

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

**Zole Market & Tobacco,**

**Appellant,**

**v.**

**Office of Retailer Operations and  
Compliance,**

**Respondent.**

**Case Number: C0223076**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to impose a six-month disqualification against Zole Market & Tobacco (“Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The purpose of this review is to determine whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of Code of Federal Regulations (CFR) § 278.6(e)(5) in its administration of SNAP when it imposed a six-month period of disqualification against Appellant on May 5, 2022.

**AUTHORITY**

According to 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**

USDA conducted an investigation of Appellant’s compliance with federal SNAP law and regulations during the period of February 13, 2020 through March 11, 2020. The investigation reported that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. These items sold during these impermissible transactions are best described in regulatory terms as “common nonfood items.” The investigation revealed that three clerks were involved in the impermissible transactions. As a result of evidence compiled from this investigation, the Office of Retailer Operations and

Compliance informed Appellant, in a letter dated April 30, 2022, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations “. . . warrant a disqualification period of six months (Section 278.6(e)(5)). Under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).”

Appellant replied to the Office of Retailer Operations and Compliance’s charges in writing. The record reflects that the Office of Retailer Operations and Compliance received and considered the information provided prior to making a determination.

The Office of Retailer Operations and Compliance notified Appellant in a letter dated May 5, 2022 that the firm was being disqualified for six months from participation as an authorized retailer in SNAP. This determination letter also stated that Appellant’s eligibility for a hardship civil money penalty (CMP) according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated to Appellant 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 May 9, 2022, Appellant appealed the Office of Retailer Operations and Compliance’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**

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 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.

Section 278.6(e)(5) of the SNAP regulations states, in part, when a firm is to be disqualified 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 due to carelessness or poor supervision by the firm's ownership or management.

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 . . .

### APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- FNS has the burden of proof.
- This is the first time the firm has had a problem with SNAP compliance.
- Appellant denies the allegations.
- FNS should consider 7 CFR § 278.6(d) before issuing a determination.
- Appellant requests a CMP. Disqualification would pose a hardship to SNAP participants who rely on the firm.
- There is no evidence of carelessness or poor supervision by management.
- A warning letter is appropriate according to *Primo Meat Market vs. Retailer Operations Division*.
- The violations were minor in nature. A warning letter is the appropriate sanction according to *Dale & Selby Superette & Deli v. U.S. Dep't of Agric.*, 836 F. Supp. 669, 673 (D. Minn. 1993) *Vasudeva v. United States*, 3 F.Supp.2d 1138, 1146 (W.D. Wash. 1998), *aff'd*, 214 F.3d 1155 (9th Cir. 2000), *Wolf v. United States*, 662 F.2d 676, 679 (10th Cir. 1981) and *Kim v. United States*, 903 F. Supp. 118 (D.D.C. 1995).
- There is insufficient evidence that violations occurred.
- Appellant requests a warning letter.
- The investigative report lacks critical details.
- Appellant questions why the time of the transactions were redacted.
- Appellant was not warned that violations were occurring.
- Clerks refused trafficking on one occasion.

In support of its contentions, Appellant provided the following documentation:

- A November 2016 report entitled *Foods Typically Purchased by Supplemental Nutrition Assistance Program (SNAP) Households*; and,
- Portions of a report entitled *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program in Fiscal Year 2017* by Insight Policy Research.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

## ANALYSIS AND FINDINGS

Regarding Appellant's denial of violations, this review examines the relevant information regarding the determination. Appellant asserts FNS bears the burden of proof in administrative review, not Appellant. Appellant is incorrect. Once the Office of Retailer Operations and Compliance establishes trafficking occurred, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that it did not engage in trafficking. If this is not demonstrated, the case will be sustained. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

Appellant questioned why the time of the investigator's entry and exit from the store was not disclosed. Information that could compromise the identity of the undercover investigator is not provided to Appellant.

### Penalty Appropriate

Appellant contends that a clerk refused trafficking on one occasion. A clerk did refuse trafficking which carries a more severe penalty. The investigation report shows that of the four times that nonfood violations were attempted, store personnel permitted them four times.

Appellant stated this is the first time the firm has had a problem with SNAP compliance, requests a warning letter and insists that there is no evidence of carelessness or poor supervision by management. If management had been properly supervising clerks - such as reviewing transactions to ensure proper processing of SNAP benefits and disciplining clerks who failed to adhere to proper procedures - clerks would not repeatedly allow the purchase of ineligible items with SNAP benefits. Repeatedly entrusting an unsupervised, inexperienced and/or untrained clerk(s) to handle SNAP benefits is reasonably viewed as careless or the exercise of poor supervision. Accordingly, the Office of Retailer Operations and Compliance attributed violations to "carelessness, or poor supervision by the firm's ownership or management," pursuant to 7 CFR § 278.6(e)(5) of the SNAP regulations, which results in a disqualification of six months. This penalty is only permitted if the firm has not been previously sanctioned. Therefore, a six-month disqualification for the violations committed, the minimum, is the appropriate sanction in this case.

