of the following ineligible items in exchange for SNAP benefits in violation of 7 CFR § 278.2(a):

- A red BIC lighter;
- Two rolls of Scott Tissue (1000 sheets per roll);
- A package of Handi-Bag Good'n Tuff lemon scented tall kitchen bags with flap ties;
- A package of Reynolds Wrap aluminum foil (18 sq. ft.);
- A pair of gray sandals/slippers (no brand indicated);
- A pair of large House Care gloves (latex);
- A 75 oz. bottle of XTRA detergent (Mountain Rain);
- A 30 oz. bottle of Clorox regular bleach;
- A 4HOME Aluminum Non-Stick Casserole Sauce Pot;
- A 3 oz. Old Spice Pure Sport High Endurance Deodorant;
- A 13 count package of Hardy Bags tall kitchen bags.

The above violations were conducted by two (2) different clerks. One of these clerks refused to exchange cash for SNAP benefits in Exhibit D.

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its reply to the charge letter and during the administrative review, in relevant part:

- An employee made a mistake selling ineligible items and the mistake

will never happen again.

- Since receiving the charge letter, an owner has trained the employees on the rules and regulations of the SNAP and has posted signs accordingly.
- More than 45 days elapsed between the investigation in July 2017 and the charge letter dated September 1, 2017. This is a serious delay which impacted the store's ability to conduct its own investigation including retrieval of security camera data. The time delay also constitutes a denial of due process.
- The charge letter and investigation report lacks clarity as there are no photos provided of the clerks. The clerk's description does not match anyone employed by the store. Several item prices are shown as NPI and the store cannot trace these amounts.
- The USDA has not meet the preponderance of the evidence standard in this case and the investigation lacks strong foundational evidence.

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

Investigation Report

In its initial telephone call to the Retailer Operations Division, the Appellant stated that its employees had made a mistake which would never happen again. However, in a fax to the administrative review officer on November 16, 2017, the Appellant challenged the reliability of the investigation report alleging, among other contentions, that the descriptions of the clerks did not match the physical appearance of any of the firm's employees. Regarding these contentions, the investigation report documents that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted under the direction of a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no known error or discrepancy. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. In comparison, the Appellant's claim is unsubstantiated and does not offer sufficient evidence to disregard the findings of the investigation report. Therefore, the Appellant's contentions do not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

Due Process

The Appellant alleges that the issuance of the charge letter on September 1, 2017 after the investigation was conducted in July 2017 represents a serious delay which impacted the store's ability to conduct its own investigation and as such constitutes a denial of due process. The Appellant indicates that anything exceeding 45 days is excessive. Regarding this contention, SNAP law and regulations do not require that a charge letter be issued within 45 days nor does it provide any other required timeframe for issuance of the charge letter following an investigation. Even if the regulations had such a requirement, the final undercover compliance visit was conducted on July 22, 2017. Only 41 days occurred between the final compliance visit and the issuance of the charge letter on September 1, 2017. This passage of time does not appear to be unreasonable considering that the investigation report would have been finalized, undergo any supervisory review and undergo consideration for possible criminal charges before an administrative action was commenced.

Also, there is no indication that the Appellant was at any time denied due process. A review of the charge letter and its attachments shows that the Retailer Operations Division provided the Appellant a sufficient explanation why the irregular transactions were violations and adequately provided the Appellant with an opportunity to respond and explain. Further, the purpose of the administrative review process is to ensure that firms aggrieved by adverse actions have the opportunity to have their position fairly considered by an impartial reviewing authority prior to the adverse action becoming final. The Appellant has been duly given, and has taken, the opportunity to present through the administrative review process whatever evidence and information it deems as pertinent in support of its position that the Retailer Operation's adverse action should be reversed.

Therefore, any evidence and information that Appellant presented to Retailer Operations, as well as any such information submitted subsequently, has now been considered in this administrative review prior to rendering the final agency administrative decision in this case. Appellant has exercised its administrative review rights, and by doing so has availed itself to the full complement of the agency's statutory obligations with regard to due process.

