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

R-G Mini Mart,

Appellant,

v.

Case Number: C0208119

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 a six-month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against R-G Mini Mart (hereinafter "Appellant") by FNS's Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it imposed a six-month disqualification against R-G Mini Mart.

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

FNS records show that the Appellant firm, R-G Mini Mart, was initially authorized for SNAP participation as a convenience store on July 18, 2016. Between April 22, 2019, and April 25, 2019, FNS conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigation report documented that personnel at R-G Mini Mart accepted SNAP benefits in exchange for ineligible items on four separate occasions. According to the report, the Appellant firm sold plastic sandwich bags, bars of soap, plastic forks, plastic cutlery, foam plates, foam bowls, and a can of air freshener in exchange for SNAP benefits, which benefits may only be used for the purchase of eligible foods.

In a letter dated July 18, 2019, the Retailer Operations Division charged the Appellant with violating SNAP regulations at 7 CFR § 278.2(a). The charge letter stated that the acceptance of SNAP benefits in exchange for ineligible nonfood merchandise warranted a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further stated that under certain conditions and in accordance with § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

On July 22, 2019, the Appellant contacted the Retailer Operations Division by telephone and was provided further information about the charges and the requirement to reply within 10 days of receipt of the charge letter. On July 25, 2019, the Appellant's attorney contacted the Retailer Operations Division and requested an extension to reply to the charges. According to agency records, Appellant's counsel was verbally granted an extension until August 6, 2019.

By August 11, 2019, the Appellant had not submitted any kind of response. Accordingly, the Retailer Operations Division proceeded with its determination. After further considering the evidence in the case, the Retailer Operations Division issued a determination letter dated August 13, 2019. This letter informed the Appellant that it was the determination of the Retailer Operations Division that violations did occur as outlined in the charge letter and that a six-month disqualification penalty would be imposed in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that consideration for a hardship CMP was given, but that the Appellant was not eligible for a CMP because there were other authorized stores in the area selling as large a variety of staple foods at comparable prices.

After close of business on August 13, 2019 – the same date that the agency sent its determination letter – Appellant's counsel sent an e-mail to the Retailer Operations Division. Attached to the e-mail was a one-page response to the charge letter. Included in the reply was a claim by Appellant's counsel that the agreed-upon extension was August 16, 2019, which contradicts the August 6 date claimed by the Retailer Operations Division. Agency records indicate that a reply e-mail was sent to Appellant's counsel on the morning of August 14, explaining that the firm's reply to the charges was late and that a determination had already been made. The agency's e-mail further stated that appeal options were outlined in the determination letter.

For informational purposes, Appellant's August 13 response included the following argument:

"In your July 18, 2019 letter, the USDA charged R G Mini Mart with accepting SNAP benefits in exchange for merchandise and common ineligible non-food items. An investigator from the USDA went into the store on 4 separate occasions and interacted with a male clerk between the age of 45-50 with blonde hair. While his name is not provided in the documentation, my client had one employee that made substantial errors with SNAP transactions. That employee was terminated for cause prior to the issuance of this charging letter."

Appellant's counsel then explained that the firm is eligible for a civil money penalty in lieu of disqualification in accordance with regulations at 7 CFR § 278.6(f). The Appellant argued that a disqualification of the firm would cause hardship to SNAP households and claimed that the store had a training program in place for its employees.

In a letter postmarked August 21, 2019, the Appellant, through counsel, appealed the agency's determination by requesting an administrative review. The request was granted and implementation of the disqualification has been held in abeyance pending completion of this review.

It is noted that on September 24, 2019, Appellant's counsel submitted an e-mail request for a copy of all records related to this matter in a request made under the Freedom of Information Act (FOIA). FNS provided a response to the firm's FOIA request in a letter dated November 12, 2019. Finally, in a letter dated December 13, 2019, the Appellant, through counsel, submitted its formal letter of contentions along with supporting evidence.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would 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 law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(5) establish the authority upon which a six-month disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, in part:
[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food.

7 CFR § 271.2 states, in part:
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, 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.... Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section. [Emphasis added.]

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination...

7 CFR § 278.6(e) states, in part:
FNS shall take action as follows against any firm determined to have violated the Act or regulations...The FNS regional office shall:
(5) 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, in part:
FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm subject to a disqualification is selling a substantial variety of staple food items, and 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.

