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

SRK Mart Corp,	
Appellant,	
v.	**Case Number: C0192957**
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 the six-month disqualification imposed upon SRK Mart Corp (hereinafter "Appellant") by the Retailer Operations Division, Investigations and Analysis Branch, hereinafter "ROD Office," is hereby sustained.

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a), 7 CFR § 278.6 (e) and 7 CFR § 278.6 (f) in its administration of the SNAP when it imposed a six-month disqualification upon Appellant.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 C.F.R. § 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

In a letter dated September 7, 2017, the ROD Office informed Appellant that it was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 271 – 282. The record reflects that the ROD Office received and considered Appellant's replies to the Charge Letter.

By a letter dated October 2, 2017, Appellant was informed that it was disqualified for a period of six-months from participation as a retail store in the SNAP and was instructed to cease accepting SNAP benefits or, alternatively, request an administrative review of the decision. On October 12, 2017, Appellant requested an administrative review of the ROD Office's decision. The request was granted and the disqualification action held in abeyance pending the results of the review.

STANDARD OF REVIEW

In appeals of adverse actions an appellant bears the burden of proving by a preponderance of the evidence that the administrative actions should be reversed. That means 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

The controlling statute in this matter is contained in the **Food & Nutrition Act of 2008**, as amended, at 7 U.S.C. § 2021 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6 (e) of the Regulations establish the authority upon which a disqualification, or a civil money penalty in lieu thereof, may be imposed upon a retail food store or wholesale food concern. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to disqualify retail stores from the SNAP.

7 U.S.C. § 2021 states, in part:

> (1) IN GENERAL.—An approved retail food store or wholesale food concern that violates a provision of this Act or a regulation under this Act may be—
>
> > (A) disqualified for a specified period of time from further participation in the supplemental nutrition assistance program;
> > (B) assessed a civil penalty of up to $100,000 for each violation; or
> > (C) both.

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 & 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(e)(5) states:

> 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.

7 CFR § 278.6(e)(6) states:

> 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.** (Emphasis added.)

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…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 store in the area selling as large a variety of staple food items… **FNS may disqualify a store which meets the criteria for a civil money penalty if the store had previously been assigned a sanction.** (Emphasis added.)

7 CFR §278.6(f)(2) states, in part:

> In the event any retail food store…which has been disqualified is sold or the ownership thereof is otherwise transferred…the person or other legal entity who sells or otherwise transfers ownership…shall be subjected to and liable for a civil money penalty in an amount to reflect that portion of the disqualification period that has not expired, to be calculated using the method found at 278.6(g).

7 CFR §278.1(b)(4) states, in part:

> If the applicant firm has been sanctioned for violations of this part, by withdrawal or disqualification, for a period of more than six months, or by a civil money penalty in lieu of a disqualification period of more than six months, or if the applicant firm has been previously sanctioned for violations and incurs a subsequent sanction, regardless of the disqualification period, FNS shall, as a condition of future authorization, require the applicant to present a collateral bond or irrevocable letter of credit…

7 CFR §278.6(h)(1),(2) and (3) state, in part:

1. Disqualify the firm for the period determined to be appropriate under paragraph

(e) of this section if the firm refuses to pay any of the civil money penalty.

2. Disqualify the firm for a period corresponding to the unpaid part of the civil money penalty if the firm does not pay the civil money penalty in full or in installments as specified by the regional office.
3. Disqualify the firm for the prescribed period if the firm does not present a collateral bond or irrevocable letter of credit within the required 15 days. If the firm presents the required bond during the disqualification period, the civil money penalty may be reinstated for the duration of the disqualification period.

SUMMARY OF THE CHARGES

Among other documents, the record contains a Report of Positive Investigation, #TR38105, which indicates that investigative work was undertaken at Appellant's firm from May 17 through August 16, 2017 and reflects that five investigative visits were made to Appellant's firm during which store clerks sold common ineligible items (those normally seen in shopping baskets) in exchange for SNAP benefits in combination with eligible food items at a substantive ratio on four separate occasions, indicative of clearly violative activity. When the extent of violative activity was determined, the investigation was halted and a report issued and assigned to the ROD Office for consideration of administrative action.

