

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

Elk Food Mart,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0249681

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 three year disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Elk Food Mart (hereinafter “Elk Food Mart” or “Appellant”) by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of the SNAP when it imposed a three year disqualification against Elk Food Mart.

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 Elk Food Mart with Federal SNAP law and regulations. In a letter dated February 10, 2022, the Retailer Operations Division charged the Appellant with allowing another business, Benbrook Food Mart 5 U.S.C. § 552 (b)(6) & (b)(7)(C), to utilize the Appellant’s SNAP authorization (FNS number 5 U.S.C. § 552 (b)(6) & (b)(7)(C)) to illegally accept and process EBT SNAP benefits for eligible food items during the period October 25, 2021 through October 30, 2021. The owner of record for Benbrook Food Mart is 5 U.S.C. § 552 (b)(6) & (b)(7)(C), who also owns Elk Food Mart.

The letter further informed the Appellant that based on the transactions which occurred during this investigation, the Appellant is charged with accepting SNAP Electronic Benefit Transfer (EBT) benefits from an unauthorized firm in Exhibits A, C, and D of the investigative report. The Appellant was informed that allowing another business to utilize the Appellant's FNS number to process EBT SNAP benefits for eligible food items was in violation of 7 CFR § 278.2 of the SNAP regulations. These violations warrant a disqualification period of three years as provided in 7 CFR § 278.6(e)(2) and (3). The letter also stated that under certain conditions, FNS may impose a hardship civil money penalty (CMP) in lieu of a disqualification as provided in 7 CFR § 278.6(f)(1). The charge letter noted that per SNAP regulations Section 278.6(b), the Appellant has the right to present any information, explanation or evidence regarding the charges and must reply within 10 calendar days of the date of receipt of the charge letter. Per UPS confirmation of delivery, the charge letter was delivered to the store address of record on February 14, 2022.

In a response to the Retailer Operations Division of February 25, 2022, the Appellant, through counsel, responded to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

After considering the Appellant's response and the evidence of this case, the Retailer Operations Division issued a determination letter dated March 16, 2022. The determination letter informed the Appellant that the firm was disqualified from the SNAP for a period of three years in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a hardship civil money penalty under 7 CFR § 278.6(f)(1). The Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the three year disqualification because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked March 28, 2022, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. FNS granted the Appellant's request for administrative review by letter dated April 7, 2022.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions 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 matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling law in this matter is found in the Food & Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(3) establish the authority upon which a three year disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, *inter alia*:

Coupons [i.e., SNAP benefits] may be accepted by an authorized retail food store only from eligible households... and only in exchange for eligible food... An authorized retail food

store may not accept coupons from another retail food store, except that public or private nonprofit homeless meal providers may redeem coupons for eligible food through authorized retail food stores. [Emphasis added.]

7 CFR § 278.6(a) states, *inter alia*:

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.... Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section.

7 CFR § 278.6(c) states, *inter alia*:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination...

7 CFR § 278.6(e) states, *inter alia*:

FNS shall take action as follows against any firm determined to have violated the Act or regulations... The FNS regional office shall:

(3) Disqualify the firm for 3 years if it is to be the first sanction for the firm and the evidence shows that:

(ii) Any of the situations described in paragraph (e)(2) of this section occurred and FNS had not previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating the regulations.

7 CFR § 278.6(e)(2)(v) states, *inter alia*:

(2) Disqualify the firm for 5 years if it is to be the firm's first sanction, the firm had been previously advised of the possibility that violations were occurring and of possible consequences of violating the regulations, and the evidence shows that:

(v) Personnel of the firm knowingly accepted coupons from an unauthorized firm or an individual known not to be legally entitled to possess coupons.

7 CFR § 278.6(f)(1) states, *inter alia*:

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 [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.

SUMMARY OF CHARGES

Between October 25, 2021 and October 30, 2021, the Department of Agriculture conducted an investigation of the compliance of Elk Food Mart with Federal SNAP law and regulations. During the investigation, FNS investigators discovered that the Appellant with allowing another business, Benbrook Food Mart 5 U.S.C. § 552 (b)(6) & (b)(7)(C), to utilize Elk Food Mart's SNAP authorization (FNS number 5 U.S.C. § 552 (b)(6) & (b)(7)(C)) to illegally accept and process EBT SNAP benefits for eligible food items on three separate occasions (Exhibits A [October 25, 2021], C [October 29, 2021], and D [October 30, 2021]). The record indicates that the owner of Elk Food Mart, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is also the owner of record for Benbrook Food Mart.

