

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

Country Food Mart,

Appellant,

v.

Case Number: C0203394

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 there is sufficient evidence to support a finding that a six month disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Country Food Mart (“Appellant”) by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a six month period of disqualification against Country Food Mart on July 9, 2018.

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

The Department of Agriculture conducted an investigation of the compliance of Country Food Mart with Federal SNAP law and regulations during the period October 24, 2017 through November 15, 2017. In a letter dated February 20, 2018, the Retailer Operations Division charged the Appellant with accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items in violation of 7 CFR § 278.2(a). These SNAP violations

occurred on six out of six compliance visits. The letter further informed the Appellant that the violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5).

In responses to the Retailer Operations Division dated February 22, 2018 and February 24, 2018, the Appellant, through counsel, replied to the charges therein denying that SNAP violations occurred during the investigation of Country Food Mart. USDA has erroneously concluded that the Appellant sold ineligible non-food items with SNAP benefits based upon alleged purchases by unidentified undercover individuals. The Appellant believes that these individuals lack investigative training that would prevent improper undercover techniques and are therefore, unreliable. In lieu of a six month SNAP disqualification, the Appellant requests that it be allowed to pay a civil money penalty.

The record reflects that in the Appellant's response dated February 24, 2018, the Appellant's counsel requested information and documents from FNS with regard to the agency's case against Country Food Mart pursuant to the Freedom of Information Act (FOIA). FNS provided a response to counsel's FOIA request, dated March 14, 2018, and received no further communication from the Appellant or counsel with regard to the agency's response to the FOIA request.

After considering the Appellant's replies and the evidence of this case, the Retailer Operations Division issued a Determination Letter dated July 9, 2018. The Determination Letter informed the Appellant that it was disqualified from the SNAP for a period of six months in accordance with 7 CFR § 278.6(a) and (e). The Determination Letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a hardship civil money penalty under 7 CFR § 278.6(f)(1). The Retailer Operations Division determined that the Appellant was not eligible for the hardship civil money penalty in lieu of the six month disqualification because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked July 20, 2018, the Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. FNS granted the Appellant's request for administrative review by letter dated July 31, 2018. Upon acceptance of the administrative review request, implementation of the six month disqualification was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulations under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e) establish the authority upon which a disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, inter alia:

Coupons may be accepted by an authorized retail food store only from eligible households . . . only in exchange for eligible food.

7 CFR § 271.2 states, inter alia:

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, inter alia:

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.

7 CFR § 278.6(e)(5) states, inter alia:

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, inter alia:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when . . . the firm's disqualification would cause hardship to Food Stamp [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.

SUMMARY OF THE CHARGES

During an investigation conducted from October 24, 2017 through November 15, 2017, USDA conducted six compliance visits at Country Food Mart. A report of the investigation was provided to the Appellant as an attachment to the Charge Letter dated February 20, 2018. The investigation report included Exhibits A through F which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded

during six of the six compliance visits and involved the sale of a variety of items best described in regulatory terms as “common nonfood items” and a “major ineligible item”. The exchange of these ineligible items for SNAP benefits is in violation of 7 CFR § 278.2(a).

APPELLANT’S CONTENTIONS

The following represents a brief summary of the Appellant’s contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the replies to the Charge Letter, in the administrative review request postmarked July 20, 2018, and in a subsequent correspondence dated August 24, 2018, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant denies that it has violated the SNAP regulations. The Retailer Operations Division has erroneously concluded that the Appellant sold ineligible items in exchange for SNAP benefits. The alleged purchases were made by unidentified undercover individuals whom the Appellant asserts lack investigative training and are therefore, unreliable.
- This case did not involve a typical compliance visit, but was a planned, pre-conceived and targeted action with the sole intent of claiming that the Appellant violated the SNAP regulations.
- A six month disqualification is extremely severe based upon the allegations. The Appellant requests that it be provided a Warning Letter and that the disqualification be withdrawn.
- The Appellant has not been provided any reliable, credible evidence of SNAP violations that it would be responsible for thereby precluding it from fully responding to the Charge Letter. Thus, the Appellant has been denied due process. The Appellant requested this and other information pursuant to the Freedom of Information Act (FOIA).
- The legislative process underpinning the SNAP statute and regulations does not adequately represent foreign born persons such as the store owner in the present case. Moreover, the store owner, being foreign born, does not understand the technical legislation being applied against it but has nonetheless worked hard to meet SNAP participation requirements. Lastly, there are no reasonable grounds for upholding the six month disqualification from the SNAP when it involves a foreign born person, such as the store owner.
- The SNAP regulations allowing the sanction in the present case violate due process of law, the Equal Protection Clause, the Contracts Clause, and the Takings Clause of the U.S. Constitution. The Appellant cites case law in support thereof.
- In order to prevent future violations of the SNAP, the Appellant will institute policies and procedures to be presented to employees of Country Food Mart to comply with the SNAP regulations.
- The Appellant requests consideration of a civil money penalty as the store is located in an area not sufficiently covered by other retailers who accept SNAP benefits. The store is

necessary to the residents surrounding it as it provides a very important benefit to these residents.

