

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

Duddy's Corner,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0191362

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 Duddy's Corner by the Retailer Operations Division. It is also USDA's final decision that a civil money penalty in lieu of disqualification is not appropriate in this case.

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 Duddy's Corner.

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, Duddy's Corner, was initially authorized for SNAP participation as a medium grocery store on January 25, 2013. Between January 12, 2017 and January 23, 2017, FNS conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigative report documented that

personnel at Duddy's Corner accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. According to the report, the Appellant firm sold liquid cleaners and sandwich bags in exchange for SNAP benefits, which benefits are only permitted to be used in exchange for eligible foods.

In a letter dated February 23, 2017, the Retailer Operations Division charged the Appellant with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). The charge letter stated that the violation of accepting SNAP benefits in exchange for ineligible nonfood items warrants a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further stated that under certain conditions and in accordance with 7 CFR § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

In response to the charge letter, the Appellant owner contacted the Retailer Operations Division by telephone on March 13, 2017. The owner acknowledged that the violations occurred, but blamed the incidents on inexperienced workers who conducted the transactions when the owner was not in the store. The owner requested that FNS give the firm a warning rather than disqualifying the store.

After considering the Appellant's response as well as the evidence in the case, the Retailer Operations Division issued a letter of determination dated May 2, 2017. This letter informed the Appellant that it was the determination of the Retailer Operations Division that the violations did occur as outlined in the letter of charges 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 retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked May 12, 2017, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and implementation of the sanction 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, *inter alia*:

[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, *inter alia*:

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, *inter alia*:

*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, *inter alia*:

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, *inter alia*:

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, *inter alia*:

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 January 12, 2017 and January 23, 2017, the USDA completed four compliance visits at Duddy's Corner. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the February 23, 2017 charge letter. The investigation report included Exhibits A through D, which provided full details on the results of each compliance visit. SNAP violations were documented during three of the four visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report noted that the following nonfood items were purchased by an investigator using SNAP benefits:

- One 32-ounce bottle of spray cleaner (*Lysol* brand), Exhibit B
- One 90-count box of sandwich bags (*Ziploc* brand), Exhibit C
- One 40-ounce bottle of summer citrus scented cleaner (*Mr. Clean* brand), Exhibit D

The report noted in Exhibit A that the clerk on duty refused to allow an ineligible bottle of liquid soap to be purchased with SNAP benefits. However, the report indicated that this same clerk committed the two violations listed in Exhibits C and D. On one occasion, the investigator attempted to exchange SNAP benefits for cash (i.e. trafficking), but the clerk refused. This refusal is noted in Exhibit D.

The charge letter states that the violations that occurred in Exhibits B, C, and D warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5). According to the report, two separate clerks conducted the three violative transactions during the investigation.

APPELLANT'S CONTENTIONS

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

- Since minimum wage went up in January 2017, the Appellant owner was forced to let go of some workers. But the owner offered the employees an opportunity to keep their hours if they agreed to learn larger tasks such as minding the registers while also stacking shelves with inventory. Due to the lack of experience of these employees, there were mistakes made which have since been corrected. Owner takes full responsibility for the mistakes.
- Regarding the determination that the firm is not eligible for a civil money penalty in lieu of disqualification, the Appellant argues that it offers something that other stores do not. It has an accounts receivable balance of over 5 U.S.C. § 552 (b)(6) & (b)(7)(C) which the customers owe the store. The owner does this as an incentive for large families to be able

to shop in the store. The large majority of customers have SNAP benefits, but it is still not enough.

- The store also offers free delivery with minimum purchases, which is a big help for large families.
- Seventy-five percent of the firm's customers use SNAP and if the firm loses these customers for six months, it may not survive in its current location. Appellant owner fears that a disqualification would force the owner into bankruptcy with approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in personal debt.
- Appellant owner states that it will take extra precautions to ensure that this does not happen again.

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 herein.

ANALYSIS AND FINDINGS

The Appellant did not, at any point, provide information or documentation to counter FNS's investigation report. Rather, the Appellant appears to acknowledge that the violations occurred, stating that inexperienced clerks committed the infractions. The Appellant owner states that it takes "full responsibility" for the violations. Therefore, it is the determination of this review that program violations did occur as charged by the Retailer Operations Division. The balance of this review will address the Appellant's remaining contentions.

Inexperienced Clerks

The Appellant argues that the violations were committed by inexperienced clerks. The Appellant contends that due to the recent increase in minimum wage, inexperienced employees were given additional tasks, including handling the cash register. This contention implies that because of the clerks' inexperience, FNS should consider a lesser penalty or perhaps a waiver of the penalty altogether.

