

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

Lamar Express Gas,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0239979

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 Lamar Express Gas (“Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). However, the determination is modified to permit a civil money penalty in the amount of \$4,794 as an option in lieu of the six-month disqualification.

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 July 9, 2021.

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 March 30, 2021 through April 7, 2021. The investigation reported that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. These items sold during these impermissible transactions are best described in regulatory terms as “common ineligible nonfood items.” The investigation revealed that three unidentified 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 21, 2021, 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. Appellant’s attorney stated that he was granted a second extension to reply to the charges, but the Office of Retailer Operations and Compliance issued a determination prior to expiration of the extension. Appellant did not provide evidence that a second extension was granted. 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 July 9, 2021 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 July 23, 2021, 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:

- Appellant requests a warning letter.
- Appellant requests a CMP. SNAP participants will incur hardship if the firm is disqualified. Nearby stores do not carry as wide a selection of staple foods. Appellant caters to the Hispanic community. Appellant provided approximately 75 affidavits, 75 pictures of Appellant and the surrounding area, six page of bus route information, and approximately eight pages of documents regarding Appellant's location.
- The Office of Retailer Operations and Compliance did not address the contentions raised in Appellant's response to the charge letter. The administrative process is arbitrary and capricious.
- Other undercover investigations have involved dishonesty and resulted in the stores in those investigations being overturned or offered a CMP. Appellant provided documents regarding other cases.
- Appellant denies nonfood items were purchased with SNAP benefits.
- The investigator is not identified. The charge letter did not include sworn statements signed by the investigator. The investigative report is hearsay.
- Appellant was not provided with evidence of the transactions or chance to confront witnesses.
- There are insufficient violations to warrant a six-month disqualification.
- There was no carelessness or poor supervision. Clerks rejected attempts to violate SNAP rules repeatedly.
- Undercover investigators did not use SNAP benefits to purchase ineligible items.
- The clerks in the investigative report do accurately describe the owner or manager. Neither were involved in the alleged impermissible transactions.
- The clerk referenced in Exhibit A was terminated.
- The clerks were trained in the proper handling of SNAP transactions.
- Appellant has not received a warning regarding violations.
- The nature of the violations was de minimus.

- Disqualification would pose a severe hardship to Appellant. Appellant provided approximately 50 pages of invoices, documents regarding expenses, and summaries of EBT transactions.
- Failure to provide FOIA documents is a denial of due process.
- Failure to provide an in-person hearing denies due process.
- Precedent set in other administrative review decisions supports the issuance of a warning letter.
- There is no evidence that violations occurred.
- Appellant has not had any previous violations.
- Intent must be established by FNS.
- An affidavit is substantial evidence of the existence of training program. Appellant provided an affidavit signed by the owner.
- The owner cannot be held liable for violations because any violations committed by clerks would have been outside the scope of their employment. Treating all acts of store personnel as acts of the retailer is not supported by statute and violates state law.

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

Appellant contends the Office of Retailer Operations and Compliance did not address the contentions raised in Appellant's response to the charge letter. As previously stated, the record reflects that the Office of Retailer Operations and Compliance received and considered the information provided prior to making a determination.

Appellant insists the owner and manager were not involved in the alleged violations, the clerks were trained in the proper handling of SNAP transactions, and the owner cannot be held liable for violations because any violations committed by clerks would have been outside the scope of their employment. Appellant argues treating all acts of store personnel as acts of the retailer is not supported by statute and violates state law. Appellant cited various cases in support of its contentions. None of these cases mirrored the facts of this case: when ownership signed the FNS application to become a SNAP authorized retailer, this included a certification and confirmation that Appellant would "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." The violations listed on this certification document include selling ineligible non-food items. Regardless of whom the ownership of a store may use to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions.

Appellant stated an affidavit is substantial evidence of the existence of training program. In seeking to establish the existence of a training program, Appellant appears to be trying establish its eligibility for a trafficking CMP. As this case did not involve trafficking, this provision is not applicable.

Appellant is incorrect in its assertion that undercover investigators did not use SNAP benefits to purchase ineligible items.

This review is limited to considering the circumstances at the time the Office of Retailer Operations and Compliance's decision was made. It is not within this review's scope to consider actions that Appellant may have taken subsequent to this decision to begin to comply with program requirements. There is no provision in SNAP regulations for reducing an administrative penalty on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, Appellant's termination of one of the offending employees, while a positive step, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

First SNAP Violation

Appellant's maintains that this is the first time there has been an issue related to SNAP. A record of program participation with no documented previous violations, however, does not constitute valid grounds for mitigating the impact of the present charges of sale of nonfood items. Appellant is correct that trafficking was refused on two occasions. Trafficking is a more serious violation that carries a more severe penalty.

Appellant insists there are insufficient violations to warrant a six-month disqualification, and there was no carelessness or poor supervision by management. Appellant requests a warning letter. 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. The investigation report shows that of the five times that nonfood violations were attempted, store personnel permitted them three times. 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.

Penalty Appropriate

Appellant contends the violations were minor in nature and states that a warning letter is the appropriate sanction according to *Shato v. United States of America*. Regarding *Shato*, that the judge held a disqualification period in suspense during a *de novo* judicial review does not establish that a warning letter should have been issued in *Shato*. 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.

Proper Reading of Regulations

Appellant asserted that FNS must prove intent before imposing a sanction. Appellant cites *Minhas v. Vilsack*. Appellant's 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), including intent. 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).

Hearsay in Administrative Hearings

Appellant contends that the investigative report is hearsay, Appellant was not provided with evidence of the transactions or chance to confront witnesses, and failure to provide an in-person hearing is a denial of due process. The record indicates that a signed affidavit by the investigator of all that occurred during the investigation is on file. Appellant cites *Marincas v. Lewis*. *Marincas* is not relevant to this proceeding as it concerned the different handling of stowaways as compared to other asylum applicants under the Immigration and Nationality Act and Refugee Act of 1980. Revisions to parts 278 and 279 of the Supplemental Nutrition Assistance Program regulations eliminated administrative hearings. The revisions became effective September 8, 2003.

Other Administrative Reviews

Appellant contends that other undercover investigations have involved dishonesty and resulted in those investigations being overturned or offering a CMP. Appellant insists a warning letter is the appropriate sanction based on *Primo Meat Market vs. Retailer Operations Division*. 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 and FOIA documents

Appellant alleges not holding determinations in abeyance while FOIA responses are pending violates is a denial of due process. 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.

Appellant contends there is no evidence of violations and the investigator is not identified. 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 amount of cash provided in exchange for 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

Appellant contends the administrative process is arbitrary and capricious. Based on a review of the evidence, it appears that the program violations at issue did, in fact, occur 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

A review of the Office of Retailer Operations and Compliance's case file found insufficient evidence to support the denial of a civil money penalty. A civil money penalty in the amount of \$4,794 is assessed as an option in lieu of the six-month disqualification. Therefore, it is unnecessary to address Appellant's remaining contentions.

CONCLUSION

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a disqualification of six months against Lamar Express Gas from participating as an authorized retailer in SNAP is modified. Consistent with 7 CFR § 278.6(f), a civil money penalty shall be imposed as an option in lieu of completion of the six-month disqualification period. In accordance with 7 CFR § 278.6(g), this civil money penalty shall be in the amount of \$4,794. The Office of Retailer Operations and Compliance will be informed of this decision. Appellant may expect to hear from that office in the near future with respect to the arrangements for payment of this civil money penalty.

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. Should Appellant choose to accept disqualification rather than pay the civil money penalty, 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

October 4, 2021