

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

ANS Market & Liquor,

Appellant,

v.

Case Number: C0202519

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 a six-month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against ANS Market & Liquor, (hereinafter “Appellant”) by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it imposed a six-month disqualification against ANS Market & Liquor.

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

FNS records show that the Appellant firm, ANS Market & Liquor, was initially authorized for SNAP participation as a convenience store on August 16, 2016. Between November 28, 2017, and January 24, 2018, FNS conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigative report documented that personnel at ANS Market & Liquor accepted SNAP benefits in exchange for ineligible merchandise on five separate occasions. According to the report, the Appellant firm sold scrub

sponges, soap, dishwashing liquid, pain medication, plastic cups, plastic forks, plastic bowls, and plastic food storage bags in exchange for SNAP benefits, which benefits may only be used to purchase eligible foods.

In a letter dated April 24, 2018, the Retailer Operations Division charged the Appellant with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). The charge letter states that the violation of accepting SNAP benefits in exchange for ineligible nonfood items warrants a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further states that under certain conditions and in accordance with 7 CFR § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification. Agency records show that the firm did not reply to the charge letter.

After further considering the evidence in the case, the Retailer Operations Division issued a determination letter dated May 15, 2018. This letter informed the Appellant that it was the determination of the Retailer Operations Division that the violations did occur as outlined in the letter of charges and that a six-month disqualification penalty would be imposed in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that consideration for a hardship CMP was given, but that the Appellant was not eligible for a CMP because there were other authorized stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked May 21, 2018, the Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and implementation of the sanction has been held in abeyance pending completion of this review.

It should be noted that on June 18, 2018, the Appellant, through counsel, requested information from the agency's case file in a request submitted under the Freedom of Information Act (FOIA). FNS responded to this request on July 10, 2018. On August 2, 2018, Appellant's counsel submitted a 14-page brief outlining its contentions in this case.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated 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.

7 CFR § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food.

7 CFR § 271.2 states, in part:

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, 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....

Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section. [Emphasis added.]

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination...

7 CFR § 278.6(e) states, in part:

FNS shall take action as follows against any firm determined to have violated the Act or regulations...The FNS regional office shall:

(5) 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, in part:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm subject to a disqualification 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 authorized retail food store in the area selling as large a variety of staple food items at comparable prices.

INVESTIGATION DETAILS

During an undercover investigation conducted between November 28, 2017, and January 24, 2018, the Food and Nutrition Service completed seven compliance visits at ANS Market & Liquor. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the April 24, 2018, charge letter. The investigation report includes Exhibits A through G, and provides full details on the results of each compliance visit. SNAP violations were documented during five of the seven visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report states that the following ineligible items were purchased by an investigator using SNAP benefits:

- One scrub sponge (*Scotch Brite* brand), Exhibit A
- One 135-gram bar of soap (*Dove* brand), Exhibit B
- One scrub sponge (*Scotch Brite* brand), Exhibit B
- One 9-fluid-ounce bottle of dishwashing liquid (*Dawn* brand), Exhibit C
- One scrub sponge (*Scotch Brite* brand), Exhibit C
- One 135-gram bar of soap (*Dove* brand), Exhibit C
- One 25-count package of plastic cups (*Imperial* brand), Exhibit E
- One 2-count package of pain medication (*Advil* brand), Exhibit E
- One 135-gram bar of soap (*Dove* brand), Exhibit E
- One 3.75-ounce bar of soap (*Irish Spring* brand), Exhibit F
- One 9-count package of plastic bowls (*Solo* brand), Exhibit F
- One 30-count package of plastic food storage bags (*Kitchen & Beyond* brand), Exhibit F

The report indicates that when the investigator attempted to exchange SNAP benefits for cash, the clerk on duty refused. This refusal is noted in Exhibit G. Refusals for ineligible items are also noted in Exhibits D and G.

According to the report, two separate clerks conducted the five violative transactions. The charge letter states that the violations that occurred in Exhibits C, E, and F warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5).

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant seeks reversal of the six-month disqualification and requests the issuance of a warning letter instead.
- The Appellant has owned the store since April 2016 and the store carries a variety of SNAP-eligible food items. The store is located in an area of Los Angeles where approximately 12 percent of the residents receive SNAP benefits.