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the reply to the charge letter and in the administrative review request, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The owner of Elk Food Mart also owns another convenience store in 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (Benbrook Food Mart).
- The owner received a May 12, 2020 determination letter from FNS stating that Benbrook Food Mart would be disqualified from the SNAP for 6 months and that the EBT processor would be notified to disable the EBT connection.
- The owner calculated the 6 month disqualification and understood SNAP payments would not go through if attempted through the processor.
- At some point the cash register/credit card terminal at the Benbrook Food Mart became incapacitated. The owner had two terminals/registers at Elk Food Mart. In order to keep the businesses open for himself, his family, store employees, and the community, the owner transferred one of the registers from Elk Food Mart to the Benbrook Food Mart so as not to prohibit or stall the operation of the store.
- The owner finds himself in the current situation for the following reasons: (1) English is the owner's second language; (2) Inadequate training for himself and employees regarding the SNAP rules; (3) Poor communication regarding the EBT disqualification period between himself and employees; (4) Poor communication and understanding between the owner and his accountant; (5) Poor record keeping and general business practices; (6) Reliance that USDA would disable EBT transactions; and (7) Strain of COVID-19 on the business.
- The owner is a native of India and immigrated to the United States in 1987. He has an inherent need to help communities.
- No citizen was denied a benefit during the stated period in question and no person used SNAP to purchase ineligible items. The owner and store employees did not intentionally defraud any citizen out of monetary or government benefits.
- The Appellant requests an itemization and outline of how USDA calculated the money damages of 5 U.S.C. § 552 (b)(7)(E). Due process under the law demands that the Appellant see if the numbers the Department is using matches up to the store's business records. Based upon the store's records, the total amount of SNAP benefits collected at Elk Food Mart from October 2020 through January 2022 was 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

- The owner cannot pay the assessed fine of 5 U.S.C. § 552 (b)(7)(E). FNS's civil money penalty regulation places a cap on the amounts that eligible SNAP retailers are required to pay (7 CFR § 3.91(b)(3)). Also, the recently issued final rule promulgated by FNS pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015 requires federal agencies to adjust civil penalties for inflation on an annual basis. For example, limiting the civil fine to a maximum of \$60,161.00 for trafficking in SNAP benefits for violations occurring during a single investigation.
- The owner requests that FNS cap his civil fine at \$60,161.00 as the violations occurred during a single undercover investigation.
- The owner would like to avoid a disqualification and offer a one-time civil payment of \$28,786.20.

In support of these contentions, the Appellant, through counsel, submitted 25 pages of hand-written information regarding Elk Food Mart's taxable and non-taxable sales for January 2020 through January 2022.

ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the determination made by the Retailer Operations Division; it is limited to the facts at the basis of the Retailer Operations Division's determination at the time it was made.

When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP application. The Appellant's SNAP authorization permit and the *SNAP Training Guide for Retailers* note that authorization from one location may not be used by someone else or at another location which has not gone through the application and authorization process.

Between October 25, 2021 and October 30, 2021, the Department of Agriculture conducted an investigation of the compliance of Elk Food Mart with Federal SNAP law and regulations. During the investigation, FNS investigators discovered that the Appellant with allowing another business, Benbrook Food Mart 5 U.S.C. § 552 (b)(6) & (b)(7)(C), to utilize Elk Food Mart's SNAP authorization (5 U.S.C. § 552 (b)(7)(E)) to illegally accept and process EBT SNAP benefits for eligible food items on three separate occasions. The record indicates that the owner of Elk Food Mart, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is also the owner of record for Benbrook Food Mart.

The investigation report noted the following transactions that occurred at Benbrook Food Mart in which Elk Food Mart's SNAP authorization number was used to process the transactions:

5 U.S.C. § 552 (b)(7)(E).

The SNAP regulations at 7 CFR § 278.2(a) state, *inter alia*:

Coupons [i.e., SNAP benefits] may be accepted by an authorized retail food store only from eligible households... and only in exchange for eligible food... An authorized retail food store may not accept coupons from another retail food store, except that public or private nonprofit homeless meal providers may redeem coupons for eligible food through authorized retail food stores. [Emphasis added.]

