

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

Adams Nice and Fresh,

Appellant,

v.

Case Number: C0188516

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the six-month disqualification imposed upon Adams Nice and Fresh (hereinafter “Appellant”) by the Retailer Operations Division, Investigations and Analysis Branch, hereinafter “ROD Office,” is hereby sustained.

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a), 7 CFR § 278.6 (e) and 7 CFR § 278.6 (f) in its administration of the SNAP when it imposed a six-month disqualification upon Appellant.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 C.F.R. § 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

In a letter dated June 12, 2017, the ROD Office informed Appellant that it was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 271 – 282. The record reflects that the ROD Office received and considered Appellant’s reply to the Charge Letter. A letter dated June 26, 2017 informed Appellant that it was disqualified for a period of six-months from participation as a retail store in the SNAP and was instructed to cease accepting SNAP benefits or, alternatively, request an administrative review of the decision. On July 5, 2017, Appellant requested an administrative review of the ROD Office’s decision. The request was granted and the disqualification action held in abeyance pending the results of the review. Appellant requested information under the auspices of the Freedom of Information Act (FOIA);

the agency provided a response to that request on or about August 17, 2017 and provided a supplemental response on or about September 27, 2018. Appellant was given the opportunity to provide any additional information or evidence it deemed appropriate in response to the agency's FOIA responses. Appellant provided additional information and evidence on or about October 22, 2018. This information, not having been previously presented to the ROD Office prior to its sanction decision, was provided to said office and given the opportunity to review same to determine if it would affect/alter their initial determination. The ROD Office performed said review, provided a summation thereof and notified ARB that the initial determination would not be affected by Appellant's new information and evidence.

STANDARD OF REVIEW

In appeals of adverse actions an appellant bears the burden of proving by a preponderance of the evidence that the administrative actions should be reversed. That means an appellant has the burden of providing relevant evidence 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.

CONTROLLING LAW

The controlling statute in this matter is contained in the **Food & Nutrition Act of 2008**, as amended, at 7 U.S.C. § 2021 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6 (e) of the Regulations establish the authority upon which a disqualification, or a civil money penalty in lieu thereof, may be imposed upon a retail food store or wholesale food concern. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to disqualify retail stores from the SNAP.

7 U.S.C. § 2021 states, in part:

- (1) IN GENERAL.—An approved retail food store or wholesale food concern that violates a provision of this Act or a regulation under this Act may be—
 - (A) disqualified for a specified period of time from further participation in the supplemental nutrition assistance program;
 - (B) assessed a civil penalty of up to \$100,000 for each violation; or
 - (C) both.

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 & Nutrition Act of 2008**, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system.

7 CFR § 278.6(e)(5) states:

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.

7 CFR § 278.6(e)(6) states:

Double the appropriate period of disqualification prescribed in paragraphs (e)(2) through (5) of this section as warranted by the evidence of violations **if the same firm has once before been assigned a sanction.** (Emphasis added.)

7 CFR § 278.6(f)(1) states, in part:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm...is selling a substantial variety of staple food items, and the firm's disqualification would cause hardship to SNAP households because there is no other store in the area selling as large a variety of staple food items... **FNS may disqualify a store which meets the criteria for a civil money penalty if the store had previously been assigned a sanction.** (Emphasis added.)

7 CFR §278.6(f)(2) states, in part:

In the event any retail food store...which has been disqualified is sold or the ownership thereof is otherwise transferred...the person or other legal entity who sells or otherwise transfers ownership...shall be subjected to and liable for a civil money penalty in an amount to reflect that portion of the disqualification period that has not expired, to be calculated using the method found at 278.6(g).

7 CFR §278.1(b)(4) states, in part:

If the applicant firm has been sanctioned for violations of this part, by withdrawal or disqualification, for a period of more than six months, or by a civil money penalty in lieu of a disqualification period of more than six months, or if the applicant firm has been previously sanctioned for violations and incurs a subsequent sanction, regardless of the disqualification period, FNS shall, as a condition of future authorization, require the applicant to present a collateral bond or irrevocable letter of credit...

