

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

Silver Mini Mart,

Appellant,

v.

Case Number: C0206183

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 Silver Mini 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 Silver Mini Mart on June 26, 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 Silver Mini Mart with Federal SNAP law and regulations during the period March 27, 2018 through May 15, 2018. In a letter dated May 31, 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 four 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 letter received by the Retailer Operations Division on June 5, 2018, the Appellant replied to the charges therein denying that store employees allowed the investigator to purchase ineligible nonfood items with SNAP benefits during the investigation of Silver Mini Mart.

After considering the Appellant's reply and the evidence of this case, the Retailer Operations Division issued a Determination Letter dated June 26, 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 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 June 29, 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 July 13, 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 15, 2018, USDA conducted four compliance visits at Silver Mini Mart. A report of the investigation was provided to the Appellant as an attachment to the Charge Letter dated May 31, 2018. The investigation report included Exhibits A through D which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during four of the four 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 administrative review request postmarked June 29, 2018, and in a subsequent correspondence postmarked August 2, 2018, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant denies that store employees allowed the investigator to purchase ineligible nonfood items with SNAP benefits during the investigation of Silver Mini Mart.

- The investigator failed to keep receipts which would provide the necessary evidence of what was purchased, especially the nonfood items allegedly purchased. The investigator failed to produce a single receipt of what was purchased, when it was purchased and how something was purchased. This is not how a proper and fair investigation should be conducted.
- The fact that the investigation report did not state a price should be very suspicious to USDA.
- The Appellant would like FNS to provide it with a reasonable opportunity to rebut the false allegations made against Silver Mini Mart as the agency did not provide it with documentary support.
- The Appellant provided FNS with signed declarations of store workers who deny allowing anyone to use their EBT card to purchase nonfood items.
- There is a significant possibility that the investigator that was sent to Silver Mini Mart is actually working for a man for improper and illegal purposes. This man attempts to position himself as a godfather of Arabic speaking people and he extorts businesses that do not pay him money by threatening to destroy their business by calling various regulatory agencies. This man has recently threatened to destroy the Appellant business if it does not pay him money he does not earn. If the USDA investigator is also an agent of the man in question, then USDA is being tricked into punishing innocent businessmen.
- The Appellant provided a copy of a lawsuit and an amended lawsuit which the man in question has imposed against the Appellant. The man is suing the Appellant for a significant amount of money. While the man originally appeared to have abandoned the lawsuit, he has recently imposed an amended lawsuit against the Appellant. The man also continually threatens to put the Appellant out of business by reporting it to various government agencies.
- This is the first time since Silver Mini Mart was authorized to participate in the SNAP that it has been cited for SNAP violations.
- The Appellant requests that FNS reconsider its decision to impose a six month SNAP disqualification for Silver Mini Mart.

ANALYSIS AND FINDINGS

Denial of Charges

Regarding the Appellant's contention that it denies that the violative SNAP transactions as described in the investigation report occurred at Silver Mini Mart, this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is, as noted above, to determine whether the Appellant demonstrates by a preponderance of the evidence that the six month disqualification should be reversed. In this case, therefore, if the Appellant demonstrates by a preponderance of the evidence that SNAP violations did not occur in the Appellant firm, then the SNAP violations will be considered not to have occurred and the disqualification reversed. If this is not demonstrated the case is to be sustained.

Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

Investigation Report

The Appellant contends that the investigator failed to keep receipts which would provide the necessary evidence of what was purchased, especially the nonfood items allegedly purchased. The investigator failed to produce a single receipt of what was purchased, when it was purchased and how something was purchased. This is not how a proper and fair investigation should be conducted. The fact that the investigation report did not state a price should be very suspicious to USDA.

