

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

Discount Beverage Mart,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0261402

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 Discount Beverage Mart (hereinafter “Discount Beverage 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 six month period of disqualification against Discount Beverage 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 Discount Beverage Mart with Federal SNAP law and regulations during the period March 15, 2023 through March 19, 2023. In a letter dated May 5, 2023, 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 three out of three 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 May 10, 2023.

In responses to the Retailer Operations Division of May 11, 2023 and May 12, 2023, 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 responses and the evidence of this case, the Retailer Operations Division issued a determination letter dated June 2, 2023. 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 an email correspondence of June 13, 2023, 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 June 15, 2023. Upon acceptance of the administrative review request, implementation of the six month disqualification was held in abeyance pending completion of this review. In an email correspondence of July 6, 2023, 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 March 15, 2023 through March 19, 2023, USDA conducted three compliance visits at Discount Beverage Mart. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated May 5, 2023. The investigation report included Exhibits A through C which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during three of the three compliance visits and involved the sale of a variety of items best described in regulatory terms as "common nonfood items". The misuse of SNAP benefits noted in Exhibits A, B, and C warrants 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 replies 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 is a small family business.
- The cashier made a mistake and sold forks and plates with SNAP benefits.
- The owner had told the clerk that ineligible nonfood items cannot be purchased with SNAP benefits, has corrected her, and promises that these types of mistakes will not occur in the future.
- The Appellant requests the issuance of a warning letter or a civil money penalty in lieu of a six month SNAP disqualification.
- FNS's evidence lacks detailed specifics, corroborating evidentiary support, and other information that would speak to intent, coupled with the absence of notice and the limited scope, indicates that this case should be treated exceptionally lightly.
- The allegations in this case are unfounded, inaccurate, do not rise to the level necessary for the issuance of the proposed six month SNAP disqualification, and are otherwise not the result of carelessness or poor supervision by the firm's ownership or management.
- The Appellant has never had a compliance problem with the SNAP in the past.
- 7 CFR 278.6(d) requires FNS to consider (1) the nature and scope of the violations allegedly committed by personnel of the firm, (2) any prior action taken by FNS to warn the firm about the possibility that violations are occurring, and (3) any other evidence that shows the firm's intent to violate the regulations.
- Contracted investigators are less reliable than prior RIB investigators. Contracted investigators have been given items from the store's inventory because they claimed to have no form of payment besides their EBT card, only for store personnel to give them items and the investigators promise to come back and pay for the items—only to never return. That is theft or fraud (obtaining items under false pretenses), and is ethically dubious at best. Contracted investigators have been known to make sexual advances to convince store clerks to violate the SNAP regulations. Contracted investigators have been known to deviate materially from the standard investigation process, often hiding that their purchases were not on EBT, or in at least one case, adding items to the bag after purchase and then alleging "NPI" for the prices. Contracted investigators have every reason to make allegations against stores in an attempt to further a disqualification. There is much motivation on the part of the contractor to find violations, even where they do not exist.
- The clerk's identity does not match the individual who was on duty during the purported allegations. As such, the investigator is either incorrect in what store they were in, was incorrect on the timing, or was otherwise fabricating the allegations.
- After a review of the pricing and the items in the charge letter's Exhibits, as well as the description of the clerk and other transaction details, the Appellant has identified a significant inaccuracy that needs to be addressed. The person who conducted these transactions is not the contracted investigator. Instead, the transactions were conducted by a minor—a child. The child was told the ineligible items were not allowed to be purchased with SNAP benefits, but he responded that he had to buy the ineligible items with SNAP benefits or he would be in trouble. The clerk was concerned for the child and then performed a work around on the computer system to convert taxable items to nontaxable, thereby tricking the computer into believing that it was running eligible transactions. The fact that the transactions were processed by a minor means the reports are inaccurate and are unethical.
- Items that appear in the investigator's pictures should also appear in the store visit report, especially if the store visit occurred within a matter of months from the investigation. Furthermore, the item pricing (in the event it is not identified by the receipt) should be consistent with the pricing shown in the store visit report assuming there is one. In the event

that the pricing is not consistent between the Transaction Report and the store visit report and the receipt does not indicate such pricing information, the Transaction Report should be disregarded.

