

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

Next Friday Inc,

Appellant,

v.

Case Number: C0208055

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 6 month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Next Friday Inc. (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 imposed a 6 month disqualification against Next Friday Inc.

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

Next Friday Inc. was initially authorized for SNAP participation as a convenience store on September 30, 2014. Between June 5, 2018, and September 4, 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 Next Friday Inc. accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. According to the report, the Appellant firm sold plastic cutlery, foam bowls, toothpaste, and soap in exchange for SNAP benefits, which may only be used to purchase eligible foods.

In a letter dated September 13, 2018, the Retailer Operations Division charged the Appellant with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). The charge letter states 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 states 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.

In a letter received by FNS on September 27, 2018, the Appellant replied to the charges. In the letter, the Appellant said that the firm is located in Floyd County, which has one of the highest poverty rates in Kentucky and a high rate of tobacco use. The Appellant said that the firm's employees are caring, compassionate, and hardworking and know the rules. Their biggest challenge is customers wanting to buy tobacco with their EBT cards and because the firm focuses on tobacco, alcohol, and gasoline purchases with EBT cards, the employees may not have been as focused as they should have been. The owner had met with each employee and discussed the violations, as provided below:

- For the violations in Exhibit A, the employee explained he had no memory of the encounter and that he either was not focused or did not press the food stamp key on the point-of-sale keyboard. The employee said that paper products should have been separated on the point-of-sale system;
- For the violations in Exhibit B, the clerk said she always asks for cash on non-food item transactions. On that day, the EBT machine was down and the credit card machine was down. The clerk was frustrated and may have unintentionally put the items on a manual voucher;
- For Exhibit C, the clerk was the same as in Exhibit A and gave the same reason. This employee was written up and given an oral reprimand;
- For the violations in Exhibit D, the employee remembered the encounter. The clerk said the investigator looked like a homeless customer and the clerk felt sorry for him since he was buying toothpaste and soap. The employee admitted what he did was wrong and said that from now on he would pay for the products out of his own pocket; and
- For the violations in Exhibit E, the clerk said the investigator was the first customer of the day and that he was very talkative and friendly. The clerk did not hit the food stamp key on the point-of-sale system and realized she had made a terrible mistake when the customer asked for cash back.

In the response letter, the Appellant said he had implemented a corrective action plan to prevent this from happening again, to include the following actions:

- For any customer using an EBT card, the employee must hit the food stamp key on the point-of-sale system to verify no other purchases were made;
- Rescanned every item in the store on the point-of-sale system to make sure each item is categorized correctly; and
- Required employees to sign an agreement form stating they would be terminated if they did not ID customers buying tobacco and alcohol products and if they did not hit the food stamp key for verification on purchases.

The Appellant's response also asked for forgiveness in assessing a penalty as this was the firm's first violation. The Appellant requests probation or a warning instead of disqualification and noted that the closest store to the firm is about three miles to the north.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated October 9, 2018. This letter informed the Appellant that it was the determination of the Retailer Operations Division that the violations did occur as outlined in the letter of charges and that a 6 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 October 20, 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, 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 (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 FNS may impose a 6 month disqualification against a retail food store or wholesale food concern

for program violations.

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...

(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.

SUMMARY OF INVESTIGATION DETAILS

During an undercover investigation conducted between June 5, 2018, and September 4, 2018, FNS completed five compliance visits at Next Friday Inc. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the September 13, 2018, charge letter. The investigation report includes Exhibits A through E, and provides full details on the results of each compliance visit. SNAP violations were documented during four of the five 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 48-count pack heavy duty clear plastic cutlery (Wright Ware brand), Exhibit A
- One 25 count pack 12-ounce foam bowls (Wright Ware brand), Exhibit A
- One 48 count pack heavy duty clear plastic forks (Wright Ware brand), Exhibit C
- One 25 count pack 12-ounce foam bowls (Wright Ware brand), Exhibit C
- One four-ounce tube of toothpaste (Colgate brand), Exhibit D
- 2 pack bars of soap (Dial brand), Exhibit D
- 48 count pack heavy duty clear spoons (Chenard brand), Exhibit E
- 25 count pack 12-ounce foam bowls (Wright Ware brand), Exhibit E

The report indicates that in Exhibit E, the investigator attempted to obtain cash in exchange for SNAP benefits, but this request was rejected by the cashier. No violations occurred in Exhibit B. According to the report, three different cashiers 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 6 months pursuant to 7 CFR § 278.6(e)(5).

APPELLANT'S CONTENTIONS

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

- A 6 month disqualification penalty is too harsh;
- Appellant has been in business for over four years, and has operated the business with the highest integrity and expects the same of the firm's employees;
- Appellant's employees are all adults, ranging from 48 to 56 years of age, all have children and grandchildren, and have great character and moral values and would never do anything intentionally to break any rule or law;
- Appellant's employees are responsible for EPA fuel reading regulations,

Kentucky alcohol and beverage control regulations, and EBT and SNAP regulations daily, but are human beings and just were not as focused as they should have been when investigators put paper products with their food items;

- Appellant has met with each employee individually and has implemented corrective actions to ensure this never happens again, to include: every employee being required to watch the DVD “Training Guide for Retailers” provided by SNAP, employees being required to hit the food stamp key on the point-of-sale system when a customer uses their EBT card to verify that the customer is only paying for food items with the card, and every item in the store has been rescanned into the point-of-sale system to verify it is entered into the correct category;
- Appellant seeks a probation or written warning instead of a 6 month disqualification, which would be a terrible hardship to the community, which has one of the highest unemployment and one of the highest poverty rates in the country; and
- Appellant requests a review of the case, and reconsideration of the firm’s disqualification from SNAP authorization.

