

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

**El Vacilon Grocery Corp,**

**Appellant,**

**v.**

**Office of Retailer Operations and  
Compliance,**

**Respondent.**

**Case Number: C0235720**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), that the record supports that El Vacilon Grocery Corp. (Appellant), committed violations of the Supplemental Nutrition Assistance Program (SNAP) regulations. There is sufficient evidence to sustain a six month disqualification of Appellant from the SNAP as imposed by the Office of Retailer Operations and Compliance (Retailer Operations).

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action in its administration of the SNAP, consistent with 7 CFR § 278.6(f)(1), 7 CFR § 278.6(a), and 7 CFR § 278.6(e), when it imposed a six month period of disqualification against Appellant.

**AUTHORITY**

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7, may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

**CASE CHRONOLOGY**

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of December 3, 2020 through December 9, 2020. The investigative report dated December 18, 2020, documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on multiple separate dates. The items sold are best described as common nonfood items.

As a result of evidence compiled during the investigation, by letter dated January 11, 2021, Retailer Operations charged Appellant with violating the terms and conditions of the SNAP regulations. Misuse of SNAP benefits was noted in Exhibits A, B, and C, that warrants a disqualification as a SNAP retail food store for a period of six months. The letter also states that under certain conditions FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

Counsel requested an extension to reply and Retailer Operations granted the extension. Counsel responded in writing to the Charge letter on February 22, 2021. Retailer Operations informed Appellant by Determination letter dated March 4, 2021, that the violations cited in the Charge letter occurred at the firm, and that a six month period of disqualification was warranted. The letter also stated that eligibility for a hardship CMP was not applicable as there are other authorized retail food stores in the area selling as large a variety of staple foods at comparable prices.

Counsel requested review of the determination by letter dated March 11, 2021. The review was granted by letter dated March 25, 2021. Counsel provided a brief on April 15, 2021.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing relevant, credible 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 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 § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e)(5) establish the authority upon which a six month disqualification may be imposed against a retail food store.

7 CFR § 278.2(a) states: “SNAP benefits may be accepted by an authorized retail food store only from eligible households or the households’ authorized representative, and only in exchange for eligible food.”

7 CFR § 278.6(a) states: “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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system.”

7 CFR § 278.6(e)(5) of the SNAP regulations states that a firm is to be disqualified 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 or poor supervision by the firm’s ownership or management.”

7 CFR § 278.6(f)(1) provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause hardship to SNAP benefit households because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It states: “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to SNAP benefit 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.”

7 CFR § 278.6 Disqualification of retail food stores... and imposition of civil money penalties in lieu of disqualifications states in part: “(p) *Freedom of Information Act (FOIA) requests and appeals.* A FOIA request or appeal for records shall not delay or prohibit FNS from making a determination regarding disqualification or penalty against a firm under paragraphs (c) and (d) of this section, or delay the effective date of a disqualification or penalty listed in paragraph (e) of this section.

### **SUMMARY OF THE CHARGES**

A report of the investigation was provided to the Appellant as Exhibits with the Charge letter. The investigative report provides details on the results of each compliance visit. The investigative report documents that SNAP violations were recorded during multiple store visits, that warrant a six month disqualification. The SNAP violations of 7 CFR § 278.2(a) involved the sale by store personnel of nonfood items for benefits. The nonfood items sold for benefits included: scrubber sponges, steel wool soap pads, and a steel scrub ball.

### **APPELLANT’S CONTENTIONS**

Consideration was made of all contentions and submissions whether recapitulated here or not.

- My client has had no opportunity to evaluate and respond to all of the information considered by your office to be instrumental in these cases, so this response cannot possibly be considered a full opportunity. A decision rendered here is a violation of the regulation.
- The issues of law to be decided herein are: (1) whether the Respondents’ alleged violations of the SNAP regulations were the result of the carelessness or poor supervision of the Store’s owners; and (2) whether the alleged violations are too limited in nature so as to warrant a disqualification.
- The Appellants vehemently denied that trafficking had occurred at the Store, a position substantiated by the Investigator’s notes. Nevertheless, the Department rendered a decision in which it determined: (1) the violations cited had occurred at the Store, and (2) that the Store did not qualify for a Civil Money Penalty.