The SNAP regulations at 278.6(e)(3)(ii) read as follows (emphasis added):

(3) Disqualify a firm for 3 years if it is to be the first sanction for the firm and the evidence shows that:

(ii) Any of the situation described in paragraph (e)(2) of this section occurred and FNS had not previously advised the firm of the possibility that violation were occurring and of the possible consequences of violating the regulations.

The SNAP regulations at 278.6(e)(2) read in part (emphasis added):

(2) Disqualify the firm for 5 years if it is to be the firm's first sanction, the firm had been previously advised of the possibility that violations were occurring and of possible consequences of violating the regulations, and the evidence shows that:

(v) Personnel of the firm knowingly accepted coupons from an unauthorized firm or individual known not to be legally entitled to possess coupons.

By the store owner's own admission, he knowingly moved/transferred a cash register/POS device/credit card reader from Elk Food Mart to another store owned by him, Benbrook Food Mart, and continued to accept SNAP benefits at Benbrook Food Mart which had been disqualified from participation in the SNAP for six months effective September 29, 2020. Therefore, it is more likely than not that these violative SNAP transactions were conducted with the knowledge of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, owner of Elk Food Mart, warranting a three year disqualification period as charged by the Retailer Operations Division.

With regard to the Appellant's contentions with respect to an imposed **5 U.S.C. § 552 (b)(7)(E)** fine, the imposed charge against Elk Food Mart is a three year SNAP disqualification for allowing another business to utilize the Appellant's FNS number to process EBT SNAP benefits for eligible food items. As such, any reference to an imposed fine is not relevant to this case.

Financial Hardship

With regard to the Appellant's contention that a SNAP disqualification would impose a financial hardship to the firm, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm or to ownership resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported

economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA.

Furthermore, giving special consideration to economic hardship to 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 may 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.

CIVIL MONEY PENALTY

The Appellant contends that the owner would like to avoid a disqualification and offer a one-time civil payment of \$28,786.20.

The Retailer Operations Division determined that the Appellant was not eligible for a hardship civil money penalty (CMP) under 7 CFR § 278.6(f)(1). That regulation reads, in part, "FNS may impose a civil money penalty as a sanction in lieu of disqualification when . . . the firm's disqualification would cause 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." [Emphasis added]. Please note that internal FNS policy memoranda clarifies the regulation by defining "in the area" to mean within a one (1.0) mile radius for an urban store such as Elk Food Mart.

The case record documents that the Retailer Operations Division determined that the three year disqualification of Elk Food Mart would not cause a hardship to SNAP households as there are other comparable or larger SNAP authorized stores located within a one mile radius of the Appellant firm. Elk Food Mart is classified by FNS as a convenience store that does not carry any unique or culturally specific items that could not be found in other area stores. Agency mapping systems document that there are three (3) SNAP authorized stores located within a one mile radius of the Appellant firm, including 1 super store, 1 other convenience store, and 1 combination grocery/other store.

Therefore, based on the evidence, the disqualification of Elk Food Mart would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division's decision not to assess a hardship CMP in lieu of a three year disqualification is sustained as appropriate under 7 CFR § 278.6(f)(1).

CONCLUSION

It is therefore established that the violations of 7 CFR § 278.2 as described in the letter of charges did in fact occur at Elk Food Mart during a USDA investigation. All transactions cited in the letter of charges were conducted or supervised 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 in which the Appellant firm accepted SNAP benefits from an unauthorized firm, and in all other critically pertinent details. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(2) and (3) the decision to impose a three year disqualification against the Appellant, Elk Food Mart, is sustained.

Further, the decision by the Retailer Operations Division to not impose a civil money penalty in lieu of disqualification is also sustained. It is the determination of this review that SNAP households will not incur hardship due to the Appellant's disqualification because there are other authorized stores in the area selling as large a variety of staple foods at comparable prices.

In accordance with the Act and regulations, the disqualification penalty shall become effective 30 days after receipt of this decision. A new application for SNAP participation may be submitted 10 days prior to the expiration of the three year disqualification period.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (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, 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

June 2, 2022