

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

**34th Street Super Market,**

**Appellant,**

**v.**

**Office of Retailer Operations and  
Compliance,**

**Respondent.**

**Case Number: C0239746**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA) that the record supports that 34<sup>th</sup> Street Super Market (Appellant), committed violations of the Supplemental Nutrition Assistance Program (SNAP) regulations. There is sufficient evidence to sustain a six month disqualification of Appellant from the SNAP as imposed by the Office of Retailer Operations and Compliance (Retailer Operations).

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action in its administration of the SNAP, consistent with 7 CFR § 278.6(a), 7 CFR § 278.6(e), and 7 CFR § 278.6(f)(1), when it imposed a six month period of disqualification against Appellant.

**AUTHORITY**

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7, may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

**CASE CHRONOLOGY**

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of November 29, 2020 through December 22, 2020. The investigative report dated December 28, 2020, documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on multiple separate dates. The items sold are best described as common nonfood items. As a result of evidence compiled during the

investigation, by letter dated February 4, 2021, Retailer Operations charged Appellant with violating the terms and conditions of the SNAP regulations. Misuse of SNAP benefits was noted in Exhibits C, D, and E that warrants a disqualification as a SNAP retail food store for a period of six months. The letter also states that under certain conditions FNS may impose a civil money penalty (CMP) in lieu of a disqualification. The record shows the owner responded to the Charge letter by letter dated February 10, 2021.

Retailer Operations informed Appellant by Determination letter dated February 18, 2021, that the violations cited in the Charge letter occurred at the firm, and that a six month period of disqualification was warranted. The letter also stated that eligibility for a hardship CMP was not applicable as there are other authorized retail food stores in the area selling as large a variety of staple foods at comparable prices.

Counsel requested review of the determination by letter dated March 4, 2021. The review was granted by letter dated March 15, 2021. Counsel submitted a brief dated April 5, 2021, and a one page USDA profile of Florida SNAP households in 2018.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing relevant, credible 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 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 § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e)(5) establish the authority upon which a six month disqualification may be imposed against a retail food store.

7 CFR § 278.2(a) states: “Benefits may be accepted by an authorized retail food store only from eligible households or the households’ authorized representative, and only in exchange for eligible food.”

7 CFR § 278.6(e)(5) of the SNAP regulations states that 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: “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(f)(1) provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause hardship to SNAP benefit households because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It states: “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to SNAP benefit 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.”

7 CFR § 278.6 Disqualification of retail food stores... and imposition of civil money penalties in lieu of disqualifications states in part: “(p) *Freedom of Information Act (FOIA) requests and appeals.* A FOIA request or appeal for records shall not delay or prohibit FNS from making a determination regarding disqualification or penalty against a firm under paragraphs (c) and (d) of this section, or delay the effective date of a disqualification or penalty listed in paragraph (e) of this section.

### **SUMMARY OF THE CHARGES**

A report of the investigation was provided to the Appellant as Exhibits with the Charge letter. The investigative report provides details on the results of each compliance visit. The investigative report documents that SNAP violations were recorded during multiple store visits, that warrant a six month disqualification. The SNAP violations of 7 CFR § 278.2(a) conducted by store personnel, involved the sale of nonfood items for benefits. The nonfood items sold included: cutlery, bathroom tissue, soap, deodorant, razors, shaving cream, and hydrogen peroxide.

### **APPELLANT’S CONTENTIONS**

Consideration was made of all contentions and submissions, whether recapitulated here or not.

- This letter is a response to correspondence from your office with exhibits of the unintentional violations that may have occurred at my store. I am requesting that you consider imposing a civil money penalty in lieu of a 6 months disqualification. Any disqualification for any period of time will adversely affect our small business and will have a negative impact on my family’s livelihood and employees, it will cause great hardship and inconvenience to the households in the surrounding area, since out of the handful of SNAP retailers around here we do carry the most substantial variety of staple food items.
- I continuously remind employees and keep stressing to them not to make mistakes mixing ineligible items with eligible items while ringing up a SNAP sale because I greatly value being a SNAP retailer and do not take mistakes lightly at all.
- Take into consideration the fact that we had no prior violations related to SNAP, tobacco & alcohol or anything else. Not making excuses but it really has been difficult to find good

employees lately because unfortunately they can make more money collecting unemployment sitting home than working at the store. If you look at the violations it is clear that they were simple mistakes by a newly hired employee still in training at the time, this was not an intentional act to defraud the SNAP benefits program in any way shape or form.

