

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

Yoders Gift Shop,

Appellant,

v.

Case Number: C0201393

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to assess a hardship civil money penalty (CMP) against Yoders Gift Shop in lieu of a six-month disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), § 278.6(e)(5 and 6), and § 278.6(f)(1) in its administration of the SNAP when it assessed a hardship CMP in lieu of a six month period of disqualification against Appellant on February 27, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period November 8, 2017, through January 3, 2018. The investigation determined that personnel at Appellant's store accepted SNAP benefits in exchange for ineligible merchandise, including one major ineligible item, on four separate occasions. All four transactions were deemed clearly violative and warrant a six month disqualification period. The items sold are best described in regulatory terms as common nonfood items and included items such as cologne (major ineligible item), toilet tissue, paper plates, air freshener, paper towels, and cleaning wipes. The investigative report indicates that these violative transactions were handled by three unidentified clerks. The investigative report also noted that the business charged sales tax on two occasions (Exhibits A and B).

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated February 9, 2018, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations “. . . warrant a disqualification period of six months (Section 278.6(e)(5)). The letter also states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).”

Appellant responded to the charges in a telephone call on February 13, 2018, and in a letter sent via fax on February 19, 2018. After giving consideration to the evidence, the Retailer Operations Division notified Appellant in a letter dated February 27, 2018, that it determined that violations had occurred at the establishment, and that an assessment of a hardship CMP in the amount of \$4,578.00 in lieu of a six-month SNAP disqualification was an appropriate penalty for the violations committed and in accordance with Section 278.6(f)(1). This determination was based on Appellant's disqualification causing hardship to SNAP households as there were no other authorized retail stores in the area selling a similar variety of staple foods at comparable prices.

By letter dated March 7, 2018, Appellant appealed the Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review. Subsequent correspondence postmarked April 3, 2018, has been received from Appellant.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Section 278. In particular, Sections 278.6(a), 278.6(e)(5), and 278.6(f)(1) establish the authority upon which a hardship CMP may be assessed against a retail food store or wholesale food concern in lieu of a six month disqualification.

7 CFR § 271.2 states 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) states: “Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households or the households' authorized representative, and only in exchange for eligible food.” Further, the citation specifies that “Coupons [SNAP benefits] may not be accepted in exchange for cash . . . or for any other nonfood use.”

7 CFR § 278.6(a) states: “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: 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.

7 CFR § 278.6(f)(1) states: “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. FNS may disqualify a store which meets the criteria for a civil money penalty if the store had previously been assigned a sanction. A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.”

APPELLANT’S CONTENTIONS

The following may represent a summary of Appellant’s contentions 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 herein:

- Immediate action was taken after receiving the notice. Two employees have been terminated. The rest are going through training again. Signs have been posted at checkouts so customers know that trying to purchase ineligible items with SNAP will not be tolerated; and,
- Ownership is sure customers will still try as they like to try and purchase paper products all the time, but the employees are being more aware and are thoroughly trained.
- Ownership doesn't know who the one female employee (Amish woman) is as the firm doesn't have an employee matching that description;
- Ownership is considering not accepting SNAP anymore due to the problems they have with SNAP customers. They get so mad they throw items on the counter, etc.
- Ownership had a business connected to the housing industry and lost almost everything in 2009 when the economy crashed. They are still trying to crawl out of debt. The 2016 taxes of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) have not been paid and if not paid by September 2019, the business will be subjected to a sheriff's sale. Due to these hardships, the owners will be unable to pay the penalty of 5 U.S.C. § 552 (b)(6) & (b)(7)(C); and,
- The owners request the penalty be reconsidered.

Appellant sent copies of overdue bills in support of these contentions.

ANALYSIS AND FINDINGS

Ownership admits to firing two employees for selling ineligible merchandise in exchange for SNAP benefits during the period of the investigation.

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. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, while the business now has terminated two employees, retrained all employees, and posted signs to train customers are all positive steps, they do not provide any valid basis for dismissing the charges, or for mitigating the penalty imposed.

While store ownership may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store

operations, the ownership is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. When store ownership signed the certification page of the SNAP retailer application to begin operating as a SNAP retailer and again when it applied for reauthorization in 2015, it confirmed it understood and agreed to abide by program rules and regulatory provisions. Ownership also agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. A record of participation in SNAP with no previously documented instance of violations also does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

The Report of Investigation shows that three clerks working at the Appellant business during the period under review transacted SNAP benefits for ineligible items on four separate occasions indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The transactions from the investigative report, including the store EBT POS receipts, have been matched to SNAP transactions posted by the Appellant business on the dates in question with no discrepancies. The acceptance of SNAP benefits for ineligible items is a violation of SNAP rules and regulations. The ineligible items sold were obvious nonfood items and would not readily be confused with eligible edible food items. SNAP regulations state that FNS shall disqualify a store for a six month period 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 the sale of common nonfood items in exchange for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management. That store employees on multiple occasions failed to deny the purchase of ineligible items using SNAP benefits is evidence that ownership failed to properly train its employees on SNAP regulations and requirements and to monitor their performance. There is no indication of involvement by the firm's management or ownership. Therefore, there is not any valid basis for dismissing the charges or for mitigating the penalty imposed.