7 CFR §278.6(h)(1),(2) and (3) state, in part:

1. Disqualify the firm for the period determined to be appropriate under paragraph (e) of this section if the firm refuses to pay any of the civil money penalty.
2. Disqualify the firm for a period corresponding to the unpaid part of the civil money penalty if the firm does not pay the civil money penalty in full or in installments as specified by the regional office.

3. Disqualify the firm for the prescribed period if the firm does not present a collateral bond or irrevocable letter of credit within the required 15 days. If the firm presents the required bond during the disqualification period, the civil money penalty may be reinstated for the duration of the disqualification period.

SUMMARY OF THE CHARGES

Among other documents, the record contains a Report of Positive Investigation, #LA08574, which indicates that investigative work was undertaken at Appellant's firm from January 31 through May 31, 2017 and reflects that three investigative visits were made to Appellant's firm during which store clerks sold common ineligible items (those normally seen in shopping baskets) in exchange for SNAP benefits in combination with eligible food items in a substantive ratio on three separate occasions, indicative of clearly violative activity. When the extent of violative activity was determined, the investigation was halted and a report issued and assigned to the ROD Office for consideration of administrative action.

APPELLANT'S CONTENTIONS

In its written request for review dated July 5, 2017, and in subsequent correspondence, Appellant provided information in which it was argued that:

1. The firm has been charged with SNAP-benefit trafficking based on irregular redemption data from incorrectly-flagged ALERT system data.
2. Appellant states that in response to its FOIA request it received copies of the original typewritten reports; there were no pictures, handwritten reports and no disposition reports. The Investigator's written statements make no comment about receipts not being produced, so the absence of receipts for all three of the alleged investigations is suspect. The absence of this documentation (or an explanation for the absence) indicates that the transactions did not occur. If the items sold in violation of regulations and rules had existed, there would be records kept to show where they went. To this end, the ROD Office's evidence does not comply with its Standard Operating Procedures. The Investigation is poorly documented at best and lacks all corroborating evidence designed to support the Investigation Report. The agency provided a supplemental response to the FOIA, providing copies of the original typewritten reports, pictures, some receipts and the disposition reports discussing where the items had been deposited after the transactions. Still absent was one cash register receipt for one of the January 31 visits, and the investigator's handwritten reports. There would have been a receipt for this transaction, and there is no investigator's note addressing the absence of said receipt; thus the absence is suspect.
3. Appellant questions why two of the store visits occurred on the same day. The time of day has not been provided, which would have been helpful to Appellant. Appellant contends that it is suspect that an Investigator would visit the same store twice on the same day. This indicates that the Investigator either misidentified the date of the second visit or confused reports from two different stores.
4. There can be no meaningful evaluation of bias on the part of the investigator and there is no surveillance tape against which to verify the allegations.

5. Appellant provides affidavits from six SNAP customers attesting that none of their purchases ever included non-foods, that the firm has never charged extra to accept SNAP benefits and has never returned cash. During the May 31, 2017 investigative visit, the clerk refused to engage in SNAP-benefit trafficking.
6. Clerks involved in the transactions noted in the Investigation Report were immediately retrained and one was terminated.
7. The alleged transactions occurred within a five-week period; two transactions occurred on one day and one occurred on May 31, 2017. The employees cited in the report were trained in SNAP transactions but, if the allegations are true, did not fully understand SNAP procedures and regulations. Thus the alleged violations, if true, demonstrated a short-lived misunderstanding of SNAP-eligible versus ineligible items. The firm cannot supervise all transactions, could not reasonably have prevented the violations, duly trained its clerks and took corrective action when notified of alleged violations. Such falls short of “carelessness and poor supervision.” Appellant cites case law in support thereof.
8. The violations were too minor to warrant a disqualification and should have received a warning letter in lieu thereof. Appellant cites case law in support thereof.
9. The firm had no prior violations and had never received any prior warning. Appellant cites case law in support thereof.
10. A disqualification will work a hardship on customers; only one other store is arguably comparable to the Appellant firm. A disqualification will unduly benefit Appellant’s competition and would raise its food prices, thus further harming SNAP customers. Appellant cites demographic information regarding the area in which the firm is located.

