

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

Stop & Choose Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0196355

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 (6) month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program¹ (SNAP) was properly imposed against Stop & Choose Inc (hereinafter, “Stop & Choose Inc” and/or “Appellant”) and its owners/corporate officers of record by the FNS Retailer Operations Division.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a) and (e) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a six (6) month disqualification against Stop & Choose Inc in a letter dated October 5, 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.

¹ Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

CASE CHRONOLOGY

The USDA conducted an investigation of the compliance of Stop & Choose Inc with Federal SNAP law and regulations which consisted of four (4) visits completed between February 27, 2017 and March 23, 2017.

The USDA-FNS Report of Positive Investigation (hereinafter, "Investigative Report") number TR3877 dated April 12, 2017 disclosed that on three (3) separate occasions Stop & Choose Inc personnel accepted SNAP benefits for merchandise that was ineligible for purchase with such benefits from a USDA Investigator. Identification information ascertained from the Investigative Report indicates that these SNAP violations were handled at Appellant firm by two (2) unidentified clerks.

As a result of the evidence compiled during the USDA investigation, in a letter dated May 1, 2017, the Retailer Operations Division, charged Appellant with violating 7 CFR § 278.2(a) of the SNAP regulations. A copy of the redacted Investigative Report was provided for consideration.

The Retailer Operations Division's record documents that following a brief extension at the request of counsel, and the completion of a Freedom of Information Act (FOIA) request, a written response was received from Appellant, through counsel, dated September 25, 2017.

The response requested the issuance of a warning letter in lieu of a six (6) month disqualification providing that:

- The demographic information for the New York, NY, 8th Congressional District² was not appropriately considered.
- Intentional SNAP violation is denied albeit the inability to identify and refute the transactions specifically are hindered thus resulting in a response that is compiled with an incomplete image of the situation.
- The materials infer the existence of clerks that have run afoul of the SNAP regulations for reasons including consideration of the special population of older, some disabled, and those lacking hope of the opportunity to make more money; and, attempting to be helpful to customers in need.

Following documented consideration of Appellant responses the Retailer Operations Division issued a final determination letter, dated October 5, 2017, assessing a six (6) month disqualification from participation as an authorized retailer in the SNAP against Stop & Choose Inc.

Appellant, through counsel, requested an administrative review of this action appealing the Retailer Operations Division's determination via letter dated October 19, 2017 that was received by the Chief of the Administrative Review Branch on October 23, 2017.

² On review it is noted that Appellant firm is located in Fall River, MA not New York, NY.

The appeal was granted and implementation of the sanction was held in abeyance, in accordance with 7 CFR § 279.4(a), until Appellant's voluntary withdrawal from SNAP effective January 11, 2018.

In an e-mail dated November 21, 2017 Appellant, through counsel, requested materials used by FNS in the development of the penalty in review through the filing of a Freedom of Information Act (FOIA) request. The FOIA request was fulfilled on January 30, 2018 with materials (redacted as appropriate) provided for consideration to Appellant, through counsel.

Appellant, through counsel, provided a supplemental brief dated February 20, 2018 for consideration.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions 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 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 (the "Act")³, 7 USC 2023 and 278 of Title 7 of the Code of Federal Regulations (CFR).⁴

7 CFR § 278.2(a) "Use of Coupons", states, in relevant part, "Coupons may be accepted by an authorized retail food store only from eligible households... only in exchange for eligible food."

7 CFR § 271.2 defines **Eligible foods**" in relative part as "**Any food and food product** intended for human consumption **except** alcoholic beverages, tobacco and **hot foods and hot food products prepared for immediate consumption...**" (Emphasis Added)

7 CFR § 278.6 establishes the authority upon which a period of disqualification may be imposed against an authorized food store or wholesale food concern in the event that it has failed to comply with the Act.

7 CFR § 278.6(e) provides the following, in relevant part, with respect to penalties that may be assessed against firms determined to have violated the Act or regulations:

³ Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment through P.L. 113-79, enacted February 7, 2014.

⁴ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

“...For the purposes of assigning a period of disqualification, a warning letter shall not be considered to be a sanction. A civil money penalty and a disqualification shall be considered sanctions for such purposes...”

7 CFR § 278.6(e)(5) applies to the period of disqualification under review, and specifies 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.”

7 CFR § 278.6(e)(7), states, that FNS shall,

“Send the firm a warning letter if violations are too limited to warrant a disqualification.”

7 CFR § 278.6(f)(1) provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP households because of the unavailability of a comparable participating food store in the area to meet their shopping needs.

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 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

USDA conducts investigations of the compliance of retail food stores, in part, to ascertain the nature and extent of SNAP violations that may be occurring. In the instant case the Investigative Report dated April 12, 2017, reveals that a USDA Investigator completed four (4) total investigative visits at Stop & Choose Inc between February 27, 2017 and March 23, 2017.

The report materials were provided to Appellant as attachments to the charge letter dated May 1, 2017 and included exhibits A through D that provide detail of the investigative results. Additionally, in response to the May 24, 2017 FOIA request materials, including photos of the items identified in each investigative visit and Appellant provided receipts were provided for consideration.

The Investigative Report reveals SNAP violations were recorded during three (3) of the four (4) reported visits, included as exhibits A, B, and C of the Investigative Report with the exchange of SNAP benefits for non-food items including wrapping paper, mittens, paper bowls, a t-shirt, a cutting board, and a roll of ribbon.

The violations are documented to have involved two (2) unidentified clerks, one (1) male and one (1) female. The Investigative Report further discloses that exchange of gloves and cash were refused in exhibit D, by the unidentified female clerk. .

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 because of the wrongful conduct of an owner, manager, or someone acting on their behalf.

