

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

St. Louis Fish & Chicken #1,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0199078

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 St. Louis Fish & Chicken #1 (St. Louis Fish & Chicken 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 April 27, 2017, through September

12, 2017. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on five separate occasions. As a result of evidence compiled during this investigation, by letter dated September 27, 2017, 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 did not reply to the charges. After giving consideration the evidence, the Retailer Operations Division notified Appellant in a letter dated October 12, 2017, 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 postmarked October 9, 2017, ownership 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.”

SUMMARY OF CHARGES

St. Louis Fish & Chicken is a convenience store, originally authorized by FNS on October 2, 2015. During an investigation conducted between April 27, 2017, and September 12, 2017, a USDA investigator conducted five compliance visits at St. Louis Fish & Chicken. A report of the investigation dated September 19, 2017, 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 each of the five compliance visits and involved the sale of common ineligible items including paper towels, plastic forks, dish soap, sandwich bags, and laundry detergent. 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 A, B, C, D, and E furnished with the charge letter.

APPELLANT’S CONTENTIONS

Appellant made the following summarized contentions in its request for review postmarked October 9, 2017, in relevant part:

- Appellant apologizes.
- Appellant did not know that its employees did this.
- One clerk did not know what he was talking about because of the lack of training ownership provided.
- Ownership was going through some personal problems.
- Appellant promises to do all the training and promises that the transactions will never happen again.
- One employee did refuse to give cash.
- The disqualification will cause the store to close and all the family members will lose their jobs.

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.

ANALYSIS AND FINDINGS

The charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted by 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. 7 CFR § 278.6(e)(5) states that FNS shall disqualify a 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 common nonfood items due to carelessness and poor supervision by the firm's ownership or management. Therefore, the imposition of a six-month disqualification, the least severe penalty allowed by regulation, is appropriate.

Store Employee

Appellant does not deny that the violations occurred. Instead, Appellant explained that the transactions were conducted by employees because of the lack of training.

Regardless of whom the ownership of a store may utilize to handle store business (i.e., regardless of whether a store owner, store manager, store clerk, friend, family member, etc. was involved in the violative transactions), ownership is accountable for the proper handling of SNAP benefit transactions.

Prior to becoming authorized to participate in the SNAP on October 2, 2015, Appellant completed and submitted a SNAP Application for Retail Stores. The SNAP Application contained a section indicating that the person(s) signing the Application understood and agreed to ensure that store employees follow the SNAP rules and regulations and that the person(s) accepts responsibility for any SNAP violations that may occur at the store that were committed by any of the store's employees---paid, unpaid, new, temporary, full-time, part-time, etc.

The SNAP Application also included a section that contained a statement which acknowledged that the person(s) signing the Application was aware that violations of Program rules could result in fines, legal sanctions, withdrawal, or disqualification of the store. In addition, Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

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 and the enforcement efforts of the USDA.

Refused Cash

Appellant contends that one employee did not exchange cash for SNAP benefits. The Retailer Operations Division did note that the Appellant only exchanged minor non-food items for SNAP benefits and refused to exchange cash during the investigation. For this reason, the Retailer Operations Division did not charge Appellant for a more serious violation and only assessed a six-month disqualification. If Appellant had exchanged cash for SNAP benefits during the investigation, the store would have been permanently disqualified.

Corrective Action

Appellant contends that that these types of transactions will never occur again and that it will conduct all the necessary training. 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. There is no provision in the SNAP regulations for a waiver or a reduction of an administrative penalty assessment on the

basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, Appellant's contention that it will take corrective action to prevent future violations does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Economic Hardship

Appellant states that the disqualification will cause the business to close and several family members to lose their jobs. It is recognized that economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. 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 will incur 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." However, the Retailer Operations Division determined that there are nine authorized stores within a one-mile radius of Appellant. Thus, in its letter dated October 12, 2017, 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 St. Louis Fish & Chicken 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

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 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

November 30, 2017