

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

Farrell Speed Check,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0196074

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 Farrell Speed Check (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 Farrell Speed Check with Federal SNAP law and regulations from December 13, 2017 through May 4, 2017. In a letter dated June 14, 2017, 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 four (4) out of six (6)

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 June 23, 2017, Appellant, through counsel, responded to the charge letter and generally stated that Farrell Speed Check implemented an effective compliance program to prevent violation of SNAP section 278.6(c) and 278.6(e)(1) of SNAP. Counsel included information regarding the geographical area where the store is located, how long the store has been in business, and indicated that the store has never had any violation of USDA and SNAP laws or been under investigation by USDA for SNAP trafficking charges. Appellant, through counsel, requested a CMP in lieu of disqualification and explained, in writing, how Appellant met Criterion 1, 2, and 3 in lieu of permanent disqualification. Appellant, through counsel, provided three pages listing store inventory, a personal affidavit from ownership, and three copies of Employment Agreements.

After reviewing the evidence and the response from the Appellant, Retailer Operations Division issued a determination letter dated August 24, 2017. 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 August 31, 2017, the Appellant 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 2008¹, 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.

¹ *Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246*

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.”

APPELLANT’S CONTENTIONS

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

- Farrell Speed Check has a training policy in place for its employees.
- We submitted proper documentation supporting a CMP. The USDA is now claiming that the petitioner is now ineligible for a CMP because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices. This decision contradicts the very nature of the original allegations.
- By disqualifying the petitioner for a period of six-months, this would cause the petitioner great financial hardship as he relies on EBT sales as a part of his livelihood. We ask that FNS remove the six-month disqualification and assess a CMP in lieu of the six-month disqualification.

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 Farrell Speed Check as a convenience store on February 26, 2009. During an investigation from December 13, 2016 through May 4, 2017, the USDA conducted six (6) compliance visits at Appellant's store. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated June 14, 2017. The investigation report included Exhibits A through F which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were committed during four (4) of the six (6) compliance visits and involved the sale of one .85 ounce tube of Crest toothpaste; one single TekPro tooth brush; one hair brush; one bar of Dove soap; one 100 count box of Good Sense sandwich bags; two 16 count packages of 16 ounce Basic Home plastic cups; one 164 count box of Member's Mark facial tissues; and one 24 count box of Global Brands heavy duty plastic ware. Store personnel refused to exchange an undisclosed amount of cash for SNAP benefits during Exhibits E and F. In its review request, Appellant did not refute the sale of common ineligible items during the investigation but asked that the determination to deny the CMP and disqualify the store be reviewed and that a six-month disqualification would cause a great financial hardship to the store.

CIVIL MONEY PENALTY

The Appellant requested reconsideration of the denial of a civil money penalty under the circumstances of the investigation. It is important to note that Appellant was charged with accepting SNAP benefits in exchange for merchandise which included common ineligible non-food items and not trafficking. The 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 nine other authorized retail stores, within a one-mile radius of Appellant, including combination/other stores, small grocery stores, supermarkets and other convenience stores, selling as large a variety of staple foods at comparable prices.

With regard to Appellant's claim that a disqualification will cause a financial hardship to the firm, 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 1977, 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 a financial 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. Although it is recognized that some degree of inconvenience to SNAP households is inherent with the firm's disqualification from the SNAP or by any participating food store, as the normal shopping pattern of such SNAP customers may be temporarily altered during the period of

disqualification, the earlier determination that the disqualification of Farrell Speed Check would not create a hardship to customers, as differentiated from potential inconvenience, is sustained, and a civil money penalty in lieu of disqualification is not appropriate in this case

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 Farrell Speed Check 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 1977, 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

November 15, 2017