

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

Garrison Shortstop,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0192719

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 Garrison Shortstop (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 Garrison Shortstop.

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, Garrison Shortstop, was initially authorized for SNAP participation as a convenience store on May 25, 2010.

Between February 17, 2017, and May 16, 2017, FNS conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigative report documented that personnel at Garrison Shortstop accepted SNAP benefits in exchange for ineligible merchandise on five separate occasions. According to the report, the Appellant firm sold paper plates, plastic cutlery, foam plates, foam cups, toilet tissue, toothpaste, napkins, and a toothbrush in exchange for SNAP benefits, which benefits may only be used in exchange for eligible foods.

In a letter dated June 22, 2017, the Retailer Operations Division charged the Appellant with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). The charge letter stated that the violation of accepting SNAP benefits in exchange for ineligible nonfood items warrants a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further stated that under certain conditions and in accordance with 7 CFR § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

Agency records show that the Appellant did not reply to the charge letter.

After further consideration of the evidence in the case, the Retailer Operations Division issued a determination letter dated July 10, 2017. This letter informed the Appellant that it was the determination of the Retailer Operations Division that the 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 this alternative penalty because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

It should be noted that after receiving the determination letter, the Appellant contacted the Retailer Operations Division to request reconsideration of the disqualification. The Retailer Operations Division informed the Appellant that it had missed the deadline for responding to the charge letter and because the disqualification determination had already been made, the firm's only option was to appeal the decision through the administrative review process.

In a letter postmarked July 21, 2017, 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, *inter alia*:

[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, *inter alia*:

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, *inter alia*:

*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, *inter alia*:

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, *inter alia*:

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, *inter alia*:

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 February 17, 2017 and May 16, 2017, the USDA completed five compliance visits at Garrison Shortstop. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the June 22, 2017, charge letter. The investigation report includes Exhibits A through E, which provide full details on the results of each compliance visit. SNAP violations were documented during each of the five visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report notes that the following nonfood items were purchased by an investigator using SNAP benefits:

- One 70-count package of paper plates (*Nature's Own* brand), Exhibit A
- One 24-count box of assorted plastic cutlery (*Our Family* brand), Exhibit A
- One 30-count pack of foam plates (*The Home Store* brand), Exhibit B
- One 24-count box of assorted plastic cutlery (*Our Family* brand), Exhibit B
- One 20-count pack of 16 fluid-ounce foam cups (*The Home Store* brand), Exhibit C
- One 30-count pack of foam plates (*The Home Store* brand), Exhibit C
- One 24-count box of luncheon size cutlery (*Diamond* brand), Exhibit C
- One 4-count pack of bath tissue rolls (*Velvet* brand), Exhibit D
- One 4.6 ounce box of fluoride toothpaste (*Crest* brand), Exhibit D
- One medium toothbrush (*Tek Pro* brand), Exhibit D
- One 4.6 ounce box of fluoride toothpaste (*Crest* brand), Exhibit E
- One 150-count package of 1-ply napkins (*Value* brand), Exhibit E
- One 70-count package of paper plates (*Nature's Own* brand), Exhibit E

The report notes that in Exhibits D and E, the investigator attempted to

exchange SNAP benefits for cash (i.e. trafficking), but the clerk refused.

The charge letter states that the violations that occurred in Exhibits A, B, C, D, and E warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5). According to the report, two separate clerks conducted the violative transactions.

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 a different option than disqualification.
- Appellant owner does not place blame on the firm's employees because the store belongs to the owner and the owner needs to watch more carefully to make sure that things are done properly.
- Appellant cannot apologize enough for the violations that occurred.
- The firm's owner lives in a very rural area and the business depends on SNAP. The store is also open 24 hours a day, seven days a week, so the Appellant believes that the store is also an asset to the community.
- Appellant asks for an opportunity to make things right.
- Appellant will be training its clerks again to make sure they understand what is right and wrong.

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 information or documentation to counter FNS's investigation report. Rather, the Appellant appears to acknowledge that the violations took place, including offering an apology for the violations. 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. The balance of this review will address the Appellant's remaining contentions.

Remedial Actions Taken

The Appellant has stated that blame cannot be placed on the employees because the store belongs to the owner and the owner needs to watch more carefully to

make sure that employees conduct SNAP transactions properly. Accordingly, the Appellant states that it will train its clerks again to make sure they understand what is right and what is wrong.

With regard to the Appellant's contention that the employees are not to blame for the violations, this review agrees that the responsibility for all violations lies with the firm's owners. By signing an application to participate in SNAP, the firm's owners agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. In this case, the record clearly shows that the Appellant owner agreed to abide by program rules, including taking responsibility for violations committed by any of the firm's employees, whether paid or unpaid, new, full-time or part-time. Regardless of which clerks are operating the cash register at a given time or whom firm ownership authorizes to handle store business, the ownership of the firm is ultimately responsible for the proper training of staff and the monitoring and handling of SNAP benefit transactions.

However, it is important to reiterate 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, such as retraining of employees, that may have been taken or 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 subsequent to findings of program violations.

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

Hardship to Appellant

The Appellant has stated that the firm's owner lives in a very rural area and the business depends on SNAP. This argument implies that a disqualification would create a hardship to the firm or the owner.

With regard to this contention, it must be noted that hardship to the firm itself or to its owners is not a factor when deciding whether or not the disqualification determination should be reversed or whether or not a lesser penalty, such as a civil money penalty, can be applied. It is recognized that some degree of economic hardship to the firm is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of possible financial hardship to either the firm or the firm's ownership resulting from the imposition of

such a penalty.

To allow store ownership to be excused from administrative penalties based on a purported economic hardship would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of 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 rules, but also to those retailers who have been disqualified from the Program in the past for similar violations. Therefore, the Appellant's contention that it may incur economic hardship as a result of the disqualification does not provide a valid basis for dismissing the charges or for modifying the penalty imposed.

Civil Money Penalty

The Appellant implies that the local community would experience some level of hardship if the disqualification were to be upheld. Because the store is open 24 hours a day, seven days a week, the Appellant believes that the store is an asset to the community.

While the store may indeed be an asset to the community because of its extended business hours, SNAP regulations do not permit dismissal of the charges for that reason. Extended hours are also not a valid reason for assessing a civil money penalty (CMP) instead of disqualification. SNAP regulations at 7 CFR § 278.6(f)(1) state that a CMP in lieu of a temporary disqualification is only allowable 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."

It is the determination of this review that a disqualification of Garrison Shortstop, 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 four comparable or larger SNAP-authorized retail stores located within a one-mile radius of Garrison Shortstop, including a large grocery store.

It is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and households are forced to use their SNAP benefits elsewhere. However, in accordance with regulation cited above, hardship exists only when there are no other authorized stores in the area selling as large a variety of staple foods at comparable prices. Therefore, pursuant to 7 CFR § 278.6(f)(1), a hardship civil money penalty in lieu of disqualification cannot be granted in this case.

CONCLUSION

Based on a review of the evidence in this case, there is no question that program violations of 7 CFR § 278.2(a) occurred 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 is specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for ineligible, nonfood items, and in all other critically pertinent details. Pursuant to 7 CFR § 278.6(a) and (e)(5) the decision to impose a six-month disqualification against the Appellant, Garrison Shortstop, 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

January 25, 2018