

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

Lil Pantry,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0215459

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 retail food store in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Lil Pantry (hereinafter Appellant), by FNS' Retailer Operations Division (Retailer Operations).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR), Part 278, in its administration of SNAP when it imposed a six-month disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer 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 undercover investigation of the compliance of Appellant with Federal SNAP law and regulations from April 1, 2019 through April 10, 2019. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. As a result of evidence compiled during this investigation, by letter dated August 15, 2019, Retailer Operations charged ownership with violating the terms and conditions of SNAP regulations at § 278.2(a) and noted the

violations warranted a six-month disqualification period. The Charge Letter stated that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification. The Charge Letter further stated if you wish to present any information, explanation, or evidenceregarding these charges, you must reply within 10 calendar days of the date you receive thisletter. The case record shows that Appellant did not respond to the Charge Letter.

Retailer Operations issued a Determination Letter dated December 5, 2019, informing Appellant's owner that Appellant was disqualified from SNAP for a period of six months in accordance with SNAP regulations at § 278.6(a) and (e). This letter also stated Retailer Operations considered Appellant's eligibility for a hardship CMP under SNAP regulations at 278.6(f)(1), but determined Appellant was 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.

Appellant, through counsel, requested an administrative review of Retailer Operations' determination by letter dated December 13, 2019, which included a copy of the November 20, 2019, Charge Letter and Report of Investigation (marked Exhibit A) and a copy of the Determination Letter dated December 5, 2019 (marked Exhibit B). The administrative review was granted by letter dated December 17, 2019. Upon acceptance of the administrative review request, implementation of the six-month disqualification was held in abeyance pending completion of this review. Appellant provided a Letter of Representation dated January 3, 2020.

STANDARD OF REVIEW

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

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and § 278 of 7 CFR § 278.6(a) and (e)(5) establish the authority uponwhich a six-month disqualification may be imposed against a retail food store.

7 CFR § 278.2(a) states, in part: SNAP benefits may be accepted by an authorized retail food store only from eligible households or the household's authorized representative, and 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 productsprepared 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 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.

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 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 six 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) provides for CMP assessments in lieu of disqualification in cases where disqualification would cause hardship to SNAP benefit households because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It states: FNS may impose a CMP as a sanction in lieu of disqualification when the firm's disqualification would cause hardship to SNAP benefit 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.

SUMMARY OF THE CHARGES

During an undercover investigation conducted from June 24, 2019 through September 26, 2019, a USDA investigator conducted nine compliance visits at Appellant. The Report of Investigation dated November 4, 2019, was provided to Appellant's owner, as an attachment to the Charge Letter. The Report of Investigation includes Exhibits A through I, which provides full details on the results of each compliance visit. The Report of Investigation documents SNAP violations were recorded during seven of the compliance visits and involved the sale of ineligible items, including hot food, cigarettes, and CBD gummies. The evidence indicates Appellant established a record of selling non-eligible SNAP items as defined by § 271.2 of SNAP regulations, on multiple occasions, as noted in Exhibits C, D, E, F, G, H, and I.

APPELLANT'S CONTENTIONS

Appellant, through counsel, made the following summarized contentions:

- Appellant has never been cited or even received so much as a warning from

USDA or any other federal, state or local regulatory agency.

- During the period in question, three employees worked different shifts during the day. Appellant's owner nor her husband were involved in any of the transactions identified in FNS' November 20th letter.
- The turnover of employees in the clerk position at Appellant is high. When store clerks are hired, the owner's husband trains them on which items are SNAP-eligible and which items are not, and how to handle transactions involving both eligible and ineligible items.
- All of the employees had quit when the Charge Letter was received. One of the former clerks came into the store and said she may have rung up CBD gummies on a SNAP EBT card by mistake once, but that she later refused a second attempt by the same customer to buy gummies with a SNAP card.
- It appears that some employees were confused as to the eligibility of prepared food items for purchase with SNAP benefits, which comprised of the majority of the ineligible sales reported. Signs have now been posted on both the hot food counter and at the register, visible to both customers and employees, saying that prepared foods and non-food items cannot be purchased with food stamps.
- Appellant's owner acknowledges her responsibility for ensuring compliance by her employees and will make sure that current and new employees are trained on the SNAP regulations.
- Under 7 CFR §279.5, FNS has the discretion to modify proposed penalties based on the facts of each case. Most of the violations noted involved the sale of prepared food items. There was no payment of cash and no sale of alcohol. Employees did refuse the agent's attempts to purchase ineligible items or receive cash on three different occasions. There is no evidence Appellant's owner knew of or condoned the sale of ineligible items and has taken steps to ensure that her employees are trained and will comply in the future with all SNAP regulations and discourage customers from attempting to make ineligible purchases.
- In view of the nature of the alleged violations, the owner's commitment to ensuring proper training and compliance by her employees, and the fact that there is no prior disciplinary history of any kind with FNS, request that FNS rescind its six-month disqualification and impose a lesser penalty. Under the circumstances, an official warning letter as authorized by 7 CFR §279.5(c) would be an appropriate remedy in this case.

