

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

Whitman Convenience Store,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0186777

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 month disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Whitman Convenience Store by the Retailer Operations Division of FNS.

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 period of disqualification against Whitman Convenience Store on March 31, 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.

CASE CHRONOLOGY

The Department of Agriculture conducted an investigation of the compliance of Whitman Convenience Store with Federal SNAP law and regulations during the period April 18, 2016 through May 19, 2016. In a letter dated August 12, 2016, the Retailer Operations Division

charged the Appellants with accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on four out of four compliance visits. The letter further informed the Appellants that the violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5).

In a telephone conversation with Retailer Operations Division staff on August 22, 2016, the Appellants replied to the charges therein indicating that the violative SNAP transactions were committed by a store employee who had inadvertently allowed ineligible items to be purchased with SNAP benefits without the firm's knowledge, consent, or approval.

After reviewing the evidence and the Appellants' reply, the Retailer Operations Division issued a Determination Letter dated March 31, 2017. The Determination Letter informed the Appellants that they were 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 Appellants' eligibility for a hardship civil money penalty (CMP) under 7 CFR § 278.6(f)(1). The Retailer Operations Division determined that the Appellants were 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 postmarked April 7, 2017, the Appellants appealed the Retailer Operations Division's assessment and requested an administrative review of this action. 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, the Appellant bears the burden of proving by a 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, 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulations 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, *inter alia*:

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

7 CFR § 271.2 states, *inter alia*:

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, *inter alia*:

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)(5) states, *inter alia*:

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, *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 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

During an investigation conducted from April 18, 2016 through May 19, 2016, USDA conducted four compliance visits at Whitman Convenience Store. A report of the investigation was provided to the Appellants as an attachment to the Charge Letter dated August 12, 2016. 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 four of the four compliance visits and involved the sale of a variety of items best described in regulatory terms as “common nonfood items”. The exchange of these ineligible items for SNAP benefits is in violation of 7 CFR § 278.2(a).

APPELLANTS' CONTENTIONS

On review, the Appellants' contentions are essentially the following:

- The SNAP violations were committed by a store employee who inadvertently allowed ineligible items to be purchased with SNAP benefits without the firm's knowledge, consent, or approval;
- This is the first time that Whitman Convenience Store has been cited for any SNAP violations;
- To ensure that these types of SNAP violations do not occur in the future, the Appellants have: (1) Released the store employee responsible for the SNAP violations from his employment at Whitman Convenience Store; (2) Hired new store employees who have been trained on the SNAP regulations to conduct SNAP transactions; and (3) Been extremely careful not to repeat any violative SNAP transactions at Whitman Convenience Store since receiving the Charge Letter from FNS; and
- The Appellants are requesting that FNS reconsider its decision to disqualify Whitman Convenience Store from the SNAP for six months and allow them to continue to participate in the SNAP.

The preceding may represent only a brief summary of the Appellants' contentions 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

The Appellants do not dispute the facts as described in the investigation report. A review of the case record shows 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 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 establishes by a preponderance of the evidence that the violations as reported occurred at the subject store.

SNAP Violations Made Without the Firm's Knowledge, Consent, or Approval

The Appellants contend that the SNAP violations were committed by a store employee who inadvertently allowed ineligible items to be purchased with SNAP benefits without the firm's knowledge, consent, or approval. This contention cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. As owners of the store, the Appellants are liable for all violative transactions that occur at Whitman Convenience Store. 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 November 17, 2015, the Appellants 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, the Appellants were provided with program training and reference materials which reinforced the statements included in the SNAP Application.

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. In this case, the individuals who committed the SNAP violations were not specifically identified during the investigation. A six month disqualification is the appropriate sanction for violations which result from employees not being fully aware of the SNAP rules, the carelessness of employees, or due to inadequate supervision by the store owner. As 7 CFR § 278.6(e)(5) of the SNAP regulations states, "Disqualify the firm for six months if ... the evidence shows that personnel of the firm have committed violations ... due to the carelessness or poor supervision by the firm's ownership or management". The Appellants' implied contention that the SNAP violations were committed by a store employee who inadvertently allowed ineligible items to be purchased with SNAP benefits without the firm's knowledge, consent, or approval cannot be accepted as a valid basis for diminishing the penalty. 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.

First Time Violators

The Appellants contend that this is the first time that Whitman Convenience Store has been cited for any SNAP violations. However, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

Corrective Action Implemented

The Appellants contend that in order to ensure that these types of SNAP violations do not occur in the future, they have: (1) Released the store employee responsible for the SNAP violations from his employment at Whitman Convenience Store; (2) Hired new store employees who have been trained on the SNAP regulations to conduct SNAP transactions; and (3) Been extremely careful not to repeat any violative SNAP transactions at Whitman Convenience Store since receiving the Charge Letter from FNS.

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 the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellants' contention that they have taken corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Second Chest Requested

The Appellants are requesting that FNS reconsider its decision to disqualify Whitman Convenience Store from the SNAP for six months and allow them to continue to participate in the SNAP. However, 7 CFR § 278.6(e)(5) of the SNAP regulations is specific in 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 by employees or poor supervision by the firm's ownership or management". As such, the Retailer Operations Division's decision to impose a six month SNAP disqualification for Whitman Convenience Store is appropriate for the SNAP violations that occurred during the investigation period.

CIVIL MONEY PENALTY

The Retailer Operations Division determined that the Appellants were 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]. Please note that internal FNS policy memoranda clarifies the regulation by defining "in the area" to mean within a one-mile radius for an urban store such as Whitman Convenience Store. The location of Whitman Convenience Store is classified as a primarily urban area by 2010 Federal Census data.

The case record documents that the Retailer Operations Division determined that the six month disqualification of Whitman 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 firm. Whitman Convenience Store is classified by FNS as a convenience store. Agency mapping systems document that there are 5 comparable or larger SNAP authorized stores within a one-mile radius of the Appellant store. These authorized SNAP stores include 3 convenience stores, 1 combination grocery store, and 1 supermarket.

Based on the evidence, the disqualification of Whitman Convenience Store would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division's 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 therefore established that the violations as described in the letter of charges did in fact occur at Whitman Convenience Store 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 nonfood 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 Whitman Convenience Store, the Appellant, is appropriate and the action is sustained.

In accordance with the Food and Nutrition Act of 2008 and the regulations there under, the six month period of disqualification shall become effective thirty (30) days after receipt of this letter. A new application for participation may be submitted by the firm ten (10) days prior to the expiration of this six month period.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to 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.

LORIE L. CONNEEN
Administrative Review Officer

January 16, 2018