

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

Pueblo Supermarket,)
)
Appellant,)
)
v.)
)
Retailer Operations Division,)
)
Respondent.)
_____)

Case Number: C0186795

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support a finding that the six-month disqualification of Pueblo Supermarket (hereinafter Pueblo Supermarket or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program, as initially imposed by the Retailer Operations Division was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(1) and 7 CFR § 278.6(a) and (e)(5) in its administration of the SNAP, when it imposed a six-month period of disqualification against Appellant.

AUTHORITY

7 USC § 2023 and the 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 May 10, 2016 through June 23, 2016. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. As a result of evidence compiled during this investigation, by letter dated November 8, 2016, the Retailer Operations Division charged ownership with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a) and noted the violations warranted a six-month disqualification period. The letter also stated that

under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

Appellant replied to the charges by fax on November 17, 2016. Appellant explained that the transactions were caused by a POS error. After giving consideration to the evidence and the retailer's reply, the Retailer Operations Division notified Appellant in a letter dated November 25, 2016, that the violations cited in the charge letter occurred at the firm and that a six-month period of disqualification was warranted. The letter stated that eligibility for a hardship CMP was not applicable as there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter dated December 1, 2016, Appellant requested an administrative review of the Retailer Operations Division's determination. The appeal was granted, and implementation of the sanction 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 clear 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, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 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.

7 CFR § 271.2 states in part that, "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 § 278.2(a) specifies in relevant part, "Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food." Further, the citation specifies that "Coupons may not be accepted in exchange for cash . . . or for any other nonfood use."

7 CFR § 278.6(a) states, inter alia, that "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 . . ." (emphasis added)

Section 278.6(e)(5) of the SNAP regulations states, in part, 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.”

In addition, 7 CFR § 278.6(f)(1) provides for civil money penalty (CMP) assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP households benefit because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It reads, 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 SNAP households benefit because there is no other authorized retail food store in the area selling as large a variety of staple food items.”

APPELLANT’S CONTENTIONS

Appellant made the following summarized contentions in its December 1, 2016, request for review, in relevant part:

- Appellant requests consideration of all the years it has served the SNAP.
- The disqualification will put the business in jeopardy and it is already going through a hard time.
- The violations were not intentional but a POS error.

The preceding may represent only a brief summary of the Appellant’s contentions presented 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

Investigation Details

Pueblo Supermarket is a medium grocery, originally authorized by FNS on July 7, 2007. During an investigation conducted between May 10, 2016 and June 23, 2016, a USDA investigator conducted five compliance visits at Pueblo Supermarket. A report of the investigation dated August 3, 2016, was provided to Appellant as an attachment to the charge letter. The investigation report included Exhibits A through E which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during four of the compliance visits and involved the sale of common ineligible items including bamboo skewers, cleaner, soap, all-purpose cleaner. The violative transactions were conducted by three clerks. Upon review, the evidence indicates 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, B, C, D, and E furnished with the charge letter.

As noted herein, 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

and supervision 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 provides through a preponderance of the evidence that the violations as reported occurred at the Appellant firm. The violations were determined by the Retailer Operations Division to represent the first sanction for the firm and evidence carelessness or poor supervision. Therefore, the imposition of a six-month disqualification, the least severe penalty allowed by regulation, is appropriate.

Consideration of Years Authorized

Appellant requests that all the years that it has served the SNAP be considered. The record shows that Pueblo Supermarket was authorized on July 2, 2007. Regarding this contention, 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 for mitigating the impact of the violations upon which they are based. 7 USC 2018 (b)(7)(e).

Ownership not Involved/POS Error

Appellant contends its employees conducted the transactions and the errors were caused by the POS system used that allowed the purchased of ineligible items. Although ownership was allegedly not involved in the violations, it cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. Regardless of whom the ownership of a store may utilize to handle store business, the ownership is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Ownership signed the FNS application to become a SNAP authorized retailer on May 17, 2007, which included a certification and confirmation that the owner 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.” The violations listed on this certification include accepting SNAP benefits for cash and as payment for ineligible items, a violation of the SNAP rules and regulations. 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. FNS sends all firms the SNAP Retailer Training Guide and instructional video in their approval package and requires ownership to share it with all employees to ensure compliance with rules and regulations. Firms are required to read the SNAP Retailer Training Guide and watch the instructional video.

Thus, that the POS system used by Appellant allowed ineligible items does not provide any valid basis for dismissing the charges or for mitigating the penalty imposition.

Remedial Action Taken

Appellant alleges that it has taken action to prevent these violations from happening again. 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 within the authority of this review to consider what subsequent remedial actions may have been taken or will be taken in the future so that a store may begin to comply with program requirements. 7 USC 2018 (b)(7)(e). Therefore, Appellant's contention that it has taken action to prevent the violations does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant Hardship

With regards to the Appellant's contention that a six-month disqualification will put it out of business, it is recognized that economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. 7 USC 2018 (b)(7)(e). To excuse ownership from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement 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 regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that the firm is incurring economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposition.

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 [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." 7 USC 2018 (b)(7)(e).

However, the Retailer Operations Division determined that there are two super store, one supermarket, one large grocery, and 12 medium groceries within a one-mile radius of Pueblo Supermarket. Thus, in its letter dated November 25, 2016, the Retailer Operations Division determined that a hardship CMP would not be appropriate, as there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices. Some degree of inconvenience to SNAP customers is inherent whenever any SNAP authorized retailer is disqualified. For example, the normal shopping pattern of SNAP customers may be temporarily altered during the period of disqualification. Nevertheless, the determination of the Retailer Operations Division that the six-month disqualification of Pueblo Supermarket from the SNAP would not create a hardship to customers, as differentiated from potential inconvenience, is sustained and a civil money penalty in lieu of disqualification is not appropriate in this case.

CONCLUSION

Based on a review of the evidence, the record indicates that the program violations at issue did occur at Appellant. The charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted by a USDA investigator. 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.

A review of the evidence in this case confirms that the Retailer Operations Division's initial determination to impose a six month disqualification in lieu of a CMP was proper. The record documents that the Retailer Operations Division properly considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations. Appellant is located in an area where there are other authorized SNAP retailers, selling as large a variety of staple food items at comparable prices. Given the evidence under review, the CMP was appropriately denied. Therefore, the six month disqualification of Appellant from participating as an authorized retailer in the SNAP is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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's owner resides or is 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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

MARY KATE KARAGIORGOS
ADMINISTRATIVE REVIEW OFFICER

January 27, 2017
DATE