

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

McCart Food Mart,

Appellant,

v.

Case Number: C0193754

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 McCart Food Mart 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 McCart Food Mart on September 7, 2017.

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 McCart Food Mart with Federal SNAP law and regulations during the period October 3, 2016 through November 3, 2016. In a letter dated August 22, 2017, the Retailer Operations Division charged the Appellants 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 five compliance visits. The letter further informed the Appellants 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 August 28, 2017, the Appellants replied to the charges therein requesting that since this is the first time that McCart Food Mart has been cited for any SNAP violations that the firm not be disqualified from the SNAP for six months. The Appellants also requested that a hardship civil money penalty (CMP) be imposed in lieu of a six month SNAP disqualification.

After considering the Appellants' reply and the evidence of this case, the Retailer Operations Division issued a Determination Letter dated September 7, 2017. The Determination Letter informed the Appellants that they were 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 Appellants' eligibility for a hardship civil money penalty under 7 CFR § 278.6(f)(1). The Retailer Operations Division determined that the Appellants were 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 September 15, 2017, the Appellants, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. FNS granted the Appellants' request for administrative review by letter dated September 20, 2017. Upon acceptance of the administrative review request, implementation of the six month disqualification was held in abeyance pending completion of this review.

The records reflects that in a letter dated October 16, 2017, the Appellants' counsel requested information and documents from FNS with regard to the Agency's case against McCart Food Mart pursuant to the Freedom of Information Act (FOIA). FNS provided a response to counsel's FOIA request, dated November 14, 2017, and received no further communication from the Appellants 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

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

APPELLANTS' CONTENTIONS

The following represents a brief summary of the Appellants' 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 Appellants' August 28, 2017 reply to the Charge Letter and in the review request postmarked September 15, 2017 and in a subsequent correspondence provided via an e:mail message dated December 6, 2017, the Appellants, through counsel, stated the following summarized contentions, in relevant part:

- The Appellants adamantly deny that any intentional violations of the SNAP regulations occurred on the part of the store. The employees involved in the violative SNAP transactions were operating specifically against their training and the store's regulations.

The violative SNAP transactions were committed by store employees without the Appellants' knowledge, consent, or approval. Store management is not expected to directly oversee every SNAP transaction that is processed at McCart Food Mart. The SNAP violations that occurred were inadvertent as the store is not required to maintain a computerized Point of Sale (POS) system to track the transactions. The cash registers in place only identify items in broad categories so any review by management, except for a detailed audit, would not necessarily have shown anything was amiss with regards to the SNAP transactions that occurred during the investigation. Therefore, the store owners and managers cannot be considered careless in reviewing these SNAP transactions.

- Given that this is the first time that McCart has been cited for any SNAP violations in the two years that it has been participating in the SNAP, such compliance history portrays that McCart Food Mart typically has the appropriate training, oversight, and procedures in place to prevent SNAP violations on the part of store clerks.
- FNS did not fore-warn the Appellants that such SNAP violations were occurring prior to sending them the Charge Letter.
- After being made aware of the SNAP violations that occurred during the investigation, the Appellants took the reasonable and appropriate steps to ensure that these types of SNAP violations do not occur in the future.
- None of the SNAP violations identified in the investigation report were actually the result of an investigator's observations. The evidence set forth by USDA is limited to the statements of an unknown confidential informant (CI). The CI did not verify his/her SNAP violation allegations. As such, the violative SNAP transactions that occurred during the investigation are based upon hearsay evidence.
- The SNAP violations that occurred at McCart Food Mart during the investigation were minor in nature as there were only six different ineligible items allowed to be purchased with SNAP benefits. As such, the violations do not warrant a six month SNAP disqualification.
- The Appellants request that FNS overturn its decision to disqualify McCart Food Mart from participation in the SNAP for six months and in the alternative issue a Warning Letter.
- McCart Food Mart serves a rural area where the local SNAP participants have a limited amount of opportunities to purchase staple foods. Therefore, a six month SNAP disqualification will impose a hardship on area SNAP customers as McCart Food Mart stocks canned goods, frozen meals, and other regular staple foods.

ANALYSIS AND FINDINGS

SNAP Violations Were Inadvertent

The Appellants adamantly deny that any intentional violations of the SNAP regulations occurred on the part of the store. The employees involved in the violative SNAP transactions were operating specifically against their training and the store's regulations. The violative SNAP transactions were committed by store employees without the Appellants' knowledge, consent, or approval. Store management is not expected to directly oversee every SNAP transaction that is processed at McCart Food Mart. The SNAP violations that occurred were inadvertent as the store is not required to maintain a computerized Point of Sale (POS) system to track the

transactions. The cash registers in place only identify items in broad categories so any review by management, except for a detailed audit, would not necessarily have shown anything was amiss with regards to the SNAP transactions that occurred during the investigation. Therefore, the store owners and managers cannot be considered careless in reviewing these SNAP transactions.

These contentions cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. As owners of the store, the Appellants are liable for all violative transactions that occur at McCart Food Mart. Regardless of whom the ownership of a store may utilize to handle store business (i.e., regardless of whether a store owner, store manager, store clerk, friend, family member, etc. was involved in the violative transactions), ownership is accountable for the proper handling of SNAP benefit transactions. Prior to becoming authorized to participate in the SNAP on February 3, 2016, the Appellants 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 Appellants were provided with program training and reference materials which reinforced the statements included in the SNAP Application.

