

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

Payless Convenience Store,

Appellant,

v.

Case Number: C0201662

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a six month disqualification against Payless Convenience Store (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), § 278.6(e)(5 and 6), and § 278.6(f)(1) in its administration of the SNAP when it imposed a six month period of disqualification against Appellant on January 10, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period September 26, 2017, through October 25, 2017. The investigation determined that personnel at the Appellant business accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. All four transactions were deemed clearly violative and warrant a six month disqualification period. The items sold are best described in

regulatory terms as common nonfood items and included items such as bar soap, toothpaste, toilet tissue, and a DVD. The investigative report indicates that these violative transactions were handled by two different clerks. The investigative report notes that the business refused to exchange SNAP benefits for cash on two occasions (Exhibits B and E) and refused to exchange SNAP benefits for ineligible items on two occasions (Exhibits A and E). The investigative report also notes that overcharges occurred on two occasions (Exhibits B and E) contrary to ownerships' contentions.

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated December 26, 2017, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations “. . . warrant a disqualification period of six months (Section 278.6(e)(5)). The letter also states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).”

Appellant responded to the charges in a letter dated January 2, 2018, but the response neither requested nor contained any evidence to be considered in support of the CMP. After giving consideration to the evidence, the Retailer Operations Division notified Appellant in a letter dated January 10, 2018, that it determined that violations had occurred at the establishment, and that a six month period of disqualification from participating as an authorized firm in SNAP was warranted. This determination letter also states that Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated “. . . you are not eligible for the CMP because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.”

By letter postmarked January 14, 2018, Appellant appealed the Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review. No subsequent correspondence was received.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Section 278. In particular, 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 § 271.2 states, in part, that, “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) states, in part, “Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food.” Further, the citation specifies that “Coupons may not be accepted in exchange for cash . . . or for any other nonfood use.”

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)(5) of the SNAP regulations states, in part, that a firm is to be disqualified 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 or poor supervision by the firm's ownership or management.”

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.”

APPELLANT’S CONTENTIONS

In the reply to the letter of charges and in the request for administrative review, Appellant has stated as its position in the matter the following:

- The worker who made the mistake was new and it was his first week. His English is weak and he presumed that only cigarettes and cigars are not allowed on EBT. He was confused with which nonfood items are not allowed even though he had been taught. He didn’t even charge more and just gave the nonfood items because of his lack of knowledge;
- The worker liable for the violations has been given notice and the owners have reviewed the FDA handbook with other workers several times to make sure they have a full understanding of the law;
- There is no excuse for this unethical occurrence, but the owners request an opportunity to make things right. They appreciate bringing this to their attention and fully intend to stay on compliance going forward into the future; and,
- The store depends on SNAP with 45% of total sales and 70% of grocery sales depending on EBT and could not survive closing for six months. One of the owners requests another chance as he is 58 years old and has no other income.

Appellant submitted no documentation or evidence in support of these contentions.

The preceding may represent only a brief summary of Appellant's contentions 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 herein.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not within the authority of this review to consider what subsequent remedial actions may have been taken or will be taken in the future so that a store may begin to comply with program requirements. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, while the owners have given notice to one clerk, even though two different employees were responsible for the violative transactions, and reviewed the USDA Handbook with all employees several times are both positive steps, they do not provide any valid basis for dismissing the charges, or for mitigating the penalty imposed. While store ownership may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, the ownership is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time. Ownership is also responsible for all SNAP transactions at the firm regardless of the amount of time the owners are present at the subject firm.

Both the FNS SNAP retailer application and retailer reauthorization application contain a certification page whereby applicants must confirm their understanding of and agreement with SNAP retailer requirements in order to complete the application/reauthorization process. Store ownership did certify its understanding and agreement to abide by program rules and regulatory provisions when they initially applied to become a SNAP retailer in 2016. The owners agreed to accept responsibility on behalf of the firm for violations of the SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. All SNAP retailers also receive a standard authorization/reauthorization package from FNS that includes the "SNAP Training Guide for Retailers" and other training materials to be used in training both store employees and store ownership that includes a short video. The certification page and the "SNAP Training Guide for Retailers" both clearly state that store owners or operators are legally responsible for their own actions as well as the actions of everyone working in their store and that violations may include being disqualified from SNAP. The FNS retailer web site also directs applicants and retailers to links to an electronic version of the SNAP Retailer Training Guide and

to a streaming video thereby precluding the need for retailers to have a DVD player. All training materials are available on the FNS retailer web site in both English and Spanish versions.

