

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

Pantry 1 Torresdale Inc,

Appellant,

v.

Case Number: C0205881

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 six-month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Pantry 1 Torresdale 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 six-month disqualification against Pantry 1 Torresdale 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

FNS records show that the Appellant firm, Pantry 1 Torresdale Inc., was initially authorized for SNAP participation as a convenience store on June 2, 2017. Between March 20, 2018, and April 10, 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 Pantry 1 Torresdale Inc. accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. According to the report, the Appellant firm sold cigarettes, toilet paper, trash

bags, and soap in exchange for SNAP benefits, which benefits may only be used to purchase eligible foods.

In a letter dated April 20, 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 six 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 dated April 24, 2018, the Appellant replied to the charges, stating that it was accepting full responsibility for the unintentional actions of its employees. The Appellant explained that after losing three employees to other firms, it hired three new employees from the neighborhood through the Welfare to Work program. The new employees were trained and then paired with experienced employees prior to being given responsibilities themselves. The Appellant stated that unfortunately these new employees did not comprehend the seriousness of the USDA program guidelines. After receiving the charge letter, the Appellant stated that it took corrective actions, such as retraining its employees, to ensure that violations do 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 April 27, 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 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 May 6, 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. It should be noted that on May 29, 2018, the Appellant submitted an additional letter of explanation along with evidence relating to one of the clerks who committed violations.

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 March 20, 2018, and April 10, 2018, the Food and Nutrition Service completed four compliance visits at Pantry 1 Torresdale Inc. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the April 20, 2018, charge letter. The investigation report includes Exhibits A through D, and provides full details on the results of each compliance visit. SNAP violations were documented during each of the four 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 pack of cigarettes (*Newport* brand), Exhibit A
- One 1,100-sheet roll of toilet paper (*Scott* brand), Exhibit B
- One 15-count package of kitchen trash bags (*Handi-Bag* brand), Exhibit C
- One pack of cigarettes (*Newport* brand), Exhibit C
- One 4-ounce bar of soap (*Dial* brand), Exhibit D
- One pack of cigarettes (*Newport* brand), Exhibit D

The report indicates that in Exhibit B, the clerk on duty refused to allow a purchase of cigarettes with SNAP benefits, but did allow a roll of toilet paper to be purchased. In Exhibit D, the investigator attempted to obtain 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash in exchange for SNAP benefits, but this request was refused. 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, and D 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:

- The violations were not the result of habitual, day-to-day actions. There was no intention to bring extra income to the business. Two of the employees were newly hired and were undergoing training.
- Since the firm opened in March 2017, the Appellant has paid close attention to ensure that the rules and regulations of USDA are followed.
- Appellant has learned a lesson from this violation and will terminate the job of any employee with no further warnings.

- This is the first business the Appellant owner has ever started and requests one more chance. Appellant requests a waiver of the disqualification on humanity grounds. Without SNAP authorization, the store will not make enough income to remain open.
- One of the cashiers identified in the investigation report is a local, single parent who joined the firm through the Welfare to Work program. She demonstrated that she had acquired sufficient knowledge, so she was assigned the morning shift as a part-time cashier.
- The other cashier was actually not a cashier at all, but was hired only as a deli worker. However, the cashier mentioned previously let him work the cash register by himself while she was on duty.
- The cashier from the Welfare to Work program ignored her training and risked the existence of the business.
- The Appellant has taken a number of corrective actions, such as ongoing refresher training, to prevent future mistakes. The Appellant requests one more chance and guarantees not to make another mistake.
- A disqualification would significantly affect the firm's revenue. The firm's employees depend on the business for their livelihood.

In support of its contentions, the Appellant submitted a copy of a SNAP recipient renewal notification for one of the Appellant's employees; and copies of two pay stubs for the same employee.

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 to counter FNS's investigation report. In fact, the Appellant appears to acknowledge that the violations occurred, blaming them on two newly hired employees who were still in training. 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 six-month disqualification is warranted. The balance of this review will address the Appellant's remaining contentions.

Violations Committed by New Employees

The Appellant contends that the violations were not the result of day-to-day business practice, but were unintentional mistakes made by two employees who were recently hired, including one who was hired through the Welfare to Work program. According to the Appellant, these employees did not fully understand the seriousness of SNAP rules and regulations. Although the Appellant claims to be taking full responsibility for the actions of its employees, the contentions in this paragraph imply that because the owner was not at fault for the violations, the disqualification penalty should be reconsidered.

With regard to these contentions, the record shows that the Appellant owner signed an application to participate as a retailer in SNAP on April 3, 2017. 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 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.

Therefore, the Appellant's claim that the violations were the fault of new employees does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

It should be noted here that the documentation submitted by the Appellant, including a SNAP recipient renewal notification and two employee paystubs offer little, if any, evidentiary value, as they provide no insight into whether or not the alleged violations took place.

Remedial Actions Taken

The Appellant contends that it has learned a lesson from these violations and from this point forward will terminate the job of any employee with no further warnings. Additionally, the Appellant claims to have taken a number of corrective actions, such as ongoing refresher training, to prevent future violations. The Appellant requests one more chance and guarantees not to make another mistake.

With regard to these contentions, 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 or that further remedial actions are planned does not provide a valid basis for dismissing the charges or for reducing the penalty imposed.

Hardship to Appellant

The Appellant has requested a waiver of the disqualification on humanity grounds. It claims that without SNAP authorization, the store will not generate enough revenue to remain open. It further contends that the firm's employees depend on the business for their livelihood.

With regard to these contentions, it is recognized that some degree of financial or economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty.

To allow store ownership to be excused from administrative penalties based on a purported economic hardship to the store's ownership or to the firm itself would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the 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 in the past for similar violations.

Therefore, the Appellant's contention that the firm or its employees may incur financial hardship as a result of a six-month disqualification from SNAP does not provide a valid basis for dismissing the charges or for reducing the penalty imposed.

Civil Money Penalty

Although not requested by the Appellant, this review evaluated the Appellant's eligibility for a civil money penalty (CMP) in lieu of a six-month disqualification. SNAP regulations at 7 CFR § 278.6(f)(1) permit a CMP in lieu of a temporary 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 Pantry 1 Torresdale Inc., 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 more than 40 comparable or larger SNAP-authorized retail stores located within a one-mile radius of Pantry 1 Torresdale Inc., including a superstore less than a quarter of a mile away.

It is recognized that some degree of inconvenience for SNAP households is likely whenever a SNAP-authorized store is disqualified and households are forced to use their SNAP benefits elsewhere. However, 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. Because such conditions do not exist in this case, a hardship civil money penalty in lieu of disqualification is not an option.

CONCLUSION

Based on an analysis of all information in this case, this review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at Pantry 1 Torresdale 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 six-month disqualification against the Appellant, Pantry 1 Torresdale 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 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.

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

October 17, 2018