

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

Tireman Services Inc.,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0246681

FINAL AGENCY DECISION

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

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, when it imposed a six-month disqualification against Tireman Services Inc.

AUTHORITY

7 U.S.C. § 2023 and 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

Tireman Services Inc. was initially authorized to participate in SNAP on March 2, 2009. Between September 4, 2021, and September 7, 2021, the USDA conducted an undercover investigation of Tireman Services Inc. to ascertain the firm’s compliance with Federal SNAP law. Agency records show that during the investigation Appellant violated SNAP regulations by accepting SNAP benefits in exchange for ineligible non-food items on four separate occasions.

In a letter dated September 29, 2021, the Retailer Operations Division charged Appellant with accepting SNAP benefits in exchange for ineligible non-food merchandise, in violation of 7 CFR § 278.2(a). The charge letter informed Appellant that the violations warranted a six-month

disqualification period from SNAP, as provided in 7 CFR § 278.6(e)(5). The letter further stated that under certain conditions, and in accordance with § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

Appellant responded to the charge letter on October 7, 2021. In the letter, Appellant said that the undercover purchases were made after midnight, when a new employee was working. Appellant provided that the new employee had been retrained and was warned that any further infraction would result in his immediate dismissal.

After considering the Appellant's response and further evaluating the evidence, the Retailer Operations Division issued a determination letter, dated November 4, 2021. This letter informed the Appellant that the Retailer Operations Division found that the violations did occur as outlined in the charge letter and that a six-month disqualification would be imposed in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that a hardship CMP was considered, 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 November 13, 2021, letter, Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and implementation of the six-month disqualification has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of an adverse action, the appellant bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. This means the 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 law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and is promulgated through regulation under Title 7 CFR Part 278. Specifically, 7 CFR § 278.6(a) and (e) 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(e) states, in part:

FNS shall take action as follows against any firm determined to have violated the Act or regulations...

(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.

7 CFR § 284.1 Pandemic Electronic Benefits Transfer (P-EBT) states in part:

(a) Overview. Section 1101 of the Families First Coronavirus Response Act (FFCRA; Pub. L. 116-127), as amended, authorized supplemental allotments to certain households. These benefits shall be referred to as Pandemic Electronic Benefits Transfer (P-EBT) benefits. This section establishes the retailer integrity regulations for P-EBT for retailers in any State as defined in Section 3(r) of the Food and Nutrition Act.

(b) Definitions. For this section:

(1) Trafficking means the activities described in the definition of trafficking at § 271.2 of this chapter when such activities involve P-EBT benefits.

(2) Firm's practice means the activities described in the definition of firm's practice at § 271.2 of this chapter when such activities involve P-EBT benefits.

(3) Involving P-EBT benefits or involve P-EBT benefits means activities involving PEBT benefits as well as supplemental nutrition assistance program (SNAP) benefits, or only P-EBT benefits.

(c) Participation of retail food stores and wholesale food concerns, and redemption of PEBT benefits. Requirements and restrictions on the participation of retail food stores and wholesale food concerns and the redemption of coupons described at §§ 278.2, 278.3 and 278.4 of this chapter, including the acceptance of coupons for eligible food at authorized firms, also apply to activities involving P-EBT benefits....

(e) Penalties. For firms that commit certain violations described at §§ 278.6 and 278.2 of this chapter where such violations involve P-EBT benefits, FNS shall take the corresponding action prescribed at § 278.6 or § 278.2 for that violation. For the purposes of assigning a period of disqualification, a warning letter shall not be considered to be a sanction. Specifically, FNS shall: (7) Disqualify the firm for ineligibles violations for such circumstances and corresponding time periods as described at § 278.6(e)(2)(i), (e)(3)(i), (e)(4)(i), and (e)(5) of this chapter, where such violations involve P-EBT benefits....

(g) Administrative and Judicial review. Firms aggrieved by administrative action under paragraphs (d), (e), and (f) of this section may request administrative review of the administrative action with FNS in accordance with part 279, subpart A, of this chapter. Firms aggrieved by the determination of such an administrative review may seek judicial review of the determination under 5 U.S.C. 702 through 706.

SUMMARY OF INVESTIGATION

During an undercover investigation conducted between September 4, 2021, and September 7, 2021, FNS completed four compliance visits at Tireman Services Inc. A report of the investigation was provided to Appellant as an attachment to the charge letter, dated September 29, 2021. The report included Exhibits A through D and provided full details on the results of each compliance visit. SNAP violations documented during each of the four visits included the exchange of ineligible non-food merchandise for SNAP benefits. One clerk committed the violations. The report noted that the following ineligible non-food items were sold in exchange

for SNAP benefits: steel wool pads, dish liquid, bathroom tissue, tall kitchen trash bags, tealight candles, leaf and grass trash bags, and makeup cleansing wipes.

The report noted that an investigator attempted to exchange SNAP benefits for cash on two occasions but the clerk on duty refused. These refusals are documented in Exhibits C and D. The charge letter states that the violations that occurred in Exhibits A, B, C, and D warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5).

