

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

Lovely Spice Land,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0207102

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to assess a civil money penalty against Lovely Spice Land (“Appellant”) in the amount of \$7,272 in lieu of a one-year disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of Code of Federal Regulations (CFR) § 278.6(e)(5) and (f)(1) in its administration of SNAP when it assessed a civil money penalty in the amount of \$7,272 in lieu of a one-year disqualification against Appellant on November 20, 2019.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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

USDA conducted an investigation of Appellant’s compliance with federal SNAP law and regulations during the period of March 14, 2019 through June 4, 2019. The investigation reported that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. These items sold during these impermissible transactions are best described in regulatory terms as “common ineligible nonfood items.” The investigation revealed that three unidentified clerk was involved in the impermissible

transactions. As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant, in a letter dated October 9, 2019, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations “. . . warrant a disqualification period of two years (Section 278.6(e)(4 and 6)). Under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).”

Appellant replied to the Office of Retailer Operations and Compliance’s charges in writing. The record reflects that the Office of Retailer Operations and Compliance received and considered the information provided prior to making a determination.

The Office of Retailer Operations and Compliance notified Appellant in a letter dated November 20, 2019 that the firm was being disqualified for one year from participation as an authorized retailer in SNAP. This determination letter also stated that an assessment of a hardship civil money penalty (CMP) was appropriate. Therefore, a civil money penalty in the amount of \$7,272, in lieu of a one-year disqualification, was offered as an option to Appellant.

On December 4, 2019, Appellant appealed the Office of Retailer Operations and Compliance’s decision to impose a one-year disqualification, and requested an administrative review of the action. The appeal was granted and implementation of the sanction has been on hold pending completion of this review.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means 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.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(5) establish the authority upon which a one-year disqualification may be imposed against a retail food store or wholesale food concern.

Section 278.6(e)(5 and 6) of the SNAP regulations states, in part, when a firm is to be disqualified for one year:

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.(6) Double the appropriate period of disqualification prescribed in paragraphs (e)(2) through (5) of this section as warranted by the evidence of violations if the same firm has once before been assigned a sanction.

7 CFR § 278.6(a) states, in part:

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(f)(1) 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.

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially the following:

- The investigator was excessively charming and flattering, which compelled the clerks to sell ineligible items.
- The owner takes full responsibility for the violations.
- Appellant requests a CMP, as it sells halal meat and other ethnic specialty items.
- All clerks were trained in the proper handling of SNAP transactions. The violations were due to lack of attention.
- Appellant will no longer sell non-food items.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

Appellant contends that the owner apologizes and takes responsibility for the careless mistakes. Appellant stated the clerks were trained in the proper handling of SNAP transactions, but committed the violations due to lack of attention. When ownership signed the FNS application to become a SNAP authorized retailer, this included a certification and confirmation that Appellant would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time." The violations listed on this certification document include selling ineligible non-food items. Appellant is correct that regardless of whom the ownership of a store may use to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions.

This review is limited to considering the circumstances at the time the Office of Retailer Operations and Compliance's decision was made. It is not within this review's scope to consider actions that Appellant may have taken subsequent to this decision to begin to comply with program requirements. There is no provision in SNAP regulations for reducing an administrative penalty on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, Appellant's elimination of non-food items from its store does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant contends that the investigator compelled the clerks to sell ineligible items, and that the conversations were not documented in the investigative report. The investigation report does not document conversations with the clerks, but does show that of the six times that nonfood violations were attempted, store personnel permitted them four times. Mere solicitation to commit a crime is not inducement which is required to establish entrapment. Nor does the government's use of artifice, stratagem, pretense or deceit (although there is no indication of same in the present case) establish inducement. Courts have found that inducement is shown only if the investigator's behavior was such that a law-abiding citizens' will to obey the law could have been overborne. If investigators merely provide an opportunity for a suspected violator to continue on a course of impermissible conduct, such activity does not constitute entrapment. Moreover, even if inducement has been shown, a finding of defendant's predisposition to violate is fatal to an entrapment defense. Predisposition may be said to exist even without prior violative involvement: the ready commission of an offense, such as a person's prompt acceptance of an undercover agent's offer of an opportunity to commit violations, may itself establish predisposition.

The Office of Retailer Operations and Compliance attributed violations to "carelessness, or poor supervision by the firm's ownership or management," pursuant to 7 CFR § 278.6(e)(5) of the SNAP regulations which provides for a disqualification of six months. This is consistent with Appellant's contention that violations were committed in error. As the firm had been previously subjected to a six-month disqualification, pursuant to 7 CFR § 278.6(e)(6) of the SNAP regulations this time period is doubled. Therefore, a one-year disqualification for the violations committed, the minimum, is the appropriate sanction in this case.¹

Investigative Record

Based on a review of the evidence, it appears that the program violations at issue did, in fact, occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted under the supervision of a USDA investigator and all are fully documented. The investigative record is specific and accurate with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail.

¹ The Office of Retailer Operations and Compliance originally incorrectly stated the firm was subject to a two-year disqualification.

CIVIL MONEY PENALTY

Appellant requested a CMP. This request was granted and Appellant was assessed a civil money penalty of \$7,272 in lieu of a one-year period of disqualification.

The regulations do provide the option of an installment plan for paying the CMP over the period of disqualification. The regulations at 7 CFR § 278.6(h), state the following:

A firm has 15 days from the date the FNS regional office notifies the firm in writing in which to pay the civil money penalty or to notify the regional office in writing of its intent to pay in installments as specified by the regional officeThe civil money penalty must be paid in full by the end of the period for which the firm would have been disqualified.

Appellant can contact Financial Management at 703-305-2830 to discuss payment of this penalty in installment payments or online in one lump sum.

CONCLUSION

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to assess a civil money penalty against Lovely Spice Land of \$7,272 in lieu of a one-year period of disqualification from participating as an authorized retailer in SNAP is sustained.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. To pay the civil money penalty, Appellant should refer to the information provided in the determination letter dated October 9, 2019. Should Appellant choose to accept disqualification rather than pay the civil money penalty, a new application for participation in the SNAP may be submitted ten (10) days prior to the expiration of the one-year period of disqualification.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt 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.

RICH PROULX
ADMINISTRATIVE REVIEW OFFICER

January 29, 2020