- It is FNS's burden of proof and where there is an inconsistency with the information received by the investigator, it should be disregarded if it cannot be reconciled.
- 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. Furthermore, if the clerk's problem is latent in nature (so as to not be obvious on normal performance review), then an owner or manager would not necessarily be aware of it, nor should they be expected to be.
- The violations are too limited to warrant a disqualification. The items involved are minor ineligible items for relatively de minimus amounts of money, indicating that the scope of the violations are de minimus.
- The pertinent proof at this stage of the disqualification process is the "preponderance of the evidence" standard, which means that the evidence must be adequate enough 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. See *L&M Grocery Market, Inc. v. Retailer Operations and Compliance*.
- The Department bears the burden of proof, not the retailer at this stage of the proceedings. See *Primo Meat Market vs. Retailer Operations Division*.
- The Appellant was not warned by FNS that violations of the SNAP rules may be occurring prior to charging the firm. A store owner or manager without such warning would have to be specifically aware of the transactions or have exercised something less than "average supervision" for a sanction to be warranted.
- A warning letter should be issued in lieu of SNAP disqualification. This matter should be afforded the same standards set out in *Primo Meat Market vs. Retailer Operations Division* as a determination under similar circumstances which is different would be described as arbitrary and capricious and furthermore, without sufficient evidentiary support. The Appellant also cited *Dale v. Selby Superette & Deli v. U.S. Dep't of Agric.*, *Kim v. United States*, *Vasudeva v. United States*, and *Wolf v. United States* in support thereof.
- A mathematical calculation of the number of visits and the number of ineligible items purchased is not adequate to determine whether a six month disqualification is warranted. See *Primo Meat Market case*.
- The plain language of 7 CFR § 278.6(d), and logical application to its terms to a disqualification, indicates that absent intent, a less stringent action should be taken in response. Courts have also previously overturned disqualifications where FNS failed to adequately consider intent. See *infra Vasudeva v. U.S.*
- According to USDA's *Profile of SNAP Households for the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) Congressional District of 5 U.S.C. § 552 (b)(6) & (b)(7)(C)*, (where the Appellant is located), there are 29,024 households that receive SNAP benefits. USDA's data indicates that 8% of all households in this Congressional District receive SNAP benefits.
- The store sells a variety of staple and accessory food items to the surrounding community.
- The list of inventory items that SNAP households prefer to purchase was compiled and set out in the Department's 2016 study, "Foods Typically Purchased by SNAP Households". The Appellant carries items included on the top 100 purchased commodity items noted in this report, to include "accessory foods".
- The Appellant requests the imposition of a hardship civil money in lieu of a SNAP disqualification. A substantial portion of the Appellant's clients come from the surrounding neighborhoods and a significant portion are SNAP recipients. The Appellant is in an area

with a higher per-capital population of SNAP households than the average store. According to USDA's SNAP Retailer Locator Tool, there are five (5) which participate in the SNAP. However, not all SNAP retailers are created equally, and many of these stores offer different inventories, services, and hours of availability. These nearby stores differ in many ways from the Appellant that would be important to local SNAP households. The Appellant provides a higher portion of households' eligible food items and is often utilized for shopping trips involving staple foods—even if such items are frozen or convenience meals.