Nevertheless, this administrative review process does not include an assessment of the constitutionality of the laws, regulations and policies under which the agency imposed its adverse action. Constitutional challenges to the laws and regulations governing the SNAP are more appropriately the province of judicial review in a court of law. Accordingly, no further findings or conclusions are rendered in this regard.

Violations Warrant a Six-Month Disqualification

The SNAP regulation at 7 CFR § 278.6(e)(5) states, in part:

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 non-food items due to carelessness or poor supervision by the firm's ownership or management.

FNS considers the sale of a total of three (3) inexpensive non-food items over one, two or three transactions to equate to carelessness and the lack of thorough supervision on the part of ownership or management. The investigation report documents that the chargeable violations in this case consisted of one (1) major non-food item and eleven (11) common non-food items exchanged for SNAP benefits over four (4) transactions; therefore, the Retailer Operations Division correctly determined that the violations warranted a six-month disqualification. A clerk refused to exchange cash for SNAP benefits in Exhibit D; however, this does not ameliorate or mitigate the penalty for exchanging non-food items for SNAP benefits.

The Appellant initially told the Retailer Operations Division that any sales of ineligible items were not intentional and were the result of honest mistakes. Regarding this contention, neither SNAP law nor regulations require an element of intent on the part of the violator where ineligible items are exchanged for SNAP benefits. Therefore, whether or not the clerks in this case intended to violate SNAP regulations is not relevant.

Owner Accountability

A store owner signed the SNAP application for Dollar One Plus Food Mart on May 19, 2008 and acknowledged that the owners were aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owners 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.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations including accepting SNAP benefits in exchange for ineligible non-food items.

In addition, an authorization packet was sent to the firm when it was first authorized and contained training materials which gave guidance on SNAP rules and regulations. SNAP authorized firms are responsible for reviewing the training materials, providing training for its employees, and generally familiarizing themselves with all SNAP rules and regulations pertaining to retailers. It is therefore no excuse that the store’s employees were not fully trained or were otherwise unfamiliar with the SNAP rules and regulations. 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 and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Corrective Action

The Appellant states that, since receiving the charge letter, the store has trained its employees on the rules and regulations of the SNAP and has posted signs accordingly. This contention does not provide any grounds for relief. There is no provision in the SNAP statute or regulations for a waiver or reduction of an administrative penalty assessment on the basis of alleged corrective actions implemented subsequent to investigative findings of program violations. Therefore, any remedial or corrective actions taken so that a store may begin to comply with SNAP regulations do not provide a valid basis for dismissing the charges, or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

The Retailer Operations Division determined that the Appellant was not eligible for a hardship CMP under 7 CFR § 278.6(f)(1). That regulation 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 [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 case record documents that the Retailer Operations Division determined that a six- month disqualification of Dollar One Plus Food Mart, a small grocery store, would not cause a hardship to SNAP households as there are 96 comparable or larger SNAP authorized stores located within a one-mile radius of Dollar One Plus Food Mart. These nearby competitors include some stores that sell halal meats.

Based on this evidence, a six-month disqualification of Dollar One Plus Food Mart would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division decision not to assess a hardship CMP in lieu of a six-month disqualification is sustained as appropriate under 7 CFR § 278.6(f)(1).

CONCLUSION

It is established that the violations as described in the letter of charges did in fact occur at Dollar One Plus Food Mart warranting a disqualification of six months

in accordance with 7 CFR § 278.6(e)(5). That regulation states 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 non- food items due to carelessness or poor supervision by the firm’s ownership or management.” Therefore, the decision to impose a six-month disqualification, **the least severe penalty** allowed by regulation, against Dollar One Plus Food Mart, Appellant, 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 authorization ten (10) days prior to the expiration of the six- month disqualification period.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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, 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.

RONALD C. GWINN
Administrative Review Officer

February 20, 2018