

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

Sweeny’s Mini Mart #1,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0193272

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 Sweeny’s Mini Mart #1 (Sweeny’s Mini Mart #1 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 February 16, 2016, through March

2, 2016. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. As a result of evidence compiled during this investigation, by letter dated September 7, 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 replied to the charges by fax on September 27, 2017. Appellant explained that staff been trained and requested a monetary fine. After giving consideration to the retailer's reply and the evidence, the Retailer Operations Division notified Appellant in a letter dated September 26, 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 12, 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

Sweeny’s Mini Mart #1 is a convenience store, originally authorized by FNS on February 18, 2016. During an investigation conducted between February 16, 2017, and March 2, 2017, a USDA investigator conducted three compliance visits at Appellant. A report of the investigation dated July 20, 2017, was provided to Appellant as an attachment to the charge letter. The investigation report included Exhibits A through C which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during each of the three compliance visits and involved the sale of common ineligible items including soap, fabric softener, 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, and C furnished with the charge letter.

APPELLANT'S CONTENTIONS

Appellant made the following summarized contentions in its request for review postmarked October 12, 2017, in relevant part:

- The investigator was entrapping the clerk.
- The employee was not going to make the sale but the investigator insisted.
- The investigator indicated that he previously was allowed to purchase items and therefore the employee believed that he was going to be reprimanded by the owner and under pressure to make the sale.
- There were inconsistencies in the investigator's story because the employee could not be in the store looking out the store window and outside the store at the same time.
- Appellant is located in a rural area of the Bronx and is far from any store offering food items for sale, with the closest store located nearly a mile and half away.
- Most of the customers do not drive and Appellant's prices are lower than others.

In support of its contentions, Appellant provided seven handwritten letters from customers explaining that Appellant's SNAP disqualification will cause a hardship for them.

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

Appellant contends that there were inconsistencies in the investigator's report, such as how could the employee look out the store window and be outside of the store at the same time. However, the report does not indicate that the employee was looking out the "store" window and it seems to state the employee was looking at the investigator through the investigator's car window and not the store window.

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 explained that the transactions were conducted by an employee who was also stealing money. 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 September 27, 2013, 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.

Entrapment

Appellant contends that the investigator was entrapping the clerk. The investigative record does not indicate that any act was committed by the investigator to entrap any individual. Appellant's clerks were merely provided opportunities to violate the SNAP laws and regulations. Multiple The two clerks did so of their own free will without threats or inducement of any kind. The record supports that the experienced

USDA investigator is fully aware that any action that would threaten, harass, intimidate, pressure, and invoke sympathy; or any other act that could be considered entrapment is against USDA rules and regulations. As such, the record offers a straightforward and complete account of the interactions by the USDA investigator with Appellant's clerks. The investigative record does not contain any evidence indicating activity characteristic of entrapment, nor has ownership provided evidence to support this claim.

Corrective Action

In Appellant's reply to the Retailer Operations Division, it explains that staff has been reassigned and have been in repeated training sessions. 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. **5 U.S.C. § 552 (b)(7)(E)**. Therefore, Appellant's contention that it took corrective action to prevent future violations does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

Appellant contends that it is located in a rural area of the Bronx and that the closest store is nearly a mile and half away. Appellant explains that most of the customers do not drive and Appellant's prices are lower than other stores. Appellant provided seven letters from customers describing their hardship if Appellant were to be disqualified. Appellant did not submit any evidence to support that its prices were lower than the nearby stores.

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." Although Appellant indicates it is located in a rural area of the Bronx, New York; according to the Rural Healthy Information Hub query tool – Am I Rural?-Report, Appellant's address is not considered to be a rural area. Moreover, the Retailer Operations Division determined that there are ten authorized stores located within a one-mile radius of Appellant. Thus, in its letter dated September 28, 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.

Each of the addresses provided by the customers was inputted into Google Maps and it was determined that each household that provided an address was able to walk and/use public transportation to stores located less than one mile from its provided address. 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 Sweeny's Mini Mart #1 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 17, 2017