

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

Quick Save,

Appellant,

v.

Case Number: C0188446

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 (“ROD”) to impose a six-month disqualification against Quick Save (“Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the ROD took appropriate action, consistent with Title 7 of Code of Federal Regulations (CFR) § 278.6(e)(5) in its administration of SNAP when it imposed a six-month period of disqualification against Appellant on February 8, 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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period April 19, 2016 through December 14, 2016. The

investigation reported that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on five separate occasions. These items sold during the violative transactions are best described in regulatory terms as "common ineligible nonfood items." Identification information developed during the investigation indicates that three unidentified male clerks were involved in the violative transactions. As a result of evidence compiled from this investigation, the ROD informed Appellant, in a letter dated January 24, 2017, 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)). Under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).”

Although afforded the opportunity to do so, Appellant did not reply to the charges. The Retailer Operations Division notified Appellant in a letter dated February 8, 2017 that the firm was being disqualified for six months from participation as an authorized retailer in SNAP. This determination letter also states that Appellant’s eligibility for a hardship civil money penalty (CMP) according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated to Appellant that “. . . you are not eligible for the CMP because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.”

On February 14, 2017, Appellant, through counsel, appealed the ROD’s decision to impose a six-month disqualification, and requested an administrative review of the action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means 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

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 Part 278. In particular, 7 CFR § 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.

Section 278.6(e)(5) of the SNAP regulations states, in part, when 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(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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system

APPELLANT'S CONTENTIONS

Appellant's contentions regarding this matter are essentially as follows:

- The penalty is arbitrary, capricious, and too severe;
- The disqualification poses an unnecessary hardship on the retailer and SNAP participants;
- The improper sales happened by mistake;
- Appellant has installed a new keyboard cover to ensure SNAP compliance;
- Appellant's staff have been retrained;
- Appellant will take corrective action to ensure no future violations occur such as more training sessions, posting signs, and increasing supervision of SNAP transactions;
- The ineligible items were inexpensive;
- There was no careless or poor supervision;
- The owners were unaware of the violations;
- The employee involved in the transactions was terminated;
- Appellant has not had any previous violations; and,
- Appellant was not warned.

The preceding may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any not specifically recapitulated.

ANALYSIS AND FINDINGS

Appellant contends that the owners were unaware of the violations. When ownership signed the FNS Application to become a SNAP authorized retailer, this included a certification and confirmation that Appellant 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 document include selling ineligible non-food items. Regardless of whom the ownership of a store may use to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions.

This review is limited to consideration of the circumstances at the time the ROD's decision was made. It is not within the scope of this review to consider actions Appellant may have taken subsequent to this decision to begin to comply with program requirements. There is no provision in SNAP regulations for reducing an administrative penalty on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, Appellant's terminating one of the offending employees, retraining the other staff, installing a new keyboard cover and willingness to take additional corrective action to ensure future violations do not occur, while positive steps, do not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

First SNAP Violation

Appellant's maintains that this is the first time there has been an issue related to SNAP, the firm did not receive any warnings, the ineligible items were inexpensive, and the penalty is arbitrary, capricious, and too severe. A record of program participation with no documented previous violations does not constitute valid grounds for mitigating the impact of the present charges of sale of nonfood items. Requiring a warning before sanctioning a firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

The ROD attributed violations to "carelessness, or poor supervision by the firm's ownership or management," pursuant to 7 CFR § 278.6(e)(5) of the SNAP regulations which provides for a disqualification of six months. This is consistent with Appellant's contention that violations were committed in error. Further, this penalty is only permitted if the firm has not been sanctioned previously. Appellant is correct that the items were not expensive. Sales of expensive nonfood items could result in more severe penalties.

Appellant argues that the violations were mistakes, but not the result of carelessness or poor supervision. This language is reserved for the least serious penalty; violations where management is involved in the transactions may result in more severe penalties. The investigation report shows that of the five times that nonfood violations were attempted, they were permitted by store personnel five times. These violations were conducted at this small grocery store by three different clerks. In contrast to the facts in *Plaid Pantry* (which Appellant referenced) where the "Plaintiff did everything it could possibly do to comply with the food stamp regulations" Appellant did not provide substantial evidence that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. Appellant also referenced *Bruno* which relied on FNS Instruction 744-9 to reverse a two-month disqualification. This instruction is obsolete and was invalidated in *Bertrand v. United States* because it

had not been published in the Federal Register and it had significant impact on the substantive rights of retail store owners.

The sanction is not arbitrary and capricious, but rather appropriate and in keeping with the regulations. Therefore, a six-month disqualification for the violations committed is the appropriate sanction in this case.

Hardship to Firm

With regards to Appellant's contention that disqualification would put the business in financial jeopardy, economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To excuse ownership from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship of 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, Appellant's contention that the firm will 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.

Investigative Record

Based on a review of the evidence in this case, it is determined 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 under the supervision of a USDA investigator and all are fully documented. The investigative record is specific and thorough 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.

CIVIL MONEY PENALTY

Appellant requested a fine in lieu of the six-month disqualification. A CMP as an optional penalty in lieu of a six-month disqualification was considered in this case. 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 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. In this regard, some degree of inconvenience to SNAP benefit users is inherent in the disqualification from the SNAP of any participating food

store as the normal shopping pattern of such SNAP benefit holders may temporarily be altered during the period of disqualification. In this case, however, the ROD has rendered a finding pursuant to 7 CFR § 278.6(f) that it would not be appropriate to impose a CMP in lieu of a period of disqualification because of its determination that Appellant is not the only authorized retail food store in the area "selling as large a variety of staple food items at comparable prices." The ROD notes that the subject store is classified in the FNS SNAP retailer database as a small grocery store and there is a supermarket located .61 miles away from Appellant. This store is easily accessible to customers and offers a variety and quality of staple foods comparable to, or better than, those offered by Appellant. The subject store does not carry any unique items or foods that cannot be found at this store. Therefore, the earlier determination that the disqualification of Appellant would not create a hardship to customers, as differentiated from potential inconvenience, is sustained, and a CMP in lieu of disqualification is not appropriate in this case.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to impose a disqualification of six months against Quick Save from participating as an authorized retailer in SNAP is sustained.

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. A new application for participation in SNAP may be submitted ten (10) days prior to the expiration of the six-month disqualification period.

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.

/S/
RICH PROULX
ADMINISTRATIVE REVIEW OFFICER

March 27, 2017
DATE