

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

Stop N Go,

Appellant,

v.

Case Number: C0202451

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 six-month disqualification from the Supplemental Nutrition Assistance Program (SNAP) as initially imposed by the Retailer Operations Division.

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 disqualification against Stop N Go.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulation at 7 CFR § 279.1 provides 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 Stop N Go with Federal SNAP law and regulations from October 2017 through November 2017. In a letter dated February 27, 2018, the Retailer Operations Division charged the Appellant store with accepting SNAP benefits in exchange for merchandise which

included ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on three (3) out of seven (7) compliance visits. The letter further informed the Appellant that the chargeable violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5). The Appellant was informed it could respond to the charges within ten (10) calendar days following delivery of the charge letter. The charge letter was delivered to the store via UPS on February 28, 2018.

An alleged relative of the store owner contacted the Retailer Operations Division during a phone call on February 28, 2018. The Retailer Operations Division properly informed the caller that it could not discuss certain details of the case without the owner's permission. However, the relative expressed his doubts regarding the veracity of the investigation report on a number of grounds including allegations that the store does not sell the items listed in the investigation report. No further contact or written information was received from the Appellant.

After considering the evidence in the case, the Retailer Operations Division issued a determination letter dated March 13, 2018. The determination letter informed the Appellant it 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 dated March 22, 2018, the Appellant requested an administrative review of the Retailer Operations Division's determination. The request for review was granted. Upon acceptance of the administrative review request, implementation of the six-month disqualification was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an 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 law in this matter is covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulation 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, in part:

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

7 CFR § 271.2 states that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the “Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

7 CFR § 271.2 states, in part:

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, 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....

7 CFR § 278.6(e) states, in part:

FNS **shall** take action as follows against any firm determined to have violated the Act or regulations ... (5) **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 non-food items** due to carelessness or poor supervision by the firm’s ownership or management. [Emphasis added.]

7 CFR § 278.6(f)(1) states, 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.

SUMMARY OF THE CHARGES

During an investigation conducted from October 2017 through November 2017, the USDA conducted seven (7) compliance visits at Stop N Go. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated February 27, 2018. The investigation report included Exhibits A through G which provide full details on the results of each compliance visit.

The investigation report documents that SNAP violations were recorded during three (3) of the seven (7) compliance visits. The chargeable violations involved the sale of five (5) ineligible items in exchange for SNAP benefits in violation of 7 CFR § 278.2(a). These ineligible items included a roll of bathroom tissue, a box of trash bags, a box of sandwich bags, a box of plastic wrap, and a pack of foam bowls as documented by Exhibits D, E and F. These violations were conducted by a single clerk. This same clerk refused to exchange SNAP benefits for two (2) packages of white t-shirts in Exhibit B, two (2) rolls of bathroom tissue in Exhibit C, and cash in Exhibit G.

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its response to the charge letter and its request for administrative review, in relevant part:

- The employee who conducted the alleged transactions states that he did not sell any ineligible items in exchange for SNAP benefits.
- The clerk refused the exchange of two (2) packages of white t-shirts, two (2) rolls of bathroom tissue and cash for SNAP benefits. This shows that he had an understanding of what is, and is not, eligible for the SNAP.
- The clerk allegedly sold a roll of bathroom tissue for SNAP benefits during a compliance visit when he refused such an exchange on a previous visit. The investigator likely put the bathroom tissue out of sight when making the transaction.
- The store does not sell trash bags, sandwich bags, plastic wrap or foam bowls.
- All of the alleged ineligible items exchanged for SNAP are listed in the investigation report as NPI for no price indicated. However, the store has price tags on all of its items. Since none of the ineligible items have prices listed on the investigation report, the investigator probably thought he bought those items, while the clerk did not charge him for those items.
- A six-month disqualification is very harsh as the store has never had any previous violations.
- The owner was out of the country when these alleged transactions occurred but will continue to give a greater amount of extensive training and provide more clarity on what is eligible and ineligible for the SNAP.