- The issues of law to be decided in this case are whether the alleged violations were the result of carelessness or poor supervision of the firm's owners; and whether the alleged violations are too limited in nature to warrant a disqualification.
- Appellant adamantly denies any intentional violation on the part of the store. The store has a strict compliance policy and has never previously been accused of SNAP violations.
- The two employees involved in the violations were operating specifically against their training and the store's regulations and are no longer employed at the store. Both clerks were newly hired part-time workers. They were trained in EBT transactions, but apparently did not fully understand the transaction process.
- The alleged violations are minimal in nature, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and occurred within a narrow window of two months.
- The store's ownership and management spoke to all of the store's clerks as soon as the charge letter was sent to the firm. All personnel were immediately retrained with respect to SNAP regulations.
- Prior to the charges, the store had a history of compliance with SNAP regulations. Given the duration of its participation in SNAP, such compliance demonstrates that the firm typically has appropriate training, oversight and procedures in place to prevent SNAP violations.
- It is crucial to note that in Exhibits D and G, no violations occurred, as the clerks identified the ineligible items and refused to accept SNAP benefits for them. This evidences the training and compliance programs of the store. The clerk in Exhibit G also refused trafficking when requested by the investigator.
- In light of the short duration in which the violations allegedly took place, coupled with the training and compliance programs of the store, it is more likely that the five incidents of alleged violations were due to a short-lived misunderstanding on the parts of the two part-time clerks rather than a store practice of selling ineligible items.
- FNS must consider 7 CFR § 278.6(d) in determining the length of a sanction. In this case, the alleged violations are very minor and took place over a period of less than two months. Additionally, the investigation included two incidents in which no violations were conducted. Further, the store has consistently been in compliance with SNAP regulations since it became an authorized retailer. There has never been so much as a warning letter sent to the firm about compliance issues. Good compliance history should be given some weight when determining whether or not a six-month disqualification is appropriate. Finally, it is clear that it was not the intent of the Appellant to violate the regulations, as evidenced by the short duration of time in which the violations occurred and the two refusals to engage in violations as evidenced in Exhibits D and G.
- The store trains its personnel and the Appellant was under the impression that its clerks were operating the register in accordance with store policies. As such, management acted reasonably prior to the occurrence of the violations.
- The store's management did not act carelessly during and after the transactions. A manager is not expected to directly oversee every EBT transaction. Managers are expected to have a broad overview of operations, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) do not stand out on their own accord. Further, the store is not required to maintain a computerized system to track transactions. As such, the registers that were used at the

time of the transactions identified items only in broad categories rather than individually. With no direct tie-in to the inventory, any review would not have shown anything amiss. Thus, the firm's management or ownership cannot be considered careless in reviewing the transactions.

- After being made aware of the violations, the Appellant took reasonable and appropriate steps to properly educate its clerks on SNAP regulations and procedures. Additionally, the two clerks in question are no longer employed by the store. There are no other reasonable steps that the Appellant could have taken under the circumstances. Therefore, the Appellant ownership and management cannot be categorized broadly as careless.
- The store did not provide poor supervision. It is reasonable that supervision would include training, a broad review of transactions, an investigation into alleged violations, and occasional spot checks of employees. None of these are foolproof, but all of these were taken into consideration. Given the long-term compliance with the regulations, and the short duration of time in which the alleged violations occurred, the Appellant had little reason to believe that there was anything wrong with the way the transactions were being run. There were no warning signs that management or ownership could have noticed.
- Appellant cites *Minhas v. Vilsack* to support its argument that there is no evidence of carelessness or poor supervision to support a six-month disqualification.
- Appellant cites five additional court cases to support its argument that a warning letter should be given rather than a period of disqualification.
- A warning letter is appropriate because there were minimal ineligible items purchased by the investigator and all were reasonably related to food preparation and/or common household products. Additionally, the violations were the result of a clear misunderstanding on the part of the clerks regarding eligible and ineligible items. Both were newly hired and both were part-time employees. They are also no longer employed at the store. Further, outright refusals occurred in Exhibits D and G, including a refusal to engage in trafficking.
- The store serves an urban area where the local SNAP participants have a limited amount of opportunity to purchase regular staple groceries. The Appellant serves these needs. If the store were to be disqualified from SNAP, the SNAP participants would be severely burdened and endure grave hardship.
- The name of the investigator who allegedly conducted the transactions is not disclosed. Accordingly, there can be no meaningful evaluation of bias on the part of the investigator, or an opportunity to check the allegations against a surveillance tape (should one exist). This absence has an evidentiary impact, as it is USDA's obligation to prove, by a preponderance of the evidence, that the allegations are correct.
- USDA has not met its burden in proving by a preponderance of the evidence that SNAP violations occurred nor that such violations were the result of management's carelessness or poor supervision. Mere statements without corroboration are not sufficient to satisfy the evidentiary standard.
- In the alternative of a warning letter, Appellant requests a hardship civil money penalty.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The Appellant has not provided any evidence or documentation to counter FNS's investigation report. In fact, the Appellant appears to acknowledge that the violations may have occurred, stating that they were committed by two temporary, part-time employees who have since had their employment at the store terminated. Because the transactions themselves do not appear to be in dispute, it is the determination of this review that program violations did occur as charged by the Retailer Operations Division and a six-month disqualification is warranted. The balance of this review will address the Appellant's remaining contentions.

