

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

Pic N Pay,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0193196

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA) that the record indicates that Pic N Pay (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP), and that there is sufficient evidence to support a hardship civil money penalty (CMP) in lieu of a six month disqualification from the SNAP as imposed by the Retailer Operations Division (Retailer Operations).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.6(f)(1), 7 CFR § 278.6(a), and 7 CFR § 278.6(e) in its administration of the SNAP, when it imposed a hardship CMP in the amount of \$852.00 in lieu of a six month period of disqualification against Appellant.

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

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of November 15, 2016 through June 13, 2017. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on multiple separate occasions that warrant a six month disqualification period. The items sold are best described in regulatory terms as common non-food items.

As a result of evidence compiled during this investigation, by letter dated August 23, 2017, Retailer Operations charged the owner with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). Misuse of SNAP benefits was noted in Exhibits C, D, and E that warrants a disqualification as a SNAP retail food store for a period of six months. The letter also states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

The owner replied to the Charge letter August 29, 2017. Retailer Operations informed the owner by Determination letter dated October 12, 2017, that the violations cited in the Charge letter occurred, and that the assessment of a hardship CMP in the amount of \$852.00 in lieu of a six month period of disqualification was appropriate.

Appellant appealed Retailer Operations' determination and requested administrative review by letter dated October 14, 2017. The appeal was granted by letter dated October 20, 2017.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the 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 argument 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, 7 U.S.C. § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). 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.

Section 278.2(a) states, "Coupons may be accepted by an authorized retail food store only from eligible households or the households' authorized representative, and only in exchange for eligible food."

Section 278.6(e)(5) of the SNAP regulations states 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(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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system..."

In addition, 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 benefit households because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It 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 benefit 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

A report of the USDA compliance investigation was provided to the Appellant as Exhibits with the Charge letter. The investigative report provides details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during three store visits that warrant a six month disqualification. The violations involved the sale of non-food items including: coffee filters and lawn and leaf bags, for SNAP benefits in violation of 7 CFR § 278.2(a).

APPELLANT’S CONTENTIONS

Consideration was made of all contentions whether recapitulated here or not.

- This was our first mistake and our last one. I accept that my employee made a mistake.
- Please reconsider the penalty.
- We have three other businesses and are running SNAP successfully.
- We have replaced the employee due to such offense.
- We are retraining my employees.
- We are calling a technician to look at our register to flag non EBT items.

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 determination made by Retailer Operations. This review is limited to what circumstances were at the basis of Retailer Operations’ determination at the time such action was taken. Upon review, the evidence supports that Appellant established a record of selling non-food items as defined by Section 271.2 of the regulations, on multiple occasions as noted in Exhibits C, D, and E furnished with the Charge letter which warrant a disqualification period of six months. 7 CFR § 278.6(e)(5) specifies that FNS shall “disqualify the firm 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 nonfood items due to carelessness or poor supervision by the firm’s ownership or management.” Three violations are considered evidence of carelessness. Therefore, the violations in this case are not too limited to warrant a disqualification.

The owner signed the FNS retailer application to become a SNAP authorized retailer which included a certification and confirmation that ownership 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." By signing this document the owner confirmed that "I am aware that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal or disqualification from Supplemental Nutrition Assistance Program; "It is my responsibility to ensure that the training materials are reviewed by all firm owners and all employees....;" "I accept responsibility on behalf of the firm for violations of the Supplemental Nutrition Assistance Program regulations, including those committed by any of the firm employees."

Regardless of whom the owner of a store may utilize to handle store business, the owner is accountable for the proper handling of SNAP benefit transactions. The regulations establish that an authorized food store may be disqualified from participating in SNAP 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.

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 mitigate the impact of the violations upon which they are based. **5 U.S.C. § 552 (b)(7)(E)**.

The owner contends that he provided SNAP retraining, and is seeking to add functionality to the store's cash register which will flag an item rung up under EBT tender type as not allowed to be purchased using the EBT card. With regard to these contentions, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the determination of Retailer Operations. This review is limited to what circumstances were at the basis of Retailer Operations' action at the time such action occurred. It is not the authority of this review to consider what subsequent remedial actions may be undertaken so that Appellant might begin to comply with program requirements. There are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective actions implemented subsequent to findings of program violations. Therefore, Appellant's contentions that corrective actions such as training, and the addition of cash register functions, do not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

Retailer Operations rendered a finding that was appropriate to impose a CMP in the amount of \$852.00 in lieu of a six month period of disqualification. Appellant is located in a rural area with no nearby authorized stores, and the firm's disqualification would cause hardship to SNAP households. Review was made of the calculation, and under review, the amount of the hardship CMP is deemed to be correct.

CONCLUSION

Based on a review of the evidence, the record indicates that program violations did occur at Appellant. The charges of violations are based on the findings of a formal USDA investigation. The investigative record is specific, thorough, and fully documented 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. The record documents that Retailer Operations properly

considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1). The granted hardship CMP in the amount of \$852.00 in lieu of the six month disqualification from participation as an authorized food retailer is herein sustained. Please review the October 12, 2017 Determination letter for payment information and take action. Failure to pay the CMP will result in Appellant's disqualification.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and to Section 279.7 of the regulations (7 CFR § 279.7) with respect to 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 the owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction.

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.

M. Viens
Administrative Review Officer

November 28, 2017