The preceding may represent only a brief summary of the contentions presented 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.

ANALYSIS AND FINDINGS

The investigation report documents that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the Charge Letter were conducted under the direction of a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no error or discrepancy. The investigation report is specific and

thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. The documentation presented by Retailer Operations provides through a preponderance of the evidence that the violations, as reported, occurred at Appellant. Furthermore, Appellant's owner or representative does not dispute the violations occurred and has not offered any compelling evidence that would persuade this review to dismiss or modify the penalty.

No Previous Violations

Appellant, through counsel, contends it has never been cited or even received so much as a warning from USDA or any other federal, state or local regulatory agency

A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

Corrective Action

Appellant, through counsel, contends it appears that some employees were confused as to the eligibility of prepared food items for purchase with SNAP benefits, which comprised of the majority of the ineligible sales reported. Signs have now been posted on both the hot food counter and at the register, visible to both customers and employees, saying that prepared foods and non-food items cannot be purchased with food stamps. Appellant's owner acknowledges responsibility for ensuring employees' compliance and will make sure that current and new employees are trained on the SNAP regulations.

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate Retailer Operations' earlier decision. This review is limited to what circumstances were at the basis of Retailer Operations' 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 SNAP regulations for a waiver or a reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, contentions that it took corrective action to prevent future violations does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Ownership Involvement

Appellant, through counsel, contends that during the period in question, three employees worked different shifts during the day. Appellant's owner nor her husband were involved in any

of the transactions identified in FNS' November 20th letter. All of the employees had quit when the Charge Letter was received. One of the former clerks came into the store and said she may have rung up CBD gummies on a SNAP EBT card by mistake once, but that she later refused a second attempt by the same customer to buy gummies with a SNAP card. Lastly, the turnover of employees in the clerk position at Appellant is high. When store clerks are hired, the owner's husband trains them on which items are SNAP-eligible and which items are not, and how to handle transactions involving both eligible and ineligible items.

Although ownership was allegedly not involved or aware of the violations, it cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. Regardless of whom the ownership of a store may utilize to handle store business, 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.

The record shows that ownership signed the FNS application to become a SNAP authorized retailer 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, a violation of SNAP rules and regulations. The regulations establish that an unauthorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations.

Ownership of a SNAP authorized firm is ultimately responsible for the proper training of staff and the monitoring and handling of SNAP benefit transactions. As such, these contentions are not valid reasons to dismiss the charges or modify the penalty in any way.

HARDSHIP CIVIL MONEY PENALTY (CMP)

Retailer Operations determined that Appellant was not eligible for a hardship CMP under 7 CFR § 278.6(f)(1). That regulation reads, in part, 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.

Retailer Operations determined that a six-month disqualification of Appellant would not cause a hardship to SNAP households, as there are other comparable or larger SNAP authorized stores in the area. Retailer Operations determined through agency mapping systems that there are 2 super stores, 3 supermarkets, 4 medium grocery stores, 1 small grocery store, and 32 other convenience stores located within 3.0-miles of Appellant selling comparable and greater depth and breadth of staple food and comparable or better prices. Appellant does not appear to offer significant specialty items (ethnic food, fish, produce, etc.) not available elsewhere.

Based on the analysis above, a six-month disqualification of Appellant would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, Retailer Operations' decision not to assess a hardship CMP in lieu of a six-month disqualification is sustained as appropriate under 7 CFR § 278.6(f)(1).

CONCLUSION

The determination by Retailer Operations to impose a six-month disqualification against Appellant from participating as an authorized SNAP retail food 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 authorization may be submitted 10 days prior to the expiration of the six-month disqualification period. Please contact the Retailer Service Center at 877-823-4369 with general questions regarding the SNAP application process. Please contact Robert Ellis at robert.ellis@usda.gov or (213) 330-2451 if you have operations questions on this matter.

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 to the regulations at 7 CFR § 279.7. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within 30 days of receipt of this Decision. Please note that the judicial filing timeframe is mandated in the Act, and this office cannot grant an extension.

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.

Kim Dameron
ADMINISTRATIVE REVIEW OFFICER

August 20, 2020