

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

Woodward Liquor,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0247368

FINAL AGENCY DECISION

It is the decision of the United States Department of Agriculture (USDA) that there is sufficient evidence to support a finding that a six-month disqualification of Woodward Liquor (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as imposed by the Office of Retailer Operations and Compliance (ROC) of FNS.

ISSUE

The issue accepted for review is whether ROC took appropriate action in its administration of SNAP, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278, when it imposed a six-month period of disqualification against Appellant, on October 13, 2021.

AUTHORITY

Per 7 U.S.C. § 2023 and its 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

ROC conducted an investigation of Appellant’s compliance with federal SNAP law and regulations, during the period of September 4, 2022 through September 7, 2022, and involved four compliance visits. The investigation report included Exhibits A through D, which provide full details on the results of each compliance visit, and indicates that SNAP violations occurred on three of the four compliance visits. Specifically:

Exhibit A

Appellant sold the investigator two common nonfood items (one package each of plastic cups and deodorant), along with four eligible items, using a SNAP card. The investigator did not attempt to traffic SNAP benefits. The investigator described this transaction as follows:

“I entered the subject store, placed all items on the counter, and presented the EBT card to the clerk for purchase. The clerk who identified himself as John, made no mention of the non-food items being purchased using SNAP benefits and completed the transaction.”

Exhibit B

Appellant sold the investigator two common nonfood items (one package each of sandwich bags and soap/“beauty bar”), along with three eligible items, using a SNAP card. The investigator did not attempt to traffic SNAP benefits. The investigator described this transaction as follows:

“I entered the subject store, placed all items on the counter, and presented the EBT card to the clerk, identified as John, for purchase. John made no mention of the non-food items being purchased using SNAP benefits and completed the transaction.

Exhibit C

Appellant sold the investigator two common nonfood items (one package each of plastic cutlery and paper plates), along with two eligible items, using a SNAP card. The investigator attempted to traffic SNAP benefits, but was refused. The investigator described this transaction as follows:

“I entered the subject store, placed all items on the counter, and presented the EBT card to the clerk for purchase. The clerk made no mention of the non-food items being purchased using SNAP benefits and completed the transaction. I attempted to get cash back off my EBT card, but the clerk refused.”

Exhibit D

The investigator attempted to purchase two common ineligible items, using a SNAP card, and to traffic SNAP benefits, but was refused. Appellant sold the investigator two eligible items, using a SNAP card. The investigator described this transaction as follows:

“I entered the subject store, placed all items on the counter, and presented the EBT card to the clerk, identified as Sam, for purchase. Sam removed the non-food items and stated that they could not be purchased using SNAP benefits. I asked Sam to utilize the EBT card for the non-food items and Sam refused. Sam then completed the transaction for the food items only. Sam provided me with 2 unpackaged plastic cups from behind the counter for free and placed them in the bag with the food items. I asked Sam for cash back off my EBT card, but Sam refused.”

In a letter dated September 28, 2021, ROC charged Appellant with accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items, in violation of 7 CFR § 278.2(a). The letter also informed Appellant that, per 7 CFR § 278.6(e)(5), the violations warranted a disqualification period of six months, and that FNS may impose a civil money penalty (CMP) in lieu of a disqualification, under the conditions specified in 7 CFR § 278.6(f)(1). The letter included a copy of the investigation report.

The charge letter also indicated that Appellant has the right to reply to the charges; may 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 Appellant, at the store address of record, on September 30, 2021.

Appellant responded to the charge letter, in writing, on October 1, 2021; and spoke with ROC staff by telephone, on October 7, 2022.

After evaluating Appellant's response, ROC concluded that the sale of ineligible food items in exchange for SNAP benefits had occurred as charged, and notified Appellant, in a determination letter dated October 13, 2021, that the firm was being disqualified from participation as an authorized retailer in SNAP for six months. This letter also stated that ROC considered Appellant's eligibility for a hardship civil money penalty (CMP), according to the terms of Section 278.6(f)(1). However, the letter indicated 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 October 26, 2021, Appellant appealed ROC'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 on hold 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 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 AND REGULATIONS

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 regulations 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.

7 CFR § 278.2(a) states, in part:

“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, in part:

“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, 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”

7 CFR § 278.6(e)(5) states, in part:

“Disqualify the firm for 6 months if it is to be the *first* [emphasis added] 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, 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.”

APPELLANT’S CONTENTIONS

The following represents a brief summary of the Appellant’s contentions in this matter. However, in reaching a decision, please note that full attention and consideration was given to all contentions presented, including any not specifically reiterated or specifically referenced herein.