- The store should be eligible for a CMP as many times customers stop by as the store also sells gas and has longer opening hours. Local customers would have a difficult time finding an open store as there is not another gas station nearby, a lot of customers walk, and public transport would not be running at early or late hours.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Owner Responsibility

Although the owner was allegedly out of the country and was 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 owner of a store may utilize to handle store business, the owner is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow a store owner to disclaim accountability for the acts of persons whom the owner 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.

Lastly, the store owner signed the SNAP application for Stop N Go on December 4, 2012. That application included a signed certification 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 in exchange for cash, otherwise known as trafficking, and other violations including accepting SNAP benefits in exchange for ineligible non-food items.

Investigation Report

The Appellant attacks the veracity of the investigation report on several grounds including an a speculative claim that the investigator likely put a roll of toilet paper out of sight of the clerk when making one of the transactions. The Appellant also claims that all items in the store have price labels and that the store does not sell sandwich bags, foam bowls, plastic wraps or trash bags. The Appellant also makes a conflicting claim that the investigator thought he purchased these ineligible items when the clerk actually did not charge him for these items.

In contrast to the Appellant's unsubstantiated claims, the investigation file contains pictures of the eligible and ineligible items purchased during each compliance visit along with the corresponding EBT transaction receipt. These pictures are sufficient evidence that the store does sell these items and not all items in the store have a price label affixed. It should also be noted that a 2013 store visit report conducted prior to the store's initial authorization contains pictures of the store inventory showing that at that time it did sell sandwich bags, foam bowls and cups, and plastic wrap. In summary, the Appellant's arguments against the veracity of the investigation report lack credibility and are not supported by a preponderance of the evidence.

The investigation report documents 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 known 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 investigation report documents by a preponderance of the evidence that personnel at the store exchanged ineligible items for SNAP benefits.

Violations Warrant a Six-Month Disqualification

The Appellant states that a six-month disqualification is too harsh. The SNAP regulation at 7 CFR § 278.6(e)(5) states, in part that "FNS shall take action as follows against any firm determined to have violated the Act or regulations ... **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 non-food items due to carelessness or poor supervision** by the firm's ownership or management." [Emphasis added.] FNS considers the sale of a total of three (3) inexpensive non-food items over one, two or three transactions to equate to carelessness and the lack of thorough supervision on the part of ownership or management.

The investigation report documents that the chargeable violations in this case consisted of five (5) non-food items exchanged for SNAP benefits over three (3) transactions. Although the same clerk refused to exchange SNAP benefits for ineligible items in Exhibits B and C and cash in Exhibit G, this does not ameliorate or mitigate the penalty for exchanging SNAP benefits for non-food items as documented by Exhibits D, E and F. Therefore, the Retailer Operations Division correctly determined that the violations warranted a six-month disqualification.

Corrective Action

The Appellant claims that in future it will continue to give a greater amount of extensive training and provide more clarity on what is eligible and ineligible for the SNAP. With regard to this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is limited to what circumstances existed at the time that was the basis of the Retailer Operations Division's action. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that a store may begin to comply with program requirements.

In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations. Therefore, the Appellant's contention that corrective action has taken place does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

The Retailer Operations Division determined that the Appellant was not eligible for a hardship 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."

The case record documents that the Retailer Operations Division determined that a six-month disqualification of Stop N Go, a convenience store, would not cause a hardship to SNAP households as there are other comparable or larger SNAP authorized stores located within a one-mile radius of the Appellant store. These include two (2) other convenience stores, a medium grocery store and a supermarket. In fact, the supermarket is located adjacent to Stop N Go.

Based on this evidence, a six-month disqualification of Stop N Go would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division 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 established that the violations as described in the letter of charges did in fact occur at Stop N Go 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 non-food 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 Stop N Go, Appellant, is appropriate and the action is sustained.

In accordance with the Act and regulations, the six-month period of disqualification shall become effective thirty (30) days after receipt of this letter. The Appellant may submit a new application for SNAP authorization ten (10) days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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, 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.

RONALD C. GWINN
Administrative Review Officer

May 22, 2018