

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

Lowell Food Mart,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0246758

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 Lowell Food Mart (hereinafter “Lowell Food Mart” or “Appellant”) by the Retailer Operations Division of FNS. However, the determination is modified to permit a civil money penalty in the amount of \$7,422.00 as an option in lieu of the six month disqualification.

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 six month period of disqualification against Lowell 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 Lowell Food Mart with Federal SNAP law and regulations during the period May 4, 2022 through May 17, 2022. In a letter dated June 1, 2022, the Retailer Operations Division charged the Appellant with accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on four out of four compliance visits. The letter further informed the Appellant that the violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5). 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 Appellant at the store address of record on June 3, 2022.

In a response to the Retailer Operations Division of June 3, 2022, the Appellant replied 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 giving consideration to the Appellant's response and the evidence of this case, the Retailer Operations Division issued a determination letter dated June 15, 2022. The determination letter informed the Appellant that the firm was disqualified from the SNAP for a period of six months 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 six month 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 June 24, 2022, the Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. FNS granted the Appellant's request for administrative review by letter dated July 14, 2022. Upon acceptance of the administrative review request, implementation of the six month disqualification was held in abeyance pending completion of this review.

The record reflects that via email of July 14, 2022, the Appellant's counsel requested an extension in time for providing additional information in support of the request for administrative review. Via email of July 15, 2022, the Administrative Review Officer granted counsel's time extension request to August 18, 2022. In an email correspondence of August 18, 2022, the Appellant, through counsel, submitted additional information in support of the request for administrative review.

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, might accept as sufficient to support a conclusion that the matter 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 promulgated through regulations under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e) establish the authority upon which a disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, inter alia:

Coupons may be accepted by an authorized retail food store only from eligible households . . . only in exchange for eligible food.

7 CFR § 271.2 states, inter alia:

Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption.

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.

7 CFR § 278.6(e)(5) states, inter alia:

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.

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's disqualification would cause hardship to Food Stamp [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 THE CHARGES

During an investigation conducted from May 4, 2022 through May 17, 2022, USDA conducted four compliance visits at Lowell Food Mart. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated June 1, 2022. The investigation report included Exhibits A through D which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during four of the four compliance visits and involved the sale of a variety of items best described in regulatory terms as "common nonfood items" and a "major ineligible item". The misuse of SNAP benefits noted in Exhibits A, B, C, and D warrant a disqualification as a SNAP retail food store for a period of six months. The exchange of these ineligible items for SNAP benefits is in violation of 7 CFR § 278.2(a).

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, in the administrative review request, and in subsequent correspondence, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant requests that the charges be dismissed.
- Upon review of the store's camera footage, the owner determined that an error was made by the clerk on duty.
- The Appellant has multiple cameras installed throughout the store which get reviewed on a routine basis. There are small notes placed behind the counter as reminders.
- Upon being hired, all employees are given the proper training and are expected to conform with the appropriate standards and policies to which they acknowledge.
- The Appellant believes that the clerk was tricked, coerced, entrapped, or otherwise influenced into permitting a single nonfood item to be purchased with SNAP benefits in each transaction.
- Each of the investigation reports states that the clerk did not tender the payment and is silent as to how the payment was made. All the reports state is that the clerk "rung up" the items.
- The clerk was not responsible for his or her own actions as he or she was intimidated and coerced by the undercover investigator. The Appellant is located in a high crime area with many crimes occurring. As a result, the clerk was intimidated by the store's customers, including the undercover investigator.
- Coercive, intimidating and entrapping practices by government agents like those used in the subject transactions are themselves illegal and negate the intent and culpability of the alleged illegal sales in question. See *Dixon v. United States*, *United States v. Bailey*, *United States v. Hinkel*, *United States v. Gendron*, *United States v. Poehlman*, and *United States v. Gamache*.
- Further, the government's report of the transactions is not credible or reliable and must be disregarded because it is unsigned. The unsigned report is fatally unreliable and cannot be accepted as having any evidentiary value. Moreover, the reason stated for the lack of signature, is apparently 5 U.S.C. 552(b)(6) and 552(b)(7)(C). However, those provisions do not apply here because the undercover agent is a government contractor and the government has no right to keep the identity of the buyer confidential.
- The transactions here were so de minimus that they were of no effect and should not be permitted to sustain a disqualification. The nonfood items purchased with SNAP benefits were insignificant.
- There was no intent by the firm or the clerks to violate the SNAP rules. In fact, the clerk in Exhibit D refused the investigator's request to traffick SNAP benefits. Therefore, there is no intent to violate the SNAP rules at any time.
- As further evidence that there was no intent by the firm to violate the SNAP rules, the Appellant has submitted numerous receipts all showing legitimate transactions conducted by the firm. All of the items purchased on each occasion were eligible food items.
- Due to the recent violations, the Appellant has changed the process of handling SNAP transactions through different software. Prior to the violations, the clerk would let the customer know the amount due for ineligible nonfood items and accept the payment through credit or cash. With the new process, the register will automatically provide the amount and will not allow for a manual entry or override (similar to a large supermarket transaction).
- The Appellant is also willing to provide any transaction reports to ensure an error such as this does not occur again in the future.
- The Appellant has been authorized for SNAP participation for 15 years and has no previous history of SNAP program violations or warnings.

