

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

F & A Grocery,

Appellant,

v.

Case Number: C0203157

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 Grocery 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 Grocery on April 12, 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 Grocery with Federal SNAP law and regulations during the period November 17, 2017 through January 8, 2018. In a letter dated February 27, 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 five 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 a telephone conversation with Retailer Operations Division staff on March 9, 2018 and in a letter received by the Retailer Operations Division on March 19, 2018, the Appellant, through counsel, replied to the charges therein stating that the overall value of the non-eligible items purchased with SNAP benefits during the store investigation totaled approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) over five different compliance visits. A six month disqualification from the SNAP is therefore, unreasonable. The Appellant also requested that FNS consider any penalty other than a SNAP disqualification, including a monetary penalty.

After considering the Appellant's replies and the evidence of this case, the Retailer Operations Division issued a Determination Letter dated April 12, 2018. The Determination Letter informed the Appellant that F & A Grocery 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 (CMP) 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 April 19, 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 May 1, 2018. Upon acceptance of the administrative review request, implementation of the six month disqualification was held in abeyance pending completion of this review.

The record reflects that in a letter dated May 18, 2018, the Appellant's counsel requested information and documents from FNS with regard to the Agency's case against F & A Grocery pursuant to the Freedom of Information Act (FOIA). FNS provided a response to counsel's FOIA request, dated June 20, 2018, and received no further communication from the Appellant or counsel with regard to the Agency's response.

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 November 17, 2017 through January 8, 2018, USDA conducted six compliance visits at F & A Grocery. A report of the investigation was provided to the Appellant as an attachment to the Charge Letter dated February 27, 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 five 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 Appellant's replies to the Charge Letter and in the administrative review request postmarked April 19, 2018, and in a subsequent correspondence postmarked July 19, 2018, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- In each of the five compliance visits in which violative SNAP transactions were cited, the only ineligible item purchased on each visit was plastic cups. The purchase of these items simply cannot be a violation of the SNAP regulations because selling cups to customers for use with drinks purchased is no different than stores with fountain drink machines including a cup for the fountain drink in the cost of the drink. Because F & A Grocery does not have fountain drink machines it allows the purchase of plastic cups to be used with bottled drinks and it should not be punished for not having fountain drink machines.
- The overall value of the noneligible items purchased with SNAP benefits during the store investigation totaled approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) over five different compliance visits. A six month disqualification from the SNAP is therefore, unreasonable.
- In one of the compliance visits (Exhibit D), the investigator entrapped the store clerk when he/she asked the clerk to "hook me up" with regard to selling the ineligible item with SNAP benefits.
- FNS has not cited the Appellant for any previous issues or violations with regard to the SNAP. As proof of compliance with another government entity, the Appellant provided FNS with copies of two memos from the Memphis Police Department, dated June 3, 2014 and May 25, 2015, indicating that the store clerk at F & A Grocery refused to sell alcohol to a minor on each visit.
- The Appellant asserts that FNS' assessment of a six month SNAP disqualification is arbitrary and capricious as set forth in Cross v. U.S., 512 F.2d 1212, 1218 (4th Cir. 1975). The Appellant asserts that its store did not commit a violation and that any disqualification for six months is grossly disproportionate for the alleged conduct.
- The Appellant requests that FNS dismiss the six month SNAP disqualification action against F & A Grocery.
- The Appellant requests that FNS impose a civil money penalty (CMP) in lieu of a six month SNAP disqualification as a SNAP disqualification will impose a hardship on area SNAP customers. F & A Grocery sells food items to its neighborhood, which is a low income area. Many customers walk from their residences and these customers rely on local markets to accept EBT payments.

In support of the Appellant's contentions, FNS was provided with copies of two memos from the Memphis Police Department, dated June 3, 2014 and May 25, 2015, indicating that the store clerk at F & A Grocery refused to sell alcohol to a minor on each visit.

ANALYSIS AND FINDINGS

Plastic Cups Similar to Fountain Drink Cups

The Appellant contends that in each of the five compliance visits in which violative SNAP transactions were cited, the only ineligible item purchased on each visit was plastic cups. The purchase of these items simply cannot be a violation of the SNAP regulations because selling cups to customers for use with drinks purchased is no different than stores with fountain drink machines including a cup for the fountain drink in the cost of the drink. Because F & A Grocery does not have fountain drink machines it allows the purchase of plastic cups to be used with bottled drinks and it should not be punished for not having fountain drink machines.

On review it is considered that the Appellant's argument is not persuasive. Cups sold with fountain drinks are the vessel for carrying the fountain drink out of the store. The Appellant contends that "they offer their customers the ability to purchase a bottled drink along with a plastic cup to use at their desired destination"; however, in the case of plastic cups sold for bottled drinks the drink itself is already in a container.

It is also important to note that prior to becoming authorized to participate in the SNAP on October 31, 2014, the Appellant completed and submitted a SNAP Application for Retail Stores. The SNAP Application contained a section indicating that the person(s) signing the Application understood and agreed to ensure that store employees follow the SNAP rules and regulations and that the person(s) accepts responsibility for any SNAP violations that may occur at the store that were committed by any of the store's employees---paid, unpaid, new, temporary, full-time, part-time, etc. The SNAP Application also included a section that contained a statement which acknowledged that the person(s) signing the Application was aware that violations of program rules could result in fines, legal sanctions, withdrawal, or disqualification of the store. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application. The program training and reference materials (which supplement the SNAP regulations) provided to the Appellant state that only food to be prepared and/or eaten at home (such as Breads and cereals; Fruits and vegetables; Meat, poultry, and fish; and Dairy products), and seeds and plants intended to grow food (but not for growing flowers or feeding birds) may be purchased with SNAP regulations. These documents also state that the following items cannot be purchased with SNAP benefits:

- Beer, wine, liquor, tobacco, or cigarettes;
- Foods that are hot at the point of sale;
- Vitamins or medicines;
- Pet foods; or
- Nonfood items such as tissue, soap, cosmetics, and other household goods.