ANALYSIS AND FINDINGS

Denial of Charges

The Appellant denies that it has violated the SNAP regulations. The Retailer Operations Division has erroneously concluded that the Appellant sold ineligible items in exchange for SNAP benefits. The alleged purchases were made by unidentified undercover individuals whom the Appellant asserts lack investigative training and are therefore, unreliable.

The Appellant bears the burden of demonstrating through a preponderance of the evidence that the violations as charged in fact did not occur and that the sanction imposed by the Retailer Operations Division should therefore be reversed. The Appellant offers statements of denial indicating that the firm did not participate in said violations; such does not constitute compelling evidence that the firm accepted SNAP benefits in exchange for eligible foods only. It is acknowledged that demonstrating that violations did *not* occur does indeed place a difficult burden upon the Appellant; however, that the burden is considerable does not render invalid the evidence of SNAP violations existing in the record or the actions taken by the Retailer Operations Division on the basis of that evidence.

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 and other specifics of the violations and in all other critically pertinent detail. Additionally, investigative results are routinely supported by documentation 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 certification that the items described were in fact received. The record also includes photographs of the items purchased at the store during the investigation, along with the dated receipts clearly showing that they were obtained at the Appellant store. The purchase costs of each of the transactions involved in the investigation are documented on SNAP terminal receipts obtained during each transaction. Moreover, transaction data generated by each investigative purchase at the Appellant's firm is stored in agency data systems.

The Appellant has provided no evidence, nor is there any evidence, that the USDA investigator conducted an unfair investigation or that he/she lacked investigative training and is therefore, unreliable. Accordingly, the Appellant offers no compelling information or supporting documentation which would constitute evidence that any relevant detail is incorrect in any substantial respect. As such, the Appellant's denial of the charges exerts little force in the context of the considerable information and documentation presented by the Retailer Operations Division, as referenced above, which indicate that the merchandise as described was in fact

obtained at the Appellant firm on the dates noted, that the manner in which it was obtained is accurately described and that the clerks in attendance throughout did in fact conduct the transactions described.

Targeted Action

The Appellant argues that this case did not involve a typical compliance visit, but was a planned, pre-conceived and targeted action with the sole intent of claiming that the Appellant violated the SNAP regulations.

To the extent that the 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. 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, C, D, E and F in the Investigation Report were approached by the investigator and willingly engaged in the sale of ineligible items in exchange for SNAP benefits on six of six visits to the store. 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.

Warning Letter

The Appellant argues that a six month disqualification is extremely severe based upon the allegations. The Appellant requests that it be provided a Warning Letter and that the disqualification be withdrawn.

The regulations at 7 CFR § 278.6(e)(5) state that the agency *shall* (emphasis added) 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 the violations in the present case. Thus, the Retailer Operations Division's determination is affirmed as correct and appropriate. It should be noted that a six month disqualification is the least severe disqualification period allowed by statute and regulation.

As to the Appellant's contention that the decision to impose a disqualification is too severe given the alleged violations, it is noted for the record that the average percentage of ineligible

items (as a percentage of the total number of all items) purchased during the investigation was approximately 37%. Neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto, requires, in order to be defined as violative, any minimum dollar amount of SNAP benefits used in transactions involving the sale of ineligible items. No mention of minimum cost is cited in Section 278.6(e)(5) of the SNAP regulations, which, as noted, 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.

Additionally, the regulations at 7 CFR § 278.6(e)(7) state that FNS shall send a firm a Warning Letter if violations are too limited to warrant a disqualification. This section of the regulations provides for a continuum of sanctions, beginning with permanent disqualification for trafficking, term disqualifications from several years to six months for lesser violations, and Warning Letters for firms committing violations less severe than that provided for by the standard for imposing six month disqualifications. The violations in the present case exceed the severity allowed for issuing a Warning Letter. A Warning Letter, in the present case, is therefore incorrect. As such, the Retailer Operations Division imposed the sanction required by the statute and regulations.

Due Process

The Appellant argues that it has not been provided any reliable, credible evidence of SNAP violations that it would be responsible for thereby precluding it from fully responding to the Charge Letter. Thus, the Appellant has been denied due process. The Appellant requested this and other information pursuant to the Freedom of Information Act (FOIA).

The Appellant may be implying that the owner did not personally commit violations of the SNAP regulations, that an employee committed the violations and thus the Appellant is not responsible for same. 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. The 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, SNAP Application for Stores, on July 10, 2015, by means of which the Appellant acknowledged and agreed to accept responsibility to prevent violations of the program by any and all employees of the firm. 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.

