

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

Krauszer’s Food Store,

Appellant,

v.

Case Number: C0202943

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a one year disqualification against Krauszer’s Food Store (hereinafter 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 of the Code of Federal Regulations (CFR) § 278.6(a), § 278.6(e)(4), and § 278.6(f)(1) in its administration of the SNAP when it imposed a one year period of disqualification against Appellant on August 24, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period March 30, 2018, through April 2, 2018. The investigation determined that personnel at the Appellant firm accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. All four transactions were deemed clearly violative and warrant a six month disqualification period. The items sold are best described in

regulatory terms as common nonfood items and included items such as bar soap, laundry detergent, baking soda, a toothbrush, and toothpaste. The investigative report indicates that these violative transactions were handled by two different clerks. The investigative report also notes that the firm refused to exchange SNAP benefits for cash (Exhibit D).

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated June 18, 2018, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations “. . . warrant a disqualification period of six months (Section 278.6(e)(5)). The letter also states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).”

Appellant responded to the charges by phone on June 28, 2018, and in a letter sent via fax on July 4, 2018. The letter admitted to owner participation in the violative transaction identified in Exhibit D. SNAP regulations at 7 CFR § 278.6(e)(4) mandate a one year disqualification period if, “It is to be the first sanction for the firm and the ownership or management personnel of the firm have committed violations such as the sale of common nonfood items in amounts normally found in a shopping basket, and FNS had not previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating the regulations”. Based on Appellant’s admission, the Retailer Operations Division reissued the charge letter on July 31, 2018, advising that a one year disqualification period was now being considered.

After giving consideration to the evidence, the Retailer Operations Division notified Appellant by letter dated August 24, 2018, that it determined that violations had occurred at the firm, and that a one year period of disqualification from participating as an authorized firm in SNAP was warranted. This determination letter also states that Appellant’s eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated “. . . you are not eligible for the CMP because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.”

By letter postmarked September 4, 2018, Appellant appealed the Retailer Operations Division’s decision and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review. No subsequent correspondence was received from Appellant.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Section 278. In particular, Sections 278.6(a) and (e)(4) establish the authority upon which a one year disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 271.2 states that: 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 § 278.2(a) states that: Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food. Further, the citation specifies that coupons may not be accepted in exchange for cash, in payment of interest on loans, or for any other nonfood use.

7 CFR § 278.6(a) states that: 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.

7 CFR § 278.6(e)(4) states that: Disqualify the firm for 1 year if: (i) It is to be the first sanction for the firm and the ownership or management personnel of the firm have committed violations such as the sale of common nonfood items in amounts normally found in a shopping basket, and FNS had not previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating the regulations.

7 CFR § 278.6(f)(1) states that: “FNS may impose a CMP as a sanction in lieu of disqualification when 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. FNS may disqualify a store which meets the criteria for a CMP if the store had previously been assigned a sanction. A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

APPELLANT’S CONTENTIONS

The following may represent a summary of Appellant’s contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- The first three Exhibits were sold by a new cashier. After talking to her, the owner realized that she had emphasized to new employees that tobacco products and cash may not be sold using SNAP, but did not explain that only food items and not household items may be purchased;

- The owner has retrained all employees and has made a listing of all SNAP eligible merchandise and given a copy to all employees;
- Exhibit D was an honest mistake by the owner incorrectly selling toothpaste and a toothbrush along with food products. The owner failed to take due diligence in refusing the sale of household products and ensures this will not occur going forward;
- The owner takes full responsibility for all four transactions and they have become a learning experience for all employees and other business owners; and,
- The owner wants to ensure the business is not disqualified because of the number of families that shop at the store for their food buying items such as milk, canned foods, boxed pasta, sauce, etc. The owner has been in business for over 25 years and feels like a staple for the community.

Appellant submitted no evidence or other rationales in support of these contentions.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not within the authority of this review to consider what subsequent remedial actions may have been taken or will be taken in the future so that a store may begin to comply with program requirements. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, while store ownership states it has retrained all new personnel is a positive step, it does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant admits that the violations occurred and that the store owner was responsible for the violative transaction in Exhibit D of the investigative report. The transactions from the investigative report, including the store EBT POS receipts, have been matched to SNAP transactions posted on the dates in question with no discrepancies and a review of the investigative report shows no errors or discrepancies. The acceptance of SNAP benefits for ineligible items is a violation of SNAP rules and regulations. The ineligible items sold were obvious nonfood items and would not readily be confused with eligible edible food items. SNAP regulations state that FNS shall disqualify a store for a one year period if it is to be the first sanction for the firm, and the evidence shows that ownership or management personnel of the firm have committed violations such as the sale of common nonfood items in exchange for SNAP benefits and that FNS had not previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating the regulations.

Based on this discussion, the decision by the Retailer Operations Division to disqualify the firm for a one year period is the appropriate penalty in this situation and there is not any valid basis for dismissing the charges or for mitigating the penalty imposed. The regulations do allow SNAP retailers to pay a hardship CMP under certain conditions as explained in the next section.

CIVIL MONEY PENALTY

Appellant is not eligible for a trafficking CMP as these only apply in cases of permanent disqualifications.

A hardship CMP as an optional penalty in lieu of a one year disqualification was considered in this case. Such a finding is appropriate only if a store sells a substantial variety of staple food items and its disqualification would create a 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. FNS records show there are 17 comparably sized or larger SNAP retail stores located within a 1.0 mile radius of the Appellant firm that includes two medium grocery stores and two small grocery stores located in proximity to Appellant's location selling comparable foods with the closest medium grocery store being approximately one block away. All of the comparable or larger stores stock adequate varieties of food in all four staple food categories and in perishables as required by FNS. The nearby comparable or larger stores appear readily accessible to SNAP recipients and offer a variety of staple foods comparable to, or better than, those offered by Appellant. Appellant does not carry any unique items or foods that cannot be found at other stores. It is recognized that some degree of inconvenience to SNAP benefit users is inherent in the disqualification from SNAP of any participating food store as the normal shopping pattern of such SNAP benefit holders may be altered. Inconvenience, however, does not rise to the level of hardship required by the regulations.

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did occur as charged and as admitted to by Appellant. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted by a USDA special agent and signed under penalty of perjury. 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, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail. Accordingly, the determination by the Retailer Operations Division to impose a disqualification of one year against the Appellant firm from participating as an authorized retailer in SNAP is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations as there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

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. A new application for participation in SNAP may be submitted ten (10) days prior to the expiration of the one year disqualification period. When eligible, Appellant may reapply for SNAP authorization using the application instructions contained on the FNS retailer web site. Any questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (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.

ROBERT T. DEEGAN
Administrative Review Officer

February 25, 2019