In the written and telephonic replies to the charge letter, and in the administrative review request, the Appellant, directly and through counsel, offered the following contentions:

- “[M]y clients are not permitted FOIA requests and the abatement of this matter. This is a violation of the regulations. 7 C.F.R. §278.6(b)(1) states in clear terms, ‘Any firm considered for disqualification. . . shall have full opportunity to submit to FNS information, explanation or evidence concerning any instances of non-compliance before FNS makes a final administrative determination.’”
- “Without this store’s SNAP participation, the local neighborhood would suffer a hardship.”

- “The evidence presently before the Department is unsworn to by the Investigator and contains no corroborating evidence.”
- “[T]he clerk during the September 7, 2021 (Exhibit C & D) investigation outright refused to engage in trafficking SNAP benefits...”
- “[T]he Department lacked sufficient evidence upon which to base a six (6) month disqualification of the Appellants. In pertinent part, the Appellants vehemently denied that violations had occurred at the Store—a position substantiated by the Investigator’s notes.”
- “[A] series of competing allegations is insufficient for the Department to find, by a preponderance of the evidence, that an alleged violation occurred.”
- “[E]ven if the allegations were accurate, the store’s violations warrant a warning letter rather than a six-month disqualification.
- “The Department bears the burden of proof at this stage of the case.”
- “There is no evidence whatsoever in the record that the alleged sales of common nonfood items were *due to* carelessness or poor supervision by the store’s ownership or management.”
- “[T]he Investigator’s affidavit is “hearsay” be definition—an out of court statement offered to prove the truth of the matter asserted.
- “[T]he ownership had taken reasonable and fiscally practical steps to prevent SNAP violations.”

ANALYSIS AND FINDINGS

Investigation Report

The purpose of this administrative review is to either validate or to invalidate ROC’s determination that Appellant should be disqualified from participation as a SNAP authorized store, for a period of six months. This review is limited to the facts at the basis of the ROC’s determination at the time it was made.

When Appellant’s 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 violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” Furthermore, the certification is clear that store ownership understood that, by signing the document, violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from SNAP. Thus, Appellant is accountable for the proper handling of SNAP benefit transactions, regardless of who Appellant chooses to handle store business, and regardless of whether the owner was aware of the violations. 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.

Appellant asserts that, in this review, the “Department bears the burden of proof at this stage of the case,” to prove, by a preponderance of the evidence, that the ROC’s determination should be upheld. However, this assertion is incorrect. As stated in the STANDARD OF REVIEW section of this document, 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.

Appellant asserts that the evidence in this case – the investigative report – upon which ROC’s determination is based, “is unsworn to by the Investigator and contains no corroborating evidence.” However, the facts of this case contradict Appellant’s contentions on these points. The charges of violations in this case are based on the findings of a formal USDA investigation of Appellant’s compliance with Federal SNAP law and regulations, conducted from September 4, 2022 through September 7, 2022. Investigators are trained thoroughly before entering any retail establishment. Investigators certify, under penalty of perjury, that their investigative reports are true and correct.

Appellant also questions the admissibility of the investigator’s reports, asserting that they are hearsay. Regarding this contention, the administrative review process and administrative determinations made by the SNAP Administrative and Judicial Review Branch are not subject to the Federal Rules of Evidence or the Administrative Procedures Act. This is because the SNAP administrative review process has its own separate authority under Section 14(a)(5) of the Food and Nutrition Act of 2008. The statute and regulations do not provide for formal discovery procedures or adversary cross-examination as part of the review process. Accordingly, the contentions regarding hearsay are not relevant to administrative review, which is to ensure that the review process is conducted in accordance with the applicable statute and regulations.

Appellant also denies that the violations occurred, and asserts that investigator’s notes support this contention; and that “a series of competing allegations is insufficient for the Department to find, by a preponderance of the evidence, that an alleged violation occurred.” However, all transactions are fully documented in the investigative reports, and contain no known error or discrepancies. 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. Specifically, the investigative report documents that a store employee engaged in the misuse of SNAP benefits -- noted in Exhibits A, B, and C -- warranting a disqualification as a SNAP retail food store for a period of six months. Aside from its assertions, Appellant submitted no evidence that contradicts these findings.

Appellant asserts that, even if the violations did occur, they were minor in nature, and too limited to warrant a disqualification. Therefore, contends Appellant, a warning letter should be issued in lieu of SNAP disqualification. However, neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto, establish a minimum transaction threshold that must be met before the purchase of ineligible items with SNAP benefits can be considered a program violation. Moreover, Section 278.6(e)(5) of the SNAP regulations states that FNS shall disqualify a store for six months, if it is a store’s first violation, 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. With regard to the Appellant’s contention that FNS did not provide prior notice by FNS that violations were occurring, 7 CFR § 278.6(d)(2) & (3) of the SNAP regulations indicate that “The FNS office making a disqualification or penalty determination . . . shall consider . . . any prior action . . . to warn the firm about the possibility that violations are occurring . . .”. This provision only requires FNS to consider any prior warnings, when determining a sanction; it does not require FNS to give such warnings. FNS did not consider prior actions to warn the Appellant about the possibility that violations were occurring because there were no prior warnings.

