

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

Express Fuel #2,

Appellant,

v.

Case Number: C0203276

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a six-month disqualification against Express Fuel #2 (“Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of Code of Federal Regulations (CFR) § 278.6(e)(5) in its administration of SNAP when it imposed a six-month period of disqualification against Appellant on June 19, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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

USDA conducted an investigation of Appellant’s compliance with federal SNAP law and regulations during the period of October 18, 2017 through October 25, 2017. The investigation reported that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. These items sold during these impermissible transactions are best described in regulatory terms as “common ineligible nonfood items.” The investigation revealed that one male clerk and two female clerks were involved in the impermissible transactions. As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated January 31, 2018, that the firm was

charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations “. . . warrant a disqualification period of six months (Section 278.6(e)(5)). Under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).”

Appellant replied to the Retailer Operations Division’s charges in writing. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

The Retailer Operations Division notified Appellant in a letter dated June 19, 2018 that the firm was being disqualified for six months from participation as an authorized retailer in SNAP. This determination letter also stated that Appellant’s eligibility for a hardship civil money penalty (CMP) according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated to Appellant that “. . . you are not eligible for the CMP because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.”

On June 27, 2018, Appellant appealed the Retailer Operations Division’s decision to impose a six-month disqualification, and requested an administrative review of the action. The appeal was granted and implementation of the sanction has been on hold pending completion of this review.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented 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.

Section 278.6(e)(5) of the SNAP regulations states, in part, when a firm is to be disqualified 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.

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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- Appellant provided a two-page employee policy signed by employees;
- The six-month disqualification is too severe. Appellant requests a warning letter;
- Appellant has not been provided with any evidence of SNAP violations;
- The investigation was inadequate. Appellant provided 12 pages from the FNS store visit, and 22 pages from the FNS investigation;
- The persons who conducted the investigation were not properly trained.
- The penalty is unconstitutional and violates the Equal Protection Clause, Takings Clause, and the Contracts Clause;
- Appellant denies the allegations;
- Appellant requests a Civil Money Penalty as Appellant is located in an area without a sufficient number of SNAP retailers;
- Appellant has been denied due process; and,
- The penalty is arbitrary and capricious.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

As to Appellant's denial of violations, this review examines the relevant information regarding the determination. Once the Retailer Operations Division establishes a violation occurred, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that the permanent disqualification should be reversed. If this is not demonstrated, the case will be sustained. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

Appellant provided a two-page employee policy signed by employees apparently to demonstrate employees were properly trained in the handling of SNAP transactions. When ownership signed the FNS application to become a SNAP authorized retailer, this included a certification and confirmation that Appellant 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 document include selling ineligible non-food items. Regardless of whom the ownership of a store may use to

handle store business, ownership is accountable for the proper handling of SNAP benefit transactions.

Severity of Penalty

Appellant contends the six-month disqualification is too severe and requests a warning letter. The investigation report shows that of the five times that nonfood violations were attempted, store personnel permitted them three times. The Retailer Operations Division attributed violations to “carelessness, or poor supervision by the firm’s ownership or management,” pursuant to 7 CFR § 278.6(e)(5) of the SNAP regulations, which results in a disqualification of six months. This is consistent with Appellant’s contention that it committed violations in error. Further, this penalty is only permitted if the firm has not been previously sanctioned. Therefore, a six-month disqualification for the violations committed, the minimum, is the appropriate sanction in this case.

Constitutionality

Appellant contends that both the federal statute and its implementing regulations do not meet the requirements of the United States Constitution. In reference to these contentions, no findings or conclusions are rendered. The administrative review process does not include an assessment of the constitutionality of the laws, regulations and policies under which the agency imposed adverse actions, but rather whether the agency actions undertaken were proper pursuant to those laws, regulations and policies and sustainable by a preponderance of evidence. As such, this office does not have the authority to assess whether the United States Congress, in its enactment of legislation, has conformed to Constitutional mandates.

No Denial of Due Process

1. Appellant contends that it has been denied due process. In this regard, the disqualification of Appellant by the ROD is neither a criminal nor a civil action, but rather an administrative action imposed against the firm as a result of trafficking violations. Only after a careful, comprehensive and complete analysis, from which appropriate conclusions are logically derived, will a firm be issued a charge letter. The firm that is charged is then given the opportunity to reply to the charges and provide any information it deems appropriate in justifying as legitimate the transaction activity detailed in the charge letter. In cases such as this where investigations have been performed, the charge letter is accompanied by a redacted copy of the investigative report. The calculus for determining whether or not to issue a charge letter in cases where investigations have taken place is straightforward and uncomplicated. Either violations were found to have occurred, or they were not found to have occurred. Section 278.6(b)(1) of the SNAP regulations provides that upon charging a firm with SNAP violations, the letter informing the firm of the charges “shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter.”

