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

El Colmadon Market Inc,

Appellant,

v.

Case Number: C0229012

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 El Colmadon Market Inc (hereinafter "El Colmadon Market Inc" or "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 El Colmadon Market Inc.

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 El Colmadon Market Inc with Federal SNAP law and regulations during the period February 4, 2020 through March 4, 2020. In a letter dated September 21, 2020, 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 four out of four 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). The letter also stated that under certain conditions, FNS may impose a hardship civil money penalty (CMP) in lieu of a disqualification as provided in 7 CFR § 278.6(f)(1).

In a letter dated September 28, 2020, the Appellant requested an extension in time for responding to the letter of charges. In a letter dated September 30, 2020, the Retailer Operations Division granted the Appellant's time extension request to October 15, 2020. In responses of September 28, 2020 and October 15, 2020, the Appellant, through counsel, replied to the charges therein stating that the owner disagrees with the alleged violations and upon review of the investigation report found various discrepancies. The owner and his business partner ordinarily compute each customer's purchase using a regular cash register. When the owner cannot be at the store, his business partner pinch-hits for him. The identification and description of the clerk identified in the investigation report do not fit the description of the owner or his business partner. The misidentification and erroneous description make the Appellant doubt in an objective and partial work of the investigator. The owner is a very responsible and respectful person who complies with the laws. It would be unfair and cruel to punish the owner for bad actions and decisions of the former business partner. All the courts of appeals that have addressed the burden-of-proof issue under Section 2023 have placed the burden of proof on the party challenging USDA's finding of liability. The Appellant joins those courts and holds that when a store challenges USDA's determination that the store violates the SNAP regulations, the store bears the burden of proving by a preponderance of the evidence that its conduct was lawful or intentional. It follows that when Congress authorizes a private right of action without specifying which party bears the burden of proof, the plaintiff bears that burden unless a statutory purpose to the contrary is apparent. The Appellant cited numerous case laws in support thereof. Proactive measures are the best way to prevent SNAP violations and minimize the consequence should they still occur. The Appellant's counsel is going to create a compliance manual to help the owner implement a detailed compliance policy to safeguard the store against these and other SNAP violations. The store also implemented a new PO system that is set up to be able to detect items that are not approved by the SNAP and avoid any violation. The owner asks FNS to consider that the bad intentions of an ex-business partner do not reflect the company values. A SNAP disqualification during this pandemic time would be economically devastating for the business and would be the stone that would lead the store to possible bankruptcy. In support thereof, the Appellant submitted for review Resigning Director and Officer, signed/dated June 23, 2020, noting resignation of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), Shareholder and Director, effective March 17, 2020; and El Colmadon Market Inc Meeting of Shareholders and Directors dated June 23, 2020.

After considering the Appellant's responses and the evidence of this case, the Retailer Operations Division issued a determination letter dated November 4, 2020. The determination letter informed the Appellant that the firm 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 CMP 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 November 13, 2020, the Appellant 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 December 15, 2020. 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 February 4, 2020 through March 4, 2020, USDA conducted four compliance visits at El Colmadon Market Inc. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated September 21, 2020. The investigation report included Exhibits A through D which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during four of the four 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 misuse of SNAP benefits noted in Exhibits A, B, C and D warrant a disqualification as a SNAP retail food store for a period of six months. 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 and in administrative review request, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The owner disagrees with the alleged violations and upon review of the investigation report found various discrepancies. The owner and his business partner ordinarily compute each customer's purchase using a regular cash register. When the owner cannot be at the store, his business partner pinch-hits for him. The alleged violations were made by a former business partner who the owner believes carried them out with the knowledge of the repercussions and with the possible intention of damaging the business. The Appellant challenges the investigation findings. Since the Appellant is tasked with reviewing the allegations report by the investigator, it takes the facts in the light most congenial to the nonmovant (the store). See *McKenney v. Mangino*, 873 F.3d 75, 78 (1st Cir. 2017), cert. denied, 138 S. Ct. 1311 (2018). The Appellant disputes the transaction report in Exhibits A, B, C and D where the investigator describes a male clerk between 40-45 years old and between 6' to 6'3" in height. The identification and description of the clerk identified in the investigation report do not fit the description of the owner or his business partner. The owner is 5'10" in height, 31 years old and has blonde short hair. The owner's business partner is 5'9" in height, 31 years old and bold. The

misidentification and erroneous description make the Appellant doubt in an objective and partial work of the investigator.

