

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

Jenny’s Bakery,

Appellant,

v.

Case Number: C0212345

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 a civil money penalty in the amount of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in lieu of a six-month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Jenny’s Bakery (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 assessed a civil money penalty in lieu of a six-month disqualification against Jenny’s Bakery.

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

Jenny’s Bakery was initially authorized for SNAP participation as a medium grocery store on March 27, 2007. Between September 27, 2018, and October 3, 2018, 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 Jenny’s Bakery accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. According to the report, the Appellant firm sold toilet paper, paper towel, dishwashing liquid, all purpose

cleaner, baby shampoo, and laundry detergent in exchange for SNAP benefits, which may only be used to purchase eligible foods.

In a letter dated October 26, 2018, the Retailer Operations Division charged the Appellant with violating the terms and conditions of 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 from SNAP for a period of 6 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. This charge letter gave the Appellant ten days to respond with any information, explanation or evidence regarding the charges. The case file indicates that the Appellant did not reply.

After considering the evidence in the case, the Retailer Operations Division issued a determination letter dated November 20, 2018. This letter informed the Appellant that the Retailer Operations Division determined that the violations did occur as outlined in the charge letter. As for a sanction, the Retailer Operations Division concluded that the firm was eligible for a CMP in lieu of disqualification because it was selling a substantial variety of staple food items, and the firm's disqualification would cause hardship to SNAP households given there are no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices. The letter also stated that the firm had 15 calendar days from receipt of the letter in which to either pay the penalty or establish an installment plan. The letter indicated that the Retailer Operations Division's determination would be final unless the Appellant submitted a written request for administrative review within 10 days of receipt of the determination letter.

In a letter postmarked November 21, 2018, 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 an adverse action, 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), (e)(f), and (f)(1) establish the authority upon which a hardship civil money penalty may be assessed against a retail food store in lieu of disqualification. 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.... FNS may, in lieu of a disqualification, subject a firm to a civil money penalty of up to an amount specified in § 3.91(b)(3)(i) of this title for each violation if FNS determines that a disqualification would cause hardship to participating households.

7 CFR § 278.6(c) states, in part:

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, 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 § 278.6(g) outlines the steps for calculating the CMP amount:

- (1) Determine the firm's average monthly redemptions of [SNAP benefits] for the 12-month period ending with the month immediately preceding that month during which the firm was charged with violations.
- (2) Multiply the average monthly redemption figure by 10 percent.
- (3) Multiply the product arrived at in paragraph (g)(2) by the number of months for which the firm would have been disqualified under paragraph (e) of this section. The civil money penalty may not exceed an amount specified in § 3.91(b)(3)(i) of this title for each violation.

SUMMARY OF INVESTIGATION

During an undercover investigation conducted between September 27, 2018, and October 3, 2018, FNS completed four compliance visits at Jenny's Bakery. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the October 26, 2018, charge letter. The investigation report includes Exhibits A through D, and provides full details on the results of each compliance visit. SNAP violations were documented during each of the four visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report states that the following nonfood items were purchased by an investigator using SNAP benefits:

- One roll toilet paper (Pom Brand), Exhibit A
- One 150 sheet roll paper towels (Lily's Brand), Exhibit B
- One 12.6 ounce bottle dishwashing liquid (Ajax Brand), Exhibit B
- One 22 ounce bottle of all purpose cleaner (Fabuloso Brand), Exhibit C
- One 15 ounce bottle baby shampoo (Johnson's Brand), Exhibit C
- One 16.2 ounce bottle dishwashing liquid (Dawn brand), Exhibit C
- One 1 liter bottle laundry detergent (Ace brand), Exhibit D

The report indicates that in Exhibits C and D, the investigator attempted to obtain cash in exchange for SNAP benefits, but these requests was rejected by the cashier. According to the report, four different cashiers conducted the four violative transactions.

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), or a civil money penalty in lieu of disqualification pursuant to 7 CFR § 278.6(f)(1) .