INVESTIGATION DETAILS

During an undercover investigation conducted between April 22, 2019, and April 25, 2019, the Food and Nutrition Service completed four compliance visits at R-G Mini Mart. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the July 18, 2019, charge letter. The investigation report includes Exhibits A through D, and provides full details on the results of each compliance visit. SNAP violations were documented during each of the four visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report states that the following nonfood items were purchased by an investigator using SNAP benefits:

- One 35-count box of plastic sandwich bags (*GoodSense* brand), Exhibit A
- One 35-count box of plastic sandwich bags (*GoodSense* brand), Exhibit B
- One 4-ounce bar of soap (*Dove* brand), Exhibit B
- One 30-count package of plastic forks (*Formal* brand), Exhibit B
- One 40-count package of foam plates (*The Home Store* brand), Exhibit C
- One 4-ounce bar of soap (*Dove* brand), Exhibit C
- One 24-count package of plastic cutlery (*Ri-pac* brand), Exhibit C
- One 30-count package of plastic forks (*Formal* brand), Exhibit D
- One 8-ounce can of air freshener (*Air Wick* brand), Exhibit D
- One 30-count package of foam bowls (generic brand), Exhibit D

The report indicates that in Exhibit D, the clerk on duty refused to exchange SNAP benefits for cash (i.e. trafficking). The report also states that the same clerk conducted all four violative transactions. The charge letter states that the violations that occurred in Exhibits B, C, and D warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5).

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- The allegations are based on alleged interactions with R-G Mini Mart. The transactions allegedly occurred between an FNS investigator and an R-G Mini Mart employee who is male, with blonde hair, 5 feet 9 inches tall, 155-165 pounds, and between 45-50 years old, according to the investigation report.
- The value of the ineligible items over the course of the investigation is less than $15.00.
- The firm contends that the transactions never occurred. R-G Mini Mart has never had an employee with blonde hair. The transaction reports are redacted such that the Appellant cannot determine the date or time of the transactions, and thus cannot provide further evidence that the transactions did not occur.
- Even if it is assumed that the transactions did occur, a six-month disqualification is invalid and cannot be upheld.
- Appellant cites several court cases to argue that FNS's determination is arbitrary and capricious and violates due process, including *Wong v. United States*, 1988; *Plaid Pantry Stores, Inc. v. United States*, 1986; and *McGlory v. U.S.*, 1985.
- The firm has never received a violation or warning letter prior to the charge letter.
- Given that the non-food items were for food-related items, which can easily be confused for eligible items, and because the items totaled less than $15.00, and because more serious violations, such as trafficking, were refused by the clerk, FNS should have applied 7 CFR § 278.6(e)(7) and given the firm a warning letter instead of disqualification.
- FNS guidelines, specifically FNS Guidelines 744-9, support the argument that a six-month disqualification is unwarranted. For example, the guidelines state that a retailer will not normally be suspended for a first-time violation absent special circumstances. They further state that a warning letter will normally be the first determination. These guidelines were cited in *Bruno, Inc. v. United States*, 1980 – a case in which the court looked at the type of ineligible food items in determining whether a disqualification for 60 days was appropriate. In that case, the court considered FNS Guidelines 744-09 and found that the violations were "not insignificant, inadvertent, or technical but, in their comparative ranking of violations, the Guidelines certainly do not view them as very serious." In *Bruno*, the court held that a 60-day disqualification rather than a warning letter was invalid.
- In *Marbro Foods, Inc. v. U.S.*, 1968, the firm in question was previously warned on numerous occasions over a two-year period, and was disqualified for a 60-day period for violations including returning change in cash.
- In summary, the six-month disqualification is unwarranted for the following reasons:
    - According to FNS guidelines, a warning letter should be the first sanction for a first time offense absent special circumstances.
    - The sanction substantially outweighs the seriousness of the violation. In both *Bruno* and *Marbro*, the violations were more substantive and serious, and yet in both of those matters, the retailers received a 60-day disqualification – far less than the six-month disqualification that FNS is proposing in this matter. In *Bruno*,

where a warning letter had not been received and mitigating circumstances were involved, the court found that even a 60-day disqualification was invalid.

- In this case, a six-month disqualification is arbitrary and capricious. Even a 60-day sanction would be arbitrary and capricious.
- Upholding a disqualification in this case would be unduly burdensome and would hinder Congress' purpose in creating SNAP, which is to safeguard the health and well-being of the nation's population by raising levels of nutrition among low-income households. El Mirage, Arizona is located in the middle of a food desert, as identified by USDA. It appears that R-G Mini Mart is one of the few stores in the area offering access to fresh food and produce. If the Appellant and the few stores nearby do not accept SNAP, low-income families will be in a food desert with limited access to food.
- Because the firm takes its ability to accept SNAP benefits seriously, it has taken remedial measures to ensure that SNAP violations do not occur at the store. A list of eligible and ineligible items is posted near the register for clerks to review at each transaction. The store's owner has also provided a refresher course on SNAP rules and regulations to all employees. The owner has also circulated a copy of the *SNAP Training Guide for Retailers* and discussed it with all employees.