It should be noted that the Retailer Operations Division did in fact provide the Appellant with a redacted copy of the Report of Positive Investigation, #HO01501, which provides substantial detail about each investigative visit to the Appellant firm. Additionally, while the Retailer Operations Division is required to consider and evaluate all evidence and responses, in

accordance with 7 CFR § 278.6(c), that are provided by the Appellant, the Retailer Operations Division is under no obligation in the Determination Letter to expound, point-by-point, on every contention or piece of evidence presented. The Determination Letter clearly states that consideration was given to the information and evidence available to the Retailer Operations Division and to the replies made by the Appellant. After an evaluation of all information, the Retailer Operations Division determined that the violations cited in the Charge Letter had occurred at the firm. Implied in the letter is the determination that the evidence or response by the Appellant was either not credible or was insufficient to prove that violations had not occurred. While the Charge and Determination Letters may not have been as comprehensive as the Appellant wishes, this review finds that due process was appropriately applied and that there was no negligence on the part of the Retailer Operations Division in the manner in which it explained its disqualification decision.

With regard to Appellant's FOIA request, the record reflects that the agency's FOIA Office replied to Appellant's FOIA request via a letter dated March 14, 2018, and received no further communication from the Appellant or counsel with regard to the agency's response to the FOIA request.

Foreign Born Persons

The Appellant appears to be making the argument that the legislative process underpinning the SNAP statute and regulations does not adequately represent foreign born persons such as the store owner in the present case. Moreover, the store owner, being foreign born, does not understand the technical legislation being applied against it but has nonetheless worked hard to meet SNAP participation requirements. Lastly, there are no reasonable grounds for upholding the six month disqualification from the SNAP when it involves a foreign born person, such as the store owner.

Whether or not the statute and regulations governing the SNAP adequately represent foreign born persons is beyond the scope of this review and more appropriately within the purview of judicial review. For the record, the firm was authorized to participate in the SNAP on or about August 17, 2015 and thus had been participating in the program for over 2.5 years at the time the Charge Letter was issued. That the owner of the Appellant firm may be foreign born 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. By means of the certification and signature statement (the last page of the application for participation in the SNAP) which the Appellant signed on July 10, 2015, the Appellant acknowledged that it understood and agreed with the conditions of participation (specifically noting that accepting SNAP benefits in exchange for ineligible nonfood items is not permitted and disqualification can result from engaging in same) and accepted responsibility to understand program rules, to follow them and to ensure that any/all personnel handling transactions on behalf of the firm likewise understands and follows program rules.

Constitutionality

The Appellant argues that the SNAP regulations allowing the sanction in the present case violate due process of law, the Equal Protection Clause, the Contracts Clause, and the Takings Clause of the U.S. Constitution. The Appellant cites case law in support thereof.

The Appellant has contended that the Retailer Operations Division's actions do not meet the requirements of the United States Constitution. This review finds that the Retailer Operations Division properly implemented the sanction at issue in accordance with the statute and regulations. The administrative review process cannot properly include an assessment of the constitutionality of the statute and regulations under which the agency imposed adverse actions, but rather assesses whether the agency actions undertaken were proper pursuant to those laws and regulations and sustainable by a preponderance of evidence. As such, this office does not have the authority to determine whether the United States Congress, in its enactment of legislation, has conformed to constitutional mandates or whether the regulations issued pursuant to those mandates conform thereto.

Additionally, considerations of legal precedent through case law, or the lack thereof in relation to the present case, are likewise beyond the scope of this review; as noted, this review relies upon the statute and regulations governing the SNAP and evaluates whether the decision of the Retailer Operations Division to impose a disqualification upon the Appellant was in accordance with same and sustainable by a preponderance of the evidence; the Appellant's case law references are addressed within this context only. Moreover, challenges to the laws and regulations governing the SNAP are more appropriately within the scope of judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

Corrective Action

The Appellant argues that in order to prevent future violations of the SNAP, it will institute policies and procedures to be presented to employees of Country Food Mart to comply with the SNAP regulations. It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that it will take corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

The Appellant requests consideration of a civil money penalty as the store is located in an area not sufficiently covered by other retailers who accept SNAP benefits. The store is necessary to the residents surrounding it as it provides a very important benefit to these residents.

The Retailer Operations Division determined that the Appellant was not eligible for a hardship civil money penalty (CMP) under 7 CFR § 278.6(f)(1). That regulation reads, in part, “FNS may impose a civil money penalty as a sanction in lieu of disqualification when . . . 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.” [Emphasis added]. **5 U.S.C. § 552 (b)(7)(E).**

Based on the evidence, the disqualification of Country Food Mart would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division’s decision not to assess a hardship CMP in lieu of a six month disqualification is sustained as appropriate under 7 CFR § 278.6(f)(1).

CONCLUSION

It is therefore established that the violations as described in the letter of charges did in fact occur at Country Food Mart warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5). That regulation states that 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”. Therefore, the decision to impose a six month disqualification, the least severe penalty allowed by regulation, against Country Food Mart, the Appellant firm, is appropriate and the action is sustained.

In accordance with the Food and Nutrition Act of 2008 and the regulations there under, the six month period of disqualification shall become effective thirty (30) days after receipt of this letter. A new application for participation may be submitted by the firm ten (10) days prior to the expiration of this six month period.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that 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 you reside or are 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 receipt of this Decision.

Under the Freedom of Information Act, 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.

LORIE L. CONNEEN
Administrative Review Officer

December 3, 2018