

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

Partyville Liquor,

Appellant,

v.

Case Number: C0203837

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 there is sufficient evidence to support a six-month disqualification from the Supplemental Nutrition Assistance Program (SNAP) as initially imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a six-month disqualification against Partyville Liquor.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulation at 7 CFR § 279.1 provides 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 Partyville Liquor with Federal SNAP law and regulations from February 2018 through April 2018. In a letter dated April 25, 2018, the Retailer Operations Division charged the Appellant store with accepting SNAP benefits in exchange for merchandise which included ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on three (3) out of five (5) compliance visits. The letter further informed the Appellant that the chargeable violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5). The Appellant was informed it could respond to the charges within ten (10) calendar days following delivery of the charge letter. The charge letter was delivered to the store via UPS on April 26, 2018.

On May 2, 2018, the Appellant responded in a telephone call to the Retailer Operations Division. The Appellant stated that he trained his staff regularly and was having the register reprogrammed to distinguish between eligible and ineligible items. The Appellant stated that his employees knew the difference but had ignored it when conducting the transactions. The Appellant stated that this was the firm's first violation.

After considering the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated May 7, 2018. The determination letter informed the Appellant it was disqualified from the SNAP for a period of six months in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a hardship civil money penalty (CMP) under 7 CFR § 278.6(f)(1). The Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the six-month disqualification because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices. The determination letter was delivered on May 9, 2018.

In a letter postmarked May 16, 2018, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. The request for review was granted. Upon acceptance of the administrative review request, implementation of the six-month disqualification was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might 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 covered in the Food & 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) establish the authority upon which a disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, in part:

Coupons may be accepted by an authorized retail food store only from eligible households ... and only in exchange for eligible food.

7 CFR § 271.2 states that the definition of "coupon" includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the "Food and Nutrition Act of 2008, as amended, for the purchase of 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....

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 non-food items** due to carelessness or poor supervision by the firm's ownership or management. [Emphasis added.]

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'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 THE CHARGES

During an investigation conducted from February 2018 through April 2018, the USDA conducted five (5) compliance visits at Partyville Liquor. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated April 25, 2018. The investigation report included Exhibits A through E which provide full details on the results of each compliance visit.

The investigation report documents that SNAP violations were recorded during three (3) of the five (5) compliance visits. The chargeable violations involved the sale of five (5) ineligible non-food items in exchange for SNAP benefits in violation of 7 CFR § 278.2(a). These ineligible items consisted of two (2) packages of plastic cups, two (2) boxes of trash bags and a roll of tissue as documented by Exhibits B, C and D. These violations were conducted by two (2) different clerks. One of these clerks refused to exchange SNAP benefits for ineligible items in Exhibit E. A third clerk refused to exchange SNAP benefits for ineligible items in Exhibit A.

APPELLANT'S CONTENTIONS

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

- The store has never had any violations of any kind in the last 16 years.
- The April 25, 2018 charge letter indicated that the store committed trafficking and that the basis of the EBT trafficking are three (3) transactions by the same investigator with the same employee during a short time period.
- The store should have been eligible for a trafficking CMP under 7 CFR § 278.6(i). The Appellant can provide adequate evidence that it has a viable compliance and training program in place as evidenced by affidavits from the store owner and a store clerk. The Appellant also presented a supplemental response with copies of SNAP training certification forms from the store employees.
- FNS violated the Appellant's rights by not allowing an opportunity to respond and provide proof of his compliance policy before being subject to disqualification. The disqualification is a *de facto* seizure of the business without affording it a notice and a hearing in violation of due process under the Fifth Amendment.
- The disqualification of Partyville Liquor is a violation of the Eight Amendment protection against cruel and unusual punishment. The punishment is grossly disproportionate to the violations due to the *de minimis* nature of the violations.
- The store should be eligible for a hardship CMP under 7 CFR § 278.6(f)(1). Partyville Liquor is the only store within 1-2 miles that has such a substantial variety of produce, fresh sandwiches, grocery and non-grocery items. If Partyville Liquor were to be disqualified it would cause a great hardship to the community.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

The Appellant, through counsel, contends that the April 25, 2018 charge letter indicated that the store committed trafficking and that the basis of the SNAP trafficking are three (3) transactions by the same investigator with the same employee during a short time period. This assessment of the charges is incorrect. The store was not charged with trafficking. Instead the store was charged with exchanging SNAP benefits for ineligible non-food items, a lesser violation. In addition, there were five (5) violations conducted over three (3) transactions with two (2) different clerks—not a single clerk.

If the store had been charged with trafficking it would have been subject to a permanent disqualification not a six-month disqualification. The Appellant states that it should have been eligible for a trafficking CMP under 7 CFR § 278.6(i). However, a trafficking CMP under 7 CFR § 278.6(i) is only available in lieu of a permanent disqualification due to trafficking violations. To repeat, the Appellant was **not** charged with any trafficking violations. Therefore,

the Appellant's contention that the store's compliance policies and training program support a trafficking CMP are not relevant to the circumstances of this case.

Violations Warrant a Six-Month Disqualification

The Appellant states that the store has not had any violations in 16 years. With regard to this contention, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

The SNAP regulation at 7 CFR § 278.6(e)(5) states, in part that "FNS shall take action as follows against any firm determined to have violated the Act or regulations ... 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 non-food items due to carelessness or poor supervision by the firm's ownership or management."