In support of its contentions, the Appellant provided the following documents:

- An affidavit signed by store owner 5 U.S.C. § 552 (b)(6) & (b)(7)(C), stating, among other things, that the firm currently has three employees, none of whom has blonde hair. The owner further states that since the company was formed in 2016, there has never been any employee with blonde hair. The owner further states that he has provided SNAP training for all of his employees.
- Copies of driver's licenses or identification cards for the firm's three current employees.
- A printout of a food desert map from USDA's Economic Research Service (ERS) showing several food desert areas, highlighted in green.
- Two photos of lists posted near the firm's cash register identifying items that can and cannot be purchased with SNAP benefits.
- A copy of the *SNAP Training Guide for Retailers*.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced in this document.

ANALYSIS AND FINDINGS

As noted above, the Appellant contends that the violations did not occur. Unfortunately, the evidence does not support the Appellant's claim. Along with the investigator's written report of the four incidents in question, the investigator collected receipts for three of the five total transactions (Exhibit B involved two separate transactions – one for food and one for nonfood – both of which were paid for with SNAP benefits; two of the receipts during the investigation were retained by the clerk) and took photographs of the items purchased. The investigator also submitted copies of donation sheets certifying that the items purchased were later donated to a local nonprofit organization. These sheets were signed by both the investigator and the

representative of the nonprofit organization. There is also an electronic record of every transaction claimed by the investigator. While the agency's electronic records do not identify what was purchased, they do prove definitively that transactions occurred at R-G Mini Mart for the amounts claimed by the investigator on the same dates and times as the investigation.

The Appellant further claims that the transactions did not occur because it has never had any blonde-haired employees, as was noted in the investigation report. The Appellant has submitted an affidavit to support this claim as well as copies of employees' identifications.

With regard to this claim, it should be noted that when Appellant's counsel replied to the charge letter on August 13, 2019, it stated the following: "… An investigator from the USDA went into the store on 4 separate occasions and interacted with a male clerk between the age of 45-50 with blonde hair. While [the clerk's] name is not provided in the documentation, my client had one employee that made substantial errors with SNAP transactions. That employee was terminated for cause prior to the issuance of this charging letter."

Two things are notable in the Appellant's original response: 1) the Appellant appears to admit that violations happened ("one employee…made substantial errors with SNAP transactions"), and 2) the Appellant does not deny the presence of a blonde-haired clerk. In fact, the Appellant seems to imply that it was the blonde-haired clerk who was "terminated for cause."

While the identification cards provided by the Appellant show that the store's current employees have black hair, it is noteworthy that the Appellant did not provide identification cards for any of its previous employees.

Based on a review of all available information in this case, this review finds through a preponderance of the evidence that the four violative transactions identified in the investigation report did occur as charged. As such, a penalty is warranted. The remainder of this review will examine whether or not a six-month disqualification is the appropriate penalty.

Nature of the Violations

The Appellant has provided a large number of contentions related to the nature of the violations. For instance, the Appellant argues that because the value of the ineligible items purchased over the course of the investigation was less than $15.00, and because the ineligible items were food-related, a six-month disqualification is far too excessive. The Appellant further argues that the store should instead receive a warning letter for a first-time violation and contends that FNS guidelines, specifically FNS Guidelines 744-9, support such an assertion. The Appellant contends that the decision made by FNS is arbitrary and capricious and has provided examples from several court cases to support this claim.

This review does not agree with any of the Appellant's claims in this matter. For instance, each of the court cases cited by the Appellant is at least 30 years old, when SNAP was still known as the Food Stamp Program and food stamps were paper coupons. *McGlory v. U.S.* was decided more than 50 years ago – nine years before the landmark Food and Agriculture Act of 1977, which fundamentally changed the Food Stamp Program, including new integrity and anti-fraud

provisions. The SNAP program, including the statutes and regulations governing the program, have changed substantially since the court decisions cited by the Appellant were rendered. As such, this review offers no opinions or findings concerning the applicability of the cases cited. Similarly, FNS Guidelines, such as 744-9, no longer exist and have been obsolete for many years and thus have no relevance to the matter at hand.