APPELLANT'S CONTENTIONS

Appellant submitted the following summarized contentions as part of its request for administrative review, in relevant part:

- The contractors that sought cash were flatly denied.
- The economic fallout is only secondary to my pride in having an unblemished business record. I have always abided by the rules and regulations of the SNAP program in my store.
- Due to COVID-19 and the ongoing labor shortage, it has been increasingly difficult for us to maintain a steady and consistent workforce. Nonetheless, all employees are repeatedly trained to obey all laws and regulations without exception.
- However, the clerk was a new employee and still in his probationary period when the alleged purchases occurred. All employees have been warned that failure to adhere to the SNAP rules and regulations will result in their immediate dismissal.
- I am writing to advocate for my customers. Most do not have transportation and rely upon this market for daily needs. A school system is located near my business and a large percentage of parents rely on this store to pick up needed food items when walking their children before and after school.
- The neighborhood my business serves is made of people of modest means and the only other business within walking distance to this market no longer accepts SNAP benefits.
- My store consists of a large selection of grocery items tailored around my customers' needs.

In support of these contentions, Appellant submitted 22 photographs of store inventory.

The preceding may represent only a summary of Appellant's contentions presented in this matter. However, in reaching a decision, full consideration was given to all contentions presented, including any not specifically summarized or referenced herein.

ANALYSIS AND FINDINGS

If a store has never been sanctioned and its personnel, due to carelessness or poor supervision, sells common nonfood items for SNAP benefits, then the penalty under SNAP regulations is a six-month disqualification of the store's SNAP authorization.

This review examines the relevant information regarding the Retailer Operation Division's 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 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.

In this case, the report of investigation, signed by the investigator under penalty of perjury, documents that the charges of violations are based on the findings of a formal USDA investigation. A complete review of this documentation has yielded no known error or discrepancy. The investigation report is specific and thorough regarding the dates of the violations, the critical facts related thereto, and is supported by documentation that confirms details of the transactions. The Retailer Operations Division has thoroughly documented the transactions in which personnel at the store exchanged ineligible items for SNAP benefits.

In response to the charge letter and on administrative review, Appellant did not offer any evidence or alternative theories to counter the agency's investigative report. In fact, Appellant, concedes that a new employee committed the violations. Because the violations themselves do not appear to be in dispute, this review finds, by a preponderance of the evidence, 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. The Retailer Operation's Division's decision not to impose a hardship CMP is also sustained.

Violations by New Employee, Refusal, and No Prior Violations

Appellant contends that the violations were committed by a new employee who refused to traffic SNAP benefits and that the store had no prior violations.

Regardless of whom the ownership of a store may utilize to handle store business, the ownership is accountable for the proper training of staff and the monitoring and 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 and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Ownership signed the FNS authorization application for SNAP retailers on February 5, 2009, which included a certification and confirmation that the owner 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 include accepting SNAP benefits for cash and as payment for ineligible items. The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations.

The investigation report shows that during each of the four compliance visits made to the firm, ineligible products were sold in exchange for SNAP benefits by the same clerk each time. The

Retailer Operations Division attributed violations to the carelessness, or poor supervision by the firm's ownership or management," pursuant to 7 CFR § 278.6(e)(5) of the SNAP regulations, for which the regulatory penalty is a disqualification of 6 months. This is the minimum penalty for a firm that has not previously been sanctioned for violations, such as the ones committed in this case. This penalty applies regardless of if the clerk conducting the violative transactions is new, or if the clerk refuses to traffic SNAP benefits.

Remedial Actions Taken

Appellant asserts all employees have been warned that failure to adhere to SNAP rules and regulations will result in their immediate dismissal.

It should 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 circumstances 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 based on alleged or planned corrective actions implemented after findings of program violations.

Therefore, the Appellant's contention that corrective action has taken place does not provide a valid basis for dismissing the charges or for reducing the penalty imposed.

Hardship Civil Money Penalty (CMP)

The Appellant alleges disqualification would cause hardship to customers. Appellant notes that many of the firm's customers are SNAP recipients who walk to the store, and that there are no other SNAP authorized stores in walking distance. Appellant submitted 22 photographs of store inventory to show that it stocks the items its customers need.

Regarding this contention, regulations at 7 CFR § 278.6(f)(1) do allow, in some circumstances, for a CMP to be imposed in lieu of disqualification when the firm's disqualification would cause hardship to SNAP households. According to this regulation, hardship is defined as "no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices." The Retailer Operations Division had determined that a six-month disqualification of Tireman Services Inc. would not cause a hardship to SNAP households as there are comparable SNAP authorized stores in the area.

SNAP customers are likely to suffer some degree of inconvenience whenever any SNAP authorized retailer is disqualified, as the normal shopping pattern of SNAP customers may be altered. However, potential inconvenience is not the same as hardship, as defined in SNAP regulations.

It is the determination of this review that a disqualification of Tireman Services Inc., a convenience store, would not cause hardship to SNAP households because there are other shopping options in the area. According to agency records, there are a number of similar SNAP

authorized retail stores located within a one-mile radius of Tireman Services Inc., including 19 convenience stores. There is also no evidence that Appellant sells its inventory at unusually low prices in comparison to nearby stores. Given that hardship conditions have not been established, this review agrees with the Retailer Operations Division's determination that a hardship CMP may not be assessed in lieu of disqualification.

CONCLUSION

This review finds, by a preponderance of the evidence, that program violations of 7 CFR § 278.2(a) did occur at Tireman Services Inc.. during a USDA investigation. Accordingly, the Retailer Operations Division's determination to impose a six-month disqualification period is sustained.

In accordance with the Food and Nutrition Act and SNAP regulations, the six-month period of disqualification shall become effective 30 days after receipt of this decision. Appellant may submit a new application for SNAP authorization 10 days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this determination are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in SNAP regulations, at 7 CFR § 279.7. If 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.

MICHELLE WATERS
Administrative Review Officer

March 24, 2022