ANALYSIS AND FINDINGS

Concerning contention 1 above, while the agency’s data system does in fact track each individual transaction, including those noted in the Investigation Report #LA08574, the firm was not charged based on irregular redemption data or ALERT system data but rather upon the sale of ineligible items as specified in said report. As further indicated below, the ROD Office cites the transaction data as further evidence that the transactions cited in the report did in fact occur at the Appellant firm in the amounts and on the dates noted therein.

Regarding contention 2 above, the Report of Positive Investigation (as referenced, #LA08574) does in fact specify in Exhibit B, second page, that no cash register receipt was provided by the store during this transaction; although it also specifies that an EBT receipt was in fact received from the clerk. Such adequately explains why an EBT receipt was provided while no cash register receipt was provided in the agency’s supplemental FOIA response. That the Investigator did not comment further upon this fact does not indicate that there actually was a cash register receipt obtained. It is noted for the record that three different clerks conducted the transactions detailed in the Report of Positive Investigation.

The charges of violations are based on the findings of a formal Department of Agriculture investigation; all transactions cited were conducted under the direct supervision of a Department Investigator. All such transactions are fully documented and a review of this documentation has yielded no indication of substantial error or discrepancy in the reported findings; the investigative record is specific and thorough with regard to the dates, amounts, merchandise obtained and other facts concerning the violations and in all other critically pertinent detail. Additionally, investigative results are routinely supported by documentation in the record that confirms items purchased at a retail firm in the course of an investigation are donated to and signed for by a charitable organization following the transactions. Such documentation includes the signature and title of the official of the charitable organization accepting the donated item, the name and address of the organization, the date the donation was made and the official's initials next to the items donated. Such documentation likewise exists in the present case. The purchase costs of each of the transactions involved in the investigation are documented on SNAP terminal receipts obtained during each transaction (as well as cash register receipts in two of the three transactions). Moreover, transaction data generated by each investigative purchase at Appellant's firm confirms the store's SNAP authorization number, the date, and the amount, among numerous other details such as the card number, household number, time of the transaction and transaction method (not reprinted below pursuant to 5 U.S.C. Section 552(b)(6) and 552(b)(7)(C) and/or 7 U.S.C. Section 2018(b)(6) & (b)(7)(c):

5 U.S.C. § 552 (b)(7)(E).

Appellant offers no compelling information or supporting documentation that would constitute evidence that any relevant detail is incorrect in any substantial respect. As such, the contentions exert little force in the context of the considerable information and documentation presented by the ROD Office, as referenced above, which indicate that the merchandise was in fact obtained as described at the Appellant firm on the dates noted, that the manner in which they were obtained is accurately described and that the clerks and their actions were likewise accurately described.

With regard to contention 3 above, the record reflects that the transactions referenced above did in fact take place at the Appellant firm in the amounts and on the dates described in the report; as noted, this is further corroborated by agency transaction data and EBT receipts in all three transactions and cash register receipts in two of the transactions. That the exact transaction amounts shown on receipts match those in agency data, along with other identifying data, removes any doubt that all the transactions occurred at the Appellant firm as described.