The Report of Investigation shows that two clerks working at the Appellant business during the period under review transacted SNAP benefits for ineligible items on four separate occasions indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The transactions from the investigative report, including the store EBT POS receipts, have been matched to SNAP transactions posted by the Appellant business on the dates in question with no discrepancies. The acceptance of SNAP benefits for ineligible items is a violation of the SNAP rules and regulations. The ineligible items sold were obvious nonfood items and would not readily be confused with eligible edible food items. SNAP regulations state that FNS shall disqualify a store for a six month period 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 the sale of common nonfood items in exchange for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management. The fact that the multiple, violative transactions conducted by these two clerks span a four week window is further indication of poor supervision by ownership or management. Additionally, Appellant acknowledges that the violations occurred. There was no indication of involvement by the firm's ownership or management.

The Report of Positive Investigation shows that the nature and scope of the violations under review do violate SNAP regulations, and the transaction amounts cited in the Report also match FNS transaction records for the dates in question. Additionally, a review of the Report shows no errors or discrepancies. There is no regulatory threshold for the dollar value of the ineligible items purchased. While a firm that has previously received warnings of possible violations or that has been sanctioned before could receive a more severe penalty, SNAP regulations do not provide any grounds for dismissing or reducing penalties for those firms that have not received warnings or previously been sanctioned. The record shows no evidence that the Appellant firm received any prior warnings or has been sanctioned and there is no evidence that the firm's ownership or management intentionally violated SNAP regulations. Based on this discussion, the decision by the Retailer Operations Division to disqualify the firm for a six month period was the appropriate penalty.

Based on the discussion above, there is not any valid basis for dismissing the charges or for mitigating the penalty imposed.

It is highly improbable, based on the willingness of the store employees to exchange SNAP benefits for ineligible items, that the only instances of SNAP violations were those identified as part of the FNS undercover investigation and more likely than not that this represented an ongoing pattern of SNAP violations at the Appellant business. As previously stated, store ownership is responsible for all SNAP transactions at the firm and therefore a certain minimal level of oversight on the part of ownership to ensure employees are not violating SNAP laws or regulations is expected. It would be unusual and irresponsible for store owners to not be monitoring all transactions, including those involving SNAP, and reviewing daily balance sheets to ensure store employees were not stealing from the business or conducting other activities that would jeopardize the licenses and income that the business is dependent upon.

CIVIL MONEY PENALTY

Appellant is not eligible for a trafficking CMP as these only apply in cases of permanent disqualifications.

A hardship CMP as an optional penalty in lieu of a six month disqualification was considered in this case. Such a finding is appropriate only if a store sells a substantial variety of staple food items and its disqualification would create a 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. FNS records show there are 29 other SNAP retail stores located within a one mile radius of the Appellant business that includes 22 convenience stores, four combination grocery stores, two small grocery stores, and one medium grocery store. All of the comparable or larger stores stock adequate varieties of food in all four staple food categories and in perishables as required by FNS. The Appellant business is also located on Cedar Street at the corner of Parker Street and is two blocks from Shawmut Avenue and from Cottage Street. Parker Street, Shawmut Avenue, and Cottage Street all have fixed route scheduled bus service that would facilitate SNAP recipients shopping at more distant SNAP retailers.

It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm or to ownership resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. Furthermore, 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 regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, ownership's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted by a USDA special agent and signed under penalty of perjury. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and accurate with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail. Accordingly, the determination by the Retailer Operations Division to impose a disqualification of six months against the Appellant business from participating as an authorized retailer in SNAP

is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations as there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In accordance with the Food and Nutrition Act, and the regulations thereunder, 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. When eligible, Appellant may reapply for SNAP authorization using the application instructions contained on the FNS web site at www.fns.usda.gov/snap/retailer-apply.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

ROBERT T. DEEGAN
Administrative Review Officer

April 18, 2018