

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

B and B Liquor,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0239258

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), that the record supports that B and B Liquor (Appellant), committed violations of the Supplemental Nutrition Assistance Program (SNAP) regulations. There is sufficient evidence to sustain a three year disqualification of Appellant from the SNAP as imposed by the Office of Retailer Operations and Compliance (Retailer Operations).

ISSUE

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

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7, may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

CASE CHRONOLOGY

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of January 7, 2021 through January 17, 2021. The investigative report dated February 10, 2021, documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on multiple dates. The items sold are best described as common nonfood items. As a result of evidence compiled during the investigation,

by letter dated February 18, 2021, Retailer Operations charged Appellant with violating the terms and conditions of the SNAP regulations. Misuse of SNAP benefits was noted in Exhibits A, B, C, and D, that warrants a disqualification as a SNAP retail food store for a period of three years. The letter also states that under certain conditions FNS may impose a civil money penalty (CMP) in lieu of a disqualification. The owner responded to the Charge letter by telephone on February 22, 2021.

Retailer Operations informed Appellant by Determination letter dated March 30, 2021, that the violations cited in the Charge letter occurred at the firm, and that a three year period of disqualification was warranted. The letter also stated that eligibility for a hardship CMP was not applicable as there are other authorized retail food stores in the area selling as large a variety of staple foods at comparable prices. The owner requested review of the determination by letter postmarked April 7, 2021. The review was granted by letter dated April 23, 2021.

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, credible 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 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 § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e)(3) establish the authority upon which a three year disqualification may be imposed against a retail food store.

7 CFR § 278.2(a) states: “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.”

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.”

7 CFR § 278.6(e)(3)(i) of the SNAP regulations states that a firm is to be disqualified for three years if it is to be the first sanction for the firm and the evidence shows that “It is the firm’s practice to commit violations such as the sale of common nonfood items in amounts normally found in a shopping basket and the firm was previously advised of the possibility that violations were occurring and of the possible consequences of violating the regulations.”

7 CFR § 278.6(f)(1) provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause hardship to SNAP benefit households because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It states: “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to SNAP benefit 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

A report of the investigation was provided to the Appellant with the Charge letter. The investigative report provides details on the results of each compliance visit. The investigative report documents that SNAP violations were recorded during multiple store visits. The SNAP violations of 7 CFR § 278.2(a) involved the sale by store personnel of nonfood items for benefits. The ineligible items exchanged by store personnel included: bathroom tissue, soap, toothpaste, and a toothbrush.

APPELLANT’S CONTENTIONS

Consideration was made of all contentions as presented, whether recapitulated here or not.

- I’d like to first acknowledge the mistake done by my staff caused by unwittingly not differentiating between SNAP authorized items and not when dealing with a mix of large food items. This led to human error that resulted in the violations of SNAP regulations. Although these mistakes were not as egregious as accepting EBT for cash exchange, they were nonetheless a breach of the regulation. As the owner of said business, I take full responsibility for these mistakes and have taken steps to mitigate them.
- I have added electronic scanners at POS to differentiate eligible SNAP items from other non-eligible ones. This will prevent from repeating the same involuntary human errors displayed in the past.
- I have personally made sure that all staff members have reviewed and watched the SNAP regulations training available online on the USDA website. This training will be repeated frequently in order to ensure staff members are implementing the regulations appropriately.
- I have worked on reorganizing the placement of SNAP eligible items in a particular area of the store so as to make it easier for both the customer and the staff when picking and ringing such items.
- In light of these mitigating steps taken, I humbly ask that the disqualification from SNAP be removed so that I can be allowed to serve my community & support my family in a productive manner.
- The owner stated that the clerks were being lazy and did not separate the non-food items from the food items during the EBT purchase transactions identified in the Report of Investigation. The owner did not deny that the SNAP violations took place.

- The owner did not conduct SNAP training with his employees. The owner stated he takes full responsibility for the SNAP violations.

ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the determination made by Retailer Operations, and it is limited to the facts at the basis of Retailer Operations' determination at the time it was made. The documentation under review supports that the violative transactions were conducted at Appellant by store personnel on different dates. The owner submitted no evidence to support that the transactions did not occur at Appellant. Retailers are informed that it is their responsibility to ensure that store personnel are properly trained regarding the SNAP rules. Regardless of whom the owner of a store may utilize to handle store business, the firm's owner is accountable for the proper training of personnel, and the effective monitoring and handling of SNAP benefit transactions.

Upon review, the evidence supports that Appellant's store personnel established a record of selling nonfood items as defined by Section 271.2 of the regulations on multiple occasions. The regulations at 7 CFR § 278.6(e)(3) specify that FNS shall disqualify the firm for three years if it is to be the first sanction for the firm and the evidence shows that it is the firm's practice to commit violations such as the sale of common nonfood items in amounts normally found in a shopping basket, and the firm was previously advised of the possibility that violations were occurring and of the possible consequences of violating the regulations.

The record supports that Appellant received a USDA Warning Letter dated November 9, 2018, as the result of a previous USDA investigation. The record indicates that the owner stated during a telephone call with Retailer Operations' staff that Appellant did not conduct or document SNAP training with store personnel. There is no provision in the Act, or regulations, that reverses or reduces a sanction based upon providing SNAP training after charged violations, or the upgrade of electronic systems by a firm. Retailer Operations determined that Appellant shall be disqualified for three (3) years due to the previous warning within the last three (3) years, for again exchanging ineligible items for SNAP benefits. The three year disqualification is accordance with 7 CFR §278.6(e)(3).

The preponderance of the evidence supports that Appellant established a record of selling nonfood items on multiple occasions. The regulations at 7 CFR § 278.6(e)(3) specify that FNS shall disqualify the firm for three years if it is to be the first sanction for the firm and the evidence shows that it is the firm's practice to commit violations such as the sale of common nonfood items in amounts normally found in a shopping basket, and the firm was previously advised of the possibility that violations were occurring and of the possible consequences of violating the regulations.

CIVIL MONEY PENALTY

Retailer Operations rendered a finding that it was not appropriate to impose a CMP in lieu of a three year period of disqualification from SNAP. The record documents that there are other authorized stores within a nearby radius of Appellant that stock a variety of comparable staple foods at comparable prices. Retailer Operations concluded that the evidence does not support that it will cause hardship for SNAP recipients if Appellant is disqualified. as stipulated by the regulations. Therefore, Appellant was properly deemed not eligible for a hardship CMP.

CONCLUSION

The preponderance of the evidence in the record supports that the program violations charged did occur at Appellant. The record documents that Retailer Operations properly evaluated Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the regulations. On review, it is decided that Retailer Operations properly denied a CMP. Therefore, the three (3) year period of disqualification of Appellant from participation as an authorized retail food store in the SNAP is sustained.

This penalty shall become effective thirty (30) days after delivery of this decision. A new application for participation in the SNAP may be submitted ten days prior to the expiration of the period of disqualification. Please contact the Retailer Center at 877-823-4369 with general questions regarding the SNAP application process. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023), and to the regulations at 7 CFR § 279.7 with respect to the owner's right to judicial review of this decision. 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 owner resides or is 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 delivery 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.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

May 21, 2021