APPELLANT’S CONTENTIONS

The request for appeal dated October 19, 2017 conveys that Appellant seeks to challenge the penalty based upon the evidence previously submitted.

In the supplemental brief dated February 20, 2018 Appellant, through counsel, requests a reversal of the decision to disqualify Appellant contending that:

- The SNAP customers in the geographic area surrounding Appellant includes include households with children and aged members.
- The clerks committed SNAP violations having taken pity on the investigator following appeals to their moral and ethical instincts.
- Ownership was unaware of the violations.

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

That SNAP benefits are not for the purchase of non-food items is clear in the “Act” and in the SNAP regulations, with noted exceptions, such as seeds used to grow food, and hunting equipment in remote areas of Alaska. This and other rules governing SNAP were provided to Appellant upon initial SNAP authorization in July 2015 upon initial SNAP authorization.

Geographic Area:

Notwithstanding the error in reference to the area in which Appellant operates, it is noted that the information regarding the makeup of SNAP households including children and aged members’ is a general contention not directly related to the incidence of SNAP violations currently in review. Therefore, no findings are rendered with regard to these specific contentions.

Appeal to Moral and Ethical Instincts:

Appellant contends that the SNAP violations included reactions by the unidentified clerks to their moral and ethical instincts, when they took pity on the investigator and the situation portrayed. This contention cannot be affirmed. Clearly there is implication that selling mittens in February in Massachusetts; providing a t-shirt at a reduced price paid by SNAP might result from pity being invoked; or even allowing paper bowls to be exchanged might relate to moral or ethical standards. However, the exchange of wrapping paper, a cutting board, and ribbon cannot be similarly explained. More importantly the SNAP regulations do not support explanations of influence to mitigate the SNAP violations as clearly described in the Investigative Report.

The SNAP regulations at 7 CFR § 278.6(e)(5) applies to the period of disqualification under review, and specifies 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.”

Owner Accountability:

The record indicates that one (1) of the owners of record signed the SNAP retailer application for Stop & Choose Inc on May 4, 2015 affirming that ownership was aware of and understood the SNAP regulations. That material includes a certification and confirmation that the owners “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 in exchange for cash, otherwise known as trafficking, and other violations including accepting SNAP benefits in exchange for ineligible non-food items. The latter describes the situation under review in the instant case.

Warning Letter:

Appellant, through counsel requests the issuance of a warning letter in lieu of disqualification citing that the non-food items were provided in an attempt to help the needy.

On review it is noted that beyond the Investigative Report the record includes photographs of the items listed as purchased (eligible and ineligible); and the “Food Stamp Purchase” customer copy receipts from “Stop Choose”; that directly correspond to the information presented in each of the Investigative Report exhibits. The evidence, coupled with the Certification of the Investigator as included on page 1 of the Investigative Report, which is an official government accounting of the events, support a conclusion that the violations as charged occurred at Appellant firm; and, affirms that FNS has met the burden of proof as cited in 7 CFR § 278.6(e)(5).

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 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.” The record reflects that the Retailer Operations Division has rendered a finding that pursuant to 7 CFR § 278.6(f)(1), it would not be appropriate to impose a civil money penalty in lieu of a period of disqualification on Appellant firm.

The Retailer Operations Division record reflects that Stop & Choose Inc is classified within FNS definitions as a convenience store; and, that there are at least three (3) SNAP authorized firms within a one (1) mile radius of Appellant. The availability of alternative SNAP Authorized venues is verified with a review of the SNAP Retailer Locator tool located at <https://www.fns.usda.gov/snap/retailerlocator> where 21 SNAP authorized firms are identified in the area where Appellant existed. Retailer Operations Division documented having reviewed the surrounding area and finding no indication that the alternative SNAP authorized firms would not provide a variety of staple foods at comparable prices to those of Appellant.

Based on the availability of the alternative SNAP authorized retailers the Retailer Operations Division has determined that the temporary disqualification of Appellant would not create a hardship to customers.

It is recognized that some degree of inconvenience to SNAP customers is inherent from the temporary disqualification of any participating food store. Although the normal shopping pattern of such SNAP customers may be temporarily altered during the period of disqualification, the determination that the disqualification of Stop & Choose Inc would not create a hardship to customers, as differentiated from potential inconvenience is sustained and a civil money penalty in lieu of disqualification is found not to be appropriate in this case.

CONCLUSION

The charges of violations are based on the findings of a formal USDA investigation in which all transactions cited in the letter of charges were fully documented and evidentiary materials are included in the record that validate the report as provided. A complete review of this documentation has yielded no swaying error or discrepancy. The Investigative Report is specific and thorough with regard to the dates of the violations and the specific related facts.

The documentation presented by the Retailer Operations Division clearly provides a preponderance of the evidence that the violations as reported occurred at Appellant firm and, 7 CFR §278.6(e)(5) specifies 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.”

It is established that the violations as described in the letter of charges dated May 1, 2017, did in fact occur at Appellant's firm, warranting a disqualification of six (6) months in accordance with 7 CFR §278.6(e)(5).

Based on the discussion above, the decision to impose a six (6) month disqualification against Stop & Choose Inc is proper and the action is sustained.

In accordance with the Act and regulations, **the six (6) month period of disqualification shall become effective thirty (30) days after receipt of this letter.** Appellant may submit a new application for SNAP participation ten (10) days prior to the expiration of the six (6) month disqualification period. However, it is noted that in the instant case Appellant has voluntarily withdrawn as a SNAP retailer effective January 11, 2018, therefore the penalty will not be imposed.

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, 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.

NANCY BACA-STEPAN
Administrative Review Officer

February 21, 2018