Consideration of 7 CFR § 278.6(d)

SNAP regulations at 7 CFR § 278.6(d) state the following:

- (d) *Basis for determination.* The FNS regional office making a disqualification or penalty determination shall consider:
 - (1) The nature and scope of the violations 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.

The Appellant, through counsel, contends that FNS must consider Section 278.6(d) of the regulations before making a sanction determination. In this case, the Appellant argues that the violations are very minor and took place over a period of less than two months. Additionally, the investigation included two incidents in which no violations occurred. Further, the Appellant claims that the store has consistently been in compliance with SNAP regulations since it became an authorized retailer and states that it was not the intent of the Appellant to violate the regulations as evidenced by the short duration of time in which the violations occurred and the two refusals to engage in violations as evidenced in Exhibits D and G.

With regard to these contentions, the record clearly shows that the Retailer Operations Division properly considered the elements of § 278.6(d) as required. The case record indicates that the Retailer Operations Division evaluated the firm's history with SNAP compliance (no prior violations were found) and determined that due to the seriousness of the violations, a warning was not appropriate in this case. Further, FNS is under no obligation to warn retailers when violations are occurring. It should be noted that while the record shows no prior violations at this store, the firm had only been authorized for 15 months before the investigation began. This can hardly be considered "long-term compliance with the regulations." Additionally, the investigation is the first one to have been undertaken at ANS Market & Liquor. The absence of a

prior investigation is not, by itself, evidence of a firm's training policy or compliance with Program regulations. In fact, Program violations occurred the first time an investigator walked through the door, which calls into question the firm's training practices and its intent to comply with the regulations.

The law is clear that when serious violations occur, such as the exchange of ineligible nonfood items for SNAP benefits, a six-month disqualification is the appropriate penalty, even on the first occasion, as noted in 7 CFR § 278.6(e)(5). As long as the administrative action taken by the agency fully conforms to SNAP regulations, this review has no authority to dismiss or reduce a period of disqualification. In this case, the sanction imposed by the Retailer Operations Division for this first-time violation is entirely in line with SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations.

As to the element of "intent," this review acknowledges that a conclusion regarding one's intention to violate the regulations is difficult to determine. However, the preponderance of evidence in this case most assuredly leans in the agency's favor. The two clerks in question never refused to allow an ineligible item to be purchased with SNAP benefits, suggesting either ignorance or a willful disregard for the rules.

Therefore, it is the determination of this review that the Retailer Operations Division appropriately considered the provisions of 7 CFR § 278.6(d) before making its determination.

Carelessness / Poor Supervision

The Appellant has stated that one of the key issues of law in this case is whether the alleged violations were the result of carelessness or poor supervision by the firm's owners or managers. The Appellant contends that it has an employee training program and that both of the clerks who committed violations participated in such training. The Appellant argues that any violation they committed was contrary to the training they received and was due to their failure to fully understand the SNAP transaction process. The Appellant further states that firm ownership and management are limited in their ability to oversee the employees' actions, as they cannot be present for every transaction a clerk processes. Unless a transaction stands out in some way, a manager has no way of knowing that something is going wrong with a particular clerk. The Appellant insists that the firm's ownership and management did everything it could be reasonably expected to do to provide training and supervision to its employees, including retraining the employees as soon as it received the charge letter. As such, the Appellant believes that FNS cannot conclude that the violations were the result of carelessness or poor supervision.

With regard to these contentions, it is reasonable to expect that clerks who are unaware of or confused about SNAP rules should receive more supervision than an experienced clerk. Supervision involves more than being physically present to monitor transactions. It also involves providing sufficient, accurate, and regular training and perhaps testing. One should not presume that because the transactions do not look unusual (e.g. odd transaction patterns or suspiciously large or repetitive purchases) that everything is fine. That fact that these two clerks were "newly hired" and yet were left to their own devices at the cash register, coupled with the fact that they

repeatedly committed program violations over a period of two months strongly suggests a lack of training and poor supervision by the firm's ownership and management.

It should be noted that the Appellant provided no evidence of the robust training activities that it claims to have at the store, and offered no evidence that either of the two violating clerks participated in such training. On two occasions (Exhibits D and G), store clerks refused to allow ineligible items to be exchanged for SNAP benefits. On one of those occasions, the clerk on duty also refused to engage in trafficking. However, these refusals were made by different clerks than those who committed the violations in Exhibits A, B, C, E, and F. The Appellant offered no information about the clerks who handled the transactions properly or what made them different from the two violating clerks. Were they more experienced? Did they receive more training? Why did these two "newly hired" clerks fail in their duties when processing SNAP transactions? Without any evidence of a training program of any kind, it is reasonable for this review to presume that the firm's ownership and management provided poor supervision to its new employees. Accordingly, it is the finding of this review that a six-month disqualification for exchanging SNAP benefits for ineligible, common nonfood items is appropriate and wholly in line with regulations at 7 CFR § 278.6(e)(5).