APPELLANT'S CONTENTIONS

In its reply to the ROD Office's Charge Letter, in its written request for review dated October 12, 2017, and in subsequent correspondence, Appellant provided information in which it was argued that:

1. Appellant has been in the SNAP approximately 10 years and has never before been warned nor committed any prior violations.
2. Most items purchased during the investigation were eligible items.
3. None of the ineligible items were major ineligible items.
4. Violations were errors only and can be adjusted with training; a disqualification is not needed in order to effect corrective action. A warning letter is more appropriate.
5. Store management has retrained all clerks. One of the partners of the firm has begun staying in the location during all times to oversee employees and ensure SNAP compliance.
6. Appellant refused to engage in trafficking.
7. Appellant notes that there were extenuating circumstances involved in the violations – the clerk had issues remembering SNAP regulations.
8. Appellant requested a CMP in lieu of a disqualification.

ANALYSIS AND FINDINGS

In regard to contention 1 above, Appellant may imply that a record of no prior SNAP violations at the store at issue, or at other firms now or previously owned, should be taken into consideration. However, such a record does not constitute valid grounds for dismissing the present charges or for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that precludes, reverses or reduces a sanction based upon a lack of prior SNAP violations by a firm and its owners, managers and/or employees. While the regulations provide for increased sanctions upon firms with prior violations, no provision exists for reducing a sanction in the absence of same. Further, as noted above, the regulations stipulate "FNS *shall* (emphasis added) disqualify the firm 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 but not limited to the sale of common nonfood items due to carelessness and poor supervision by the firm's ownership or management." Such accurately describes the nature and extent of violations in the present case. It should be added that a six-month disqualification is the least severe disqualification period allowed by regulation.

Regarding contention 2 above, while the Appellant firm sold more eligible items during the investigation than ineligible items, Appellant also sold a substantial amount of ineligible items; as noted, this occurred on four of five visits to the Appellant store. Such meets the standard for imposing a six-month disqualification and exceeds that for issuing a warning letter in lieu thereof. Accordingly, the ROD Office's determination to impose the sanction at issue was correct and appropriate and well within the statute and regulations.

With regard to contention 3 above, if a substantial amount of major ineligible items had been sold in exchange for SNAP benefits during the investigation, the sanction could have been increased beyond a six-month disqualification. However, the sanction was not increased and, as noted in the foregoing, was the correct sanction given the facts of the case.

In regard to contention 4 above, Appellant may imply that mistakes made in handling transactions, as opposed to violations intentionally committed, may provide a compelling rationale to reduce or reverse the sanction imposed in the present case. Lack of intent to violate is contemplated by the regulations and reprinted above on page 1; as noted above, violations due to carelessness or poor supervision warrant a six-month disqualification or a hardship civil money penalty in lieu thereof, provided the firm is qualified for such alternate sanction. Moreover, it is acknowledged that the agency issues warning letters for some cases involving violations; however, this is done in accordance with 7 CFR 278.6(e)(7), which states, "Send the firm a warning letter if violations are too limited to warrant a disqualification." As the violations in the present case exceeded the standard for warranting a warning letter only, the SNAP Office was afforded no latitude to issue a warning letter and, therefore, properly assigned a six-month disqualification.

Regarding contention 5 above, it is important to clarify for the record that there is no provision in the statute or regulations for waiver or reduction of an administrative penalty on the basis of corrective action implemented subsequent to findings of program violations. The purpose of this review is to determine if the earlier decision of the SNAP Office was proper and in compliance with pertinent laws and regulations. Accordingly, this review is limited to considerations relevant at the time such decision was made. It is beyond the scope of this review to consider what subsequent remedial actions, such as changes in store management, procedures, internal controls, employee discipline/training or facility and/or inventory changes and improvements Appellant may propose to take or may have taken in order to comply with program requirements. Therefore, to the extent Appellant implies that it will, or has, implement(ed) corrective and/or remedial actions, though this would likely have been valuable in preventing program violations at an earlier time, such cannot now apply retroactively and does not provide a valid basis for dismissing the charges or for mitigating the serious impact of the violations upon which they are based. It is further added for the record that, although Appellant claims corrective action has been taken, it offers no documentary evidence of same. As such, the claim carries little weight, and as noted above, corrective action following findings of violations is not relevant in ROD Office sanction decisions.

