

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

Dollar Plus & Convenience Store,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0217471

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 Dollar Plus & Convenience Store (hereinafter “Appellant”) by FNS’s 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 Dollar Plus & Convenience 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, Dollar Plus & Convenience Store, was initially authorized for SNAP participation as a convenience store on January 8, 2018. Between June 26, 2019, and August 19, 2019, 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 Dollar Plus & Convenience Store accepted SNAP benefits in exchange for ineligible items on four separate occasions. According to the report, the Appellant firm sold trash bags, foam bowls, epoxy glue, hardware nails, and foam plates in exchange for SNAP benefits, which benefits may only be used for the purchase of eligible food.

In a letter dated September 23, 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 warrants 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 telephone call with the Retailer Operations Division on October 3, 2019, the Appellant responded to the charges. According to the agency's record of the conversation, the Appellant acknowledged that violations occurred and blamed them on a new employee who had not been fully trained.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated October 23, 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 November 4, 2019, the Appellant appealed the agency's 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 June 26, 2019, and August 19, 2019, FNS completed four compliance visits at Dollar Plus & Convenience Store. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the September 23, 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 10-count box of trash bags (*Hardy Bags* brand), Exhibit A
- One 10-count package of foam bowls (*Good Time* brand), Exhibit B

- One 2-count container of epoxy glue tubes (*Telstar* brand), Exhibit C
- One package of hardware nails (*Plextools* brand), Exhibit C
- One 14-count package of foam plates (*Good Time* brand), Exhibit D

The report indicates that in Exhibit D, the clerk on duty refused to exchange SNAP benefits for cash (i.e. trafficking). The report indicates that three different clerks conducted the four 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:

- The store is open from 7 a.m. to 11 p.m. Monday to Saturday, and 9 a.m. to 9 p.m. on Sunday. It is the only convenience store in the neighborhood that is open for such long hours, making it convenient for customers, including EBT recipients, to buy necessary food items such as milk, chips, bread, eggs, rice, etc.
- The store is located directly across the Irvington bus terminal, which is the second busiest bus terminal in the state of New Jersey. This gives great convenience to commuters to buy various food items early in the morning or late at night without missing their bus. The store is also located beneath a day care center, making it easier for parents to buy food items for their kids before dropping them off or picking them up.
- The neighborhood consists of various foreign nationalities, including Haiti, Ghana, Nigeria, etc. The store carries various indigenous food items, including, but not limited to, Ga Kenkey, Fanti Kenkey Banku, Gari, Banku flour, Apon, Cassava flour, tapioca, fufu flour, palmnut oil, shito, geisha mackerel, Titus sardines, Jamaican seasonings, etc.
- Appellants requests that FNS consider the store for an alternate penalty instead of disqualification so that the store can continue to serve the neighboring community without any interruption. A disqualification will bring great difficulties to the neighborhood since many people use SNAP benefits in the store.
- When the Appellant owner first contacted FNS about the violations, he explained that they were merely honest mistakes by newly hired employees. The store strictly follows SNAP regulations.
- The Appellant also requested consideration of a civil money penalty in lieu of disqualification, but this request was denied based on there being other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

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 information or evidence to counter FNS’s investigation report. In fact, the Appellant appears to acknowledge that violations occurred, claiming that the

violations were honest mistakes by newly hired employees. Because the violations do not appear to be in dispute, it is the determination of this review that SNAP violations did occur as charged and a penalty is warranted.

“Honest Mistakes” by New Employees

The Appellant contends that the firm strictly follows SNAP regulations and argues that the violations outlined in the investigation report were honest mistakes by newly hired employees. These contentions imply that because of the firm’s history of compliance with SNAP rules, the disqualification penalty should be reconsidered.

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 firm’s employees committed program violations on four consecutive visits by an investigator. At no time did a store clerk deny a purchase of ineligible items with SNAP benefits. This strongly suggests that the violations were due to either employee carelessness or failure on the part of ownership or management to properly train and supervise the employees. Accordingly, a six-month disqualification penalty is appropriate and is entirely in line with SNAP regulations. This penalty is also consistent with sanctions imposed upon other retailers that have committed similar violations. As such, a dismissal or reduction of the six-month disqualification due to the firm’s previous compliance history is not appropriate.

Hardship to Households / Civil Money Penalty

The Appellant contends that the firm should be considered for a civil money penalty in lieu of disqualification because a disqualification would bring great difficulties to the neighborhood since many people in the area use SNAP benefits in the store. The Appellant argues that the store is open long hours and is located next to a busy bus terminal and day care facility. The Appellant contends that these store characteristics offer great convenience to the neighborhood. The Appellant further contends that it sells indigenous food items that cater to its multicultural neighborhood, including residents from the Caribbean as well as countries like Haiti, Ghana, and Nigeria. These contentions imply that SNAP households will experience hardship if the firm’s disqualification is upheld.

With regard to these contentions, 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 this alternative sanction is allowed when a 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.” Consideration is not given to store hours or proximity to businesses that are not SNAP-authorized, such as bus terminals or day care centers.

It is the determination of this review that a disqualification of Dollar Plus & Convenience Store, would not cause hardship to SNAP households because there are many other shopping options in the area. According to agency records, there are at least 50 similarly-stocked or larger SNAP-authorized retail stores located within a one-mile radius of Dollar Plus & Convenience Store, including two superstores and a supermarket. There is also no evidence that the Appellant sells its inventory at unusually low prices in comparison to nearby stores.

It is further recognized that some SNAP households may experience a certain level of inconvenience because a small number of unique food items are temporarily unavailable for purchase with SNAP benefits at Dollar Plus & Convenience Store. However, such inconvenience does not rise to the level of hardship, which, as noted earlier, is defined as the absence of other SNAP-authorized retail food stores in the area. The purpose of SNAP is not to provide households with every desired food variety, but to offer nutrition assistance to low-income individuals and families. With that objective in mind, it is clear to this review that nutritious food options are readily available at other stores in the immediate area near Dollar Plus & Convenience Store.

Because hardship conditions do not exist in this case, a civil money penalty in lieu of disqualification is not an available option.

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 Dollar Plus & Convenience 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. Furthermore, the Appellant has not offered any compelling evidence that would persuade this review to dismiss or modify the penalty. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, Dollar Plus & Convenience 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. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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

April 13, 2020