

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

Country Farm,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0251193

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is insufficient evidence to support the assessment of a fine in the amount of \$8,543.93 against Country Farm (Appellant) for the unauthorized acceptance of SNAP benefits. Therefore, the determination is reversed and the fine is cancelled.

ISSUE

The issue accepted for review is whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), § 278.6(e)(2 and 3), and § 278.6(f)(1) in its administration of the SNAP when it imposed an unauthorized acceptance fine against Appellant.

AUTHORITY

According to 7 U.S.C. § 2023 and the 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

The Office of Retailer Operations and Compliance determined that the Appellant firm accepted SNAP benefits in exchange for ineligible merchandise and imposed a six month disqualification against Appellant by letter dated March 15, 2021. Appellant appealed this determination and requested an administrative review. The resulting Final Agency Decision dated September 23, 2021, upheld the six month disqualification stating that it would become effective 30 days following receipt of the Decision. The Decision was received by store ownership on September 24, 2021. The Office of Retailer Operations and Compliance did not close the case until

November 3, 2021, and the store's point of sale (POS) terminal was not turned off until November 9, 2021.

In a letter dated December 30, 2021, the Office of Retailer Operations and Compliance charged the Appellant firm for the unauthorized acceptance of SNAP benefits during the period of November 4, 2021, through November 8, 2021. This letter cited the March 15, 2021, determination letter, but did not mention the Administrative Review. Appellant failed to respond to the charges. No warning letter was issued prior to the charge letter.

After giving consideration to the evidence, the Office of Retailer Operations and Compliance notified Appellant in a letter dated January 25, 2022, that it determined that the unauthorized acceptance of SNAP benefits had occurred at the firm, and that a fine in the amount of \$8,543.93 was warranted in accordance with Section 278.6(m) of the SNAP regulations. This determination letter included a Bill for Collection (Form 1114) in the amount of \$8,543.93.

By an email sent on February 4, 2022, Appellant, through counsel, appealed the Office of Retailer Operations and Compliance'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 was received.

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(m) establishes the authority upon which a fine may be assessed against a firm that accepts SNAP benefits without authorization.

7 CFR § 278.6(m) states that:

Fines for unauthorized third parties that accept food stamps. FNS may impose a fine against any individual, sole proprietorship, partnership, corporation or other legal entity not approved by FNS to accept and redeem food coupons for any violation of the provisions of the Food and Nutrition Act of 2008, as amended, or the program regulations, including violations involving the acceptance of coupons. The fine shall be \$1,000 for each violation plus an amount equal to three times the face value of the illegally accepted food coupons. The fine shall be paid in full within 30 days of the individual's or legal entity's receipt of FNS' notification to pay the fine. The Attorney General of the United States may institute judicial action in any court of competent

jurisdiction against the person to collect the fine. FNS may withdraw the authorization of any firm that is under the same ownership as an unauthorized firm that has failed to pay such a fine, as specified under § 278.1(k). FNS may deny authorization to any firm that has failed to pay such a fine, as specified under § 278.1(j).

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:

- The charge letter and determination letter were confusing, contradicting, and misleading to the Appellant for whom, English is a second language;
- The determination letter did make clear that the method or mechanism for effecting the suspension on the store's EBT account, was as follows:
 - **Your Electronic Benefit Transfer (EBT) processor will be advised to disable your EBT connection. If your EBT machine is government-supplied, it must be returned to the processor [(emphasis added)].**
- The Appellant understandably, believed that this statement was the sole proclamation it could rely upon with certainty, to wit: when the suspension took place, the Appellant's "EBT processor will . . . disable your EBT connection.";
- The Appellant had no previous EBT/SNAP violations and did not know anything about the process or the mechanics of how the disqualification would be effectuated. The Appellant discussed with other SNAP vendors the process of how a disqualification would take place and was told that when the disqualification took place SNAP would simply have the store's EBT connection disabled. This is what was believed would happen. This was logical, simple, reasonable, and no further explanation than what was contained in the March 15, 2021, letter was necessary;
- The Appellant read the clear warning in the eighth paragraph of the March 15, 2021, letter, that "If you accept SNAP benefits after the effective date of disqualification, you will be subject to a monetary fine . . . and possible prosecution." The Appellant has no previous record of violations of SNAP rules, no criminal history, and are 100 percent law abiding people. Moreover, they would not have voluntarily or knowingly decided to violate SNAP rules for approximately 4 – 5 days, making at most a profit of around \$20 dollars, knowing that they would thereupon be punished with a huge fine and be subject to possible criminal prosecution. There was no knowing violation, and it is absurd to the point of inanity here to suggest or imply otherwise;
- Further, the Administrative Review Branch decision, at page 7, states, [T]his penalty **shall become effective** thirty (30) days after receipt of this decision. A new application for SNAP participation may be submitted ten (10) days prior to the expiration of the six month disqualification period. . . .Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369 [(emphasis added)];
- Importantly, the words "shall become effective" do not state how the disqualification shall be imposed, and as discussed above, the other statements by SNAP during this proceeding, i.e., the specific language in the letter dated March 15, 2021, that at the time of the disqualification Petitioner's "EBT processor will be advised to disable [the] EBT

