

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

Taco Time, Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0225132

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 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, when it imposed a six-month disqualification against Taco Time, Inc.

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 Taco Time, Inc. with Federal SNAP law and regulations in March and April 2020. In a letter dated August 5, 2020, 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 during three (3) out of four (4) compliance visits. The letter further informed the Appellant that the chargeable violations warranted a six-month disqualification period 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 Appellant on August 6, 2020 as documented by a UPS delivery notification in the case record.

On August 13, 2020, the Appellant replied to the charges in an emailed letter to the Retailer Operations Division. The Appellant stated that the violations were the honest mistake of an aging employee. The Appellant also stated that the store has taken corrective action in retraining store employees to ensure this never happens again. The Appellant requested leniency and noted that a six-month disqualification would be detrimental to the business, store employees and the local SNAP community that relies upon the store to meet its nutritional needs.

After considering the Appellant's contentions and the evidence in the case, the Retailer Operations Division issued a determination letter dated January 11, 2021. The determination letter informed the Appellant it was disqualified from the SNAP for a six-month period 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. The determination letter was delivered to the Appellant on January 14, 2021 as documented by a UPS delivery notification in the case record.

In a letter postmarked January 21, 2021, 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 in March and April 2020, the USDA conducted four (4) compliance visits at Taco Time, Inc. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated August 5, 2020. The investigation report included Exhibits A through D 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 four (4) compliance visits as documented by Exhibits A, B, and D. The chargeable violations in Exhibits A, B, and D involved the sale of the following items in exchange for SNAP benefits:

- A 4-roll package of Charmin Essentials soft toilet paper;

- A package of Veela baby wipes (80 wipes);
- A package of Axxion soak-proof foam plates (22 plates);
- A 24-piece box of Ri-pac Plastic Cutlery (8 forks, 8 spoons, 8 knives);
- Four (4) rolls of Cotton Bay 2-Ply white bath tissue toilet paper.

The violations were conducted by a single clerk. In Exhibit C, this clerk refused to exchange non-food items for SNAP benefits. In Exhibit D, this clerk also refused to exchange cash for SNAP benefits. However, these refusals do not negate or mitigate the chargeable violations documented in Exhibits A, B, and D.

APPELLANT'S CONTENTIONS

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

- The clerk who conducted the violations made an honest mistake possibly due to age and memory loss. He conducted these violations without malice or intent to cheat the system. There was no financial gain, no benefit, and no advantage to anyone in his actions.
- The store has taken corrective action in hiring new staff to ease the role of this employee and giving him other duties to perform away from the register.
- The store has taken corrective action in going over the SNAP rules with all staff to ensure these violations never occur again.
- It would be a disservice to the community to subject the store to a six-month disqualification.
- A six-month disqualification would represent burden the business and its owners.

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

Investigation Report

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 by, or 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.

Owner Accountability

Store owners are at all times accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. In addition, a store owner signed the SNAP application on behalf of all the owners of Taco Time, Inc. on August 1, 2018. That application included a signed certification that the owner(s) 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 as repayment on credit accounts or in exchange for ineligible non-food items.

Violations Warrant a Six-Month Disqualification

The Appellant requests leniency and states that the violations were honest mistakes and were not conducted with malice or intent to cheat the system. Regarding this contention, the violation of accepting SNAP benefits for ineligible non-food items does not require an element of intent upon the part of the violator. Therefore, whether or not the violations were intentional or an honest mistake is not relevant.

The SNAP regulations 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.]

The investigation report documents that the number of chargeable violations over multiple transactions in this case equate to carelessness or poor supervision by ownership. Therefore, the Retailer Operations Division correctly determined that the violations warranted a six-month disqualification, **the least severe penalty** allowed by regulation under these circumstances. This review does not have the authority to waive or reduce the regulatory six-month disqualification in this case.

Corrective Action

The Appellant states that corrective action has been taken to ensure these violations never occur again. 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 corrective 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.

Hardship to the Business

The Appellant indicates that the store relies upon its participation in the SNAP and the business and its owners will be burdened by a six-month disqualification. With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in the 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 either the owners personally or to the firm resulting from the imposition of such penalty. To allow stores to be excused from assessed administrative penalties based on a purported economic hardship would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

HARDSHIP 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." [Emphasis added.]

The case record documents that the Retailer Operations Division determined that a six-month disqualification of Taco Time, Inc., a convenience store, would not cause a hardship to SNAP households as there are other comparable or larger SNAP authorized stores in the area. The Retailer Operations Division determined through agency mapping systems that there are eleven (11) SNAP authorized stores located within a one-mile radius of Taco Time, Inc. These SNAP authorized stores include a medium grocery store, a large grocery store, a supermarket and a superstore. The supermarket is located only 0.31 miles away and the superstore is located only 0.44 miles away. These larger stores likely carry a greater depth and variety of staple food at comparable or better prices. There is also no evidence that Taco Time, Inc. carries any specialty or international foods that cannot be obtained at these other SNAP authorized locations.

Based on the analysis above, a six-month disqualification of Taco Time, Inc. 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 Taco Time, Inc. warranting a disqualification of six (6) 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 Taco Time, Inc., 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. Please note that the judicial filing timeframe is specified in the Act, and this office cannot grant an extension.

Under the Freedom of Information Act, FNS is 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

April 7, 2021