- A SNAP disqualification would impose a financial hardship and the Appellant will suffer irreparable harm.
- The Appellant requests the imposition of a civil money penalty in lieu of a SNAP disqualification due to imposed customer hardship. The firm sells a substantial variety of staple foods including ethnic foods and there are no other authorized retailers in the area selling as large a variety of staple foods at comparable prices. The Appellant matches each vendor's suggested retail prices for each product sold and maintains the same low prices as its competitors. Per the submitted petition signed by 41 of the firm's customers, the Appellant has a large number of regular and loyal SNAP customers who rely upon the firm. The Appellant has numerous SNAP customers from the numerous low income housing projects located around it. Many of the Appellant's customers walk to the subject firm for their grocery needs and it will be difficult for these customers to obtain alternative options.

In support of these contentions the Appellant, through counsel, submitted the following information for review:

- Affidavit of store owner dated August 18, 2022;
- Numerous itemized cash register receipts for cash transactions that took place at the Appellant on the dates May 1, 2022 – May 6, 2022, May 8, 2022 – May 10, 2022, May 12, 2022 – May 13, 2022, May 15, 2022, and May 17, 2022; and
- Petition signed by numerous SNAP customers attesting to hardship if the Appellant is disqualified from participation in the SNAP.

ANALYSIS AND FINDINGS

SNAP Violations

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.

Regardless of who the store owner utilizes to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. The acceptance of SNAP benefits for ineligible items is a violation of SNAP rules and regulations.

The charges of violations are based on the findings of a formal USDA investigation conducted of the compliance of Lowell Food Mart with Federal SNAP law and regulations during the period May 4,

2022 through May 17, 2022. Investigators are trained thoroughly before entering any retail establishment and all protocols, including but not limited to what can and cannot be said. Investigators sign, under penalty of perjury, that investigative reports are true and correct. The investigators in these cases are licensed by the states and on top of being prosecuted for perjury, can lose their jobs and their licenses giving them no incentive to fabricate the information contained in the Reports of Investigation.

All transactions are fully documented and a complete review of this documentation has yielded no known error or discrepancy in the reported findings. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. The documentation on record includes EBT receipts and photos showing that 7 ineligible nonfood items (one of which was a major ineligible item) and 12 eligible food items were purchased with SNAP benefits by the investigator. Also on record is documentation that confirms that the ineligible nonfood items and the eligible food items previously noted were donated to and signed for by a charitable organization following the transaction. Such documentation includes the signature and title of the official of the charitable organization accepting the donated item, the name and address of the organization, the date the donation was made, and the official's initials next to the items donated. Moreover, the total purchase costs of each of the transactions involved in the investigation is documented on SNAP terminal receipts obtained during each transaction and matches the reported purchase totals indicated in the investigation report.

The Appellant contends that there was no intent by the firm to violate the SNAP rules and submitted numerous receipts all showing legitimate transactions conducted by the firm in support thereof. However, the submitted register receipts are for cash transactions and therefore, have no bearing on the violative SNAP transactions noted in the investigation reports.

The Appellant is correct that the clerk in Exhibit D refused to exchange SNAP benefits for cash. However, the FNS investigative report documents by a preponderance of the evidence that two employees working at the Appellant firm accepted SNAP benefits for ineligible nonfood items on four separate occasions during the investigative period indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The investigation report documents by a preponderance of the evidence that the store employees engaged in the misuse of SNAP benefits noted in Exhibits A, B, C, and D, warranting a disqualification as a SNAP retail food store for a period of six months. The owner submitted no evidence to support that the transactions did not occur at the Appellant.