- Again let me emphasize and stress that I will take all steps necessary to make sure all employees receive additional intensive training in handling SNAP transactions, I will also be very strict in monitoring how employees are following guidelines and SNAP program requirements. Many families in the surrounding area receive SNAP assistance and we want to keep on providing this valuable service to our neighbors and customers.
- After review of the Department's allegations in the Charge Letter, and a review of the pertinent case law on this issue, the Department lacked sufficient evidence upon which to base a six month disqualification of the Appellants. The Appellants vehemently denied that trafficking had occurred at the Store, a position substantiated by the Investigator's notes. Nevertheless, the Department rendered a decision in which it determined: (1) the violations cited occurred at the Appellants' Store, and (2) that the Store did not qualify for a CMP.
- My client has had no opportunity to evaluate and respond to all of the information considered by your office to be instrumental in these cases, so this response cannot possibly be considered a "full opportunity."
- My clients deny any wrongdoing which would warrant a six-month disqualification. The Department has neither audio nor video recordings that these transactions occurred as described, despite having the ability to do so, nor does the Department have any other witnesses. The Department's failure to utilize such tools, and choice to rely only upon an effectively unsigned affidavit, means that RIB has failed to meet its burden.
- Another technicality in this matter is that the Investigator's affidavit is "hearsay" by definition – an out of court statement offered to prove the truth of the matter asserted. Specifically: (1) the alleged violation is not corroborated by any other verifying the statements or evidence in the Charge Letter; (2) there can be no reasonable opportunity for the Appellants to subpoena or otherwise depose the witness because the Department redacted all of that information prior to sending the Charging Letter and (3) as a result of the Appellants' inability to subpoena said witness, it is impossible to determine the witness's veracity or whether or not a statement is biased. This uncorroborated document should not be relied upon by this Department in determining whether a violation has occurred.
- The only violation to have occurred during these visits was the sale of minor ineligible SNAP items in exchange for SNAP benefits. As such, even if the allegations were accurate then the store's violations warrant a warning letter rather than a six-month disqualification.
- There is no evidence whatsoever in the record that the alleged sales of common nonfood items was due to carelessness or poor supervision by the store's ownership or management. The mere presence of the alleged violation, even in a certain volume, is not a prima facie case for "carelessness or poor supervision."
- There were minimal ineligible items purchased by the investigator, all of which were reasonably related to food preparation and/or common household products. There was a clear misunderstanding on the part of the Store's clerks regarding the difference between eligible and ineligible items, and nothing in the record to indicate that the sales were intentionally violative.
- It would seem the violations are exceptionally minor in nature, and while certainly in need of correction, proper corrective action can be achieved by the issuance of a warning letter.

Accordingly, a six-month disqualification (which likely will still be subject to the COVID lockdowns) would be a hardship on the local SNAP participants.

## ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the determination made by Retailer Operations, and it is limited to the facts at the basis of Retailer Operations' determination at the time it was made. The Charge letter in this matter does not refer to trafficking. The firm was charged with transacting SNAP benefits in exchange for ineligible nonfood items, which violates Section 278.2(a) of the SNAP regulations. Appellant's misuse of SNAP benefits was noted in Exhibits C, D, and E provided with the Charge letter. 7 CFR § 278.6(e)(5) of the SNAP regulations states that 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."

This review supports that all transactions cited in the letter of charges were conducted by a USDA contracted investigator. The investigative report is signed by the investigator and declared to be true under penalty of perjury. The violations are the multiple purchases of ineligible items at Appellant with SNAP benefits. That soap, deodorant, razors, shaving cream, and hydrogen peroxide can be construed as food items lacks credibility. All SNAP transactions are fully documented in the record, including photos of the nonfood items acquired with SNAP benefits at Appellant. The owner admitted: "it really has been difficult to find good employees lately because unfortunately they can make more money collecting unemployment sitting home than working at the store. If you look at the violations it is clear that they were simple mistakes by a newly hired employee still in training at the time, this was not an intentional act to defraud the SNAP benefits program in any way shape or form."