- The owner is a very responsible and respectful person who complies with the laws. It would be unfair and cruel to punish the owner for bad actions and decisions of the former business partner. The submitted documents demonstrate that the former partner no longer works with the company or makes decisions that affect the operations of the store. The owner asks FNS to consider that the bad intentions of an ex-business partner do not reflect the company values.
- Precedent bears out this intuition. All the courts of appeals that have addressed the burden-of-proof issue under Section 2023 have placed the burden of proof on the party challenging USDA's finding of liability. See *Fells v. United States*, 627 F.3d 1250, 1253 (7th Cir. 2010); *Kim v. United States*, 121 F.3d 1269, 1272 (9th Cir. 1997); *Warren v. United States*, 932 F.2d 582, 586 (6th Cir. 1991), and *Redmond v. United States*, 507 F.2d 1007, 1011-12 (5th Cir. 1975). The Appellant joins those courts and holds that when a store challenges USDA's determination that the store violates the SNAP regulations, the store bears the burden of proving by a preponderance of the evidence that its conduct was lawful or intentional. It follows that when Congress authorizes a private right of action without specifying which party bears the burden of proof, the plaintiff bears that burden unless a statutory purpose to the contrary is apparent. See G*ross v. FBL Fin. Servs*., 557 U.S. 167, 177 (2009).
- Proactive measures are the best way to prevent SNAP violations and minimize the consequence should they still occur. Having a compliance plan and following through on it could mean the difference between staying in business and losing the store. For that reason, the Appellant's counsel is going to create a compliance manual to help the owner implement a detailed compliance policy to safeguard the store against these and other SNAP violations. Such a plan typically involves: Thorough training—the bedrock of a solid compliance plan. Every cashier should know USDA's list of rules before being allowed to accept EBT transactions. That is how you train employees. Then, employees sign an acknowledgement of training before starting cashier duties. That is how you can prove to USDA that the Appellant took adequate steps to ensure compliance with public assistance programs. The store also implemented a new PO system that is set up to be able to detect items that are not approved by the SNAP and avoid any violation.
- A SNAP disqualification during this pandemic time would be economically devastating for the business and would be the stone that would lead the store to possible bankruptcy.
- The Appellant challenges the decision that it does not qualify for a civil money penalty. There are two stores located in the area but they are a considerable distance from the Appellant: 5 U.S.C. § 552 (b)(6) & (b)(7)(C) which is 0.7 miles away and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) which is 0.4 miles away. These stores do not accept SNAP benefits. A SNAP disqualification will impose a hardship and difficulties for certain residents such as the elderly and other residents at a local homeless shelter which is located within feet of the Appellant. Some of these residents are disabled or have medical conditions that make them unable to shop for essential items from the convenience store located a long distance from them.

In support of these contentions, the Appellant, through counsel, submitted the following documents for review:

- Resigning Director and Officer, signed/dated June 23, 2020, noting resignation of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), Shareholder and Director, effective March 17, 2020; and
- El Colmadon Market Inc Meeting of Shareholders and Directors dated June 23, 2020.

ANALYSIS AND FINDINGS

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. Additionally, a claim of having a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

The FNS investigative report shows that one employee working at the Appellant firm accepted SNAP benefits for ineligible nonfood items on four separate occasions during the investigative period indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The report shows that the nature and scope of the violations under review do violate SNAP regulations, and the transaction amounts cited in the report also match FNS transaction records for the dates in question. Additionally, a review of the report shows no errors or discrepancies.

There is no regulatory threshold for the dollar value of the ineligible items purchased or for the timeframe in which they were purchased. The acceptance of SNAP benefits for ineligible items is a violation of SNAP rules and regulations. The ineligible items sold were obvious nonfood items and would not readily be confused with eligible edible food items. SNAP regulations explicitly state that FNS shall disqualify a store for a six month period 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.

SNAP benefits, in general, are only authorized to be used for the purchase of foods for the household to eat as well as seeds and plants which produce food for the household to eat. The common nonfood items purchased are clearly not edible foods and are not plants or seeds, so one

has to question the level of training the employee received by store ownership and/or management. The basic concept of "if you can't eat it, you can't buy it using SNAP" is not a difficult one for employees to grasp, yet the employee allowed the purchase of ineligible items using SNAP benefits on multiple occasions.

Had an effective compliance policy and program been in effect at the firm, it is unlikely that the employee would have made such obvious mistakes. The more likely explanation is that store ownership and/or management failed to properly train and subsequently supervise the employee. Additionally, had store ownership and/or management been supervising the employee through occasionally monitoring him using videotape, if available, or in person, it would have readily noticed that he was allowing the sale of ineligible nonfood items in exchange for SNAP benefits. It also would have been immediately evident to store ownership and/or management that the employee was deficient in his knowledge of SNAP rules and regulations had it periodically spot checked the employee's knowledge and abilities by asking questions about SNAP eligible/ineligible items. Either of these basic supervisory techniques would have provided a no cost method for store ownership and/or management to ensure that store employees were not putting the firm's SNAP authorization at risk.