There is a significant possibility that the investigator that was sent to Silver Mini Mart is actually working for a man for improper and illegal purposes. This man attempts to position himself as a godfather of Arabic speaking people and he extorts businesses that do not pay him money by threatening to destroy their business by calling various regulatory agencies. This man has recently threatened to destroy the Appellant business if it does not pay him money he does not earn. If the USDA investigator is also an agent of the man in question, then USDA is being tricked into punishing innocent businessmen.

In support of its contentions, the Appellant provided a copy of a lawsuit and an amended lawsuit which the man in question has imposed against the Appellant. The man is suing the Appellant for a significant amount of money. While the man originally appeared to have abandoned the lawsuit, he has recently imposed an amended lawsuit against the Appellant. The man also continually threatens to put the Appellant out of business by reporting it to various government agencies.

With regard to the Appellant's contentions, 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 its report that the items listed in the investigation report were, in fact, purchased at Silver Mini Mart 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 case record also includes photos of the items purchased and transaction/register receipts for the purchases made during the investigation. The penalty imposed by the Retailer Operations Division is based on the occurrence of violative SNAP transactions involving the sale of ineligible items at Silver Mini Mart during the investigation period of March 27, 2018 through May 15, 2018.

The Appellant has provided no evidence, nor is there any evidence, that the FNS investigator conducted an unfair investigation or that he/she is associated with the man in question. 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 Appellant did not provide FNS with any evidence or documentation that substantiates/proves that the violative SNAP transactions listed in the investigation did not occur at Silver Mini Mart.

Due Process

The Appellant contends that it would like FNS to provide it with a reasonable opportunity to rebut the false allegations made against Silver Mini Mart as the agency did not provide it with documentary support.

The Appellant replied to the charges in writing to the Retailer Operations Division staff, denying the charges that ineligible nonfood items were allowed to be purchased with SNAP benefits at Silver Mini Mart. After considering the evidence of the case and the Appellant's reply, the Retailer Operations Division determined that a six month disqualification is warranted. The action was not arbitrary or capricious as it followed the agency's due process procedures which are two-fold in nature. First, the retailer is afforded an opportunity to reply to the charges as specified by the Retailer Operations Division; the Appellant has availed itself of this first aspect of the due process procedures in the form of a written reply to the Retailer Operations Division. The second level of due process involves an administrative review, of which the Appellant has likewise availed itself (through counsel) and in the process of which the Appellant was granted an additional three (3) weeks within which additional information may be provided in support of the request for review.

The purpose of the administrative review process is to ensure that firms aggrieved by FNS' adverse actions have the opportunity to have their position fairly considered by an impartial reviewing authority prior to that adverse action becoming final. The Appellant has been duly given, and has taken, the opportunity to present to USDA through the administrative review process whatever evidence and information it deems as pertinent in support of its position that the Retailer Operations Division's adverse action should be reversed. Therefore, any evidence and information that the Appellant presented to the Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to the Appellant's right to a fair and thorough review. The Appellant has exercised its opportunity to reply to the Charge Letter and its administrative review rights, and by doing so have availed itself of the full complement of the agency's statutory obligations with regard to due process.

Employee Statements

In support of its contentions, the Appellant provided FNS with signed declarations of store workers who deny allowing anyone to use their EBT card to purchase nonfood items.

With regard to the employee statements/declarations which purport to establish that that the violative SNAP transactions as described in the investigation report did not occur at Silver Mini Mart, 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 to admit that questionable transactions were not legitimate, were it really so. On the contrary, one would expect that any employee affidavit provided would attest to questionable transactions being legitimate.

First Time Violator

The Appellant contends that this is the first time since Silver Mini Mart was authorized to participate in the SNAP that it has been cited for SNAP violations. 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.

Reconsideration of Penalty

The Appellant requests that FNS reconsider its decision to impose a six month SNAP disqualification for Silver Mini Mart. 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 Silver Mini Mart is appropriate for the SNAP violations that occurred during the investigation period.

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 Silver Mini 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 Silver Mini 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 Silver Mini 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

November 8, 2018