

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

South Perry BP,)	
)	
Appellant,)	
)	
v.)	Case Number: C0182980
)	
Retailer Operations Division,)	
)	
Respondent.)	
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FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division (“ROD”) to impose a six-month disqualification against South Perry BP (“Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the ROD took appropriate action, consistent with Title 7 of Code of Federal Regulations (CFR) § 278.6(e)(5) in its administration of SNAP when it imposed a six-month period of disqualification against Appellant on September 7, 2016.

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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period July 15, 2015 through July 8, 2016. The investigation reported that personnel at Appellant accepted SNAP benefits in exchange for ineligible

merchandise on three separate occasions. These items sold during the violative transactions were cigarettes. Identification information developed during the investigation indicates that one unidentified male clerk was involved in the violative transactions. As a result of evidence compiled from this investigation, the ROD informed Appellant, in a letter dated August 11, 2016, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations “. . . warrant a disqualification period of six months (Section 278.6(e)(5)). Under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).”

Appellant replied to the charges in a subsequent letter to the ROD. The record reflects that the ROD received and considered this information prior to making a determination.

The Retailer Operations Division notified Appellant in a letter dated September 7, 2016 that the firm was being disqualified for six months from participation as an authorized retailer in SNAP. This determination letter also states that Appellant’s eligibility for a hardship civil money penalty (CMP) according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated to Appellant that “. . . you are not eligible for the CMP because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.”

On September 8, 2016, Appellant appealed the ROD’s decision to impose a six-month disqualification, and requested an administrative review of the action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means 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

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented 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.

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

APPELLANT'S CONTENTIONS

Appellant's contentions regarding this matter are essentially as follows:

- This is the first time that Appellant has been sanctioned for SNAP violations;
- The violations were the result of a single clerk's poor judgment;
- The clerks were trained on the proper handling of SNAP transactions;
- Appellant has changed its policies to ensure only eligible items are purchased with SNAP benefits;
- Appellant is planning to provide SNAP posters and brochures; and,
- Appellant was unaware of the violations by the clerk prior to receiving the charge letter.

The preceding may represent only a brief summary of Appellant's contentions . However, in reaching a decision, full consideration has been given to all contentions presented, including any not specifically recapitulated.

ANALYSIS AND FINDINGS

Appellant contends it was unaware of the violations by the clerk prior to receiving the charge letter. Appellant maintains the clerks were trained on the proper handling of SNAP transactions and the violations were the result of a single clerk's poor judgment. When ownership signed the FNS Application to become a SNAP authorized retailer, this included a certification and confirmation that Appellant 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 document include selling ineligible non-food items. Regardless of whom the ownership of a store may use to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions.

This review is limited to consideration of the circumstances at the time the ROD's decision was made. It is not within the scope of this review to consider actions Appellant may have taken subsequent to this decision to begin to comply with program requirements. There is no provision in SNAP regulations for reducing an administrative penalty on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, Appellant's updating of its policies and plans to provide SNAP posters and brochures, while positive steps, do not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

First SNAP Violation

Appellant's maintains that this is the first time there has been an issue related to SNAP. A record of program participation with no documented previous violations does not constitute valid grounds for mitigating the impact of the present charges of sale of nonfood items. Moreover, the investigation report shows that of the 5 times that nonfood violations were attempted, they were permitted by store personnel 3 times. Despite the sales being for cigarettes which can result in a more severe penalty, the ROD attributed violations to "carelessness, or poor supervision by the firm's ownership or management," pursuant to 7 CFR § 278.6(e)(5) of the SNAP regulations which provides for a disqualification of six months. This is consistent with Appellant's contention that violations were committed in error. Further, this penalty is only permitted if the firm has not been sanctioned previously. Therefore, a six-month disqualification for the violations committed, the minimum, is the appropriate sanction in this case.

Investigative Record

Based on a review of the evidence in this case, it is determined that the program violations at issue did, in fact, occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted under the supervision of a USDA investigator and all are fully documented. The investigative record is specific and thorough 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.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to impose a disqualification of six months against South Perry BP from participating as an authorized retailer in SNAP is sustained.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. A new application for participation in SNAP may be submitted ten (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 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant’s owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

/s/

RICH PROULX
ADMINISTRATIVE REVIEW OFFICER

October 24, 2016

DATE