

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

Save Way,)	
)	
Appellant,)	
)	
v.)	Case Number: C0183182
)	
Retailer Operations Division,)	
)	
Respondent.)	
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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 Save Way by the Retailer Operations Division (hereinafter “ROD”).

ISSUE

The issue accepted for review is whether ROD took appropriate action, consistent with 7 CFR § 278.6(e)(5) in its administration of the SNAP when it imposed a six month period of disqualification against Save Way on March 1, 2016.

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 Save Way with SNAP law and regulations during the period July 8, 2015 through December 23, 2015. The investigation reported that personnel at Save Way accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. Of items sold during the violative transactions, not less than 33 percent were ineligible and included a variety of items best described in regulatory terms as “common nonfood items”. Identification information developed during the investigation indicates that these violative transactions were handled by an unidentified female clerk.

As a result of evidence compiled from this investigation, the Retailer Operations Division informed the Appellant, in a letter dated February 18, 2016, that he was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a).

In a letter dated February 28, 2016, the Appellant, through his former Attorney, denied the trafficking allegations.

After giving consideration to the firm's reply and the evidence in this case, the Retailer Operations Division informed the Appellant, by letter dated March 1, 2016, that Save Way was disqualified from participation as a retail store in the SNAP for a period of six months.

In a letter postmarked March 10, 2016, the Appellant, through his former Attorney, appealed the Retailer Operations Division's assessment 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.

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

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6 establishes the authority upon which a period of disqualification may be imposed against an authorized retail food store or wholesale food concern in the event that it has failed to comply with the Food and Nutrition Act of 2008, as amended. 7 CFR § 278.6(e)(5) applies to the specific period of disqualification under review. 7 USC 2018 (b)(7)(e).

7 CFR § 278.6(e)(5) reads, "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."

APPELLANT'S CONTENTIONS

On review, the Appellant's contentions in the matter are essentially the following:

- The Appellant denies that ineligible items were purchased with SNAP benefits during the USDA investigation of Save Way;
- The Appellant questions the validity of the investigation findings; and

- The Appellant's signed affidavit indicates that upon investigation of all employees employed at Save Way, no instances of wrongdoing with respect to the SNAP regulations were discovered.

The preceding may represent only a brief summary of the Appellant's 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.

Regarding the Appellant's contention that he denies that ineligible items were purchased with SNAP benefits during the USDA investigation of Save Way, this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is, as noted above, to determine whether the Appellant demonstrates by a preponderance of the evidence that the six month SNAP disqualification of Save Way should be reversed. In this case, therefore, if the Appellant demonstrates by a preponderance of the evidence that ineligible items were not purchased with SNAP benefits during the USDA investigation of Save Way, then purchasing ineligible items with SNAP benefits during the investigation will be considered not to have occurred and the disqualification reversed. If this is not demonstrated the case is to be sustained. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

The Appellant contends that he questions the validity of the investigation findings. Such a contention cannot be accepted as a valid basis for dismissing any of the charges. 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. When responding to the Charge Letter allegations and in his request for administrative review, the only documentation that the Appellant provided to FNS to support his claim that the investigation findings did not occur was a signed affidavit from the Appellant stating that upon questioning all employees of the subject store, he found no instances of wrongdoing with respect to the SNAP regulations. The Appellant did not provide FNS with any other documentation that would validate his contention. The Investigators stand by their report that the items listed in the investigative report were, in fact, purchased at Save Way on the dates indicated and FNS has documentation on file that confirms the items listed were donated to and signed for by a charitable organization following each transaction. Also supporting the conclusion that the investigation did take place at Save Way and that the investigative report findings are accurate are EBT receipts obtained during the investigation whose transaction amounts correspond exactly to the purchase amounts and times indicated in each of the Exhibits of the investigative report, and clearly bear the name and address of the subject store. Therefore, it is more likely than unlikely that violative transactions involving the sale of ineligible items with SNAP benefits did occur at Save Way. The penalty imposed by the Retailer Operations Division is based on the occurrence of violative transactions involving the sale of ineligible items with SNAP benefits. As such, the contention brought out by the Appellant regarding his questioning

of the validity of the investigation findings (without any valid documentation to support the contention) cannot be used to lessen or mitigate the penalty imposed by the Retailer Operations Division.

The Appellant contends that his signed affidavit indicates that upon investigation of all employees employed at Save Way, no instances of wrongdoing with respect to the SNAP regulations were discovered. With regard to the affidavit provided by the Appellant which purports to establish that the questionable transactions that were conducted at Save Way were legitimate and that no personnel at Save Way accepted SNAP benefits in exchange for ineligible merchandise during the investigation period, the truth of such declarations can neither be confirmed nor denied. Although such affidavits may be sworn to and notarized, that does not mean that they are necessarily truthful. One would not expect the store owner/store employees to admit that questionable transactions were not legitimate, were it really so. On the contrary, one would expect that any store owner/employee affidavit provided would attest to questionable transactions being legitimate.

Consideration was also given to whether it might be appropriate to impose a civil money penalty in this case in lieu of a period of disqualification. Such a finding is appropriate only if a store sells a substantial variety of staple food items and its disqualification would create a hardship to nutrition assistance program 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. In this regard, it is recognized that some degree of inconvenience to SNAP beneficiaries is inherent in the disqualification from the SNAP of any participating food store as the normal shopping pattern of such beneficiaries may be temporarily altered during the period of disqualification.

In this case, however, the Retailer Operations Division has rendered a finding pursuant to 7 CFR § 278.6(f) that it would not be appropriate to impose a civil money penalty in lieu of a period of disqualification because of its determination that Save Way is not the only authorized retail food store in the area "selling as large a variety of staple food items at comparable prices." As the disqualification of the subject store would not create a hardship to customers, as differentiated from potential inconvenience, the finding that a civil money penalty in lieu of disqualification is not appropriate in this case is sustained.

Based on a review of the evidence in this case, it appears that the program violations at issue did, in fact, 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 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 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.

CONCLUSION

Based on the discussion above, the decision to impose a disqualification against Save Way for a period of six months is sustained.

In accordance with the Food and Nutrition Act of 2008 and the regulations thereunder, this 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 (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/

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

October 31, 2016
DATE