- Problems facing SNAP households like transportation inconsistency, purchase preferences, and shopping habits should be determined based upon either direct information from local households, or from other credible information sources that FNS traditionally relies upon. Other concerns regarding transportation include things like the household's disability status, elderly status, or households with a large number of children. All of these circumstances make transportation and travel more difficult.
- The Appellant provided information regarding SNAP households' shopping habits and cited the following studies in support thereof: *Foods Typically Purchased by SNAP Households*, USDA FNS, November 2016; *Benefit Redemption Patterns in the SNAP in Fiscal Year 2017 Final Report*, Insight Policy Research, September 2020; *Shopping Pattern and Food Purchase Differences Among SNAP Households and Non-SNAP Households in the United States*, Preventative Medicine Reports, June 20, 2017; and *What Does SNAP Benefit Usage Tell Us About Food Access in Low-Income Neighborhoods?*, Social Science & Medicine, 2014.
- The Appellant should be afforded an immediate hearing.
- Not holding the determinations in abeyance while a FOIA response is pending violates 7 CFR § 278.6(b)(1) according to *Triple E Express vs. ROD*, because the Appellant is not given a full opportunity to respond.

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

- 5 U.S.C. § 552 (b)(6) & (b)(7)(C), *Who Participates in SNAP?* USDA FNS;
- *U.S. Grocery Shopping Trends Annual Report*, FMI, 2016;
- *What Does SNAP Benefit Usage Tell Us About Food Access in Low-income Neighborhoods?* Social Science & Medicine, 2014;
- *Benefit Redemption Patterns in the SNAP in Fiscal Year 2017 Final Report*, Insight Policy Research; and
- *Shopping Pattern and Food Purchase Differences Among SNAP Households and Non-SNAP Households in the United States*, Preventative Medicine Reports, June 20, 2017.

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.

The Appellant contends that the cashier made a mistake and sold forks and plates with SNAP benefits. The owner had told the clerk that ineligible nonfood items cannot be purchased with SNAP benefits, has corrected her, and promises that these types of mistakes will not occur in the future.

However, 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 Appellant contends that the contracted investigator has every reason to make allegations against stores in an attempt to further a disqualification. There is much motivation on the part of the contractor to find violations, even where they do not exist. The transaction descriptions in the Transaction Reports lack meaningful and specific detail. The person who conducted these transactions is not the contracted investigator. Instead, the transactions were conducted by a minor—a child. The fact that the transactions were processed by a minor means the reports are inaccurate and are unethical.

The FNS investigative report shows that an employee working at the Appellant firm accepted SNAP benefits for ineligible nonfood items on three 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 employee engaged in the misuse of SNAP benefits noted in Exhibits A, B, and C and that the misuse of SNAP benefits warrants a disqualification as a SNAP retail food store for a period of six months. The report shows that the nature and scope of the violations under review do violate SNAP regulations, and the transaction amounts cited in the report also match FNS transaction records for the dates in question. Additionally, a review of the report shows no errors or discrepancies.

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.

Investigative personnel stand by their report that the items listed in the investigation report were, in fact, purchased and have documentation on file that confirms the items listed were donated to and signed for by a charitable organization following each transaction. Also supporting the conclusion that the investigation did take place at the subject store are EBT receipts obtained during the investigation whose transaction amounts correspond exactly to the purchase amounts and times indicated in each of the Exhibits of the investigation report, and clearly bear the name and address of

the subject store. Therefore, the evidence supports the conclusion that the Appellant was not misidentified as the offending store and that the SNAP violations as noted occurred.

The Appellant contends that the violations are too limited to warrant a disqualification. Therefore, 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 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 there is no evidence showing that the alleged sales of common nonfood items was due to carelessness or poor supervision by the store's ownership or management. However, had an effective compliance policy and program been in effect at the firm, it is unlikely that the employee 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 employee. Additionally, had store ownership and/or management been supervising the employee through occasionally monitoring her using videotape, if available, or in person, it would have readily noticed that she was 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 employee was deficient in her 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 employee 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. The regulations do allow SNAP retailers to pay a hardship CMP, if eligible, as explained in the Civil Money Penalty section of this Final Agency Decision.

With regard to the studies cited and/or provided by the Appellant in support of its contentions, while FNS does not dispute the findings of these studies, they do not provide evidence that the sale of ineligible nonfood items with SNAP benefits did not occur at Discount Beverage Mart during the investigation period.