5 U.S.C. § 552 (b)(7)(E). The investigation report documents that the chargeable violations in this case consisted of five (5) non-food items exchanged for SNAP benefits over three (3) transactions. Although the clerks in Exhibit A and Exhibit E refused to exchange SNAP benefits for ineligible items, this does not ameliorate or mitigate the penalty for exchanging SNAP benefits for non-food items as documented by Exhibits B, C and D. Therefore, the Retailer Operations Division correctly determined that the violations warranted a six-month disqualification.

Investigation Report

The investigation report documents that 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 known 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 investigation report documents by a preponderance of the evidence that personnel at the store exchanged ineligible items for SNAP benefits.

Owner Responsibility

The Appellant states the violations were due to the mistake of a single clerk. However, it should be noted that the investigation report documents that the violations were conducted by two (2) different clerks. Although the store owner was not apparently not involved in the transactions, the store owner signed the SNAP reauthorization application for Partyville Liquor on March 24, 2017. That application included a signed certification that the owner would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time." The violations listed on this certification include accepting SNAP benefits in exchange for cash,

otherwise known as trafficking, and other violations including accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible non-food items.

Regardless of whom the owner of a store may utilize to handle store business, the owner is accountable for the monitoring and handling of SNAP benefit transactions. To allow a store owner to disclaim accountability for the acts of persons whom the owner chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Corrective Action

The Appellant stated that the store is reprogramming its register to differentiate between eligible and ineligible items. Regarding this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is limited to what circumstances existed at the time of the violations that formed the basis of the Retailer Operations Division's action. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that a store may 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 assessment on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations. Therefore, the Appellant's contention that corrective action will take place does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Due Process and Constitutional Claims

The Appellant states that FNS violated its rights by not allowing an opportunity to respond and provide proof of the store compliance policy before being subject to disqualification. The Appellant also contends that the disqualification is a *de facto* seizure of the business without affording it a notice and a hearing in violation of due process under the Fifth Amendment.

Regarding this contention, it is false that the Appellant was not afforded a notice and an opportunity to be heard. The charge letter dated April 25, 2018 afforded the Appellant a ten (10) day time period to respond to the charges. The Appellant store owner took advantage of this time period by contacting the Retailer Operations Division on May 2, 2018 in an attempt to justify or explain the transactions. The Appellant's contentions were considered before the Retailer Operations Division issued its determination letter dated May 7, 2018. The determination letter afforded the store a further opportunity to obtain this administrative review which the Appellant's counsel requested on May 16, 2018. Based on the above, it is difficult to understand how the Appellant feels that it was not afforded proper notice and a hearing.

Regarding the Appellant's claim that a six-month disqualification is a *de facto* seizure of the store, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in the SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis

of possible economic hardship to either the ownership personally or the firm resulting from the imposition of such penalty. To allow stores to be excused from assessed administrative penalties based on a purported economic hardship would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

The Appellant also claims that the violations were *de minimis* in comparison to the volume of the store's transactions and a six-month disqualification is "cruel and unusual" punishment. Regarding this contention, 7 CFR § 278.6(e) states, "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 non-food items** due to carelessness or poor supervision by the firm's ownership or management. [Emphasis added.] Clearly, there is no required minimum dollar threshold contemplated by the regulation and a six-month disqualification is the least severe penalty allowed by SNAP regulations.

Lastly, it should be noted that this administrative review process does not include an assessment of the constitutionality of the laws, regulations and policies under which the agency imposed its adverse action. Instead, the administrative review process assesses whether the adverse action is proper pursuant to Federal SNAP law and regulations and sustainable by a preponderance of the evidence. Therefore, this review does not have the authority to determine whether the United States Congress in its enactment of legislation, or whether the regulations issued pursuant to those laws, conforms to constitutional mandates. Constitutional challenges to the laws and regulations governing the SNAP are more appropriately the province of a judicial review in a court of law. Accordingly, no further findings or conclusions are rendered concerning the Appellants' constitutional claims.

HARDSHIP CIVIL MONEY PENALTY

The Retailer Operations Division determined that the Appellant was not eligible for a hardship CMP under 7 CFR § 278.6(f)(1). That regulation 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 case record documents that the Retailer Operations Division determined that a six-month disqualification of Partyville Liquor, a convenience store, would not cause a hardship to SNAP households as there are other comparable or larger SNAP authorized stores in the area. In total, there are 11 SNAP authorized stores located within a one-mile radius of Partyville Liquor. These consist of seven (7) other convenience stores and four (4) combination grocery stores. Partyville Liquor does not sell any specialty or international foods and does not sell any food that cannot be obtained at these other SNAP authorized stores. The larger combination grocery stores in particular likely have a greater depth and breadth of staple food at comparable or better prices.

Based on this evidence, a six-month disqualification of Partyville Liquor would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the

Retailer Operations Division decision not to assess a hardship CMP in lieu of a six-month disqualification is sustained as appropriate under 7 CFR § 278.6(f)(1).

CONCLUSION

It is established that the violations as described in the letter of charges did in fact occur at Partyville Liquor warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5). That regulation states that FNS **shall** “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 non-food items due to carelessness or poor supervision by the firm’s ownership or management.” Therefore, the decision to impose a six-month disqualification, **the least severe penalty** allowed by regulation, against Partyville Liquor, Appellant, is appropriate and the action is sustained.

In accordance with the Act and regulations, the six-month period of disqualification shall become effective thirty (30) days after receipt of this letter. The Appellant may submit a new application for SNAP authorization ten (10) days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this determination. Please note that 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 you reside or are 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.

RONALD C. GWINN
Administrative Review Officer

July 25, 2018