U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302

Colonial Grocer,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0185880

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the one-year disqualification imposed upon Colonial Grocer (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 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 August 15, 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. By a letter dated March 30, 2017, Appellant was informed that it was disqualified for a period of one-year 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 April 8, 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.

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. 5 U.S.C. § 552 (b)(7)(E).

7 U.S.C. § 2021 states, *inter alia*:

> (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, *inter alia*:

> 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, *inter alia*:

> 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, *inter alia*:

> 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, *inter alia*:

> 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, *inter alia*:

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, #TR37081, which indicates that investigative work was undertaken at Appellant's firm from July 6 through August 1, 2016 and reflects that five 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 at a substantive ratio on four 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 reply to the ROD Office's Charge Letter, and in its written request for review dated April 8, 2017, Appellant provided information in which it was argued that:

1. Appellant cannot verify the violations but concedes that they occurred and were conducted by employees.
2. The investigator should not be intimidating or try to coerce the clerk into committing violations. The investigator was trying to gain the confidence of Appellant's employees by talking about personal financial problems and other cashiers that the investigator had

purchased from previously.

3. Other cashers had refused to allow the investigator to purchase non-food items.
4. Appellant has not had enough employees and is involved in training new employees a lot of the time. It is very difficult to train new employees in a convenience store environment.
5. Appellant will make a concerted effort to train employees in SNAP rules.
6. Appellant believes that there have been no violations since its August 22, 2016 reply to the ROD Office's Charge Letter.
7. Losing the SNAP authorization would be a devastating blow to Appellant and its customers; the firm is in a low-income neighborhood with section 8 housing projects close by. Appellant requests a civil money penalty in lieu thereof.

ANALYSIS AND FINDINGS

In regard to contention 1 above, Appellant implies that the Owner did not personally commit violations of the SNAP Regulations and notes that employees committed the violations. (It is noted for the record that two employees committed violations, as documented in the Report of Positive Investigation, #TR37081.) This contention cannot be accepted as a valid basis for dismissing any of the charges or for mitigating the impact of the violations upon which they are based. Appellant is liable for all violative transactions handled by full or part-time, paid or unpaid store personnel, whether or not ownership is aware of such transactions. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. Additionally, ownership of the Appellant firm signed an FNS-252-2, SNAP Reauthorization Application for Stores, on August 21 2014, by means of which Appellant acknowledged and agreed to accept responsibility to prevent violations of the program by any and all employees of the firm. Again, to allow store ownership to disclaim accountability for the acts of persons to whom the responsibility to handle store business has been assigned would render inert the enforcement provisions of the Food and Nutrition Act of 2008 and corresponding provisions of the regulations.

Regarding contention 2 above, to the extent Appellant may imply that entrapment played a role in the firm's tendency/willingness to commit violations, the presence of entrapment depends upon whether or not the government's actions leading up to the violations amounted to inducing violative activity in persons who had no such inclination to violate. However, mere solicitation to commit a crime is not inducement, nor does the government's use of artifice, stratagem, pretense or deceit (although there is no indication of same in the present case) establish inducement. Courts have found that inducement is shown only if the investigator's behavior was such that a law-abiding citizen's will to obey the law could have been overborne. The Department maintains that if investigators

merely provide an opportunity for a suspected violator to engage in violative conduct, such activity does not constitute entrapment. Moreover, even if inducement has been shown, a finding of defendant's predisposition to violate is fatal to an entrapment defense. Predisposition may be said to exist even without prior violative involvement: the ready commission of an offense, such as a person's prompt acceptance of an undercover investigator's offer of an opportunity to commit violations may itself establish predisposition. In the present case, the employees in Exhibits A, B, D and E in the Investigation Report were approached by the Investigator and willingly engaged in the sale of ineligible items on four occasions; thus, of five attempts to commit violations using SNAP benefits, the investigator found the firm willing to do so on four separate occasions. The goal of undercover investigative visits is to determine if there are compliance issues and, if so, to determine the nature and extent thereof; the agency clearly has a justifiable interest, on behalf of the public trust, in achieving this very reasonable goal.