With regard to contention 6 above, Appellant's refusal to commit trafficking on one occasion, as noted in the investigative report, is duly acknowledged; such refusals tend to indicate that SNAP- benefit trafficking was not occurring at the firm. Had the firm not refused trafficking and instead exchanged cash for SNAP benefits, the ROD Office would have been required by statute and the regulations to impose a permanent disqualification. However, as noted, a six-month disqualification was the sanction imposed by the ROD Office; it is reiterated that a six-month disqualification is the least severe sanction allowed by regulation given the violations in this case.

In regard to contention 7 above, the extenuating circumstances cited by Appellant are acknowledged and may well have resulted in the violations noted during the period when the firm was investigated. However, neither the **Food and Nutrition Act of 2008** nor the regulations issued pursuant thereto provide for waiver or reduction of a disqualification on the basis of extenuating circumstances or after-the-fact corrective action implemented subsequent to findings of program violations. 7 CFR § 278.6(e)(5) states, as noted above, that FNS shall disqualify a firm 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 but not limited to the sale of common nonfood items due to carelessness and poor supervision by the firm's ownership or management. Accordingly, once violations warranting a six-month disqualification are established, there is no latitude to impose a lesser sanction, with the exception of a hardship civil money penalty, for which, as discussed below, Appellant does not qualify.

Appellant implies that the Owner did not personally commit violations of the SNAP regulations and notes that an employee committed the violations. (It is noted for the record that two employees committed violations, as documented in the Report of Positive Investigation,#TR38105.) This contention cannot be accepted as a valid basis for dismissing any of the charges or for mitigating the impact of the violations upon which they are based. Appellant is liable for all violative transactions handled by full or part-time, paid or unpaid store personnel, whether or not ownership is aware of such transactions. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. Additionally, ownership of the Appellant firm signed an FNS-252, SNAP Application for Stores, on January 4, 2009, by means of which Appellant acknowledged and agreed to accept responsibility to prevent violations of the program by any and all employees of the firm. Again, to allow store ownership to disclaim accountability for the acts of persons to whom the responsibility to handle store business has been assigned would render inert the enforcement provisions of the **Food and Nutrition Act of 2008** and corresponding provisions of the regulations.

Regarding contention 8 above, the record reflects that the SNAP Office duly considered the firm's eligibility for a hardship civil money penalty and correctly found the firm ineligible. The ROD Office noted that, at the time of the sanction decision, there were 83 SNAP-authorized firms within a one-mile radius of the Appellant firm, including two super stores, three supermarkets, three large grocery stores, three medium grocery stores, 44 small grocery stores and 28 other convenience stores. Agency information reflects that there are currently 103 other SNAP-authorized firms within a one-mile radius including two super stores, three supermarkets, three large grocery stores, three medium grocery stores, 45 small grocery stores, one seafood specialty store, two farmers markets, 10 combination grocery/other stores and 34 other convenience stores. The regulations stipulate the conditions upon which this alternative penalty may be imposed in lieu of a disqualification: if a store 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 store in the area selling as large a variety of staple food items, a hardship civil money penalty is to be assessed. In the present case there is no indication that the disqualification would work a hardship upon SNAP customers due to the impending closure of a nearby comparable firm, due to loss of access to ethnic foods or due to physical barriers or conditions that would make travel difficult or would restrict normal travel to comparable firms.

It should be reiterated that hardship worked upon retailers is not a consideration in decisions to disqualify firms due to SNAP violations or in decisions to impose civil money penalties in the event disqualified firms are subsequently sold or the ownership thereof otherwise transferred; there are no provisions in the Act or the regulations allowing for hardship worked upon a firm, due to a disqualification, to warrant a civil money penalty. In accordance with the regulatory and policy guidance referenced in the foregoing, therefore, the ROD Office's decision to

withhold a civil money penalty in lieu of a six-month disqualification was correct and appropriate.

CONCLUSION

In view of the above, the decision of the ROD Office to disqualify SRK Mart Corp for a period of six months from participation in the SNAP is hereby sustained and will become effective upon the 30th day following your firm's receipt of this document. Appellant may reapply for authorization to participate in the SNAP up to 10 days prior to the end of the six-month disqualification period.

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 a judicial review is desired, 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 provisions of the Freedom of Information Act (FOIA), 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.

DANIEL S. LAY May 29, 2018
Administrative Review Officer