

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

Little Sac Grocery,

Appellant,

v.

Case Number: C0208025

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA) that the record supports by a preponderance of the evidence that Little Sac Grocery (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP) regulations. There is sufficient evidence to sustain a six month disqualification of Appellant from the SNAP as imposed by the Retailer Operations Division (Retailer Operations).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.6(f)(1), 7 CFR § 278.6(a), and 7 CFR § 278.6(e) in its administration of the SNAP, when it imposed a six month period of 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 the Food and Nutrition Service (FNS).

CASE CHRONOLOGY

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of May 29, 2018 through September 4, 2018. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on multiple separate occasions that warrant a six month disqualification period. The items sold are best described as common nonfood items.

By letter dated September 13, 2018, as a result of evidence compiled during the investigation, Retailer Operations charged the owner with violating the terms and conditions of the SNAP

regulations. Misuse of SNAP benefits was noted in Exhibits A, B, C, and E that warrants a disqualification as a SNAP retail food store for a period of six months. The letter also states that under certain conditions FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

Appellant replied to the Charge letter by letter dated September 17, 2018. Retailer Operations informed the owner by Determination letter dated October 1, 2018, that violations occurred at the firm, and that a six month period of disqualification was warranted. The letter also stated that eligibility for a hardship CMP was not applicable as there are other authorized retail food stores in the area selling as large a variety of staple foods at comparable prices.

The owner appealed the determination by letter dated October 4, 2018. The administrative review was granted by letter dated October 12, 2018. The owner provided an additional letter postmarked October 25, 2018.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the 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 argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

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 Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e)(5) establish the authority upon which a six month disqualification may be imposed against a retail food store.

7 CFR § 278.2(a) states: “Coupons may be accepted by an authorized retail food store only from eligible households or the households’ authorized representative, and only in exchange for eligible food.”

7 CFR § 278.6(e)(5) of the SNAP regulations states that a firm is to be disqualified 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(a) states: “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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system.”

7 CFR § 278.6(f)(1) provides for civil money penalty 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 civil money penalty 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

A report of the investigation was provided to the Appellant as Exhibits with the Charge letter. The investigative report provides details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during four of five store visits that warrant a six month disqualification. The violations involved the sale of nonfood items for SNAP benefits in violation of 7 CFR § 278.2(a).

APPELLANT’S CONTENTIONS

Consideration of all contentions was made whether recapitulated here or not.

- The occurrence on May 29, 2018 was said to have 2 items which were spoons and bowls to have been purchased on EBT. That is correct, and I am attaching the actual sales receipt for that purchase. Our system doesn’t separate food and nonfood items and we don’t have a key on our system for EBT. It is a very dated program and it needs to be updated, but we haven’t had the money to update it.
- It was said to be completed by a bald man in the 65-72 age range. He is actually 75 years old and we have known him for 35 years. He is like family to us and that is why we hate to have to terminate him, but his mental state is failing and he’s making a lot of mistakes. This event has made it clear that we are going to have to part ways.
- The second occurrence was July 23, 2018 and was said to have toothpaste, spoons and paper bowls. As you can observe from the sales receipt there were no such items sold. I don’t know why the person said we sold those items, because we have to proof [sic] that we didn’t.
- The third occurrence took place on July 30, 2018 and was said to have soap, spoons and plates and that was factual. The employee listed in that transaction has since been terminated. She ignored her training on proper daily business practices, which is not tolerated.
- The fourth occurrence was on August 27, 2018 and was said to have Kids toothpaste; the sales receipt again did not reflect such purchase on EBT.
- The final event was on September 4, 2018 and was said to have foam bowls and this was true according to the sales receipt. This occurrence was an oversight and the only thing that could have been possible is because of the timing of the transaction which is our busiest time it must have been missed.
- We have been in business for a little over 5½ years and it was a struggle for us to even get the opportunity to accept EBT cards due to previous owners’ misconduct. We were shocked and upset that they had conducted those type abuses of the system. We weren’t

made aware of this when purchasing the business. When we purchased it, it had been closed for over a year and was completely empty.