Warning letters are issued in situations where the SNAP violations are of a limited nature that would not warrant a disqualification. This investigation confirmed three violative transactions, therefore a warning letter is not appropriate. Section 278.6(e)(5) of the SNAP regulations 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 the sale of common nonfood items in exchange for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management. The language "due to carelessness or poor supervision," in the context of the statute and regulations, has been consistently applied by the agency to a specified number of clearly violative sales of ineligible items in which the evidence does not demonstrate firm practice and/or owner/management involvement. Furthermore, entrusting an unsupervised, inexperienced and/or untrained clerk to handle SNAP benefits is reasonably viewed as careless, and/or the exercise of poor supervision. Retailers are informed that it is their responsibility to ensure that store personnel are properly trained regarding the SNAP rules. Counsel did not provide evidence to support that Appellant had a SNAP training program. Regardless of whom the owner of a store may utilize to handle store business, the firm's owner is accountable for the proper training of personnel, and the effective monitoring and handling of SNAP benefit transactions.

The contention that, pursuant to 7 CFR § 278.6(d) of the SNAP regulations, FNS did not take any prior action to warn the firm about the possibility that violations were occurring or find any evidence that shows that the firm intended to violate the regulations, is an incorrect reading of the regulatory citation. The citation requires FNS to consider any prior warnings and evidence of a firm's intent to violate when determining a sanction. It does not require FNS to give such warnings, or to prove a firm's intent to violate. FNS did not consider prior actions to warn Appellant about the possibility that violations were occurring because there were no prior warnings. The evidence considered by Retailer Operations included the information obtained during the onsite store investigation.

As to the cases cited by counsel regarding hearsay, they refer to criteria for documents submitted into evidence in lieu of witness testimony in administrative hearings. Revisions to parts 278 and 279 of the SNAP regulations eliminated administrative hearings. The revisions became effective September 8, 2003, and the agency no longer holds in-person hearings. Moreover, the statute and regulations do not provide for formal discovery procedures, or adversary cross-examination as part of the review process. Accordingly, the case citations are not relevant to the administrative review. If the final agency decision is appealed to the federal district court, a judge is responsible for determining whether case law cited by counsel is on point and applicable to Appellant's case.

A review of the investigative report and the overall record yielded no indication of error in the reported findings. The investigative record is specific with regard to the dates of the violations, the exchange of SNAP benefits for ineligible nonfood items, and in other critically pertinent detail. The documentation under review supports that the violative transactions were conducted at Appellant by store personnel on different dates as noted on the Exhibits. The owner submitted no evidence to support that the transactions did not occur at Appellant. Retailers are informed that it is their responsibility to ensure that store personnel are properly trained regarding the SNAP rules. Regardless of whom the owner of a store may utilize to handle store business, the firm's owner is accountable for the proper training of personnel, paid or unpaid, and the effective monitoring and handling of SNAP benefit transactions. The preponderance of evidence under review supports that Appellant's personnel sold nonfood items on multiple store visits in exchange for SNAP benefits. The violations in this case are not too limited to warrant a disqualification period of six months.

### **CIVIL MONEY PENALTY**

Retailer Operations considered Appellant's eligibility for a hardship civil money penalty according to the terms of Section 278.6(f)(1) of the SNAP regulations. The record documents that there are other authorized stores within a nearby radius of Appellant, that stock as large a variety of comparable staple food items at comparable prices. Therefore, Retailer Operations concluded that the evidence does not support that it will cause hardship for SNAP recipients if Appellant is disqualified. It rendered a finding that it was not appropriate to impose a hardship CMP in lieu of a six month period of disqualification from SNAP.

## CONCLUSION

The preponderance of the evidence in the record supports that the violations charged did occur at Appellant. The record documents that Retailer Operations properly evaluated Appellant's eligibility for a hardship CMP according to Section 278.6(f)(1) of the regulations. On review it is decided that Retailer Operations properly denied a CMP. Therefore, the six month disqualification of Appellant from participation as an authorized retail food store in the SNAP is sustained. This penalty shall become effective thirty (30) days after delivery of this decision.

A new application for participation in the SNAP may be submitted ten days prior to the expiration of the six month period of disqualification. The Retailer Center at 877-823-4369 may answer questions regarding the SNAP application process. **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

## RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023), and to the regulations at 7 CFR § 279.7 with respect to the right to judicial review of this decision. 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 the owner resides or is 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, 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.

M. Viens  
ADMINISTRATIVE REVIEW OFFICER

May 7, 2021