

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

Excel Food & Gas,

Appellant,

V.

Retailer Operations Division,

Respondent.

Case Number: C0211014

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 of Excel Food & Gas (hereinafter Appellant), from participation as an authorized retailer in 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 Appellant.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations 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 Excel Food & Gas, with Federal SNAP law and regulations from March 21, 2019 through August 23, 2019. In a letter dated September 30, 2019, Retailer Operations Division charged the Appellant firm with accepting SNAP benefits in exchange for merchandise which included common ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on five (5) out of eight (8) compliance visits. The letter further informed the Appellant that the violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5).

In correspondence dated October 7, 2019, Appellant replied to the charge letter and generally stated that it cannot confirm or deny what has happened in this situation. Ownership has met with all employees and they all deny the transactions. Unless the employee can be identified it will have no choice but to terminate all employees which is not a fair practice. Appellant stated that it cannot and will not tolerate such action because there is no excuse. All of the employees are trained and know exactly what is eligible and what is not eligible to be purchased by an EBT card. If an employee sold an item on the EBT card and such item is ineligible I assure you that he has acted on his own out of laziness and ignorance. Appellant indicated that it has been participating in SNAP for over 20 years and continues to do so in several other locations. It understands and values the program and has never allowed misuse of the program by employees, customers or anyone.

After reviewing the evidence and the response from the Appellant, Retailer Operations Division issued a determination letter dated October 17, 2019. 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 Retailer Operations Division considered Appellant's eligibility for a hardship CMP under 7 CFR § 278.6(f)(1). 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 dated October 24, 2019, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. The appeal was accepted and the implementation of the six-month disqualification was held in abeyance pending completion of this review.

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

The controlling statute in this matter is contained 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 period of disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, inter alia: "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, inter alia: “Eligible food 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 1977, 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, inter alia: “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 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.”

FREEDOM OF INFORMATION ACT (FOIA) REQUEST

Appellant, through counsel, submitted a Freedom of Information Act (FOIA) request via email dated December 23, 2019. The FOIA Request was processed on January 6, 2020. The record reflects that counsel received the requested documentation, via email, on January 23, 2020. Counsel was then informed that all supporting documentation was to be provided no later than February 18, 2020, to be considered during this review.

APPELLANT’S CONTENTIONS

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

1. The Appellant adamantly deny any intentional violation of SNAP regulations on the part of the store. The sole employee involved in the transactions set forth in the RIB investigation was operating specifically against his training and the store’s regulations as he was new and became confused as to what items were eligible.
2. The owner spoke to the employee as soon as this matter was brought to the management’s attention, wherein the employee admitted that the transactions were an honest mistake.
3. Prior to the charges at hand the store had a history of compliance with SNAP regulations and there has been no showing that there was any neglect or carelessness on the part of ownership or management that resulted in any potential violations. Without that evidence, a disqualification under 7 C.F.R §278.6 would be improper.
4. It is more likely that these investigations demonstrate a short-lived misunderstanding on the part of Clerk B concerning the difference between eligible and ineligible items, rather than a practice of selling ineligible items.

5. Where the violations are too limited to warrant a disqualification, a warning letter should be issued.
6. After being made aware of the violations, the store took the reasonable and appropriate steps to properly educate the employee and retrained all store employees on SNAP regulations and procedures.
7. If the store were to be disqualified for six months the participants would be severely burdened and endure grave hardship.

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

FNS initially authorized Excel Food & Gas as a convenience store on October 8, 2010. During an onsite investigation from March 21, 2019 through August 23, 2019, the USDA conducted eight (8) compliance visits at Appellant's store. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated September 30, 2019. The investigation report included Exhibits A through H, which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were committed during five (5) of the eight (8) compliance visits. They involved the sale of two (2) 24 count boxes of Simply Done forks, two (2) 24 count boxes of Simply Done Spoons, two (2) 24 count boxes of Simply Done cutlery, one (1) 24 count box of Essential Everyday spoons, one (1) eight count pack of 12 ounce Strongholder bowls, one (1) 12.6 ounce bottle of Ajax dishwashing liquid and one (1) 24 count box of Essential Everyday forks. A clerk refused the purchase of two ineligible items in Exhibit C and two ineligible items in Exhibit D. A clerk also refused to exchange of an undisclosed amount of SNAP benefits for cash in exhibit G.

Appellant, through counsel, did not deny that the violations took place during the investigation. With regard to Appellant's contentions, through counsel, it is important to note that as owner of the store, Appellant is liable for all volatile transactions handled by either paid or unpaid store personnel. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. 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 Stamp Act and the enforcement efforts of the USDA. Additionally, a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported

economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the 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, Appellant's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Furthermore, it is important to clarify for the record that the purpose of this review is to determine if the earlier decision of the Retailer Operations Division, to disqualify Appellant from participation in the SNAP for a period of six months, was in fact a correct one. It is not within the scope of this review to consider what subsequent actions Appellant may have taken so that its store may begin to comply with program requirements.

Appellant, through counsel, asked that a warning letter be issued in lieu of a six-month disqualification. Regarding this request, FNS may send a warning letter in lieu of a disqualification only under specific circumstances. SNAP regulations at 7 CFR §278.6(e)(7) states that FNS should "send the firm a warning letter if violations are too limited to warrant a disqualification. The Agency clarifies the regulations and states to "send the firm a warning letter if the investigation discloses only one or two sales of common ineligible items." As previously noted, the investigation report documents the exchange of 10 common ineligible items during five (5) visits. Therefore, as clarified by the Agency, these violations do not meet the definition of "violations that are too limited to warrant a disqualification" and are evidence of carelessness on the part of ownership or management.

Based on a review of the evidence in this case, there is no question that program violations did occur. Clerks working at Appellant sold common ineligible items to an FNS investigator on five (5) separate investigative visits. The investigative record is specific and accurate with regard to the dates of the violations, the exchange of SNAP benefits for ineligible items, and in all other critically pertinent detail. As such, the contentions presented do not constitute valid grounds for dismissal of the current charges of violations, or for mitigating the impact of those charges. Based on a review of the evidence in this case, it appears that the SNAP violations at issue did, occur as charged.

As to the court cases cited by counsel, the administrative review process is to determine whether FNS followed the Food and Nutrition Act and the regulations issued under the Act when it took action against the retailer. The administrative review officer is not responsible for determining whether any court cases cited by counsel apply to Appellant's situation. If this final agency decision is appealed to the federal district court, the judge is responsible for determining whether the court cases cited by counsel are on point and applicable to the case presently under review.

CIVIL MONEY PENALTY

Appellant requested consideration of a civil money penalty. Retailer Operations Division considered Appellant's eligibility for a hardship 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 at least 11 SNAP authorized retailers within a one-mile radius of Appellant. These retailers included one (1) superstore and 10 additional convenience stores and all are selling as large a variety of staple foods at comparable prices.

CONCLUSION

The documentation presented by Retailer Operations Division provides through a preponderance of the evidence that the violations as reported occurred at the Appellant firm. 7 CFR § 278.6(e)(5) specifies that FNS shall "disqualify the firm for six 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.

The violations were determined by Retailer Operations Division to represent the first sanction for the firm and evidence carelessness and poor supervision. Therefore, the imposition of a six-month disqualification, the least severe penalty allowed by regulation, is appropriate.

It is therefore established that the violations as described in the letter of charges did in fact occur at the Appellant firm warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5). Based on the discussion herein, the decision to impose a six-month disqualification against Excel Food & Gas 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 participation ten (10) days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to 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 (FOIA), 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.

Monique Brooks
ADMINISTRATIVE REVIEW OFFICER

April 1, 2020