Warning Letter

The Appellant has argued that a warning letter is appropriate in this case because there were minimal ineligible items purchased by the investigator and all were reasonably related to food preparation or were common household products. Additionally, the Appellant claims that the violations were the result of a misunderstanding on the part of the newly-hired, part-time clerks regarding eligible and ineligible items. Further, outright refusals occurred in Exhibits D and G, including a refusal to engage in trafficking. The Appellant cites five court cases to support its argument that a warning letter should be given rather than a period of disqualification.

This review does not agree with the Appellant. According to regulation at 7 CFR § 278.6(e)(7), a warning letter is to be sent if the violations are *too limited* to warrant a disqualification. In this case, violations occurred on five separate occasions over a period of two months. On three occasions, the firm permitted the investigator to purchase at least three obvious non-food items in each transaction (see Exhibits C, E, and F). Two clerks never refused to permit an ineligible item to be purchased with SNAP benefits. It is the position of this review that this is a clear indication of a lack of supervision on the part of the firm's ownership and management. Such violations meet the criteria for a six-month disqualification pursuant to Section 278.6(e)(5) of the regulations. The penalty is also entirely in line with penalties imposed against other firms who have committed similar violations. Therefore, it is the conclusion of this review that a warning letter is not appropriate.

As to the court cases cited by the Appellant (including the case cited in support of its arguments related to carelessness and poor supervision), this review will not address whether or not it believes these citations have any relevance to the present case. An administrative review decision is limited to whether or not the Retailer Operations Division appropriately followed the Food and Nutrition Act of 2008, as amended, and the regulations and agency policy promulgated under

that Act. It is the conclusion of this review that existing statutes and regulations were appropriately followed. Therefore, any application of a supposed judicial precedent would best be addressed in a judicial review in a court of law.

Remedial Actions Taken

The Appellant has stated that since receiving the charge letter, it has retrained its employees with regard to SNAP regulations. It further stated that neither employee who committed the violations is employed at the store any longer. One clerk's employment ended in January 2018, and the other's ended in July 2018.

With regard to these contentions, it should be restated that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. This review is limited to the circumstances that existed at the time the violations were committed. It is not the authority of this review to consider any subsequent remedial actions that may have been taken or that will take place so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations. Therefore, the Appellant's contention that corrective action has taken place or that further remedial actions are planned does not provide a valid basis for dismissing the charges or for imposing a lesser penalty.

Hardship to SNAP Households / Civil Money Penalty

The Appellant contends that the firm's disqualification from SNAP would cause Program participants in the area to be severely burdened and endure grave hardship. It claims that ANS Market & Liquor – classified as a convenience store – serves an urban area where local SNAP participants have a limited amount of opportunity to purchase regular staple groceries and that the Appellant store serves those needs. The Appellant requests that if a warning letter is not granted in this case that a hardship civil money penalty be imposed instead of disqualification.

With regard to these contentions, it is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and households are forced to use their program benefits elsewhere. Regulations at 7 CFR § 278.6(f) do allow, in some circumstances, for a hardship civil money penalty to be imposed in lieu of disqualification. Paragraph (f)(1) of this regulation states that a CMP in lieu of temporary disqualification is allowable when the firm's disqualification would cause hardship to SNAP households because there are "no other authorized retail food stores in the area selling as large a variety of staple food items at comparable prices." However, FNS records show that there are nearly four dozen SNAP-authorized stores located within a one-mile radius of the Appellant store, including one superstore and one supermarket, which undoubtedly have larger varieties and quantities of staple foods than what is found at ANS Market & Liquor. Prices in supermarkets and superstores are also generally very comparable, if not lower, than most convenience stores.

In accordance with regulation cited above, hardship exists only when there are no other authorized stores in the area selling as large a variety of staple foods at comparable prices. Because such conditions do not exist in this case, a hardship civil money penalty in lieu of disqualification cannot be granted.

CONCLUSION

Based on an analysis of all information in this case, this review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at ANS Market & Liquor during a USDA investigation. All transactions cited in the letter of charges were either conducted or supervised by a USDA investigator and all are thoroughly documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record appears to be specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for ineligible, nonfood merchandise, and in all other critically pertinent details. Pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, ANS Market & Liquor, is sustained.

In accordance with the Act and regulations, the disqualification penalty shall become effective 30 days after receipt of this decision. A new application for SNAP participation may be submitted 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 Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

November 7, 2018