The letter was delivered on February 1, 2018 and provided Appellant the opportunity to reply to the charges and provide explanations for the questionable transactions. Appellant provided written documents to the ROD in a letter dated February 10, 2018 which included a FOIA

request. Appellant received a response to its FOIA request. After considering the evidence of the case, the ROD determined that a six-month disqualification was warranted.

The agency's due process procedures are two-fold in nature. First, the retailer is afforded an opportunity to reply to the charges leveled by the ROD. The regulations at 7 CFR § 278.6(c) state:

in the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section . . . the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

After the determination letter is issued, the second level of due process involves an administrative review. Appellant availed itself of this option and provided additional information in support of the request for review.

The purpose of the administrative review process is to ensure that firms aggrieved by FNS's adverse actions have the opportunity for their position to be fairly considered by an impartial reviewing authority prior to that adverse action becoming final. Through the administrative review process, Appellant has been duly given, and has taken, the opportunity to present any evidence and information it deemed as pertinent in support of its position that the ROD's adverse action should be reversed. All evidence and information that Appellant presented to the ROD, as well as any such information submitted subsequently, have now been considered in this administrative review prior to rendering the final agency decision. No additional records were provided during the administrative review that would establish that the impermissible purchases did not occur. The record does not indicate any departure from established procedures with regard to Appellant's right to a fair and thorough review. Appellant has exercised its opportunity to reply to the charge letter and its administrative review rights, and by doing so has availed itself of the full complement of the agency's statutory obligations with regard to due process.

Adequacy of Investigation

Appellant contends the investigation was inadequate, and that it has not been provided with any evidence of SNAP violations. As previously stated, 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** . . ." (Emphasis added.) Appellant was provided a copy of the investigation report, redacted to protect the identity of the investigative operative, which details each occasion during which violations occurred, their dates and times of day, what ineligible nonfood items were sold for SNAP benefits, and the descriptions and any comments of the clerk involved. Appellant has also received all file information requested under the Freedom of Information Act except information that is specifically exempt from disclosure by law. In contrast to Appellant's assertions, there is substantial evidence that the violations occurred. Although Appellant

contends that the persons who conducted the investigation were not properly trained, Appellant did not provide any basis for this assertion.

Investigative Record

Appellant argues that the penalty is arbitrary and capricious, but it has not provided sufficient evidence to rebut the investigative findings as outlined in the charge letter. It has not convincingly rebutted the ROD's determination that Appellant most likely purchased ineligible non-food items with SNAP benefits. The SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have permitted the purchase of non-food items with SNAP benefits.

Based on a review of the evidence, it appears that the program violations at issue did, in fact, occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted under the supervision of a USDA investigator and all are fully documented. The investigative record is specific and accurate with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail.

CIVIL MONEY PENALTY

Appellant requested a fine in lieu of the six-month disqualification because Appellant is located in an area without a sufficient number of SNAP retailers. A CMP as an optional penalty in lieu of a six-month disqualification was considered in this case. Such a finding is appropriate only if: 1) a store sells a substantial variety of staple food items, and; 2) its disqualification would create a 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.

In this regard, some degree of inconvenience to SNAP benefit users is inherent in the disqualification from the SNAP of any participating food store, since the normal shopping pattern of such SNAP benefit holders may temporarily be altered during that period. In this case, however, the Retailer Operations Division has rendered a finding pursuant to 7 CFR § 278.6(f) that it would not be appropriate to impose a CMP in lieu of a period of disqualification. The Retailer Operations Division has determined that Appellant is not the only authorized retail food store in the area "selling as large a variety of staple food items at comparable prices." In addition, the Retailer Operations Division notes that the subject store is classified in the FNS SNAP retailer database as a convenience store. That database also shows a small grocery store and a medium grocery store located within a one-mile radius. All of these stores are easily accessible to customers and offer a variety and quality of staple foods comparable to, or better than, those offered by Appellant. Appellant does not carry any unique items or foods that cannot be found at other stores. Therefore, the earlier determination that Appellant's disqualification would not create a hardship to customers, as differentiated from potential inconvenience, is sustained, and a CMP in lieu of disqualification is not appropriate in this case.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to impose a disqualification of six months against Express Fuel #2 from participating as an authorized retailer in SNAP is sustained.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. A new application for participation in SNAP may be submitted ten (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 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

RICH PROULX
Administrative Review Officer

August 20, 2018