- My clients adamantly deny any violation of SNAP regulations which would warrant a six month disqualification. The store has a policy of compliance with SNAP regulations which is demonstrated throughout the allegations set out in the Charge Letter. The clerks even refused to engage in trafficking. As such, even if the allegations were accurate then the store's violations warrant a warning letter rather than a six month disqualification.
- There is no evidence whatsoever in the record that the alleged sales of common nonfood items was due to carelessness or poor supervision by the store's ownership or management. The mere presence of the alleged violation – even in a certain volume – is not a prima facie case for carelessness or poor supervision. Store owners and management are not expected to sit over their employee's shoulder for every transaction to verify their accuracy.
- A concealed problem (such as where there's no way for the store owner/manager to have known about these specific alleged problems) is not the same as acting careless or neglectful. Careless/neglectful qualifies for store owners who never trained their staff, or who govern their store on an absentee basis without any ongoing concern for how the store is operating. A determination that a certain number of ineligible sales over a certain number of visits is the very definition of arbitrary: a determination based upon individual preference or convenience rather than by the intrinsic nature of the transactions.
- The store's owner maintains a strict set of rules for the operation SNAP regulations and has reviewed the regulations with each of the employees until they demonstrated personal knowledge of the rules. Evidence that such policy and training was in place can be found in the first investigation visit where the store personnel refused the sale of ineligible items on EBT. The owner has always worked to correct any problematic activity within the store, clarify any matters which employees indicate they are confused about, and to terminate employees who have violated rules and regulations governing any of the store's business. To say that the store owner/manager failed to supervise the employees is without basis.
- The Department has neither audio nor video recordings that these transactions occurred as described, despite having the ability to do so, nor does the Department have any other witnesses. The Department's failure to utilize such tools, and choice to rely only upon an effectively unsigned affidavit, means that RIB has failed to meet its burden. The admission of the hearsay evidence at issue herein.
- As a result of the Appellants' inability to subpoena said witness, it is impossible to determine the witness's veracity or whether or not a statement is biased. As such, this uncorroborated document should not be relied upon by this Department in determining whether or not a violation has occurred.
- The Store would ask that a warning letter be issued in lieu of a six month disqualification. There were minimal ineligible items purchased by the investigator, all of which were reasonably related to food preparation and/or common household products. There was a clear misunderstanding on the part of the Store's clerks regarding the difference between eligible verse ineligible items, and nothing in the record to indicate that the sales were intentionally violative. The violations were minor in nature.
- A determination that a certain number of ineligible sales over a certain number of visits is the very definition of arbitrary: a determination based upon individual preference or convenience rather than by the intrinsic nature of the transactions.
- In this instance, the ownership had taken reasonable and fiscally practical steps to prevent SNAP violations. Their efforts cannot be reasonably described as careless or as poor supervision.

- Though there are several stores within a mile that are authorized, the price, food quality and service at El Vacilon Grocery Corp. are well known to the local neighborhood. The other stores in the area are either priced higher or have less food.

## ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the determination made by Retailer Operations, and it is limited to the facts at the basis of Retailer Operations' determination at the time it was made. Appellant was investigated by the USDA for compliance with SNAP laws and regulations. During the course of multiple visits to Appellant, store personnel exchanged common ineligible items for SNAP benefits on each of three store visits. The investigative record is specific and accurate with regard to the dates of the violations, and the exchange of SNAP benefits for the purchase of nonfood items. The record includes photos of the ineligible and eligible items exchanged by the store personnel for SNAP benefits, the dated EBT receipts with the store name and address, and signed sheets documenting the donation of the items to local non-profits. The owner submitted no evidence to support that the transactions did not occur at Appellant.

