

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

Penn Valley Market & Liquor,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0198678

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 finding that a **six-month disqualification** from participation as an authorized retailer in the Supplemental Nutrition Assistance Program¹ was properly imposed against Penn Valley Market & Liquor (hereinafter “Penn Valley Market & Liquor” and/or “Appellant”) and you as its owner of record, by the Retailer Operations Division of the FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a) and (e) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a six-month disqualification against Penn Valley Market & Liquor in a letter dated December 13, 2017.

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.

¹ Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

CASE CHRONOLOGY

The USDA conducted an investigation of the compliance of Penn Valley Market & Liquor with Federal SNAP law and regulations which consisted of five (5) visits completed between August 28, 2017, and November 1, 2017.

The USDA-FNS Report of Positive Investigation (hereinafter, "Investigative Report") number LA09999 dated November 15, 2017 disclosed that on four (4) separate occasions Penn Valley Market & Liquor personnel accepted SNAP benefits for merchandise that was ineligible for purchase with such benefits from two (2) USDA Investigators. Identification information ascertained from the Investigative Report indicates that these SNAP violations were handled at Appellant firm by three (3) unidentified male clerks.

As a result of the evidence compiled during the USDA investigation, in a letter dated November 21, 2017, the Retailer Operations Division, charged Appellant with violating 7 CFR § 278.2(a) of the SNAP regulations.

The Retailer Operations Division record indicates Appellant responded, through ownership, in a telephone discussion held on November 22, 2017. The record indicates that ownership indicated that Appellant operates with the use of scanning equipment which precludes the sale of SNAP ineligible items for SNAP benefits.

Following documented consideration of Appellant ownership's response the Retailer Operations Division issued a final determination letter, dated December 13, 2017, assessing a six-month disqualification from participation as an authorized retailer in the SNAP against Penn Valley Market & Liquor.

In a letter dated December 14, 2017, received in the offices of the Administrative Review Branch on December 21, 2017, Appellant submitted an appeal of the Retailer Operations Division's assessment, requesting an administrative review of the action. The appeal was granted and implementation of the sanction has been held in abeyance, in accordance with 7 CFR § 279.4(a).

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, 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)², 7 USC 2023 and 278 of Title 7 of the Code of Federal Regulations (CFR).³

7 CFR § 278.2(a) “Use of Coupons”, states, in relevant part, “Coupons may be accepted by an authorized retail food store only from eligible households... only in exchange for eligible food.”

7 CFR § 271.2 defines **Eligible foods**” in relative part as “**Any food and food product** intended for human consumption **except** alcoholic beverages, tobacco and **hot foods and hot food products prepared for immediate consumption...**” (Emphasis Added)

7 CFR § 278.6 establishes the authority upon which a period of disqualification may be imposed against an authorized food store or wholesale food concern in the event that it has failed to comply with the Act.

7 CFR § 278.6(e) provides the following, in relevant part, with respect to penalties that may be assessed against firms determined to have violated the Act or regulations:

“...For the purposes of assigning a period of disqualification, a warning letter shall not be considered to be a sanction. A civil money penalty and a disqualification shall be considered sanctions for such purposes...”

7 CFR § 278.6(e)(5) applies to the period of disqualification under review, and specifies 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 nonfood items due to carelessness or poor supervision by the firm’s ownership or management.”

7 CFR § 278.6(e)(7), states, that FNS shall,

“Send the firm a warning letter if violations are too limited to warrant a disqualification.”

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

7 CFR §278.6(f)(1) reads, in part,

² Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment through P.L. 113-79, enacted February 7, 2014.

³ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

“FNS may impose a civil money penalty as a sanction in lieu of disqualification when...the firm’s disqualification would cause hardship to Food Stamp [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

USDA conducts investigations of the compliance of retail food stores, in part, to ascertain the nature and extent of SNAP violations that may be occurring. In the instant case the Investigative Report dated November 15, 2017, reveals that two (2) USDA Investigators completed five (5) total investigative visits at Penn Valley Market & Liquor between August 28, 2017 and November 1, 2017.

The report materials were provided to Appellant as attachments to the charge letter dated November 21, 2017 and included exhibits A through E that provide detail of the investigative results. The Investigative Report reveals SNAP violations were recorded during four (4) of the five (5) reported visits, included as exhibits B, C, D and E of the Investigative Report with the exchange of SNAP benefits for non-food items including sandwich bags, plastic bowls; disposable cutlery; a scrubber; a box of matchbooks; a bottle of liquid dish detergent; and dish sponges.

The violations are documented to have involved three (3) unidentified male clerks. The Investigative Report further discloses that exchange of cash was refused in exhibit D, by one (1) of the unidentified male clerks. Exhibit A discloses the refusal by an unidentified female clerk to allow the exchange of ineligible items for SNAP benefits.

