

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

Express Lane Valero,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0204250

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 Express Lane Valero (hereinafter “Appellant”) by the 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 Express Lane Valero.

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, Express Lane Valero, was initially authorized for SNAP participation as a convenience store on June 8, 2010. Between November 6, 2018, and December 18, 2018, 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 Express Lane Valero accepted SNAP benefits in exchange for ineligible items on four separate occasions. According to the report, the Appellant firm sold plastic cups, foam cups, and alcoholic beverages in exchange for SNAP benefits, which benefits may be used only for the purchase of eligible foods.

In a letter dated February 25, 2019, the Retailer Operations Division charged the Appellant with violating SNAP regulations at 7 CFR § 278.2(a). The charge letter states 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 states 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 letter dated March 1, 2019, the Appellant responded to the charge letter, explaining that the female clerk who committed the violations has been fired. The Appellant stated that in her employment interview, the clerk claimed that she had the necessary experience to perform the duties of a cashier, but was ultimately let go on February 20, 2019, for other reasons. Had the Appellant known about the clerk's SNAP violations, it would have terminated her employment immediately. The Appellant further stated that the firm has been in business for many years without any SNAP violations. It regrets that violations occurred and has retrained each cashier on the proper handling of SNAP benefits. Finally, the Appellant offered its assurance that program violations would not happen again.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated March 8, 2019. This letter informed the Appellant that it was the determination of the Retailer Operations Division that 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 stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked March 12, 2019, 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, 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 November 6, 2018, and December 18, 2018, the Food and Nutrition Service completed five compliance visits at Express Lane Valero.

The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the February 25, 2019, charge letter. The investigation report includes Exhibits A through E, and provides full details on the results of each compliance visit. SNAP violations were documented during four of the five visits, specifically the exchange of ineligible merchandise for SNAP benefits. The report states that the following ineligible items were purchased by an investigator using SNAP benefits:

- One 20-count package of 14-ounce plastic cups (*Rosewood* brand), Exhibit B
- One 18-count package of 16-ounce plastic cups (*Rosewood* brand), Exhibit C
- One 750-millileter bottle of wine (*MD 20/20* brand), Exhibit D
- One 25-count package of 8-ounce foam cups (*Dart* brand), Exhibit D
- One 750-millileter bottle of wine (*MD 20/20* brand), Exhibit E
- One 25-count package of 8-ounce foam cups (*Dart* brand), Exhibit E

The report indicates that in Exhibit A, the investigator did not attempt to commit any violations. In Exhibit E, the clerk on duty refused to exchange cash for SNAP benefits (i.e. trafficking). According to the report, the same cashier conducted all four violative transactions.

The charge letter states that the violations that occurred in Exhibits B, C, D, and E 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:

- Appellant would like the administrative review officer to consider its original response to the charges.
- Appellant ensures that with its updated training, the violations will not occur again.
- The firm has been authorized in SNAP for many years and has never had this happen.
- The cashier who committed the violations has been terminated, and the remaining cashiers have been retrained on accepting SNAP benefits. The firm will constantly make sure the rules are followed.
- Violations will never happen again because the community depends on the firm as a store where SNAP benefits can be used.

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 has not provided any evidence or documentation to counter FNS's investigation report. In fact, in its original response to the charges, the Appellant expressed regret that violations occurred and thanked FNS for bring the issue to its attention. Because the violations themselves do not appear to be in dispute, it is the determination of this review that program

violations did occur as charged by the Retailer Operations Division and a six-month disqualification is warranted. The balance of this review will address the Appellant's remaining contentions.

Remedial Actions Taken

The Appellant contends that it has taken a number of steps to ensure that program violations will not happen again. For example, the cashier who committed the violations has been fired; the remaining cashiers have been retrained on how to properly accept SNAP benefits; and the firm will more closely monitor its cashiers to ensure that the rules are followed.

With regard to these contentions, it must be noted 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 facts that existed at the time the violations were committed. It is not the authority of this review to consider any subsequent remedial actions that may have been taken or that 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 after the discovery of program violations.

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

No Prior Violations

The Appellant contends that the firm has been authorized in SNAP for many years and has never had this happen. This contention implies that because of the firm's history of compliance with SNAP rules, the disqualification penalty should be reconsidered.

Unfortunately, this contention does not provide a valid basis for dismissing the charges or for modifying the disqualification penalty. The law is clear that when serious violations occur, such as the exchange of ineligible nonfood items for SNAP benefits, a six-month disqualification is the appropriate penalty, even on the first occasion, as noted in 7 CFR § 278.6(e)(5). As long as the administrative action taken by the agency fully conforms to SNAP regulations, this review has no authority to dismiss or reduce a period of disqualification. In this case, the sanction imposed by the Retailer Operations Division for this first-time violation is entirely in line with SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations.

Hardship to Households / Civil Money Penalty

The Appellant claims that one of the reasons violations will not happen again is because the community depends on the firm as a store where SNAP benefits can be used. This contention implies that a six-month disqualification will cause hardship to SNAP households in the area.

With regard to this contention, 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 a CMP in lieu of disqualification is allowable when the firm's disqualification would cause hardship to SNAP households. The regulation defines hardship 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 Express Lane Valero, a standard gas station/convenience store, would not cause hardship to SNAP households because there are other shopping options in the area. According to agency records, within a one-mile radius of Express Lane Valero there are at least five comparable or larger SNAP-authorized retail stores with as large a variety of staple food inventory at comparable prices. Because hardship conditions do not exist in this case, a civil money penalty in lieu of disqualification is not an option.

CONCLUSION

Based on a review of all information in this case, this administrative review finds that the Retailer Operations Division has proven by a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at Express Lane Valero 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. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, Express Lane Valero, 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 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

July 1, 2019