The Appellant contends that there is no evidence that the alleged sales of common nonfood items was due to carelessness or poor supervision by the store's ownership or management. However, on three of four attempts, Appellant's employee was willing to exchange SNAP benefits for ineligible nonfood items. It is highly improbable that the only instances in which Appellant's employees engaged in SNAP violations were those transactions conducted as part of the FNS undercover investigation. Rather, it is far more likely that those transactions represent an ongoing pattern of SNAP violations at the Appellant firm, which is a clear sign of poor or no supervision by store ownership and/or management.

Appellant also contends that it took reasonable and fiscally practical steps to prevent SNAP violations. However, Appellant provided no evidence in support of this contention.

Finally, Appellant asserts that, on two of the four compliance visits, Appellant's employees refused to engage in trafficking of SNAP benefits. While this assertion is correct, it is not relevant, as ROD did not charge Appellant with trafficking.

Based on this discussion, ROC's decision to disqualify Appellant for a six-month period, for the sale of ineligible items in exchange for SNAP benefits, was the appropriate penalty, and there is no valid basis for dismissing the charges or for mitigating the penalty imposed.

FOIA

Appellant contends that not holding determinations in abeyance while FOIA responses are pending "is a violation of the regulations. 7 C.F.R. §278.6(b)(1) states in clear terms, 'Any firm considered for disqualification. . . shall have full opportunity to submit to FNS information, explanation or evidence concerning any instances of non-compliance before FNS makes a final administrative determination.'" With regard to this contention, effective October 26, 2020, changes to 7 CFR § 278.6 and 7 CFR § 279.4 went into effect. These changes prohibit holding determinations and administrative reviews in abeyance while FOIA responses are pending. Moreover, Appellant had ample opportunity to provide information showing that the trafficking transactions described in the investigation report were legitimate transactions. In fact, Appellant did submit such a response, through counsel, and ROC considered this information prior to making a determination.

Case Law

With regard to other the case law 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 ROD 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

Appellant contends that a SNAP disqualification would impose a hardship on area SNAP customers and therefore, requests the imposition of a hardship civil money penalty in lieu of a six-month SNAP disqualification.

ROC 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.”

The case record documents that ROC determined that the six-month disqualification of Appellant 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. Appellant is classified by FNS as a convenience store. Agency mapping systems indicate that there are 24 SNAP authorized stores located within a one-mile radius of the Appellant firm, including two supermarkets, and over a dozen convenience stores similar to Appellant.

Based on the evidence, the disqualification of Appellant would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, ROD’s decision not to assess a hardship CMP in lieu of a six-month disqualification is sustained, as appropriate under 7 CFR § 278.6(f)(1).

CONCLUSION

Based on a review of all available information in this case, this review finds, through a preponderance of the evidence, that the violations as described in the letter of charges did, in fact, occur at Appellant, did occur at Appellant’s store during a USDA investigation. All transactions cited in the letter of charges were conducted 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 date of the trafficking violations, and in all other critically pertinent details. Further, the Appellant has not offered convincing evidence in support of its counterarguments, and its contentions do not persuade this review to conclude that a reversal of the agency’s sanction determination would be appropriate. Therefore, the ROC’s decision to impose a disqualification, pursuant to 7 CFR § 278.6(a) and (e)(1) was appropriate.

That regulation states that FNS shall “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.” Therefore, the decision to impose a six-month disqualification against Appellant, the least severe penalty allowed by regulation, is appropriate, and the action is sustained.

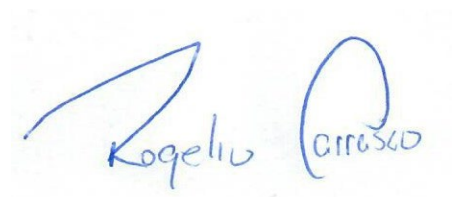
In accordance with the Food and Nutrition Act of 2008 and the regulations there under, the six-month period of disqualification shall become effective thirty (30) days after receipt of this letter. A new

application for participation may be submitted by the firm 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.

A handwritten signature in blue ink. The first part of the signature is a stylized 'R' followed by the word 'Rogelio'. The second part is a circular flourish followed by the word 'Carrasco'.

ROGELIO CARRASCO
ADMINISTRATIVE REVIEW OFFICER

August 8, 2022