As mentioned previously, the SNAP Application included a section that contained a statement which acknowledged that the person(s) signing the Application was aware that violations of program rules could result in fines, legal sanctions, withdrawal, or disqualification of the store. By signing the SNAP Application for Retail Stores, the Appellant agreed to adhere to the SNAP regulations including not allowing ineligible items (as stipulated above) to be purchased with SNAP benefits at F & A Grocery. The Appellant's signature also indicated that he was aware

that violations of program rules could result in fines, legal sanctions, withdrawal, or disqualification of the subject firm.

Value of SNAP Violations Minor

The Appellant contends that the overall value of the noneligible items purchased with SNAP benefits during the store investigation totaled approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) over five different compliance visits. A six month disqualification from the SNAP is therefore, unreasonable. However, neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto cite any minimum dollar amount of SNAP benefits for transactions involving the sale of ineligible items to be defined as violative. No mention of minimum cost or types of ineligibles 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 by store employees or poor supervision by the firm's ownership or management.

Entrapment

The Appellant contends that in one of the compliance visits (Exhibit D), the investigator entrapped the store clerk when he/she asked the clerk to “hook me up” with regard to selling the ineligible item with SNAP benefits. The Appellant’s contention that, rather than just verifying violations, the investigator offered and persuaded store employees to violate by stating “hook me up” seems to imply that the investigator engaged in activity commonly referred to as entrapment. Generally, the entrapment that is forbidden by law depends on whether or not the activity leading up to the violation amounted to putting the activity in the mind of a person who had no prior inclination to violate, and leading him/her to do so for the first time. The U.S. Department of Agriculture’s Office of General Counsel maintains that if investigators merely provide an opportunity for a suspected violator to continue on a course of criminal conduct, such activity would not constitute entrapment. In this regard, the investigation record does not contain any evidence indicating activity characteristic of entrapment, nor has the Appellant provided substantial evidence to support its claim of entrapment.

First Time Violator

The Appellant contends that FNS has not cited it for any previous issues or violations with regard to the SNAP. As proof of compliance with another government entity, the Appellant provided FNS with copies of two memos from the Memphis Police Department, dated June 3, 2014 and May 25, 2015, indicating that the store clerk at F & A Grocery refused to sell alcohol to a minor on each visit. However, a record of participation in the 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.

With regard to the memos provided from the Memphis Police Department in which the store clerk at F & A Grocery refused to sell alcohol to a minor on each visit, these documents and the results of the alcohol compliance visits have no direct impact on the SNAP violations that

occurred in F & A Grocery during the course of the undercover investigation. Therefore, they are not germane to the present case.

Case Law

The Appellant asserts that FNS' assessment of a six month SNAP disqualification is arbitrary and capricious as set forth in Cross v. U.S., 512 F.2d 1212, 1218 (4th Cir. 1975). The Appellant asserts that its store did not commit a violation and that any disqualification for six months is grossly disproportionate for the alleged conduct. With regard to this contention, it should be noted that considerations of legal precedent through case law, or the lack thereof in relation to the present case, is beyond the scope of this review. Instead this administrative review is limited to whether the Retailer Operations Division appropriately followed the Food and Nutrition Act of 2008, as amended, and the regulations promulgated under the Act, and whether the action taken is sustainable by a preponderance of the evidence. Therefore, any application of a supposed judicial precedent would be best addressed in a judicial review in a court of law. Accordingly, no further findings or conclusions are rendered in this regard.

It is important to note that the Appellant contends that the subject firm did not commit a violation of the SNAP regulations. However, in a telephone conversation with Retailer Operations Division staff on March 9, 2018 in which the Appellant was responding to the Charge Letter allegations, the Appellant acknowledged that store employees sold ineligible nonfood items with SNAP benefits. As such, the Appellant attested to and was aware that SNAP violations occurred at F & A Grocery during five of the six compliance visits which involved the sale of a variety of items best described in regulatory terms as "common nonfood items".

Request to Dismiss Disqualification Action

The Appellant requests that FNS dismiss the six month SNAP disqualification action against F & A Grocery. However, 7 CFR § 278.6(e)(5) of the SNAP regulations is specific in 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 by employees or poor supervision by the firm's ownership or management". As such, the Retailer Operations Division's decision to impose a six month SNAP disqualification for F & A Grocery is appropriate for the SNAP violations that occurred during the investigation period.

CIVIL MONEY PENALTY

The Appellant requests that FNS impose a civil money penalty (CMP) in lieu of a six month SNAP disqualification as a SNAP disqualification will impose a hardship on area SNAP customers. F & A Grocery sells food items to its neighborhood, which is a low income area. Many customers walk from their residences and these customers rely on local markets to accept EBT payments.

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 Grocery 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 Grocery 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 Grocery, 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

July 27, 2018