Although the Appellant did not submit any additional evidence for consideration as part of the administrative review request, in a letter postmarked December 4, 2018, the Appellant asked that the administrative review take into consideration the following:

- The firm’s authorization was inadvertently withdrawn for 17 days when FNS failed to log the receipt of the administrative review request when received, causing the firm financial hardship and extended undue embarrassment;
- Appellant has done everything possible to ensure this never happens again;
- One of the employees has resigned due to this situation; and
- Appellant asks that the resignation and the 17 day withdrawal be considered the firm’s punishment along with a warning letter or possible probation.

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. In fact, the Appellant concedes that some of the violations occurred, while attributing the errors to employees making mistakes, being unfocused in their work, or being sympathetic to customers, and to point-of-sale system errors. 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 and a 6 month disqualification is warranted. The balance of this review will address the Appellant's remaining contentions.

Ineligible Items Sold by Mistake

Appellant asserts that in most instances when ineligible items were sold for SNAP benefits during the investigation, the store's employees simply made a mistake. For example, Appellant says employees either did not recall the ineligible sale, were not focused during the transaction, sold ineligible items unintentionally, or the point-of-sale system did not properly separate ineligible items. Appellant says that the firm's employees are all adults with good character and values and would never intentionally break any rule or law.

With regard to this contention, the record shows that the Appellant owner signed an application to participate as a SNAP retailer on August 24, 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 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 or 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. To allow store ownership to disclaim accountability for the acts of its employees would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA.

Although the firm's employees may not have intentionally violated SNAP rules, their mistakes indicate inadequate training and poor supervision. Therefore, the contention that the violations were due to mistakes made by store employees does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Harshness of Penalty

Appellant asserts that a 6 month disqualification penalty is too harsh. Further, Appellant seeks that the penalty be reduced because of an administrative error that resulted in the firm's authorization being inadvertently withdrawn for 17 days and because one of the firm's employees resigned due to the violations.

The investigation report shows that of the five compliance visits made to the firm, during four of these visits ineligible products were sold in exchange for SNAP benefits and that three different clerks conducted the violative sales. The Retailer Operations Division

attributed violations to the carelessness, or poor supervision by the firm's ownership or management," pursuant to 7 CFR § 278.6(e)(5) of the SNAP regulations, for which the regulatory penalty is a disqualification of 6 months. This is the minimum penalty for a firm that has not previously been sanctioned, and for the violations committed in this case. Although it is unfortunate that the firm's authorization was withdrawn for 17 days and that the firm's employee resigned under the given circumstances, these factors do not mitigate the penalty required under law.

Remedial Actions Taken

Appellant asserts that the violations have been addressed with each employee, individually, and that corrective actions have been implemented.

It should be noted 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 the circumstances that existed at the time the violations were committed. It is not the authority of this review 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 subsequent to findings of program violations.

Therefore, the Appellant's contention that corrective action has taken place does not provide a valid basis for dismissing the charges or for reducing the penalty imposed.

Hardship to SNAP Households

The Appellant seeks a written warning or probation instead of a 6 month disqualification because the firm's disqualification would be a terrible hardship to the community, which has one of the highest unemployment and one of the highest poverty rates in the country.

As provided above, under SNAP regulations, a 6 month disqualification is the minimum penalty for the violations committed by Appellant, and therefore a warning letter or probation are not available penalties in this case. Program regulations, at 7 CFR § 278.6(f), do allow, in some circumstances, for a civil money penalty to be imposed in lieu of disqualification when the firm's disqualification would cause hardship to SNAP households. According to this regulation, hardship is defined as "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 this review that a disqualification of Next Friday Inc. would not cause hardship to SNAP households because there are other shopping options in the area. According to agency records, there are at least nineteen comparable or larger SNAP-authorized retail stores located within a one-mile radius of Next Friday Inc., including two superstores, two supermarkets, and one large grocery store.

In accordance with regulation cited above, hardship exists only when there are no other authorized stores in the area selling as large a variety of staple foods at comparable prices. Therefore, pursuant to 7 CFR § 278.6(f)(1), a hardship civil money penalty in lieu of disqualification cannot be assessed in this case.

CONCLUSION

Based on an analysis of all information in this case this review finds, by a preponderance of the evidence, that program violations of 7 CFR § 278.2(a) did occur at Next Friday Inc. 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. Pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a 6 month disqualification against the Appellant, Next Friday Inc., 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 participation may be submitted 10 days prior to the expiration of the 6 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.

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

February 1, 2019