

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

Janice Dollar Store,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0193447

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 Janice Dollar Store (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 Janice Dollar Store.

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, Janice Dollar Store, was initially authorized for SNAP participation as a convenience store on November 12,

2013. Between December 6, 2016, and December 20, 2016, 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 Janice Dollar Store accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. According to the report, the Appellant firm sold a battery-powered toothbrush, a razor, and expensive electronic toys in exchange for SNAP benefits, which benefits may only be used in exchange for eligible foods.

In a letter dated July 17, 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.

In response to the charge letter, the Appellant owner sent a letter, postmarked July 19, 2017, to the Retailer Operations Division. In its letter the Appellant did not dispute that the violations occurred, but apologized for them and contended that they were the fault of a single employee who had been with the firm for nine years. The Appellant stated that the employee in question has been given a warning and assured the Retailer Operations Division that such violations would not happen again. The Appellant further requested leniency based on the firm's past compliance with SNAP regulations. In support of its response, the Appellant provided a copy of a disciplinary form showing that the employee in question has been officially reprimanded for the violations that were committed.

After considering the Appellant's response as well as the evidence in the case, the Retailer Operations Division issued a determination letter dated July 27, 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 a CMP because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked July 29, 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 December 6, 2016, and December 20, 2017, the USDA completed six compliance visits at Janice Dollar Store. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the July 17, 2017, charge letter. The investigation report includes Exhibits A through F, which provides full details on the results of each compliance visit. SNAP violations were documented during three of the six visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report notes that the following nonfood items were purchased by a confidential informant using SNAP benefits:

- One battery-powered toothbrush (*Assured* brand), Exhibit C
- One razor (*Hurley* brand), Exhibit C
- One Android New Power Warrior toy robot (green/gray), Exhibit D
- One Android New Power Warrior toy robot (yellow/blue), Exhibit D
- One Android New Power Warrior toy robot (yellow/red), Exhibit E
- One Android New Power Warrior toy robot (green/white), Exhibit E

The report notes that in Exhibits E and F, the confidential informant attempted to exchange SNAP benefits for cash (i.e. trafficking), but the clerk refused. The report indicates that the confidential informant did not attempt to commit any violations in Exhibits A or B.

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

APPELLANT'S CONTENTIONS

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

- Appellant does not agree with the decision to disqualify the firm for six months
- Because it was the same employee who committed all of the violations, the disqualification decision should be reconsidered.
- The owner was unaware that one of its employees was committing violations.
- After learning of the violations, the Appellant gave the employee a “strict warning.”
- Owner promises to “meticulously monitor and control the SNAP transactions that occur from now on.”
- Clientele is crucial to a business owner, and any change in the amount of clientele would affect the firm.
- Appellant requests that consideration be given of the many years the firm has been a SNAP retailer and has followed the guidelines and regulations.

In support of these contentions, the Appellant provided copies of 24 cash register receipts of SNAP purchases, dated between July 19, 2017, and July 27, 2017. The receipts show that only eligible food was purchased with SNAP benefits. These receipts were provided as evidence that the owner is now monitoring and controlling the firm's SNAP transactions.

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, stating that the violations were caused by one female employee. 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.

Appellant Owner Not Involved in Violations

The Appellant contends that the violations are not the fault of the owner. The Appellant argues that the owner was not aware that violations were taking place, and blames the infractions on one employee, who has since been reprimanded.

With regard to these contentions, the record shows that on September 6, 2013, the Appellant owner signed an application to participate as a retailer in SNAP. By signing this application, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. The record clearly establishes 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. An owner is not free of responsibility simply because he or she was not in the vicinity at the time the violations occurred or because he or she was uninvolved in the violations. 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. To allow store ownership to disclaim accountability for the acts of its employees would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA.

Therefore, the Appellant's claim that the violations were not the fault of the owner does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Hardship to Appellant

The Appellant has argued that a firm's clientele is crucial to a business owner and that a disqualification would negatively affect the amount of clientele at the store.

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 mitigating the penalty imposed.

Remedial Actions Taken

The Appellant has stated that the employee who committed the violations was given a "strict warning." The Appellant also offers its assurance that the owner will meticulously monitor and control the firm's SNAP transactions "from now on." To support this contention, the Appellant provided copies of 24 SNAP transaction receipts, dated between July 19, 2017, and July 27, 2017, showing that only eligible foods are now being purchased with SNAP benefits.

With regard to this contention, 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 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.

No Prior Violations

The Appellant has argued that FNS should take into consideration the fact that the firm's owner has been a SNAP retailer for many years and has had no previous SNAP violations.

With regard to this contention, SNAP regulations at 7 CFR § 278.6(e)(5) require that when serious violations occur, such as the exchange of nonfood items for SNAP benefits, a six-month disqualification is the necessary penalty, even on the first occasion, regardless of a firm's prior compliance with program rules. As noted earlier, the purpose of this review is to determine whether or not the Retailer Operations Division took appropriate action, consistent with SNAP regulations, in its imposition of a six-month disqualification against Janice Dollar Store. 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 is wholly in line with SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations. Therefore, the firm's prior compliance with program rules does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Civil Money Penalty

Although not requested by the Appellant, this review evaluated the Appellant's eligibility for a civil money penalty (CMP) in lieu of a six-month disqualification. SNAP regulations at 7 CFR § 278.6(f)(1) state that a CMP in lieu of a temporary disqualification is 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 Janice Dollar Store, 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 at least 24 comparable or larger SNAP-authorized retail stores located within a one-mile radius of Janice Dollar Store.

It is recognized that some degree of inconvenience for SNAP households is likely whenever a SNAP-authorized store is disqualified and the 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 assessed 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) did occur 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, Janice Dollar Store, 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 18, 2018