These are clear signs of poor or no supervision by store ownership and/or management. It is highly improbable, based on the willingness of the employee to exchange SNAP benefits for ineligible nonfood items, that the only instances of SNAP violations were those transactions identified as part of the FNS undercover investigation. These actions more likely than not represent an ongoing pattern of SNAP violations at the Appellant firm.

The Appellant contends that the alleged violations were made by a former business partner. However, as previously stated, store ownership is responsible for all SNAP transactions at the firm and therefore, a certain minimal level of oversight and training on the part of ownership to ensure employees, especially new employees, are not violating SNAP laws or regulations is expected. It would be unusual and irresponsible for store ownership to not have a program of ongoing supervision of employee performance and conduct by periodically monitoring store transactions, including those involving SNAP, and reviewing daily balance sheets to ensure store employees were not stealing from the firm or conducting other activities that would jeopardize the licenses and income that the firm is dependent upon. Under SNAP regulations, the penalty for allowing the purchase of ineligible nonfood items using SNAP benefits as the result of poor supervision by ownership or management is a six month disqualification. The regulations do allow SNAP retailers to pay a hardship CMP, if eligible, as explained in the next section.

The Appellant is correct that the firm has no previous history of SNAP program violations or warnings. However, this does not necessarily mean that the firm has not been conducting violative transactions. Neither FNS nor the Appellant has sufficient data to conclusively prove that the firm was or was not conducting violative transactions prior to the start of the undercover investigation. However, the matter under review is the first time that the firm has been investigated by FNS and the results of the investigation showed SNAP violations conducted by one employee in four of the four visits to the firm. While it is not definitive, it can be readily inferred that violative transactions were more likely than not occurring in previous months based on these investigatory visits.

Regarding the Appellant's contentions with regard to the employee description noted in the investigation report, no statutory or regulatory requirements exist for investigative personnel to positively identify store employees that have committed violations of SNAP rules and regulations. The descriptions contained in the Report of Positive Investigation are provided only to assist store ownership in identifying those employees responsible for the violative transactions. Many variables can affect the description of an employee (e.g. whether the employee was sitting or standing or on a platform, the fit of their clothing, changing hair styles/lengths/colors, etc.) so these descriptions may not be one hundred percent accurate which does not mean that the violations did not occur. Disclosing the identity of investigative personnel would cause a clearly unwarranted invasion of personal privacy. The store entry/exit times could also be used to identify investigative personnel and cannot be provided.

SNAP regulations do not establish any minimum dollar amount that exchanges of SNAP benefits for common ineligible nonfood items must exceed in order to be considered violative; therefore, any allegations that transactions involving "insignificant amounts" not being credible are baseless. There are no requirements in existing FNS regulations that require that stores suspected of trafficking or misusing SNAP benefits be provided with a written or verbal notification that violations of SNAP regulations may be occurring and the potential penalties. Warning letters are issued in those situations where the SNAP violations are of a limited nature that would not warrant a disqualification and therefore, would not have been appropriate in this situation. The redacted investigative report does show that a single investigator conducted the four visits to the Appellant firm. Based on this discussion, the decision by the Retailer Operations Division to disqualify the firm for a six month period was the appropriate penalty and there is no valid basis for dismissing the charges or for mitigating the penalty imposed.

Corrective Action

The Appellant contends that proactive measures have been implemented to ensure that SNAP violations do not occur in the future, to include creation of a compliance manual to help the owner implement a detailed compliance policy to prevent SNAP violations, thorough training of store employees, and implementation of a new PO system. In addition, the owner's former business partner no longer works with the company or makes decisions that affect the operations of the store. In support thereof, the Appellant submitted documents noting the resignation of the business partner from the corporation effective March 17, 2020.

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 has taken or 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.

Case Laws

With regard to the case laws cited by the Appellant, it is beyond the scope and authority of this review to determine the applicability of same. This review is limited to consideration of whether or not the Retailer Operations Division duly adhered to the Food and Nutrition Act of 2008, as amended, and the implementing regulations, and whether or not the action taken is sustainable by a preponderance of the evidence. Therefore, the application of any judicial precedent is better addressed via judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

Financial Hardship

With regard to the Appellant's contention that a SNAP disqualification will impose a financial hardship on the firm, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm or to ownership resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA.

Furthermore, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

With regard to the Appellant's contention that a SNAP disqualification will impose a hardship on SNAP customers, 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 El Colmadon Market Inc 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 El Colmadon Market Inc 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 El Colmadon Market Inc, 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

January 25, 2021