

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

Fuel N’ Go,

Appellant,

V.

Case Number: C0219839

Retailer Operations Division,

Respondent.

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 Fuel N’ Go (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 Fuel N’ Go, with Federal SNAP law and regulations from October 30, 2019 through December 11, 2019. In a letter dated January 22, 2020, 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 seven (7) 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 a January 29, 2020 email, the Appellant requested an extension of time in which to respond to the charge letter. In a letter dated January 30, 2020, Retailer Operations Division granted Appellant a 10 calendar day extension February 10, 2020. In a letter dated January 31, 2020, Appellant through counsel, responded to the charge letter and generally stated that under the facts of the visits, there can be no logical basis to institute the harsh penalty of a six month disqualification. Putting aside the obvious legal issue associated with the alleged transaction, it would seem that all of the transactions, taken as a whole are relatively minor and do not warrant the sanction of a six month disqualification. Appellant, through counsel, stated that the clerk was immediately fired and is no longer employed at the establishment. The USDA must understand the nature of my client's business which is exclusively a neighborhood convenience store catering to local residents, who often purchase their daily needs at the store. Many of them are frequent visitors known to the area and my clients. Immediately upon receipt of the notice herein, management has sought to re-educate all employees on proper SNAP regulations including eligible purchases. Included within this retraining is the requirement that all employees watch the video materials offered by USDA on SNAP transactions.

After reviewing the evidence and the response from the Appellant, Retailer Operations Division issued a determination letter dated February 18, 2020. 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 February 28, 2020, 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 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.”

APPELLANT’S CONTENTIONS

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

1. Of the seven visit to the subject store for the 6-week period of time in question, five visits did result in a technical violation of the SNAP regulations. However, to suggest that those five instances is tantamount to warranting the permissive sanction of disqualification for a 6-month period of time clearly is excessive and overreaching.
2. While certainly there was in fact a technical violation, the lesser offenses associated and set forth in 278.6 are warranted in this case.
3. We respectfully request that the administrative review result in a warning pursuant to 278.6(e).
4. Alternatively, given the circumstances in this case, the Appellee would respectfully request the imposition of a civil money penalty.

No additional information or evidence was provided during this review. 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 Fuel N’ Go as a convenience store on October 17, 2012. During an investigation from October 30, 2019 through December 11, 2019, the USDA conducted seven (7) compliance visits at Appellant’s store. A report of the investigation was provided to the

Appellant as an attachment to the charge letter dated January 22, 2020. The investigation report included Exhibits A through G, 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 seven (7) compliance visits. They involved the sale of three 20 count packages of Solo squared plastic cups, two rolls of Scott toilet tissue and one 50 count package of Glad sandwich bags. A clerk refused the purchase of two ineligible items in Exhibits B and G and the exchange of an undisclosed amount of SNAP benefits for cash in exhibits E and 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.

The Appellant, through counsel, has offered no evidence to support the statement that the investigator was persistent, insistent, pushy and aggressive. A review of the report of investigation did not suggest that the investigator acted in the alleged manner. If this statement were true, the Appellant could have denied service to the investigator rather than committing violations of the SNAP regulations. In fact, the investigator comments detail that the employees involved, were aware that the sale of ineligible items were not allowed, however the clerks engaged in the activity despite this knowledge.

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 six (6) 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.

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 34 authorized retailers within a one-mile radius of Appellant. These retailers included eight (8) combination other grocery stores, four (4) small grocery stores, six (6) medium grocery stores, one (1) large grocery store, three (3) supermarkets, two (2) superstores 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 Fuel N' Go 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

August 4, 2020