APPELLANT'S CONTENTIONS

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

- In the many years of working with USDA, the Appellant has not had an issue like this present itself;
- The firm is a small family owned business located in the heart of a well populated neighborhood, and many customers are able to shop at the bakery thanks to their SNAP benefits. The majority of the store's customers are families, and SNAP users would suffer hardship if the appeal is not accepted;

- The investigation report shows that 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The firm realizes the severity of the violation and has made employees and customers more aware of eligible and ineligible items;
- The firm has implemented new methods, such as signs and talking to cashiers, to bring awareness to the issue and to prevent it from ever occurring;
- The penalty amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is a substantial amount for the firm, but if the decision is not favorable, the firm would rather pay this amount if it can apply for an installment plan; and
- Appellant requests a review of the case, and reconsideration of the firm's disqualification from SNAP authorization.

The Appellant submitted for review a copy of the investigation report showing the ineligible items purchased during the investigation.

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 evidence or documentation that the violations did not take place as described in the charge letter, nor has the Appellant provided any evidence or documentation to counter FNS's investigation report. In fact, the Appellant acknowledges the severity of the violations that took place during the investigation period. 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.

No Prior History and Small Violative Transaction Amounts

Appellant maintains this is the first time there has been an issue related to SNAP and that the violations are for small transaction amounts. A record of program participation with no documented previous violations, however, does not constitute valid grounds for mitigating the impact of the present charges of sale of nonfood items. Likewise, the fact that the violations were for small transaction amounts does not impact the applicable penalty when such violations occur. The investigation report shows that of the four times that nonfood violations were attempted, four different store personnel committed violations each time. The Retailer Operations Division attributed violations to "carelessness, or poor supervision by the firm's ownership or management," pursuant to 7 CFR § 278.6(e)(5) of the SNAP regulations, which results in a disqualification of six months, or a hardship civil money penalty in lieu, when applicable. This penalty is only permitted if the firm has not been previously sanctioned, is the minimum for these violations, and therefore is the appropriate sanction in this case.

Remedial Actions Taken

The Appellant contends that it has taken new methods, such as signs and talking to cashiers to bring awareness to the issue, in order to prevent these types of violations from ever occurring.

Regarding these contentions, it is important to clarify for the record 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 what circumstances existed at the time the Appellant was charged with committing program violations, and at the time that the Retailer Operations Division made its determination. It is not the authority of this review to consider what subsequent remedial actions may be taken so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations or internal agency policy directives for a waiver or reduction of an administrative penalty on the basis of alleged or planned after-the-fact 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 any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

As noted earlier, the Retailer Operations Division has determined that the Appellant is eligible for a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) civil money penalty in lieu of a six-month disqualification because the firm 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. This assessment of a civil money penalty is in accordance with 7 CFR § 278.6(a), § 278.6(f)(1) and § 278.6(g).

After reviewing the evidence in this case, this review agrees that a civil money penalty in lieu of disqualification is appropriate. This review also agrees that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is the correct CMP amount. Regulations at 7 CFR § 278.6(g) outline the steps for calculating the CMP amount. The CMP is calculated on the basis of the store's SNAP redemptions during the 12 months immediately prior to the firm being charged with SNAP violations. Modifications to the CMP by the Administrative Review Officer may occur only when there is an error in calculation or when the CMP exceeds the statutory limit. This review has no authority to reduce or lessen a CMP amount for any other reason.

The calculation of the CMP in this case is as follows:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

In this case, the calculated CMP of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is less than the sanction limit of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Because the CMP amount is less than the statutory limit, the total penalty remains at 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Based on the information above and the regulations cited at 7 CFR § 278.6(g), it is the determination of this review that a CMP in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was properly assessed in this matter.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to assess a civil money penalty against Jenny's Market of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in lieu of a six-month period of disqualification from participating as an authorized retailer in SNAP is sustained.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. To pay the civil money penalty, Appellant should refer to the information provided in the determination letter dated November 20, 2018. Should Appellant choose to accept disqualification rather than pay the civil money penalty, a new application for participation in the SNAP may be submitted ten (10) days prior to the expiration of the six-month period of disqualification.

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.

MICHELLE WATERS
Administrative Review Officer

March 27, 2019