With regard to contention 3 above, Appellant's refusals to commit violations on two occasions, as noted in the investigative report, are duly acknowledged; such refusals tend to indicate that violations are not firm practice, despite the evidence noted above that there was indeed present a degree of intent to commit violations. The record reflects that the ROD Office carefully weighed such factors in the present case. Had the SNAP Office determined that violations were seen as firm practice, a more severe sanction may have been imposed. It should be noted that a six-month disqualification is the least severe sanction allowed by regulation given the violations in this case. The sanction was, however, correctly doubled in accordance with 7 C.F.R. § 278.6(e)(6) due to the firm having been previously disqualified on or about January 20, 2014 for similar violations. It is noted for the record that, in accordance with 7 C.F.R. § 278.6(e)(1)(ii), if in the future the firm is again found to have committed violations warranting a disqualification it can be disqualified permanently.

In regard to contention 4 above, the extenuating circumstances cited by Appellant are acknowledged and may well have resulted in a lack of oversight of the firm's operations during the period when the firm was investigated. However, neither the Food and Nutrition Act of 2008 nor the regulations issued pursuant thereto provide for waiver or reduction of a disqualification on the basis of extenuating circumstances or after-the-fact corrective action implemented subsequent to findings of program violations. 7 CFR § 278.6(e)(5) states, as noted above, that FNS shall disqualify a firm 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 and poor supervision by the firm's ownership or management. Such accurately describes the nature and extent of violations in the present case. Accordingly, once violations warranting a six-month disqualification are established, there is no latitude to impose a lesser sanction, with the exception of a hardship civil money penalty, for which,

as discussed below, Appellant does not qualify. Also, as noted, the six-month disqualification was correctly doubled to a one-year disqualification in accordance with 7 C.F.R. § 278.6(e)(6).

Regarding contention 5 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 SNAP 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.

With regard to contention 6 above, Appellant may imply that a record of no SNAP violations at the store at issue since it's reply to the Charge Letter, 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 additional SNAP violations by a firm and its owners, managers and/or employees following investigative findings warranting a disqualification. While the regulations provide for increased sanctions upon firms with prior violations, no provision exists for reducing a sanction in the absence of additional violations.

In regard to contention 7 above, the record reflects that the SNAP Office duly considered the firm's eligibility for a hardship civil money penalty and correctly found the firm ineligible. The ROD Office noted that, at the time of the sanction decision, there were nine similarly or better-stocked stores within a one-mile radius. Agency information reflects that there are currently eight other SNAP-authorized firms within a one-mile radius, including one supermarket (at just over one-half mile from the Appellant firm), one medium grocery store, one combination grocery/other store and five other convenience stores (four of which are located from just under one-quarter of a mile to just under one-half of a

mile). 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. In the present case there is no indication that the disqualification would work a hardship upon SNAP customers due to the impending closure of a nearby comparable firm, due to loss of access to ethnic foods or due to physical barriers or conditions that would make travel difficult or would restrict normal travel to comparable firms. 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. 5 U.S.C. § 552 (b)(7)(E).

As noted above, 7 CFR § 278.1(b)(4) requires as a condition of continued participation in the SNAP that a firm receiving greater than a six-month disqualification (or civil money penalty in lieu thereof) present a collateral bond or irrevocable letter of credit in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or 10% of the firm's average monthly SNAP redemptions (during the 12-month period prior to the effective date of the most recent sanction necessitating the bond or letter of credit), whichever is greater. Therefore, if the Appellant firm reapplies to participate in the SNAP at the end of the one-year disqualification period, provision of said bond, in the amount specified by regulation, will be a further condition of the firm's eligibility to participate in the SNAP.

CONCLUSION

In view of the above, the decision of the ROD Office to disqualify Colonial Grocer for a period of one year from participation in the SNAP is hereby sustained and will become effective upon the 30th day following your firm'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 one-year 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

November 21, 2017