It should be noted that the violations which occurred during the course of this investigation meet, in every respect, current agency policy and regulatory standards which require that a firm be disqualified for six months for allowing SNAP benefits to be exchanged for common nonfood items – even on the first occasion. A warning letter is only appropriate if the firm commits minor violations that do not reach minimum policy requirements.

It must be further stated that the regulations at 7 CFR § 278.6(e)(5) do not allow for a modification or a reduction of a disqualification period based on punishment that appears to be excessive in comparison to the violations that were committed. The regulation states that FNS "shall disqualify the firm … if … 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" (emphasis added). The regulation does not mention transaction amounts or the value of the ineligible items purchased and says nothing about whether or not the ineligible item is related to food.

That the investigator was permitted by the firm to exchange SNAP benefits for ineligible items on four consecutive occasions strongly suggests a lack of supervision or oversight by store ownership or management. Additionally, the clerk's refusal to engage in trafficking in Exhibit D implies that he knew the rules regarding SNAP but either willfully ignored them or was careless in his processing of transactions.

Accordingly, it is the finding of this review that the six-month disqualification imposed by the Retailer Operations Division for this first-time violation is not arbitrary and capricious as the decision wholly conforms to SNAP regulations and agency policy and is entirely consistent with sanctions imposed upon other retailers that have committed similar violations.

Hardship to Households / Civil Money Penalty

The Appellant contends that upholding a disqualification in this case would be unduly burdensome and would hinder Congress' purpose in creating SNAP. The Appellant argues that USDA itself has identified the city of El Mirage, Arizona as being located in the middle of a food desert. According to the Appellant, R-G Mini Mart is one of the few stores in the area offering access to fresh food and produce. The Appellant claims that if R-G Mini Mart and the few stores nearby do not accept SNAP, low-income families will be in a food desert with limited access to food.

Unfortunately, the Appellant has erred in this contention as well. It should first be noted that R-G Mini Mart is not located in a food desert. The ERS map provided by the Appellant identifies areas that are considered low-income/low access areas. The areas highlighted in green are food deserts, or areas in which there are high percentages of low-income residents and limited access

to food. The areas not highlighted in green are not considered food deserts. While the city of El Mirage may include several low income/low access areas, R-G Mini Mart itself is not located in such an area.

It is recognized that some degree of inconvenience to SNAP recipients is likely whenever a retail food store is disqualified and households are forced to use their benefits elsewhere. To address potential hardship situations that SNAP households might incur when a firm is disqualified, regulations at 7 CFR § 278.6(f) allow, in certain circumstances, for a civil money penalty to be imposed instead of disqualification. Paragraph (f)(1) of this regulation states that this alternative sanction is allowed when a firm's disqualification would cause "hardship" to SNAP households. According to this regulation, hardship occurs when there is "no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices."

It is the determination of this review that a disqualification of R-G Mini Mart, a standard convenience store, would not cause hardship to SNAP households because there are several other shopping options in the area. According to agency records, there are at least a dozen similarly-stocked or larger SNAP-authorized retail stores located within a one-mile radius of R-G Mini Mart, including two superstores, one of which is barely a tenth of a mile away from R-G Mini Mart. There is also no evidence that R-G Mini Mart sells its inventory at unusually low prices in comparison to nearby stores. Because hardship conditions do not exist in this case, a civil money penalty in lieu of disqualification is not an available option.

Remedial Actions Taken

The Appellant contends that because it takes its SNAP authorization seriously, it has enacted remedial measures to ensure that SNAP violations do not occur at the store. According to the Appellant, a list of eligible and ineligible items has been posted near the cash register for clerks to review. The store's owner has also provided refresher training on SNAP rules and regulations to all employees and has circulated and discussed with all employees the *SNAP Training Guide for Retailers*.

With regard to these contentions, it must be stated that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. This review is limited to the facts that existed at the time the violations were committed. It is not the authority of this review to consider any subsequent remedial actions that may have been taken or that will take place so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of alleged or planned corrective actions implemented after the commission of program violations. As such, the reported remedial actions do not provide a valid basis for reversing or modifying the agency's disqualification determination.

CONCLUSION

Based on a review of all information in this case, this administrative review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at R-G Mini Mart during a USDA investigation. All transactions cited in the letter of charges were either

conducted or supervised by a USDA investigator and all are thoroughly documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record appears to be specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for ineligible, nonfood merchandise, and in all other critically pertinent details. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, R-G Mini Mart, is sustained.

In accordance with the Act and regulations, the disqualification penalty shall become effective 30 days after receipt of this decision. A new application for SNAP authorization may be submitted 10 days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

December 17, 2019