In regard to contention 4 above, Appellant suggests that the Investigator was in some way biased, though it provides little evidence or information in support thereof. No evidence of bias exists in the record. Additionally, in order to charge a firm with violations, the ROD Office must have information/evidence that it regards as an adequate basis for a sanction. The firm is given the opportunity to provide any evidence it deems relevant in reply to the charge letter. The ROD Office must then consider its own evidence and that provided by the retailer and determine if a sanction is warranted or unwarranted, based upon a preponderance of the evidence. Similarly, in administrative review, a determination is made upon whether the Appellant or the ROD Office presents a preponderance of evidence. Accordingly, a review decision that sustains a ROD

Office sanction does not hinge upon whether the ROD Office's case has been proven to the Appellant; similarly, a review decision that reverses a ROD Office sanction does not hinge upon whether Appellant's case has been proven to the ROD Office. In the present case, as will be discussed in further detail, this review finds that there is a preponderance of evidence in the record that the violations at issue occurred as determined by the ROD Office and that the sanction imposed was consistent with the statute and regulations; given the facts of the Investigation Report and supporting documentation, there is little latitude for a finding of bias on behalf of the Investigator; the record contains the Report of Positive Investigation, photographs of merchandise obtained, register and EBT receipts, documentation of the donation of the merchandise to (a) charitable organization(s) and records of merchandise that was destroyed, all of which is internally consistent with agency transaction data, as noted in the foregoing. The record reflects that the investigation was fully documented in a manner consistent with longstanding agency practice and protocols.

Regarding contention 5 above, the ROD Office does not contend that other customers, or the six customers signing affidavits, purchased ineligible items at the Appellant firm, but rather that SNAP benefits were exchanged for ineligible items, in combination with eligible items in a substantial ratio, on three separate occasions as specified in the Report of Positive Investigation. Likewise, the firm has not been charged with overbilling SNAP customers or with SNAP-benefit trafficking.

With regard to contention 6 above, it is important to clarify for the record that there is no provision in the statute or regulations for waiver or reduction of an administrative penalty on the basis of corrective action implemented subsequent to findings of program violations. The purpose of this review is to determine if the earlier decision of the ROD Office was proper and in compliance with pertinent laws and regulations. Accordingly, this review is limited to considerations relevant at the time such decision was made. It is beyond the scope of this review to consider what subsequent remedial actions, such as changes in store management, procedures, internal controls, employee discipline/training or facility and/or inventory changes and improvements Appellant may propose to take or may have taken in order to comply with program requirements. Therefore, to the extent Appellant implies that it will, or has, implement(ed) corrective and/or remedial actions, though this would likely have been valuable in preventing program violations at an earlier time, such cannot now apply retroactively and does not provide a valid basis for dismissing the charges or for mitigating the serious impact of the violations upon which they are based. It is further added for the record that, although Appellant claims corrective action has been taken, it offers no documentary evidence of same. As such, the claim carries little weight, and as noted above, corrective action following findings of violations is not relevant in ROD Office sanction decisions.

Concerning contention 7 above, Appellant cites the firm's compliance history, short duration of the time period in which alleged violations occurred (five months), its refusal to commit trafficking in Exhibit C of the Report of Positive Investigation and the firm's lack of intent to commit violations. The argument is taken to mean that the firm operated a legitimate business and thus would not have purposely committed violations. However, it is noted that virtually all firms found during investigations to have sold ineligible items also operated legitimate businesses at the time and were authorized on the basis thereof to participate in the SNAP.

Nonetheless, whether the contention is true or not is largely irrelevant in the present case; sanctions for violations are not limited to only those committed intentionally. Lack of intent to violate is contemplated by the regulations and reprinted above on page 1; as noted above, violations due to carelessness or poor supervision (a specified minimum number of clearly violative transactions in the absence of evidence of firm practice and/or ownership/management involvement) warrant a six-month disqualification or a hardship civil money penalty in lieu thereof, provided the firm is qualified for such alternate sanction.

Appellant contends that the firm conducted SNAP training, though provided no documentation in support thereof. Furthermore, as noted, a sufficient number of clearly violative transactions is adequate evidence for the ROD Office to determine that they were due to careless and/or poor supervision. While a particular firm may or may not choose to supervise each SNAP transaction, a sufficient number of clearly violative transactions found during an investigation warrants a sanction, which in this case is the minimum disqualification period (six months).