The Appellant contends that the violations were minor in nature and too limited to warrant a disqualification. However, neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto cite any minimum dollar amount of SNAP benefits for transactions involving the sale of ineligible items to be defined as violative. No mention of minimum cost or types of ineligibles is cited in Section 278.6(e)(5) of the SNAP regulations, which states that FNS shall disqualify a store 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 in exchange for SNAP benefits due to carelessness by store employees or poor supervision by the firm's ownership or management.

The Appellant contends that employees are trained on the SNAP rules upon being hired. However, had an effective compliance policy and program been in effect at the firm, it is unlikely that the

employees would have made such obvious mistakes. The more likely explanation is that store ownership and/or management failed to properly train and subsequently supervise the employees. Additionally, had store ownership and/or management been supervising the employees through occasionally monitoring them using videotape, if available, or in person, it would have readily noticed that they were allowing the sale of ineligible nonfood items in exchange for SNAP benefits.

It also would have been immediately evident to store ownership and/or management that the employees were deficient in their knowledge of SNAP rules and regulations had it periodically spot checked the employees' knowledge and abilities by asking questions about SNAP eligible/ineligible items. Either of these basic supervisory techniques would have provided a no cost method for store ownership and/or management to ensure that store employees were not putting the firm's SNAP authorization at risk.

These are clear signs of poor or no supervision by store ownership and/or management. It is highly improbable, based on the willingness of the employees to exchange SNAP benefits for ineligible nonfood items, that the only instances of SNAP violations were those transactions identified as part of the FNS undercover investigation. These actions more likely than not represent an ongoing pattern of SNAP violations at the Appellant firm. Under SNAP regulations, the penalty for allowing the purchase of ineligible nonfood items using SNAP benefits as the result of poor supervision by ownership or management is a six month disqualification. However, as described in the Civil Money Penalty section of this Final Agency Decision, the Appellant is eligible for a civil money penalty in lieu of a SNAP disqualification.

The Appellant is correct that the firm has no previous history of SNAP program violations or warnings. However, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

With regard to the Appellant's contention that, rather than just verifying violations, the investigator offered and persuaded the store clerk to violate seems to imply that the investigator engaged in activity commonly referred to as entrapment. Generally, the entrapment that is forbidden by law depends on whether or not the activity leading up to the violation amounted to putting the activity in the mind of a person who had no prior inclination to violate, and leading him/her to do so for the first time. The U.S. Department of Agriculture's Office of General Counsel maintains that if investigators merely provide an opportunity for a suspected violator to continue on a course of criminal conduct, such activity will not constitute entrapment. In this regard, the investigation record does not contain any evidence indicating activity characteristic of entrapment, nor had the retailer provided substantial evidence to support the claim of entrapment.

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, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. The Appellant did not provide any evidence that the violations cited in the charge letter did not occur.

Corrective Actions

With regard to the Appellant's contentions with respect to the imposition of corrective actions to prevent future SNAP violations from occurring, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that it has taken or will take corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Financial Hardship

With regard to the Appellant's contention that a SNAP disqualification would impose a financial hardship on 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.

Case Laws

With regard to the case laws cited by the Appellant, it is beyond the scope and authority of this review to determine the applicability of same. This review is limited to consideration of whether or not the Retailer Operations Division duly adhered to the Food and Nutrition Act of 2008, as amended, and the implementing regulations, and whether or not the action taken is sustainable by a preponderance of the evidence. Therefore, the application of any judicial precedent is better addressed via judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

CIVIL MONEY PENALTY

A review of the Retailer Operations Division's case file found insufficient evidence to support the denial of a civil money penalty. A civil money penalty in the amount of \$7,422.00 is assessed as an option in lieu of the six month disqualification. Therefore, it is unnecessary to address the Appellant's contentions regarding the civil money penalty.

CONCLUSION

It is therefore established that the violations as described in the letter of charges did in fact occur at Lowell Food Mart warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5). However, the Retailer Operations Division's determination to impose a six month disqualification period is modified to provide the option of a civil money penalty in lieu of disqualification, in accordance with 7 CFR § 278.6(f). In accordance with 7 CFR § 278.6(g), this civil money penalty shall be assessed in the amount of \$7,422.00. The Retailer Operations Division will be informed of this decision. The Appellant may expect to hear from that office in the near future with respect to the arrangements for payment of this civil money penalty. Please note that if the penalty is not paid, the six month SNAP disqualification will be imposed.

In accordance with the Food and Nutrition Act of 2008 and the regulations there under, this penalty shall become effective thirty (30) days after receipt of this letter. Should the Appellant choose to accept disqualification rather than pay the civil money penalty, the Appellant may submit a new application for SNAP participation 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, 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

September 8, 2022