

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

Pit N Go #3,

Appellant,

v.

Case Number: C0203683

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 Pit N Go #3, (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 Pit N Go #3.

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, Pit N Go #3, was initially authorized for SNAP participation as a convenience store on September 23, 2013. Between November 1, 2017, and March 1, 2018, 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 Pit N Go #3 accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. According to the report, the Appellant firm sold plastic cups, trash bags, steel

wool pads, and plastic sandwich bags in exchange for SNAP benefits, which benefits may only be used to purchase eligible foods.

In a letter dated May 8, 2018, 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 states that the violation of accepting SNAP benefits in exchange for ineligible nonfood items warrants a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further states 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 a letter dated May 17, 2018, the Appellant replied to the charges, acknowledging that the violations occurred, but claiming that they were not committed intentionally. The Appellant stated that the ineligible items that were sold to the investigator were not properly entered into the firm's scanning system. So when the clerk rang up the items, they were accidentally permitted to be purchased with SNAP benefits. The Appellant requested a warning for this violation or perhaps a CMP instead of disqualification because the store is an important resource for the neighborhood and there are no other SNAP-authorized firms within a mile radius of the store. It further argued that this was the firm's first offense and that a disqualification would be very tough on the firm. It also stated that all transactions are now personally monitored by the owner to ensure that violations are not repeated in the future. The Appellant strongly urged the Retailer Operations Division to reconsider the disqualification and give the firm one more chance to comply.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated May 22, 2018. 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 May 29, 2018, 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. It should be noted that on June 27, 2018, the Appellant submitted an additional letter of explanation along with three pages of sales reports for the year 2017.

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 November 1, 2017, and March 1, 2018, the Food and Nutrition Service completed five compliance visits at Pit N Go #3. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the May 8, 2018, charge letter. The investigation report includes Exhibits A through E, and provides full details on the results of each compliance visit. SNAP violations were documented during four of the five visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report states that the following nonfood items were purchased by an investigator using SNAP benefits:

- One 20-count package of blue plastic cups (*Our Family* brand), Exhibit B
- One 26-count box of kitchen trash bags (*Glad* brand), Exhibit B
- One 20-count package of blue plastic cups (*Our Family* brand), Exhibit C
- One 26-count box of kitchen trash bags (*Glad* brand), Exhibit C
- One 20-count package of red plastic cups (*Our Family* brand), Exhibit D
- One 4-count box of steel wool pads (*S.O.S.* brand), Exhibit E
- One 150-count box of plastic sandwich bags (*Our Family* brand), Exhibit E

The report indicates that in Exhibit A the investigator did not attempt to purchase any ineligible items. In Exhibit D, the investigator attempted to obtain 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash in exchange for SNAP benefits, but this request was refused. According to the report, two different cashiers conducted the four violative transactions.

The charge letter states that the violations that occurred in Exhibits B, C, and E 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 submitted a copy of its original reply to the charge letter. It also submitted a copy of last year's sales reports to highlight how important SNAP is at Pit N Go #3.
- The store is located in the heart of downtown Cumberland's biggest neighborhood. It is open 24 hours a day, seven days a week for customer convenience, and it provides a wide variety of staple foods and other goods.

- Appellant accepts fault for the error of incorrectly keying in some items into the firm's scanning system, which led to transactions being permitted to be purchased with SNAP benefits at the point-of-sale.
- Since receiving the charge letter, the firm's owner has personally supervised all transactions.
- Appellant pleads for reconsideration of the disqualification determination. If that is not possible, it requests a CMP in lieu of disqualification.

In support of its contentions, the Appellant submitted three pages of reports showing sales figures for the year 2017.

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. In fact, the Appellant appears to acknowledge that the violations occurred, blaming them on data entry errors when store personnel programmed codes into the firm's scanning equipment. It argued that because the ineligible items were keyed in improperly, the items were permitted to be purchased with SNAP benefits at the point of sale. 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 and a six-month disqualification is warranted. The balance of this review will address the Appellant's remaining contentions.

Violations Due to Programming Error

As noted above, the Appellant contends that the violations were the result of a scanning equipment programming error that caused ineligible items to register as SNAP-eligible at the point of sale. Although the Appellant claims to be taking responsibility for the errors, the contentions in this paragraph imply that because the violations were not intentional, the disqualification penalty should be reconsidered.

With regard to these contentions, the record shows that the Appellant owner signed an application to participate as a retailer in SNAP on August 7, 2013. By signing this application, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. One way to comply with the rules is for ownership and management to ensure that all employees are fully trained on what can and cannot be purchased with SNAP benefits. Even with a system programming error, the clerk on duty should have recognized that obvious non-food items could not be paid for with SNAP benefits. In this case, the cashiers allowed Program violations every time the investigator visited the store. This strongly implies either carelessness or a lack of supervision on the part of the

firm's ownership or management. Errors in programming cannot be considered a valid basis for dismissing the charges or for mitigating the penalty imposed.

Remedial Actions Taken

The Appellant has stated that since receiving the charge letter, it has personally monitored all transactions to ensure that violations do not happen again.

With regard to this contention, it should be noted 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 that may have been taken or that 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 reducing the penalty imposed.

Hardship to Appellant

The Appellant has argued that a disqualification would be very tough on the firm. In support of this claim, it submitted three pages of sales reports in an effort to show just how much SNAP means to the store.

With regard to this contention, it is recognized that some degree of financial or economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty.

To allow store ownership to be excused from administrative penalties based on a purported economic hardship to the store's ownership or to the firm itself would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. Moreover, 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 requirements, but also to those retailers who have been disqualified from the program in the past for similar violations.

Therefore, the Appellant's contention that the firm may incur financial hardship as a result of a six-month disqualification from SNAP does not provide a valid basis for dismissing the charges or for reducing the penalty imposed.

Warning Letter / Civil Money Penalty

The Appellant contends that Pit N Go #3 is located in the heart of downtown Cumberland's biggest neighborhood and is a great convenience to its customers. It further claims that there are no other SNAP-authorized stores within a one-mile radius of the store. These claims imply that if the firm is disqualified, SNAP households in the area will experience hardship because they would not be able to use spend their SNAP benefits near their homes. As such, the Appellant requests a warning for this violation or perhaps a civil money penalty in lieu of disqualification.

It should be noted that both this review and the Retailer Operations Division evaluated the Appellant's eligibility for a lesser penalty, including a warning letter and a civil money penalty. As for a warning letter, such a penalty is not appropriate in this case. The firm committed program violations on four consecutive visits made by the investigator. On three of those visits, the clerks on duty permitted two obvious nonfood items to be purchased with SNAP benefits. Regulations at 7 CFR § 278.6(e)(7) state that a warning letter should only be sent if the violations are too limited to warrant a disqualification. In this case, the violations quite clearly meet the criteria for a six month disqualification, even on the first occasion, as noted in 7 CFR § 278.6(e)(5).

As for a civil money penalty, SNAP regulations at 7 CFR § 278.6(f)(1) permit a CMP in lieu of a temporary disqualification 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 Pit N Go #3, 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 nine comparable or larger SNAP-authorized retail stores located within a one-mile radius of Pit N Go #3, including two supermarkets, both of which have significantly greater staple food inventory at comparable prices.

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. Because such conditions do not exist in this case, a hardship civil money penalty in lieu of disqualification is not an option.

CONCLUSION

Based on an analysis of all information in this case, this review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at Pit N Go #3 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 appears to be 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, Pit N Go #3, 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

November 8, 2018