

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

New York Express,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0219364

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 New York Express (hereinafter “Appellant”) by FNS’s 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 New York Express.

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, New York Express, was initially authorized for SNAP participation as a convenience store on July 8, 2014. Between December 3, 2019 and January 23, 2020, FNS conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigation report documented that personnel at New York Express accepted SNAP benefits in exchange for ineligible items on four separate occasions. According to the report, the Appellant firm sold bathroom tissue, plastic cutlery, facial tissues, batteries, and a cigarette lighter in exchange for SNAP benefits, which benefits may only be used for the purchase of eligible food.

In a letter dated March 2, 2020, the Retailer Operations Division charged the Appellant with violating SNAP regulations at 7 CFR § 278.2(a). The charge letter stated that the acceptance of SNAP benefits in exchange for ineligible merchandise warranted a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further stated that under certain conditions and in accordance with § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

In correspondence dated March 5, 2020, the Appellant responded to the charges, acknowledging that program violations had occurred and admitting that its employees were not fully trained on handling SNAP transactions. The Appellant further stated that the store is located in a high crime area and the firm has trouble keeping employees. The Appellant requested relief from a disqualification and provided its assurance that program violations would not happen again.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated March 17, 2020. This letter informed the Appellant that it was the determination of the Retailer Operations Division that violations did occur as outlined in the charge letter 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 stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked March 23, 2020, the Appellant appealed the agency's determination by requesting an administrative review. The request was granted and implementation of the disqualification 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, 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. [Emphasis added.]

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...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, 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.

INVESTIGATION DETAILS

During an undercover investigation conducted between December 3, 2019, and January 23, 2020, FNS completed six compliance visits at New York Express. The agency's record indicates that a report of the investigation was provided to the Appellant as an attachment to the March 2, 2020, charge letter. The investigation report includes Exhibits A through F, and provides full details on the results of each compliance visit. SNAP violations were documented during four of the six 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 of bathroom tissue (*Celtic* brand), Exhibit A
- One 24-count box of plastic cutlery (*Parade* brand), Exhibit C
- One 10-count package of facial tissues (*Kleenex* brand), Exhibit C

- One cigarette lighter (*Bic* brand), Exhibit D
- One 10-count package of facial tissues (*Kleenex* brand), Exhibit D
- One package of facial tissues (no brand indicated), Exhibit E
- One 24-count box of plastic cutlery (*Parade* brand), Exhibit E
- One 2-count package of AAA batteries (*Duracell* brand), Exhibit E

The report indicates that in Exhibits A, D, and E, the investigator attempted to exchange SNAP benefits for cash (i.e. trafficking), but the clerks on duty did not permit this to occur. In Exhibits B and F, the clerks refused to allow any ineligible items to be purchased with SNAP benefits. The report states that four different clerks conducted the four violative transactions. The charge letter states that the violations that occurred in Exhibits A, C, D, and E warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5).

APPELLANT’S CONTENTIONS

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

- Appellant would like FNS to review its decision based on the facts. It agrees that the violations were a mistake, but the store is located in a high crime area and it is very hard to find good workers. The store has a history of shooting crimes, but the Appellant is working with local authorities for support. Appellant owner knows he is guilty on this due to a lack of training, but newly hired workers made this happen.
- Appellant requests another chance and promises FNS that the violations will not happen again. The Appellant has taken very strict actions and has made a very strict policy about what is allowed to be purchased with SNAP benefits.
- The store is the owner’s livelihood and he does not know how he will survive if the store’s disqualification is upheld.

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 in this document.

ANALYSIS AND FINDINGS

The Appellant has not provided any information or evidence to counter FNS’s investigation report. In fact, the Appellant acknowledges that violations took place, blaming them on the store’s high crime location, inexperienced workers, and a lack of training. Because the violations do not appear to be in dispute, it is the determination of this review, through a preponderance of the evidence, that SNAP violations did occur as charged and a penalty is warranted.

Owner Not Involved in Violations

As stated earlier, the Appellant has freely acknowledged that SNAP violations occurred, but blamed them on the store’s high crime area. According to the Appellant, few people are willing to work at the store because of the criminal history in the area; consequently, the violations are

the fault of new employees. This contention implies that because of high employee turnover, the Appellant is unable to properly train its staff. It further implies that the owner is not to blame for the situation.

With regard to these claims, the record shows that the Appellant owner signed an initial application to participate as a SNAP retailer on June 9, 2014. 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 or manager 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 and regardless of 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. As such, the owner's lack of involvement in this matter is not a valid reason to dismiss the charges or modify the penalty in any way.

Remedial Actions Taken

The Appellant requests another chance to remain authorized and promises that program violations will not happen again. According to the Appellant, it has taken very strict actions and has made a strict policy regarding what is allowed to be purchased with SNAP benefits.

With regard to this contention, it must be made clear that this review is limited to the facts that existed at the time the violations were committed. This review has no authority to consider any subsequent remedial actions that may have been taken or that 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 after the discovery of program violations.

Hardship to Appellant

The Appellant argues that New York Express is the owner's livelihood and he does not know how he will survive if the store's SNAP disqualification is upheld.

With regard to this contention, SNAP regulations do not permit this review to consider a waiver or modification of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm itself. To allow an exemption from penalties based on a purported financial hardship to the firm or its ownership 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 requirements, but also to those retailers who have been disqualified from the program for similar violations.

Civil Money Penalty

Although not requested by the Appellant, the Retailer Operations Division evaluated the firm's eligibility for a civil money penalty (CMP) in lieu of a six-month disqualification. To address potential difficulties that SNAP households might face when a firm is disqualified, regulations at 7 CFR § 278.6(f)(1) allow for a CMP to be imposed instead of disqualification when the firm's disqualification would cause "hardship" to SNAP households. According to this regulation, hardship occurs when there is "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 both the Retailer Operations Division and this review that a disqualification of New York Express, 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 a dozen similarly-stocked or larger SNAP-authorized retail stores located within a one-mile radius of New York Express, including a supermarket and a superstore. There is also no evidence that the Appellant sells its inventory at unusually low prices in comparison to nearby stores. Because hardship conditions do not exist in this case, a CMP in lieu of disqualification is not an available option.

CONCLUSION

Based on a review of all information in this case, this administrative review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at New York Express 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 appears to be specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for ineligible, nonfood merchandise, and in all other critically pertinent details. Furthermore, the Appellant has not offered any compelling evidence that would persuade this review to dismiss or modify the penalty. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, New York Express, 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.

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. The judicial filing timeframe is mandated by 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.

JON YORGASON
Administrative Review Officer

June 3, 2020