

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

Borderline Beverage,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0211175

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a six-month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Borderline Beverage (hereinafter “Appellant”) by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it imposed a six-month disqualification against Borderline Beverage.

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

FNS records show that the Appellant firm, Borderline Beverage, was initially authorized for SNAP participation as a convenience store on March 14, 2008. Between August 17, 2018, and December 19, 2018, FNS conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigation report documented that personnel at Borderline Beverage accepted SNAP benefits in exchange for ineligible items on four separate occasions. According to the report, the Appellant firm sold sponges, dish soap, masking tape, and clothing in exchange for SNAP benefits, which benefits may only be used for the purchase of eligible foods.

In a letter dated May 15, 2019, the Retailer Operations Division charged the Appellant with violating SNAP regulations at 7 CFR § 278.2(a). The charge letter stated that the acceptance of SNAP benefits in exchange for ineligible nonfood merchandise warranted a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further stated that under certain conditions and in accordance with § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

In an e-mail dated May 20, 2019, the Appellant responded to the charges, apologizing for the violations and explaining that the mistakes were the result of employees who were being trained. The Appellant further explained that the store accepts both SNAP benefits and cash benefits through the EBT card, but the employees got confused and made mistakes. The Appellant stated that it has been operating the store for a long time and has never had this happen before, and offered its assurance that it would never happen again.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated May 21, 2019. This letter informed the Appellant that it was the determination of the Retailer Operations Division that violations did occur as outlined in the charge letter and that a six-month disqualification penalty would be imposed in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that consideration for a hardship CMP was given, but that the Appellant was not eligible for a CMP because there were other authorized stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked May 30, 2019, the Appellant, through counsel, appealed the agency's determination by requesting an administrative review. The request was granted and implementation of the disqualification has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 law in this matter is found in the Food and 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)(5) establish the authority upon which a six-month disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for 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.... **Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction;** for [a] period of 12 months to 10 years for a firm's second sanction; and disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section. [Emphasis added.]

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination...

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...The FNS regional office shall:

(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 nonfood items due to carelessness or poor supervision by the firm's ownership or management.

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 subject to a disqualification is selling a substantial variety of staple food items, and 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.

INVESTIGATION DETAILS

During an undercover investigation conducted between August 17, 2018, and December 19, 2018, the Food and Nutrition Service completed five compliance visits at Borderline Beverage. The agency record indicates that a report of the investigation was provided to the Appellant as an

attachment to the May 15, 2019, charge letter. The investigation report includes Exhibits A through E, and provides full details on the results of each compliance visit. SNAP violations were documented during four of the five visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report states that the following nonfood items were purchased by an investigator using SNAP benefits:

- One 2-pack of sponges (*Ocelo* brand), Exhibit A
- One 10-fluid-ounce bottle of dish soap (*Palmolive* brand), Exhibit A
- One roll of masking tape (*Autostore* brand), Exhibit B
- One 2-pack of sponges (*Ocelo* brand), Exhibit C
- One 8-fluid-ounce bottle of dish detergent (*Dawn* brand), Exhibit C
- One black “New England Nation” sweatshirt (no brand indicated), Exhibit D

The report indicates that in Exhibit B, the investigator attempted to purchase a toy dog and a toy seal with SNAP benefits, but these attempts were rejected. In Exhibit E, the clerk on duty refused to allow an exchange of SNAP benefits for cash (i.e. trafficking). The report states that two separate clerks conducted the four violative transactions.

The charge letter states that the violations that occurred in Exhibits A, C, and D warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5).

APPELLANT’S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- It is the Appellant’s opinion that a hardship civil money penalty is applicable because the store provides unique services and goods that differentiates it from other participating stores in the area.
- The firm serves a community in which there is a significant number of low income housing units. It is also unique in that it is easily accessible and does not cause local residents to cross busy roadways where ambulatory travel would be dangerous.
- The store sells specialty products that other stores in the area do not sell.
- It would be a hardship for local residents should the firm’s SNAP privileges be suspended.
- Appellant provided several statistics regarding low income and very low income households in the town of Somersworth, New Hampshire, including the number of renting households; rent overburdened households; average household size; number of low income housing apartment complexes nearby; monthly EBT sales; average number of EBT customers at the store; and approximate total customer visits per day.
- Many EBT customers visit the store on foot and it is remarkably accessible to local patrons, as it is near several low income residences and has safe sidewalk access. Customers do not have to cross busy intersections to patronize the store and there are nearby crosswalks and ample parking spaces.

