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

Petro South,	
Appellant,	
v.	**Case Number: C0189983**
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 Petro South, (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 Petro South.

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, Petro South, was initially authorized for SNAP participation as a convenience store on May 12, 2015. Between October 25, 2016, and April 4, 2017, 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 Petro South accepted SNAP benefits in exchange for ineligible merchandise on four separate

occasions. According to the report, the Appellant firm sold coffee filters and plastic cutlery in exchange for SNAP benefits, which benefits may only be used to purchase eligible foods.

In a letter dated August 24, 2017, 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 stated that the violation of accepting SNAP benefits in exchange for ineligible nonfood items warrants a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further stated 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 response to the charge letter, the Appellant, through counsel, submitted a two-page written letter dated September 8, 2017. In this letter, the Appellant stated that it did not dispute the charges, but wished for the Retailer Operations Division to consider various factors before determining an appropriate sanction. For example, the Appellant stated that this was the firm's first violation; the ineligible items sold were minor in comparison to other types of ineligible items that could have been sold; the undercover investigator did not warn the firm that the violations were occurring; the violations were committed by just one employee and not by an owner or manager; and the firm has instituted precautionary measures to prevent future violations. With these factors in mind, the Appellant requested either a warning letter or a civil money penalty in lieu of disqualification.

After reviewing the Appellant's response and further considering the evidence in the case, the Retailer Operations Division issued a determination letter dated September 19, 2017. 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 September 30, 2017, 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.

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 October 25, 2016, and April 4, 2017, the USDA completed four compliance visits at Petro South. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the August 24, 2017, 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 notes that the following nonfood items were purchased by an investigator using SNAP benefits:

- One package of coffee filters (no brand indicated), Exhibits A, B, and C
- One 100-count container of coffee filters (*Simply Pure* brand), Exhibit D
- One box of plastic cutlery (*Diamond* brand), Exhibit D

The report notes that in Exhibit D, the investigator attempted to exchange SNAP benefits for cash (i.e. trafficking), but this attempt was refused by the clerk on duty. According to the report, one clerk conducted all four violative transactions.

The charge letter states that the violations that occurred in Exhibits A, B, 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:

- Appellant has not and does not dispute that the violations occurred. It does, however, believe that the six-month suspension is excessive.
- The Appellant has participated in SNAP for multiple years. Prior to the violations outlined in the letter, the Appellant has been in full compliance with SNAP regulations and has no prior violations.
- The ineligible items were sold by a single employee, not multiple employees, management, or ownership. That employee has been disciplined and all employees have been educated or re-educated regarding SNAP rules and regulations, including reviewing the training videos and guides available on the SNAP website to ensure that there are no future violations.
- The investigation elected not to warn the Appellant after the first violation. Had the Appellant been warned, the matter would have been immediately addressed.

- On every occasion, the ineligible items were purchased along with eligible items. The ineligible items purchased are not on the same level of items such as alcohol or tobacco products. It is also illuminative that the clerk refused to engage in trafficking.
- Appellant requests that the firm be issued a warning letter rather than be disqualified for six months.

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. Rather, the Appellant clearly acknowledges that the violations occurred. 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. The balance of this review will address the Appellant's remaining contentions.

No Prior Violations

The Appellant, through counsel, contends that the Appellant has participated in SNAP for multiple years and that prior to the violations outlined in the charge letter, it has been in full compliance with SNAP regulations and has no prior violations. This contention implies that because the firm does not have a history of program violations, the six-month disqualification determination should be overturned or reduced.

With regard to this contention, SNAP regulations at 7 CFR § 278.6(e)(5) require that when serious violations occur, such as the exchange of common nonfood items for SNAP benefits, a six-month disqualification is the necessary penalty, even on the first occasion, regardless of a firm's prior compliance with program rules. As noted earlier, the purpose of this review is to determine whether or not the Retailer Operations Division took appropriate action, consistent with SNAP regulations, in its imposition of a six-month sanction against Petro South. As long as the administrative action taken by the agency fully conforms to SNAP regulations, this review has no authority to dismiss or reduce a period of disqualification.

In this case, the sanction imposed by the Retailer Operations Division is in entirely line with SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations. As such, there is no valid basis for this review to consider reversing or reducing agency's disqualification decision.

It should also be noted that this is not actually the Appellant owner's first SNAP violation. In February 2004, the Appellant owner was disqualified from SNAP participation for three years as a result of WIC violations committed at another store owned by the Appellant owner.

No Prior Warning

The Appellant, through counsel, has argued that the investigator did not warn the firm that violations were being committed. It contends that if the investigator had taken the time to notify the firm after the first violation, other violations would not have occurred and the firm could have addressed the situation immediately.

With regard to this contention, it should be noted that USDA is under no obligation to warn retailers when SNAP violations are occurring. A warning letter is generally issued only when the violations that are committed are too limited to warrant a period of disqualification. This is in accordance with 7 CFR § 278.6(e)(7). In this case, the firm committed SNAP violations on every visit the investigator made to the store. It is true that the clerk on duty refused to engage in trafficking (see Exhibit D of the investigation report), so it is clear that some level of understanding of Program rules existed. However, the fact that violations were committed in every other instance shows either a willful disregard of the rules or poor supervision by the firm's owner or managers. Such repetitive violations are serious enough to warrant a six-month disqualification pursuant to 7 CFR § 278.6(e)(5). Therefore, a warning is not an appropriate sanction in this case.

Remedial Actions Taken

The Appellant, through counsel, contends that the employee who committed the violations has been disciplined and that all employees have been educated or re-educated regarding SNAP rules and regulations to ensure that there are no future violations.

With regard to these contentions, it is important to reiterate 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, such as the disciplining of employees or providing additional training, that may have been taken or 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 modifying the penalty imposed.

Civil Money Penalty

In its original reply to the charges, the Appellant, through counsel, stated if a warning was not an option, that it would like the agency to consider a civil money penalty in lieu of disqualification.

After reviewing all evidence in this case, it is the determination of this review that a civil money penalty in lieu of a six-month disqualification is not appropriate. SNAP regulations at 7 CFR § 278.6(f)(1) state that a CMP in lieu of a temporary disqualification is allowable only 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 Petro South, 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 at least 14 SNAP authorized stores located within a two-mile radius of Petro South, including a superstore and a supermarket.

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. Therefore, pursuant to 7 CFR § 278.6(f)(1), a hardship civil money penalty in lieu of disqualification cannot be granted in this case.

CONCLUSION

Based on a review of the evidence in this case, there is no question that program violations of 7 CFR § 278.2(a) occurred 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 is 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, Petro South, 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

April 6, 2018