- If we were to lose the ability to accept EBT it might possibly and very likely end our business.
- All our staff has already been spoken to and retrained on all the proper procedures. They were all stressed these things when hired, but apparently there was some oversight.
- I'm not sure why the other 2 occasions were said to be in violation, when clearly, we were not.
- Our store is in a very poor neighborhood and our customers all walk to our store and the vast majority of them rely on EBT. This would not only put a great deal of strain on us but would hurt them greatly as well.
- The other grocery store in our area is high priced and our customers complain about being treated poorly and receiving a lot of bad product. They come to our store because we are nice to them and make them feel comfortable using EBT, where other stores make them to feel embarrassed by it.
- We have price checked many times and some if not all of our prices are better than our local competitors.
- The violations totaled less **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in merchandise, and all but one occasion have already been rectified or weren't even true violations. The punishment of taking away our EBT processing ability for a first offense and one with minor infractions seems extremely harsh.
- There is another grocery store in the area. It has closed several times, once 2 years ago. It is not doing very well, and is rumored to be close to closing again. The owner is now cutting meat there because they had to reduce the amount of hours on their payroll. We have many elderly cash paying customers that we deliver groceries to. If our store were to close, those people would be in a hardship. They would have to find a way to the store or have to pay someone else to go for them. They are on fixed incomes, and it would affect their budget. Our prices are better than our local competitors.

The owner provided itemized copies of cash register receipts for the dates of each Exhibit.

ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the determination made by Retailer Operations; it is limited to the facts at the basis of Retailer Operations' determination at the time it was made. Upon review, the evidence supports that Appellant established a record of selling nonfood items as defined by Section 271.2 of the regulations, on multiple occasions. Exhibits A, B, C, and E furnished with the Charge letter warrant a disqualification period of six months. The regulations at 7 CFR § 278.6(e)(5) specify that FNS shall "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 nonfood items due to carelessness or poor supervision by the firm's ownership or management." Three violations are considered evidence of carelessness. Therefore, the violations in this case are not too limited to warrant a disqualification.

The preponderance of the evidence supports that Appellant sold nonfood items on at least three store visits in exchange for SNAP benefits, a program violation. The receipt provided by the owner for the items allegedly purchased in Exhibit B does not include any ineligible items. Retailer Operations did not provide any additional information other than the investigative report to refute the owner's evidence. Thus, it may be that no ineligible items were transacted on this visit. The receipt for Exhibit D advanced by the owner also shows no ineligible items. However, this Exhibit was not charged in the Charge letter and did not contribute to the total number of chargeable passes at Appellant.

The owner admits to ineligible items being sold on three store visits as confirmed by Exhibits A, C, and E. As noted, three violative store visits constitutes the threshold to charge a retailer with a sanction of a six month disqualification. The regulations stipulate FNS shall disqualify a 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 the sale of common nonfood items due to carelessness and poor supervision by the firm's ownership or management.

Whatever alleged SNAP training was provided to employees was not adequate to prevent the violations in this matter. Regardless of who the store owner utilizes to handle store business, the owner is accountable for the proper handling of SNAP benefit transactions. The regulations establish that an authorized food store may be disqualified from participating in SNAP when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf.

Ownership contends that the total amount involved totaled less **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. As to the dollar value of the ineligible items sold, regardless of cost, Appellant established a record of selling non-food items as defined by Section 271.2 on at least three occasions. No mention of minimum cost is cited in Section 278.6(e)(5) of the SNAP regulations, which states that FNS shall disqualify a store 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 the sale of common nonfood items in exchange for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management.

The owner contends that a SNAP disqualification will have a negative financial impact on Appellant's business. It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. Furthermore, 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 regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, the contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

Retailer Operations rendered a finding that it was not appropriate to impose a CMP in lieu of a six month period of disqualification. The record documents that there are other authorized stores within a nearby radius of Appellant that stock a variety of comparable staple foods at comparable prices. The owner provided no evidence to support the claim that Appellant offered better prices or stocked comparable staple foods as nearby authorized stores. The preponderance of the evidence does not support that it will cause hardship for SNAP recipients if Appellant is disqualified. Therefore, Appellant is not eligible for a hardship CMP.

CONCLUSION

The preponderance of the evidence in the record supports that program violations of the sale of ineligible items in exchange for SNAP benefits did occur at Appellant on at least three store visits. Three violative store passes are chargeable with a sanction of a six month disqualification. The record documents that Retailer Operations considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the regulations, and properly denied it. Therefore, the six month disqualification of Appellant from participation as an authorized retail food store in the SNAP is sustained.

RIGHTS AND REMEDIES

This penalty shall become effective thirty (30) days after receipt of this Decision. 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. Please contact the Retailer Center at 877-823-4369 with any questions regarding the SNAP application process.

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and to the regulations at 7 CFR § 279.7 with respect to your right to judicial review of this Decision. 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 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.

M. Viens
Administrative Review Officer

November 14, 2018