The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf.

APPELLANT’S CONTENTIONS

In the letter postmarked December 14, 2017, ownership apologized for the errors of one (1) of his employees, noting that he recognizes ownership responsibility for all errors occurring at Appellant. Extra training steps are indicated to have been established to avoid repeat violations.

The preceding represents 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

That SNAP benefits are not for the purchase of non-food items is clear in the “Act” and in the SNAP regulations, with noted exceptions, such as seeds used to grow food, and hunting equipment in remote areas of Alaska. This and other rules governing SNAP were provided to

Appellant upon initial SNAP authorization in August 2008, and have been restated in various retailer notifications routinely provided to all SNAP authorized retailers.

Employee Error:

Although ownership has explained that the SNAP violations resulted from the errors of one (1) employee it is noted that the Investigative Report clearly identifies SNAP violations by three (3) unidentified male clerks. Regardless of the number of employees involved Appellant's ownership correctly recognizes ownership responsibility for all SNAP violations at Appellant.

Owner Accountability:

The record indicates that the owner of record signed the SNAP retailer application on June 20, 2008, affirming that ownership was aware of and understood the SNAP regulations. That material includes a certification and confirmation that the owners "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 ineligible non-food items. Appellant has not provided any compelling evidence or explanation to warrant the reduction of the penalty as deemed appropriate by the Retailer Operations Division.

Scanning Technology:

Although Appellant indicates that ineligible products cannot be exchanged for SNAP because the use of scanning technology is used, no evidence that the transactions identified as violations were not, in fact, violations was provided for consideration. Recognizing that the use of scanning technology can avert SNAP violations when it comes to selling ineligible items for SNAP, the use of the technology is not 100 percent error free as items can be miscoded upon entry.

Corrective Actions:

Appellant's ownership has indicated that extra training steps have been established to avoid repeat violations. There is no provision in the SNAP regulations for the reduction or mitigation of penalties involving SNAP violation through the implementation of corrective action. Therefore, Appellant's contention cannot be considered as a factor in the final determination of penalty in the instant case.

Card Transaction Processing:

Appellant's ownership has offered that the SNAP violations may have occurred as a result of the policy in place at Appellant to refuse any card for purchases **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

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 Food Stamp [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 record reflects that the Retailer Operations Division has rendered a finding that pursuant to 7 CFR § 278.6(f)(1), it would not be appropriate to impose a civil money penalty in lieu of a period of disqualification on Appellant firm.

The Retailer Operations Division record reflects that Penn Valley Market & Liquor is classified within FNS definitions as a convenience store; and, that there are at least two (2) SNAP authorized firms within a one (1) mile radius of Appellant which includes a full-line superstore. The availability of alternative SNAP Authorized venues is verified with a review of the SNAP Retailer Locator tool located at <https://www.fns.usda.gov/snap/retailerlocator> .

Based on the availability of the alternative SNAP authorized retailers the Retailer Operations Division has determined that the temporary disqualification of Appellant would not create a hardship to customers. It is recognized that some degree of inconvenience to SNAP customers is inherent from the temporary disqualification of any participating food store. Although the normal shopping pattern of such SNAP customers may be temporarily altered during the period of disqualification, the determination that the disqualification of Penn Valley Market & Liquor would not create a hardship to customers, as differentiated from potential inconvenience is sustained and a civil money penalty in lieu of disqualification is found not to be appropriate in this case.

CONCLUSION

The charges of violations are based on the findings of a formal USDA investigation in which all transactions cited in the letter of charges were fully documented and evidentiary materials are included in the record that validate the report as provided. A complete review of this documentation has yielded no swaying error or discrepancy. The Investigative Report is specific and thorough with regard to the dates of the violations and the specific related facts.

The documentation presented by the Retailer Operations Division clearly provides a preponderance of the evidence that the violations as reported occurred at Appellant firm and, 7 CFR §278.6(e)(5) specifies 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 nonfood items due to carelessness or poor supervision by the firm’s ownership or management.”

It is established that the violations as described in the letter of charges dated November 7, 2017, did in fact occur at Appellant’s firm, warranting a disqualification of six (6) months in accordance with 7 CFR §278.6(e)(5).

Based on the discussion above, the decision to impose a six-month disqualification against Penn Valley Market & Liquor is proper and the action is sustained.

In accordance with the Act and regulations, **the six (6) month period of disqualification shall become effective thirty (30) days after receipt of this letter.** Appellant may submit a new application for SNAP participation ten (10) days prior to the expiration of the six (6) month disqualification period.

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.

NANCY BACA-STEPAN
Administrative Review Officer

April 30, 2018