Appellant contends the violations were minor in nature, argues that Appellant should have received a warning while the investigation was ongoing, and states that a warning letter is the appropriate sanction according to *Dale & Selby Superette & Deli v. U.S. Dep't of Agric.*, 836 F. Supp. 669, 673 (D. Minn. 1993) *Vasudeva v. United States*, 3 F.Supp.2d 1138, 1146 (W.D. Wash. 1998), *aff'd*, 214 F.3d 1155 (9th Cir. 2000), *Wolf v. United States*, 662 F.2d 676, 679 (10th Cir. 1981) and *Kim v. United States*, 903 F. Supp. 118 (D.D.C. 1995). In *Dale*, the court found the FNS violated its own regular procedures in imposing a more severe sanction, which did not occur in the present case. In *Vasudeva*, the court found that the retailer had met the stringent requirements for a trafficking civil money penalty through evidence of SNAP training and compliance program. Again, these circumstances did not exist in the current case. In *Wolf*, the court upheld the six-month disqualification sanction. The judge's decision in *Kim* was

inconsistent with other court rulings. To require Appellant to receive a warning of violations before administrative action can be taken would render the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA virtually meaningless.

### **Consideration of Factors for a Sanction**

Appellant stated that FNS should consider the factors listed in 7 CFR § 278.6(d) before imposing a sanction. Appellant lists these factors: the nature and scope of the violations; whether the firm was warned violations were occurring; and any evidence of intent to violate the regulations. This argument is based on an incorrect understanding of the regulations. The severity of the penalties, set forth in the subsequent paragraph 7 CFR § 278.6(e), are based on the factors listed in 7 CFR § 278.6(d). For example, permitting the sale of cigarettes with SNAP benefits results in a three-year disqualification, but this becomes five years if the firm had been previously warned. Other sanctions consider intent, such as whether false information on an application was “knowingly submitted” or whether the sale of nonfood items was “the firm’s practice” (which carries a three-year disqualification) rather than “due to carelessness or poor supervision” (which results in a six-month disqualification). The period of disqualification for this latter violation is doubled if Appellant has previously received a sanction. In issuing Appellant a six-month disqualification, the Office of Retailer Operations and Compliance did consider the factors listed in 7 CFR § 278.6(d).

### **Prior Administrative Reviews**

Appellant contends that the determination should be reversed based on the Final Agency Decision in another case. Prior administrative review decisions are based on the specific circumstances of each case as documented by materials provided by the Appellant and the Office of Retailer Operations and Compliance. Administrative review decisions do not establish policy or supersede federal law, regulations, or policy guidance. The determination in this case conforms to SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations.

### **Evidence of Violation**

Appellant contends there is insufficient evidence that violations occurred and that the investigative report lacks critical details. As previously stated, 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** . . . (Emphasis added.)

Appellant was provided a copy of the investigation report, redacted to protect the identity of the investigative operative, which details each occasion during which violations occurred, their dates, the nonfood items purchased with SNAP benefits, and the descriptions and any comments of the clerk involved. The evidence in the record includes EBT receipts which substantiate the amounts of the trafficking transactions cited in the investigative report and photos of the items

purchased. In contrast to Appellant's assertions, there is substantial evidence that the violations occurred.

### **Investigative Record**

Based on a review of the evidence, it appears that the program violations at issue occurred as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted under the supervision of a USDA investigator and all are fully documented. The investigative record is specific and accurate with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail.

### **CIVIL MONEY PENALTY**

Appellant requested a fine in lieu of the six-month disqualification. A CMP as an optional penalty in lieu of a six-month disqualification was considered in this case. Such a finding is appropriate only if: 1) a store sells a substantial variety of staple food items, and; 2) its disqualification would create a 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.

In this regard, some degree of inconvenience to SNAP benefit users is inherent in the disqualification from SNAP of any participating food store since the normal shopping pattern of such SNAP benefit holders may temporarily be altered during that period. In this case, however, the Office of Retailer Operations and Compliance has rendered a finding pursuant to 7 CFR § 278.6(f) that it would not be appropriate to impose a CMP in lieu of a period of disqualification. The Office of Retailer Operations and Compliance has determined that Appellant is not the only authorized retail food store in the area "selling as large a variety of staple food items at comparable prices." In addition, the Office of Retailer Operations and Compliance notes that the subject store is classified in the FNS SNAP retailer database as a convenience store. That database also shows a medium grocery store, three supermarkets, and four superstores located within a one-mile radius. All of these stores are easily accessible to customers and offer a variety and quality of staple foods comparable to, or better than, those offered by Appellant. Appellant does not carry any unique items or foods that cannot be found at other stores. Therefore, the earlier determination that Appellant's disqualification would not create a hardship to customers, as differentiated from potential inconvenience, is sustained, and a CMP in lieu of disqualification is not appropriate in this case.

### **CONCLUSION**

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a disqualification of six months against Zole Market & Tobacco from participating as an authorized retailer in SNAP is sustained.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. A new application for participation in

SNAP may be submitted ten (10) days prior to the expiration of the six-month disqualification period.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt 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.

RICH PROULX  
ADMINISTRATIVE REVIEW OFFICER

July 25, 2022