On review, counsel denies wrongdoing at Appellant yet states that, "Rather, it would seem as though the violations are exceptionally minor in nature, and while certainly in need of correction, proper corrective action can be achieved by the issuance of a warning letter." No mention of the minimum costs of ineligible items is cited in Section 278.6(e)(5) of the SNAP regulations, which 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.

The language "due to carelessness or poor supervision," in the context of the statute and regulations, has been consistently applied by the agency to a specified number of clearly violative sales of ineligible items in which the evidence does not demonstrate firm practice and/or owner/management involvement. Furthermore, entrusting an unsupervised, inexperienced and/or untrained clerk to handle SNAP benefits is reasonably viewed as careless, and/or the exercise of poor supervision. Retailers are informed that it is their responsibility to ensure that store personnel are properly trained regarding the SNAP rules. Regardless of whom the owner of a store may utilize to handle store business, the firm's ownership is accountable for the proper training of personnel, and the effective monitoring and handling of SNAP benefit transactions.

The contention that, pursuant to 7 CFR § 278.6(d) of the SNAP regulations, FNS did not take any prior action to warn the firm about the possibility that violations were occurring or find any evidence that shows that the firm intended to violate the regulations, is an incorrect reading of the regulatory citation. The citation requires FNS to consider any prior warnings and evidence of a firm's intent to violate when determining a sanction. It does not require FNS to give such warnings, or to prove a firm's intent to violate. FNS did not consider prior actions to warn Appellant about the possibility that violations were occurring because there were no prior

warnings. The evidence considered by the Retailer Operations included the information obtained during the onsite store investigation as presented in the investigative report.

As to the cases cited by counsel regarding hearsay, they refer to criteria for documents submitted into evidence in lieu of witness testimony in administrative hearings. Revisions to parts 278 and 279 of the SNAP regulations eliminated administrative hearings. The revisions became effective September 8, 2003, and the agency no longer holds in-person hearings. Moreover, the statute and regulations do not provide for formal discovery procedures, or adversary cross-examination as part of the review process. Accordingly, the case citations are not relevant to the administrative review. If the final agency decision is appealed to the federal district court, a judge is responsible for determining whether case law cited by counsel is on point and applicable to Appellant's case.

The evidence more supports that Appellant established a record of selling nonfood items on multiple occasions. The regulations at 7 CFR § 278.6(e)(5) specify that FNS shall "disqualify the 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 nonfood items due to carelessness or poor supervision by the firm's ownership or management." Three violations are considered evidence of carelessness. Therefore, the violations in this case are not too limited to warrant a disqualification period of six months, rather than a warning letter. The preponderance of evidence under review supports that Appellant's personnel sold nonfood items on multiple store visits in exchange for SNAP benefits. This program violation warrants a six month disqualification.

### **CIVIL MONEY PENALTY**

Retailer Operations rendered a finding that it was not appropriate to impose a CMP in lieu of a six month period of disqualification from SNAP. The record documents that there are many other other authorized stores within a nearby radius of Appellant, a convenience store, that stock a variety of comparable staple foods at comparable prices. Therefore, Retailer Operations concluded that the evidence did not support that it would cause hardship for SNAP recipients if Appellant is disqualified. Counsel provided no evidence to support the contention that other authorized stores in the area are either priced higher or have less food.

### **CONCLUSION**

The preponderance of the evidence in the record supports that SNAP violations did occur at Appellant. The record documents that Retailer Operations properly evaluated Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the regulations, and properly denied a CMP. Therefore, the six month disqualification of Appellant from participation as an authorized retail food store in the SNAP is sustained. This penalty shall become effective thirty (30) days after delivery of this decision.

A new application for participation in the SNAP may be submitted ten days prior to the expiration of the six month period of disqualification. Please contact the Retailer Center at 877-823-4369 with general questions regarding the SNAP application process.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

## **RIGHTS AND REMEDIES**

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023), and to the regulations at 7 CFR § 279.7 with respect to the owner's right to judicial review of this decision. 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 owners 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 delivery 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.

M. Viens  
ADMINISTRATIVE REVIEW OFFICER

April 27, 2021