connection,” when considered in the context of the word “impose” in the previous paragraph, made clear to Appellant that when SNAP determined to finally impose the sanction, it would take the facile and definitive step of disabling Petitioner’s EBT connection. Moreover, and as noted above, Appellant understood, through talking to other SNAP vendors and receiving information from them, that on the date when SNAP determined the disqualification was to take effect (which specific date was never disclosed; in fact, according to SNAP later statements, the date of disqualification was November 3, 2021, which was nowhere stated or explained by SNAP), SNAP would take the simple and definitive step of disabling the EBT connection;

- The SNAP charge letter dated December 30, 2021, charged Appellant with “unauthorized acceptance of [SNAP/EBT] benefits at your firm from November 4, 2021 to November 8, 2021” under 7 CFR §278.6(m). The cited section of the regulations, §278.6(m), however, is inapplicable here, because Appellant was not an “unauthorized third party” which had not been “approved by FNS to accept and redeem food coupons” as referenced in the regulation, but rather was an approved and registered SNAP vendor who had in place at the time of the alleged violations an existing registered and authorized EBT terminal and an EBT connection that had been installed and connected at the specific instruction of SNAP, that was under the control of SNAP or its agent, and that remained in operation (and had not been disabled by SNAP or its agent) at the subject time, November 4 – 8, 2021;
- Moreover, even if §278.6(m), is applicable here (which Appellant does not concede), Subsection (m) clearly gives the SNAP agency broad discretion in determining whether or not to impose a fine: the subsection states in its introductory and seminal clause, “FNS **may** impose a fine . . .” (emphasis added). *Id.* Thus, it is axiomatic that the agency here has discretion whether or not to impose a fine at all. Here, this is a clear case of an unintentional, inadvertent, innocent violation that is precisely the type of situation that the authors of the regulation envisioned when they chose to insert the term “may” rather than the term “shall” or “must” into the first sentence of the regulation. Here, it cannot be gainsaid that Appellant would not have intentionally violated a rule that would risk imposition of a fine of many thousands of dollars in hopes of gaining maybe a profit of \$20 per day on EBT sales, especially where Appellant knew that the six month disqualification would be imposed in any event, and they were waiting for it to take effect! Indeed, it was far more preferable to Appellant that the six months came and ended as soon as possible, so that they could have their SNAP/EBT reinstated earlier to take advantage of the rebound in commercial activity following the anticipated approval and propagation of COVID-19 vaccines. Petitioner respectfully submits that the agency abused its discretion here, where there was a clear case of an innocent, unknowing violation with an extremely brief period with little or no impact on Appellant’s income, and should not have imposed a discretionary fine under §278.6(m); and,
- Finally, it is clear that the agency failed properly to follow the mandate of §278.6(d), to consider, before making any penalty determination, (1) the “nature and scope of the violations . . . (2) Any prior action taken by FNS to warn the firm about the possibility that violations are occurring, and (3) Any other evidence that shows the firm's intent to violate the regulations.”⁶ Here, the nature and scope of the violations were irrefutably innocent and extremely insignificant – 4-5 days of sales, with profits of maybe \$20 per day, whereas Appellant previously had been a SNAP/EBT vendor without a violation for

thirteen years. Further, in clear violation of §278.6(d), there was no prior action taken by SNAP/FNS to warn the firm about the possibility that violations are occurring. It is beyond peradventure that, had FNS warned Petitioner that it was not supposed to be using the EBT terminal between November 4 and November 8, 2021, Petitioner would have immediately stopped doing so. Finally, FNS clearly did not consider “Any other evidence that shows the firm's intent to violate the regulations,” because there was no evidence of intent, and the only possible conclusion to be derived from the circumstances was that there was no intent to violate any rule, regulation or order (as further discussed above).

Appellant submitted copies of previous correspondence to and from the Appellant in support of these contentions.

ANALYSIS AND FINDINGS

A review of the evidence does not support the Office of Retailer Operations and Compliance’s determination in this case. Accordingly, it is unnecessary to address Appellant’s contentions in this matter.

This administrative review decision is based on the specific circumstances of this case as documented by materials provided by Appellant and the Office of Retailer Operations and Compliance. In addition, this administrative review decision does not establish policy or supersede federal law or regulations.

CONCLUSION

After a review of the pertinent documentation, and based on the applicable regulations and other guidance, the decision by Office of Retailer Operations and Compliance to impose a fine in the amount of \$8,543.93 for the unauthorized acceptance of SNAP benefits is reversed and the fine is cancelled. The Office of Retailer Operations and Compliance should continue processing the Appellant firm’s SNAP retailer application.

Under the Freedom of Information Act, FNS is 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

June 30, 2022