

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

Express Zone,)
Appellant,)
)
)
 v.)
)
)
)
Retailer Operations Division,)
Respondent.)

Case Number: C0186120

FINAL AGENCY DECISION

The United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support that a six month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was improperly imposed against Express Zone (Appellant) by the Retailer Operations Division (Retailer Operations). However, although the violations do not warrant a six month disqualification, they do warrant an Official Warning Letter. Therefore, it is the decision of the USDA that Retailer Operations issue an Official Warning Letter to Appellant.

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with and 7 CFR § 278.2(a), 7 CFR § 278.6(e)(5), and 7 CFR § 278.6(f)(1) in its administration of the SNAP, when it imposed a six month period of disqualification as a SNAP retailer against Appellant.

AUTHORITY

7 USC § 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 USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of November 13, 2015 through March 11, 2016. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on multiple separate occasions. The items sold are best described in

regulatory terms as common non-food items and included: foam plates, cigarette lighters, plastic wrap, and paper towels.

As a result of evidence compiled during this investigation, by letter dated July 28, 2016, Retailer Operations charged ownership with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a) and noted the violations in Exhibits B and C warranted a six month disqualification period. The letter also states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

Ownership replied to the Charge letter by letter dated August 8, 2016. Retailer Operations informed ownership by Determination letter dated August 31, 2016, that the violations cited in the Charge letter occurred at the firm and that a six month period of disqualification was warranted. The letter also 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.

By letter dated September 7, 2016, ownership, via counsel, appealed Retailer Operations' determination and requested administrative review of this action. The appeal was granted by letter dated September 14, 2016. By letter dated October 7, 2016, counsel provided a copy of a two page SNAP Compliance and Training Policy to be implemented at Appellant.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action 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 argument 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 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 defines *Staple food* as “those food items intended for home preparation and consumption.”

7 CFR § 278.2(a) states “Coupons 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.”

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*, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system..." (*emphasis added*)

7 CFR § 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."

7 CFR § 278.6(e)(7) reads, in part, "Send the firm a warning letter if violations are too limited to warrant a disqualification."

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 subject to a disqualification is selling a substantial variety of staple food items, and the firm's disqualification would cause hardship to food stamp households..."

SUMMARY OF THE CHARGES

During an investigation, the USDA conducted five compliance visits at Appellant. A report of the investigation was provided to the Appellant as an attachment to the Charge letter. The investigation report included Exhibits A through E which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during five store visits and involved the sale of common non-food items in exchange for SNAP benefits in violation of 7 CFR § 278.2(a). The Charge letter states that Exhibits B and C warrant a disqualification period of six months.

APPELLANT'S CONTENTIONS

Consideration of all contentions was made whether these are recapitulated here or not.

- My clients believe they have done nothing wrong.
- My clients regularly train their staff as to how SNAP purchases are to be made.
- The clerk properly rejected cigarettes, cash, and alcohol.
- The clerk was relatively new. He was unaware that paper plates and lighters were not to be treated the same as food items.
- The gentleman made a mistake.
- We believe the facts show substantial compliance with the regulations.
- My clients have taken steps and will take additional steps to make sure all employees are properly trained.
- This does not appear to be a case of wholesale and intentional disregard of the regulations.
- There is one violation that we know of which was a mistake and was de minimis.
- We do not believe any sanctions appropriate for a mistake and for one sale which was clearly an error.

- We believe a suspension would work a hardship and a small CMP if anything would be appropriate.
- I reiterate my reasons for review as laid out in my initial letter dated September 7, 2016.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination made by Retailer Operations. This review is limited to what circumstances were at the basis of Retailer Operations' determination at the time such action was taken. Upon review, the evidence indicates that Appellant established a record of selling non-food items, as defined by Section 271.2 of the regulations, as noted in Exhibits A, B, C, D and E furnished with the Charge letter. The Charge letter notes that Exhibits B and C warrant a disqualification period of six months per Section 278.6(e)(5).

7 USC 2018 (b)(7)(e)

Appellant established a record of selling non-food items. However, after careful review of the investigative report, the violations do not rise to the level to merit a disqualification period in accordance with 7 CFR § 278.6(e)(5). However, the violations do meet the requirements of 7 CFR § 278.6(e)(7), and as such, the determination is modified accordingly. An Official USDA Warning Letter is to be issued to Appellant.

CONCLUSION

Based on a review of the evidence, the record indicates that program violations did occur at Appellant. The charges of violations are based on the findings of a formal USDA investigation. The investigative record is specific, thorough, and fully documented 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.

It is therefore determined that the violations as described in the letter of charges did in fact occur at Appellant. However, as noted, the investigative report as a whole does not rise to the standards as set forth to warrant a disqualification period of six months. Therefore, the six month disqualification determination is not sustained. Instead, the evidence supports the issuance of a USDA Official Warning Letter. It is therefore the decision of the USDA that pursuant to 7 CFR § 278.6(e)(7), an Official Warning Letter is to be issued to Appellant.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 USC § 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 the owners 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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

/S/

MADELINE VIENS
ADMINISTRATIVE REVIEW OFFICER

October 19, 2016

DATE