The Appellant is correct that the firm has no previous history of SNAP program violations or warnings. However, a record of participation in 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 the violations upon which they are based. There is no provision in the Act,

regulations, or agency policy that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

With regard to the Appellant's contention that the clerk's identity does not match the individual who was on duty during the purported allegations, no statutory or regulatory requirements exist for investigative personnel to positively identify store employees that have committed violations of SNAP rules and regulations. The descriptions contained in the Report of Positive Investigation are provided only to assist store ownership in identifying those employees responsible for the violative transactions. Many variables can affect the description of an employee (e.g. whether the employee was sitting or standing or on a platform, the fit of their clothing, changing hair styles/lengths/colors, etc.) so these descriptions may not be one hundred percent accurate which does not mean that the violations did not occur.

With regard to the Appellant's contentions that the owner was not given prior notice by FNS that violations were occurring, 7 CFR § 278.6(d)(2) & (3) of the SNAP regulations provides 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 . . .". The citation simply 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.

In an appeal of an adverse action, **the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed.** That means the 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. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. The Appellant did not provide any evidence that the violations cited in the charge letter did not occur.

Based on this discussion, the decision by the Retailer Operations Division to disqualify the firm for a six month period was the appropriate penalty and there is no 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.

Corrective Action

With regard to the Appellant's contentions with respect to the implementation of corrective actions to ensure that future SNAP violations do not occur, 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.

FOIA

The Appellant contends that not holding determinations in abeyance while FOIA responses are pending violates 7 CFR §278.6(b)(1) according to *Triple E Express vs. ROD*, because the Appellant is not given a full opportunity to respond. With regard to this contention, effective October 26, 2020, the 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. The finding in *Triple E Express* was based on outdated regulations.

It is also important to note with regard to due process that prior to a disqualification determination, the firm was given ample opportunity to reply to the charge letter and provide any information to explain the transactions noted in the charge letter and investigation reports. The Appellant submitted responses to the letter of charges and the Retailer Operations Division received and considered this information prior to making a determination.

The second level of due process involves an administrative review, of which the Appellant, through counsel, has likewise availed itself and in the process of which the Appellant was granted an additional three weeks within which additional information may be provided in support of the request for review. Therefore, any evidence and information that the Appellant presented in support of its case has now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to the Appellant's right to a fair and thorough review. The Appellant has exercised its opportunity to reply to the charge letter and its administrative review rights, and by doing so has availed itself of the full complement of the agency's statutory obligations with regard to due process.

Hearing Request

With regard to the Appellant's request for an immediate hearing, this disqualification is an administrative action and the SNAP regulations do not provide for a hearing, but rather for an administrative review of the action. As noted previously, the Act and regulations provide that any

firm aggrieved by an administrative review determination may seek judicial review of the determination in Federal court or a State court of record having competent jurisdiction. In such event, trial de novo proceedings ensure the firm of a full evidentiary hearing on the agency action at issue.

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.

Previous Administrative Review Decisions

With regard to the Appellant's contention that this matter should be afforded the same standards based on the Final Agency Decisions in other cases, this administrative review decision is based on the specific circumstances of this case as documented by the materials provided by the Appellant and the Retailer Operations Division. This administrative review decision does not establish policy or supersede Federal law or regulations. The determination in this case conforms to SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations.

CIVIL MONEY PENALTY

The 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.

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]. **5 U.S.C. § 552 (b)(7)(E).**

Based on the evidence, the disqualification of Discount Beverage 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 six month disqualification is sustained as appropriate under 7 CFR § 278.6(f)(1).

CONCLUSION

It is therefore established that the violations as described in the letter of charges did in fact occur at Discount Beverage Mart warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5). 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, the least severe penalty allowed by regulation, against Discount Beverage Mart, the Appellant firm, 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 delivery 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 delivery 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

November 9, 2023