With regard to this contention, the record shows that the Appellant owner signed an application to participate as a SNAP retailer on December 30, 2012. By signing this application, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. The record clearly establishes that the Appellant owner agreed to abide by program rules, including taking responsibility for violations committed by any of the firm's employees, whether paid or unpaid, new, full-time or part-time. An owner is not free of responsibility simply because he or she was not in the vicinity at the time the violations occurred or because he or she was uninvolved in the violations. Regardless of which clerks are operating the cash register at a given time or whom firm ownership authorizes to handle store business, the ownership of the firm is ultimately responsible for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of its employees would render

virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA.

Therefore, the contention that the violations were the fault of inexperienced clerks does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Remedial Actions Taken

The Appellant contends that the clerks' lack of experience has been corrected and argues that it will take extra precautions to ensure that SNAP violations do not happen again.

It is important to clarify 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 circumstances that existed at the time the Appellant was charged with committing program violations and at the time that the Retailer Operations Division made its determination. It is not the authority of this review to consider any subsequent remedial actions that may have been taken or 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 subsequent to findings of program violations.

Therefore, the Appellant's contention that corrective action has taken place or that further remedial actions are planned does not provide a valid basis for dismissing the charges or for reducing the penalty imposed.

Civil Money Penalty

The Appellant states that although there are other SNAP-authorized stores in the area, Duddy's Corner offers incentives that other stores do not. For example, the firm has an accounts receivable balance of over 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which its customers owe the store. The Appellant claims to do this as an incentive for large families to be able to shop in the store. The Appellant argues that most customers have SNAP benefits, but it is still not enough. The Appellant also claims to offer free delivery with a minimum purchase.

Unfortunately, a civil money penalty is not permissible in this situation. SNAP regulations at 7 CFR § 278.6(f)(1) state that a civil money penalty in lieu of a temporary disqualification is only allowable when the firm's disqualification would cause hardship to SNAP households. According to this regulation, hardship is defined as "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 Duddy's Corner, classified as a medium grocery store, would not cause hardship to SNAP households because there are many other shopping options in the area. According to agency records, there are a dozen similar or larger SNAP-authorized retail stores located within a half-mile radius of Duddy's Corner,

including a superstore and several supermarkets. The offer of free delivery is not a consideration in this matter.

Further, the Appellant appears to be admitting to allowing SNAP customers the option of shopping at the store on a credit basis. This practice is strictly forbidden by regulations found at 7 CFR § 278.2(f). A firm found to have engaged in the practice of selling eligible food items to SNAP households on credit is subject to a disqualification period of one year.

It is recognized that some degree of inconvenience for SNAP households is likely whenever a SNAP-authorized store is disqualified and the households are forced to use their SNAP benefits elsewhere. However, in accordance with regulation cited above, hardship exists only when there are no other authorized stores in the area selling as large a variety of staple foods at comparable prices. Therefore, pursuant to 7 CFR § 278.6(f)(1), a hardship civil money penalty in lieu of disqualification cannot be granted in this case.

Hardship to Appellant

The Appellant has argued that the imposition of a six-month disqualification would negatively affect the firm, perhaps causing the business to close. The Appellant also claims that a disqualification might force the owner into bankruptcy with approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in personal debt.

With regard to this contention, it must be noted that hardship to the firm itself or to its owners is not a factor when deciding whether or not the disqualification determination should be reversed or whether or not a lesser penalty, such as a civil money penalty, can be applied. It is recognized that some degree of economic hardship to the firm is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of possible financial hardship to either the firm or the firm's ownership resulting from the imposition of such a penalty.

To allow store ownership to be excused from administrative penalties based on a purported economic hardship would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA. Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with Program regulations, but also to those retailers who have been disqualified from the Program in the past for similar violations. Therefore, the Appellant's contention that it may incur economic hardship as a result of the disqualification does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

CONCLUSION

Based on a review of the evidence in this case, there is no question that program violations of 7 CFR § 278.2(a) did occur 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 is specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for ineligible, nonfood items, and in all other critically pertinent details. Pursuant to 7 CFR § 278.6(a) and (e)(5) the decision to impose a six-month disqualification against the Appellant, Duddy's Corner, is sustained.

Further, the decision by the Retailer Operations Division to not impose a civil money penalty in lieu of disqualification is also sustained. Pursuant to 7 CFR § 278.6(f)(1) it is the determination of this review that SNAP households will not incur hardship as a result of the Appellant's disqualification because there are other authorized stores in the area selling as large a variety of staple foods at comparable prices.

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 participation 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

November 15, 2017