It is highly improbable, based on the readiness of the store employees to exchange SNAP benefits for ineligible items, that the only instances of SNAP violations were those identified as part of the FNS undercover investigation and more likely than not that this represented an ongoing pattern of SNAP violations at the Appellant business. As previously stated, store ownership is responsible for all SNAP transactions at the firm and therefore a certain minimal level of oversight on the part of ownership to ensure employees are not violating SNAP laws or regulations is expected. It would be unusual and irresponsible for store owners to not be monitoring all transactions, including those involving SNAP, and reviewing daily balance sheets to ensure store employees were not stealing from the business or conducting other activities that would jeopardize the licenses and income that the business is dependent upon.

The investigative report shows that the nature and scope of the violations under review do violate SNAP regulations, and the transaction amounts cited also match FNS transaction records for the dates in question. Additionally, a review of the report shows no errors or discrepancies. The descriptions provided in the Report of Positive Investigation are provided to assist store ownership in identifying those employees responsible for the violative transactions. Many variables can affect the description of an employee (e.g. whether the employee was sitting or standing or on a platform, the fit of their clothing, changing hair styles/lengths/colors, etc.) so these descriptions may not be one hundred percent accurate which does not mean that the violations did not occur.

There is no regulatory threshold for the dollar value of the ineligible items purchased. While a firm that has previously received warnings of possible violations or that has been sanctioned before could receive a more severe penalty, SNAP regulations do not provide any grounds for dismissing or reducing penalties for those firms that have not received warnings or previously been sanctioned. The record shows no evidence that the Appellant firm received any prior warnings or has been sanctioned and there is no evidence that the firm's ownership or management intentionally violated SNAP regulations. Therefore, the decision to disqualify the firm for a six month period is the appropriate penalty.

The assessment of a hardship CMP is discussed in the next section.

CIVIL MONEY PENALTY

Appellant is not eligible for a trafficking CMP as these only apply in cases of permanent disqualifications.

The Retailer Operations Division determined that the Appellant firm is selling a substantial variety of staple food items, and the firm's disqualification would cause hardship to SNAP household because there is no other store in the area selling as large a variety of staple food items. Thus, pursuant to 7 CFR § 278.6(f), it is the decision of USDA that a six-month disqualification would create a hardship to SNAP recipients, and that a CMP in lieu of disqualification is appropriate in this case. The case record documents that, under 7 CFR § 278.6(g), the Retailer Operations Division correctly calculated the amount of the hardship CMP. That regulation states that the hardship CMP is to be calculated on a formula which includes the SNAP redemption volume of the store during the 12 months prior to the firm being notified of the violations that led to the store's disqualification. Modifications to the hardship CMP may occur only when there is an error in calculation or the amount exceeds the statutory limit.

Appellant contends that store ownership is unable to pay the hardship CMP of \$4,578.00 due to outstanding debts and requests that the CMP be waived. Appellant's

request cannot be granted because neither the Retailer Operations Division nor this administrative review has the authority to modify the hardship CMP formula mandated by SNAP regulations at 7 CFR § 278.6(g).

It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP or a CMP is imposed in lieu of a period of disqualification. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm or to ownership resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. Furthermore, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, ownership's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted by a USDA special agent and signed under penalty of perjury. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and accurate with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail.

Accordingly, the determination by the Retailer Operations Division to assess a hardship CMP in the amount of \$4,578.00 in lieu of a six-month disqualification from participating as an authorized retailer in SNAP is sustained. Based on the discussion above, the amount of the hardship CMP was properly computed by Retailer Operations. Please note that if the penalty is not paid, the six-month SNAP disqualification will be imposed. Appellant may contact the USDA-FNS Financial Management Accounting Division at (703) 605-0483 to discuss a monthly payment plan, or follow the instructions in the Retailer Operations Division's letter dated February 27, 2018, regarding online or check payment options.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. In the event a six-month disqualification is imposed for failure to pay the CMP, or some lesser disqualification period reflecting the unpaid portion of the CMP, Appellant may reapply for authorization to participate in the SNAP up to 10 days prior to the end of the disqualification period. When eligible, Appellant may reapply for SNAP authorization using the application instructions contained on the FNS web site at www.fns.usda.gov/snap/retailer-apply.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

ROBERT T. DEEGAN
Administrative Review Officer

May 18, 2018