- Most other local food sources, such as Walmart, Target, etc., and smaller convenience stores, do not possess the same close proximity to low income housing coupled with easy and safe foot access to customers.
- If the disqualification is upheld, EBT users would lose access to many healthful foods provided by the firm, such as fresh deli sandwiches, cold cuts, tuna salad, chicken salad, and other mixed meat products. The store is also the only convenience store in the area which sells Chester's Fried Chicken, which is sold cold. The store also provides its customers with a variety of fresh produce, including lettuce, tomatoes, bananas, apples, oranges, onion, potatoes, etc. It also sells dairy products, snack food items, and child-friendly snacks and meals. It also offers a larger selection of beverages than other small convenience stores.
- Prior to this incident, Borderline Beverage has not been cited for an infraction, and continues to provide adequate training to its employees. This incident was an oversight and store management will not let such an oversight occur again. The errors will be corrected with augmented training of the clerk in question and with all other clerks handling EBT items.
- If the firm were to lose its SNAP privileges, it would create an extreme hardship to the many low income individuals and families who shop at the store. As such, the Appellant requests a hardship CMP rather than disqualification.

To support its contentions, the Appellant submitted two photographs showing the store's safe, accessible location.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced in this document.

ANALYSIS AND FINDINGS

The Appellant has not provided any evidence or documentation to counter FNS's investigation report. In fact, the Appellant has acknowledged that mistakes were made and were simply an oversight that store management claims will not happen again. Because the Appellant has not refuted the allegations, it is the determination of this review that SNAP violations did occur as charged and that a six-month disqualification is warranted. The balance of this review will address the Appellant's remaining contentions.

Hardship to Households / Civil Money Penalty

The Appellant, through counsel, has provided a lengthy explanation for why it believes a hardship civil money penalty is warranted in this case. In short, the Appellant believes that its convenient and safe location and its food offerings are unique, and claims that a disqualification would cause hardship to the many low-income individuals and families who live in the area.

With regard to these contentions, it is recognized that some degree of inconvenience to SNAP recipients is likely whenever a retail food store is disqualified and households are forced to use their benefits elsewhere. To address potential difficulties that SNAP households might face when

a firm is disqualified, regulations at 7 CFR § 278.6(f)(1) allow for a CMP to be imposed instead of disqualification when the firm's disqualification would cause "hardship" to SNAP households. According to this regulation, hardship occurs when there is "no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices."

It is the determination of this review that a disqualification of Borderline Beverage, a convenience store, would not cause hardship to SNAP households because there are other shopping options in the area. According to agency records, there are at least five similarly-stocked or larger SNAP-authorized retail stores located within a one-mile radius of Borderline Beverage, including a similar-sized convenience store located directly across the street. There is also no evidence that Borderline Beverage sells its inventory at unusually low prices in comparison to nearby stores.

It is further recognized that some SNAP households may experience a certain level of inconvenience because a small number of unique food items, such as deli sandwiches or cold fried chicken, are temporarily unavailable for purchase with SNAP benefits at Borderline Beverage. However, such inconvenience does not rise to the level of hardship, which, as noted earlier, is defined as the absence of other authorized retail food stores in the area. The purpose of SNAP is not to provide households with every desired food variety, but to offer nutrition assistance to low-income individuals and families. With that objective in mind, it is clear to this review that nutritious food options are readily available in the immediate area of Borderline Beverage.

Because hardship conditions do not exist in this case, the Appellant's request for a civil money penalty in lieu of disqualification cannot be granted.

No Prior Violations

The Appellant contends that prior to this incident, Borderline Beverage had not been cited for any program infractions. This contention implies that because of the firm's history of complying with SNAP rules, the disqualification penalty should be reconsidered or modified.

Unfortunately, the law is clear that when program violations occur, specifically the exchange of ineligible nonfood items for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management, a six-month disqualification is the required penalty, even on the first occasion. In this case, the sanction imposed by the Retailer Operations Division for these first-time violations is entirely in line with SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations. As such, a dismissal or modification of the six-month disqualification is not appropriate.

Remedial Actions Taken

The Appellant contends that this incident was an oversight and claims that store management will not let such an oversight occur again. According to the Appellant, the errors will be corrected with augmented training of the clerk in question and with all other clerks handling EBT items.

With regard to this contention, it must be stated that the purpose of this review is to either validate or invalidate the determination of the Retailer Operations Division. This review is limited to the facts that existed at the time the violations were committed. It is not the authority of this review to consider any subsequent remedial actions, such as conducting additional training, that may have been taken or that will take place so that a store may enhance or 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 on the basis of alleged or planned corrective actions implemented after the discovery of program violations.

CONCLUSION

Based on a review of all information in this case, this administrative review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at Borderline Beverage during a USDA investigation. All transactions cited in the letter of charges were either conducted or supervised by a USDA investigator and all are thoroughly documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record appears to be specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for ineligible, nonfood merchandise, and in all other critically pertinent details. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, Borderline Beverage, is sustained.

In accordance with the Act and regulations, the disqualification penalty shall become effective 30 days after receipt of this decision. A new application for SNAP authorization may be submitted 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 Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

August 28, 2019