

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

Pop’s Grocery Inc,

Appellant,

v.

Case Number: C0195968

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 there is sufficient evidence to support a finding that a six month disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Pop’s Grocery Inc. (hereinafter “Pop’s Grocery”) by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a six month period of disqualification against Pop’s Grocery on August 8, 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.

CASE CHRONOLOGY

The Department of Agriculture conducted an investigation of the compliance of Pop’s Grocery with Federal SNAP law and regulations during the period December 28, 2016 through March 9, 2017. In a letter dated July 18, 2017, the Retailer Operations Division charged the Appellant

with accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on four out of six compliance visits. The letter further informed the Appellant that the violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5).

The Appellant did not reply to the charges that were outlined July 18, 2017 Charge Letter. After considering the evidence of this case, the Retailer Operations Division issued a Determination Letter dated August 8, 2017. The Determination Letter informed the Appellant that he was disqualified from the SNAP for a period of six months in accordance with 7 CFR § 278.6(a) and (e). The Determination Letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a hardship civil money penalty (CMP) under 7 CFR § 278.6(f)(1). The Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the six month disqualification because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked August 11, 2017, the Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. FNS granted the Appellant's request for administrative review by letter dated August 21, 2017 and implementation of the six month disqualification was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might 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, 7 U.S.C. § 2021, and promulgated through regulations under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e) establish the authority upon which a disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, inter alia:

Coupons may be accepted by an authorized retail food store only from eligible households . . . only in exchange for eligible food.

7 CFR § 271.2 states, inter alia:

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, inter alia:

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) states, inter alia:

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, inter alia:

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

5 U.S.C. § 552 (b)(7)(E)

APPELLANT'S CONTENTIONS

In the administrative review request postmarked August 11, 2017, the Appellant, through counsel, made the following summarized contentions, in relevant part:

- The Determination Letter stated that the Appellant did not respond to the charges that were outlined in the July 18, 2017 Charge Letter. However, this is an incorrect statement as a certified mail receipt from the U.S. Postal Service indicates that FNS received the Appellant's letter of response on July 31, 2017.
- To ensure that these types of SNAP violations do not occur in the future, the Appellant will review the provisions of the SNAP and conduct training with store employees involved in the sale of goods to make certain that there is full compliance with all applicable provisions and regulations.
- The Appellant is requesting that FNS issue a Warning Letter in lieu of disqualifying Pop's Grocery from the SNAP for six months.

- A SNAP disqualification will impose a hardship on the store's SNAP customers as there are no other authorized retail food stores in the area selling as large a variety of staple food items at comparable prices.

The preceding may represent only a brief summary of the Appellant's contentions in this matter. Please be assured, however, that 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

The Appellant does not dispute the facts as described in the investigation report. A review of the case record shows that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted under the direction of a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no error or discrepancy. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. The documentation presented by the Retailer Operations Division establishes by a preponderance of the evidence that the violations as reported occurred at the subject store.

Response to Charge Letter

The Appellant contends that the Determination Letter stated that the Appellant did not respond to the charges that were outlined in the July 18, 2017 Charge Letter. However, this is an incorrect statement as a certified mail receipt from the U.S. Postal Service indicates that FNS received the Appellant's letter of response on July 31, 2017. It is important to note that the Appellant's July 28, 2017 letter of response to the Charge Letter was signed for by an employee of the FNS mail room on July 31, 2017. Unfortunately, the Retailer Operations Division never received the Appellant's Charge Letter response. FNS apologizes for this inadvertent error. However, the Appellant has now been given and has taken the opportunity in the present administrative review to submit whatever evidence and information he could have previously submitted in support of his position that the Retailer Operations Division's adverse action against Pop's Grocery should be reversed. Therefore, evidence and information that the Appellant was not able to present before now has been considered in this administrative review in rendering the Final Administrative Decision in this case.

Corrective Action Implemented

The Appellant contends that in order to ensure that these types of SNAP violations do not occur in the future, he will review the provisions of the SNAP and conduct training with store employees involved in the sale of goods to make certain that there is full compliance with all applicable provisions and regulations. 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 the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. 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 after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that he has taken/will take corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Reconsideration of Disqualification

The Appellant is requesting that FNS issue a Warning Letter in lieu of disqualifying Pop's Grocery from the SNAP for six months. However, 7 CFR § 278.6(e)(5) of the SNAP regulations is specific in 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 by employees or poor supervision by the firm's ownership or management". As such, the Retailer Operations Division's decision to impose a six month SNAP disqualification for Pop's Grocery is appropriate for the SNAP violations that occurred during the investigation period.

CIVIL MONEY PENALTY

The Appellant contends that a SNAP disqualification will impose a hardship on the store's SNAP customers as there are no other authorized retail food stores in the area selling as large a variety of staple food items at comparable prices. The Retailer Operations Division determined that the Appellant was not eligible for a hardship civil money penalty (CMP) under 7 CFR § 278.6(f)(1). That regulation 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." [Emphasis added].

5 U.S.C. § 552 (b)(7)(E)

Based on the evidence, the disqualification of Pop's Grocery would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division's decision not to assess a hardship CMP in lieu of a six month disqualification is sustained as appropriate under 7 CFR § 278.6(f)(1).

CONCLUSION

It is therefore established that the violations as described in the letter of charges did in fact occur at Pop's Grocery Inc. warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5). That regulation states 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". Therefore, the decision to impose a six month disqualification, the least severe penalty allowed by regulation, against Pop's Grocery Inc., the Appellant, is appropriate and the action is sustained.

In accordance with the Food and Nutrition Act of 2008 and the regulations there under, the six month period of disqualification shall become effective thirty (30) days after receipt of this letter. A new application for participation may be submitted by the firm ten (10) days prior to the expiration of this six month period.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (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 you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, FNS is 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.

LORIE L. CONNEEN
Administrative Review Officer

April 11, 2018