Appellant cites case law in support of its arguments. Considerations of legal precedent through case law, or the lack thereof in relation to the present case, are beyond the scope of this review; this review relies upon the statute and regulations governing the SNAP and evaluates whether the decision of the ROD Office to impose a disqualification upon Appellant was in accordance with same and sustainable by a preponderance of the evidence; Appellant's case law references are addressed within this context only.

Regarding contention 8 above, as noted, the clearly violative transactions detailed in the Report of Positive Investigation warrant a six-month disqualification, or a hardship civil money penalty in lieu thereof; the ROD Office correctly and appropriately applied the statute and regulations in so doing. Warning letters are to be issued in cases in which violations are too limited to warrant a disqualification; as such, a warning letter would have been incorrect in the present case. It is added that regulations at 7 C.F.R. § 278.6(e)(5) provide that FNS **shall** (emphasis added) 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; thus the ROD Office has no latitude to issue a lesser sanction if the violations warrant a six-month disqualification, which, as noted, is the least severe disqualification allowed by the regulations.

With regard to contention 9 above, Appellant states that a record of no prior SNAP violations at the store, or at other firms now or previously owned, should be taken into consideration. However, such a record does not constitute valid grounds for dismissing the present serious charges or for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that precludes, reverses or reduces a sanction based upon a lack of prior SNAP violations by a firm and its owners, managers and/or employees. While the regulations provide for increased sanctions upon firms with prior violations, no provision exists for reducing a sanction in the absence of same.

Additionally, it should be noted that a warning letter is not a statutory or regulatory prerequisite to a disqualification: the presence of a prior warning may in some cases increase the sanction imposed on a firm (see §278.6(e)(2) and (3)), while the lack of a warning does not decrease a sanction properly imposed or prevent the imposition of such a sanction. Additionally, departmental and agency investigators routinely determine the extent/severity of violations before referring cases to ROD Offices for administrative action; ROD Offices then again evaluate the nature and extent of violations in determining the appropriate administrative action; these standard procedures are seen to have been likewise followed in the present case.

In regard to contention 10 above, the record reflects that the ROD Office duly considered the firm's eligibility for a hardship civil money penalty and correctly found the firm ineligible. The ROD Office noted that there is a supermarket located just over one-half mile from the Appellant firm. The ROD Office further notes that this firm also carries fresh and frozen meat, as well as Hispanic foods, including meat products, and operates as a full-line supermarket with an extensive and comprehensive variety of eligible and staple foods. The regulations stipulate the conditions upon which this alternative penalty may be imposed in lieu of a disqualification: if a store is selling a substantial variety of staple food items and the firm's disqualification would cause hardship to SNAP households because there is no other store in the area selling as large a variety of staple food items, a hardship civil money penalty is to be assessed. As noted, in this case there is in fact such a store in the area and thus a hardship civil money penalty is not warranted.

It should be reiterated that hardship worked upon retailers is not a consideration in decisions to disqualify firms due to SNAP violations or in decisions to impose civil money penalties in the event disqualified firms are subsequently sold or the ownership thereof otherwise transferred; there are no provisions in the Act or the regulations allowing for hardship worked upon a firm, due to a disqualification, to warrant a civil money penalty. In accordance with the regulatory and policy guidance referenced in the foregoing, therefore, the ROD Office's decision to withhold a civil money penalty in lieu of a six-month disqualification was correct and appropriate. It is again noted for the record that a six-month disqualification is the least severe suspension provided for by the regulations.

In view of the above, the decision of the ROD Office to disqualify Adams Nice and Fresh for a period of six months from participation in the SNAP is hereby sustained and will become effective upon the 30th day following your firm's (or its legal representative's) receipt of this document. Appellant may reapply for authorization to participate in the SNAP up to 10 days prior to the end 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 a judicial review is desired, 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 provisions of the Freedom of Information Act (FOIA), 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.

DANIEL S. LAY
Administrative Review Officer

January 28, 2019