

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

F & A Fuel Express Inc,

Appellant,

v.

Case Number: C0206643

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 F & A Fuel Express Inc. 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 F & A Fuel Express Inc. on July 17, 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 F & A Fuel Express Inc. with Federal SNAP law and regulations during the period March 27, 2018 through May 24, 2018. In a letter dated June 14, 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 four 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 June 20, 2018 and July 6, 2018, the Appellant, through counsel, replied to the charges therein denying that SNAP violations occurred during the investigation of F & A Fuel Express Inc. The descriptions of the employees included in the investigation report do not accurately describe any of the store's employees. In addition, the SNAP violations are too limited to warrant a six month SNAP disqualification and a Warning Letter should be issued.

After considering the Appellant's replies and the evidence of this case, the Retailer Operations Division issued a Determination Letter dated July 17, 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 27, 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 August 7, 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 March 27, 2018 through May 24, 2018, USDA conducted six compliance visits at F & A Fuel Express Inc. A report of the investigation was provided to the Appellant as an attachment to the Charge Letter dated June 14, 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 four of the six compliance visits and involved the sale of a variety of items best described in regulatory terms as "common nonfood items". 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 the administrative review request postmarked July 27, 2018, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant denies that SNAP violations occurred during the investigation of F & A Fuel Express Inc.
- In the Appellant's interview of the store's only two employees, they denied selling ineligible nonfood items with SNAP benefits. Both employees have been adequately trained and constantly reminded of the SNAP regulations. The Appellant provided signed affidavits from two store employees and the owner who attested that they have never accepted SNAP benefits in exchange for ineligible nonfood items.
- The descriptions of the employees working at F & A Fuel Express Inc. during the FNS investigation do not accurately describe any of the employees employed at the store.
- The Appellant has been unable to provide video evidence to back its denial of the charges due to the timeframe of receiving the Charge Letter. The security recording system records in two week intervals and the period between the investigation and the receipt of the Charge Letter is well over fourteen days. Attempting to prove that an allegation did not happen poses a substantial hardship to the Appellant under these circumstances.
- For the sake of argument, if SNAP violations did occur at F & A Fuel Express Inc., FNS should consider issuing a Warning Letter as the violations are too limited to warrant a SNAP disqualification.

ANALYSIS AND FINDINGS

Denial of Charges

The Appellant denies that SNAP violations occurred during the investigation of F & A Fuel Express Inc. In the Appellant's interview of the store's only two employees, they denied selling ineligible nonfood items with SNAP benefits. Both employees have been adequately trained and constantly reminded of the SNAP regulations. The Appellant provided signed affidavits from two store employees and the owner who attested that they have never accepted SNAP benefits in exchange for ineligible nonfood items. In addition, the Appellant argues that the descriptions of the employees working at F & A Fuel Express Inc. during the FNS investigation do not accurately describe any of the employees employed at the store.

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.

With regard to the discrepancies between the clerk descriptions given in the investigation report and those given by the Appellant, the matter of descriptions is often subjective in nature and may involve descriptive features that are relative with respect to the point of view of the observer. For example, a short investigator may view taller clerks as being much taller than they really are, and a young investigator may believe older clerks are much older than they really are. In this case, the Appellant did not provide any information or evidence to support its claim that the description of the clerks encountered during the investigation do not accurately describe any of the employees employed at F & A Fuel Express Inc. In addition, the issue here is whether or not, through a preponderance of evidence, it is more likely true than not true that the investigation did, in fact, take place at F & A Fuel Express Inc. as reported.

With regard to the affidavits provided by two store employees and the owner which purport to establish that they never accepted SNAP benefits in exchange for ineligible nonfood items and that no SNAP violations occurred, the truth of such declarations can neither be confirmed nor denied. Although such affidavits may be sworn to and notarized, that does not mean that they are necessarily truthful. One would not expect a store employee/owner to admit that they were involved in SNAP violations even if it were really so. On the contrary, one would expect that any store employee/owner affidavit provided would attest that they were not involved in nor did SNAP violations occur at F & A Fuel Express Inc.

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.

Time Between Investigation and Charge Letter Issuance

The Appellant contends that it has been unable to provide video evidence to back its denial of the charges due to the timeframe of receiving the Charge Letter. The security recording system records in two week intervals and the period between the investigation and the receipt of the Charge Letter is well over fourteen days. Attempting to prove that an allegation did not happen poses a substantial hardship to the Appellant under these circumstances.

With regard to the Appellant's contention, there is no statute of limitations with regards to an administrative action against a firm, although the agency does strive to take such actions as soon as they are able. It is important to note that when the Retailer Operations Division charges a firm for violations uncovered during a covert investigation is dependent primarily on when the investigative agency releases their report and gives approval for USDA to pursue administrative action. There are a number of reasons an administrative action could be delayed. For example, an investigation may be escalated from the administrative level to the criminal level, and after some time a decision may be made not to pursue the criminal investigation after all; this could take a couple of years. In addition, investigations often involve a number of different stores, and no arrests or charges are made until after all store investigations have been completed. In the interim, no administrative actions are taken until after any civil and criminal actions against firms have been pursued. Prosecutors may also accept a case referral, and then months later decide to decline the case for prosecution. In the present case, the investigation report was completed on June 5, 2018 and the Charge Letter was issued to the Appellant on June 14, 2018. The time elapsed between the SNAP violations and the Charge Letter does not have any effect on the potency or validity of the charges.

Warning Letter

The Appellant argues that for the sake of argument, if SNAP violations did occur at F & A Fuel Express Inc., FNS should consider issuing a Warning Letter as the violations are too limited to warrant a SNAP disqualification.

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, 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.

CIVIL MONEY PENALTY

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 F & A Fuel Express 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 F & A Fuel Express 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 F & A Fuel Express 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

December 18, 2018