The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. In this case, the individuals who committed the SNAP violations were not specifically identified during the investigation. A six month disqualification is the appropriate sanction for violations which result from employees not being fully aware of the SNAP rules, the carelessness of employees, or due to inadequate supervision by the store owner. As 7 CFR § 278.6(e)(5) of the SNAP regulations states, "Disqualify the firm for six months if ... the evidence shows that personnel of the firm have committed violations ... due to the carelessness or poor supervision by the firm's ownership or management". The Appellants' implied contention that the SNAP violations were inadvertently committed by store employees without their knowledge, consent, or approval cannot be accepted as a valid basis for diminishing the penalty. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA.

First Time Violator

The Appellants contend that given that this is the first time that McCart has been cited for any SNAP violations in the two years that it has been participating in the SNAP, such compliance history portrays that McCart Food Mart typically has the appropriate training, oversight, and procedures in place to prevent SNAP violations on the part of store clerks. 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.

No Warning Provided

The Appellants contend that FNS did not fore-warn them that such SNAP violations were occurring prior to sending them the Charge Letter. 7 CFR § 278.6(d)(2) & (3) of the SNAP regulations provides that “The FNS office making a disqualification or penalty determination ... shall consider ... any prior action ... to warn the firm about the possibility that violations are occurring....” The citation simply requires FNS to consider any prior warnings when determining a sanction. It does not require FNS to give such warnings. FNS did not consider prior actions to warn McCart Food Mart about the possibility that violations were occurring because there were no prior warnings.

Moreover, USDA conducts investigations of the compliance of retail food stores, in part, to ascertain the nature and extent of violations that may be occurring. As was outlined in the investigation report that was provided to the Appellants as part of the Charge Letter, in the investigation of McCart Food Mart, the Appellants were charged with accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items in violation of 7 CFR § 278.2(a). These violations occurred on five out of five compliance visits. 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 McCart Food Mart is appropriate for the SNAP violations that occurred during the investigation period.

Corrective Action Implemented

The Appellants contend that after being made aware of the SNAP violations that occurred during the investigation, they took the reasonable and appropriate steps to ensure that these types of SNAP violations do not occur in the future. 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 Appellants’ contention that they have taken 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.

Investigator Not Involved in Investigation

The Appellants contend that none of the SNAP violations identified in the investigation report were actually the result of an investigator's observations. The evidence set forth by USDA is limited to the statements of an unknown confidential informant (CI). The CI did not verify his/her SNAP violation allegations. As such, the violative SNAP transactions that occurred during the investigation are based upon hearsay evidence.

Regarding the Appellants' contention that none of the SNAP violations identified in the investigation report were actually the result of an investigator's observations and therefore, the evidence set forth by USDA is limited to the statements of an unknown confidential informant, the investigation report documents that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted under the direction of a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no error or discrepancy. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. The investigator stands by his/her report that the ineligible items listed in the investigation report were, in fact, purchased at McCart Food Mart by the CI under the investigator's supervision on the dates indicated and FNS has documentation on file that confirms the items listed were donated to and signed for by a charitable organization following each transaction. The penalty imposed by the Retailer Operations Division is based on the occurrence of violative SNAP transactions involving the sale of ineligible items with SNAP benefits regardless of whether the investigator or the CI purchased the ineligible items during the investigation of McCart Food Mart.

As mentioned previously, 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. The Appellants did not provide FNS with any evidence or documentation that substantiate/prove that the violative SNAP transactions listed in the investigation did not occur at McCart Food Mart.

In addition, the Appellants' contentions with regard to hearsay are duly noted. It is important to clarify however that the rules of evidence in administrative proceedings differ from those used in judicial proceedings generally and differ specifically with regard to the admissibility of hearsay: The Administrative Procedures Act (APA) at 5 U.S.C. § 556(d) provides that *any* oral or documentary evidence may be received. It excludes only "irrelevant, immaterial, or unduly repetitious evidence," primarily for the sake of expedience. Therefore the test for admissibility under the APA is relevance; hearsay is admissible, like other evidence, if it is relevant. In the present case, the statements of the confidential informant, made to the investigator regarding the trafficking transactions, are corroborated by additional and substantial physical evidence, impart probative value and are closely connected to the issues at hand, indicating materiality. Thus, they are clearly relevant, even if they may be seen as hearsay. Nonetheless, both investigators and their cooperating informants are typically available to testify at trial, in which case eye-

witness accounts of the events described in the report could be presented, thus precluding the presumption of hearsay.

SNAP Violations Minor

The Appellants contend that the SNAP violations that occurred at McCart Food Mart during the investigation were minor in nature as there were only six different ineligible items allowed to be purchased with SNAP benefits. As such, the violations do not warrant a six month SNAP disqualification. 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.

Reconsideration of Disqualification

The Appellants request that FNS overturn its decision to disqualify McCart Food Mart from participation in the SNAP for six months and in the alternative issue a Warning Letter. 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 McCart Food Mart is appropriate for the SNAP violations that occurred during the investigation period.

CIVIL MONEY PENALTY

The Appellants contend that McCart Food Mart serves a rural area where the local SNAP participants have a limited amount of opportunities to purchase staple foods. Therefore, a six month SNAP disqualification will impose a hardship on area SNAP customers as McCart Food Mart stocks canned goods, frozen meals, and other regular staple foods.

The Retailer Operations Division determined that the Appellants were 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)(6) & (b)(7)(C)**.

Based on the evidence, the disqualification of McCart Food Mart 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 McCart Food Mart 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 McCart Food Mart, 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

May 9, 2018