

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

One Stop Lucky Food Mart,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C023927

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support a finding that the six-month disqualification of One Stop Lucky Food Mart (One Stop Lucky Food Mart or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program, as initially imposed by the Retailer Operations Division, was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(1) and 7 CFR § 278.6(a) and (e)(5) in its administration of the SNAP, when it imposed a six-month period of disqualification against Appellant.

AUTHORITY

7 USC § 2023 and the 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

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of March 6, 2018, through May 14, 2018. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. As a result of evidence compiled during this investigation, by letter dated June 28, 2018, the Retailer Operations Division charged ownership with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a) and noted the violations warranted a six-month disqualification period. The letter also stated that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

Appellant, through counsel, replied to the charge letter by letters dated July 16, 2018, and July 23, 2018. After giving consideration to the retailer's reply and the evidence, the Retailer Operations Division notified Appellant in a letter dated July 25, 2018, that the violations cited in the charge letter occurred at the firm and that a six-month period of disqualification was warranted. The letter stated that eligibility for a hardship CMP was not applicable as there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

By letter dated August 3, 2018, Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. The appeal was granted, and implementation of the sanction was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions 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 matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 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 or wholesale food concern.

7 CFR § 278.6(a) states, inter alia:

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 . . . (emphasis added)

Section 278.6(e)(5) of the SNAP regulations states, in part, that a firm is to be disqualified for six months:

[I]f 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 § 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 § 278.2(a) specifies in relevant part:

Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food. . . . Coupons may not be accepted in exchange for cash . . . or for any other nonfood use.

In addition, 7 CFR § 278.6(f)(1) provides for civil money penalty (CMP) assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP households benefit because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It reads, inter alia:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when . . . the firm’s disqualification would cause hardship to SNAP households benefit because there is no other authorized retail food store in the area selling as large a variety of staple food items.

SUMMARY OF CHARGES

One Stop Lucky Food Mart is a convenience store originally authorized by FNS on July 2, 2013. During an investigation conducted between March 6, 2018, and May 14, 2018, a confidential informant under the direction of a USDA investigator conducted four compliance visits at Appellant. A report of the investigation dated June 7, 2018, was provided to Appellant as an attachment to the charge letter. The investigation report included Exhibits A thru D which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during each of the four compliance visits and involved the sale of common ineligible items including plastic cups and paper towels. Upon review, the evidence indicates that Appellant established a record of selling non-food items, as defined by Section 271.2 of the regulations, on multiple occasions as noted in Exhibits A, B, C, and D furnished with the charge letter.

APPELLANT’S CONTENTIONS

Appellant made the following summarized contentions in its August 3, 2018, administrative review request, and subsequent correspondence dated September 10, 2018, in relevant part:

- Appellant states that FNS should consider 278.6(f)(1).
- Appellant request that the nature and scope of the violations be considered.
- There has been no action taken by FNS to warn the firm about the possibility of violations are occurring.
- There was no evidence of intent.

The preceding may represent only a brief summary of the Appellant's 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

Appellant does not deny that the violations occurred. The charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges 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 the Retailer Operations Division provides through a preponderance of the evidence that the violations as reported occurred at the Appellant firm.

7 CFR § 278.6(e)(5) states, as noted above, that 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 but not limited to the sale of common nonfood items due to carelessness and poor supervision by the firm's ownership or management. Therefore, the imposition of a six-month disqualification, the least severe penalty allowed by regulation, is appropriate.

Consideration of 7 CFR § 278.6(d)

Appellant argues that the violations are very minor and that FNS must consider the SNAP regulations at 7 CFR § 278.6(d). The regulations state the following:

(d) *Basis for determination.* The FNS regional office making a disqualification or penalty determination shall consider:

- (1) The nature and scope of the violations committed by personnel of the firm,
- (2) Any prior action taken by FNS to warn the firm about the possibility that violations are occurring, and
- (3) Any other evidence that shows the firm's intent to violate the regulations.

7 CFR §278.6(d) simply requires FNS to consider any prior warnings when determining a sanction. However, 7 CFR §278.6(d) does not require the Retailer Operations Division to give prior warnings or to show the firm's intent to violate when chargeable violations have been conducted. Appellant only has to consider, when rendering a final determination, any prior warnings or intent to violate that might be evident. Thus, a warning letter is not prerequisite to a disqualification. However, the SNAP regulations do provide for a warning letter in some cases. Specifically, 7 CFR 278.6(e)(7) states the following: "Send the firm a warning letter if violations are too limited to warrant a disqualification." As previously stated, the investigative report documented that common ineligible items were exchanged for SNAP benefits on four separate occasions. These violations are not considered "violations that are too limited to warrant a

disqualification.” Therefore, the Retailer Operations Division correctly determined that a warning letter was not appropriate.

The SNAP regulations at 7 CFR § 278.2(a) and 7 CFR § 278.6(e)(5), pertaining to the violation of exchanging ineligible items for SNAP benefits, do not require an element of intent on the part of the violator. Therefore, whether or not the Appellant store owners or its employees intended to violate SNAP regulations or benefit from such violations is irrelevant in this case.

The case record documents that the Retailer Operations Division did consider the nature and scope of the violations. The Retailer Operations Division correctly determined that the violations equated to carelessness or poor supervision by the firm’s ownership or management and warranted a six-month disqualification.

Civil Money Penalty

7 CFR § 278.6(f)(1) reads, in part, “FNS may impose a civil money penalty 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.” The Retailer Operations Division determined that there are six other authorized stores located within a one-mile radius of Appellant, including one super store. Thus, in its letter dated July 25, 2018, the Retailer Operations Division determined that a hardship CMP would not be appropriate, as there is another authorized retail store in the area selling as large a variety of staple foods at comparable prices.

Some degree of inconvenience to SNAP customers is inherent whenever any SNAP authorized retailer is disqualified. For example, the normal shopping pattern of SNAP customers may be temporarily altered during the period of disqualification. Nevertheless, the determination of the Retailer Operations Division that the six-month disqualification of One Stop Lucky Food Mart from the SNAP would not create a hardship to customers, as differentiated from potential inconvenience, is sustained and a civil money penalty in lieu of disqualification is not appropriate in this case.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to impose a six-month disqualification against One Stop Lucky Food Mart from participating as an authorized retailer in SNAP is sustained.

In accordance with the Food and Nutrition Act, and the regulations, 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 six-month disqualification period.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7CFR § 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 Appellant's 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 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

December 4, 2018