

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

Super Bargain #8,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0235349

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA) that the record supports that Super Bargain #8 (Appellant), committed violations of the Supplemental Nutrition Assistance Program (SNAP) regulations. There is sufficient evidence to sustain a six month disqualification of Appellant from the SNAP as imposed by the Office of Retailer Operations and Compliance (Retailer Operations).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action in its administration of the SNAP, consistent with 7 CFR § 278.6(f)(1), 7 CFR § 278.6(a), and 7 CFR § 278.6(e), when it imposed a six month period of disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7, may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

CASE CHRONOLOGY

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of October 23, 2020 through November 11, 2020. The investigative report dated November 25, 2020, documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on multiple dates. The items sold are best described as common nonfood items.

As a result of evidence compiled during the investigation, by letter dated February 19, 2021, Retailer Operations charged Appellant with violating the terms and conditions of the SNAP regulations. Misuse of SNAP benefits was noted in Exhibits A, B, and E, that warrants a disqualification as a SNAP retail food store for a period of six months. The letter also states that under certain conditions FNS may impose a civil money penalty (CMP) in lieu of a disqualification. The record shows that one owner made a telephonic reply on February 24, 2021, and provided an written response to the Charge letter on March 4, 2021.

Retailer Operations informed Appellant by Determination letter dated March 12, 2021, that the violations cited in the Charge letter occurred at the firm, and that a six month period of disqualification was warranted. The letter also stated that eligibility for a hardship CMP was not applicable as there are other authorized retail food stores in the area selling as large a variety of staple foods at comparable prices. The responding owner requested review of the determination by letters postmarked March 18, 2021. The review was granted by letter dated April 1, 2021. One owner provided additional information by email dated April 20, 2021.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing relevant, credible evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than 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 § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e)(5) establish the authority upon which a six month disqualification may be imposed against a retail food store.

7 CFR § 278.2(a) states: “SNAP benefits may be accepted by an authorized retail food store only from eligible households or the households’ authorized representative, and only in exchange for eligible food.”

7 CFR § 278.6(e)(5) of the SNAP regulations states that a firm is to be disqualified 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 or poor supervision by the firm’s ownership or management.”

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.”

7 CFR § 278.6(f)(1) provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause hardship to SNAP benefit households because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It states: “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to SNAP benefit 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.”

7 CFR § 278.6 Disqualification of retail food stores... and imposition of civil money penalties in lieu of disqualifications states in part: “(p) *Freedom of Information Act (FOIA) requests and appeals.* A FOIA request or appeal for records shall not delay or prohibit FNS from making a determination regarding disqualification or penalty against a firm under paragraphs (c) and (d) of this section, or delay the effective date of a disqualification or penalty listed in paragraph (e) of this section.”

SUMMARY OF THE CHARGES

A report of the investigation was provided to the Appellant as Exhibits A through E with the Charge letter. The investigative report provides details on the results of each compliance visit. The SNAP violations of 7 CFR § 278.2(a) involved the sale by store personnel of nonfood items for benefits. The nonfood items exchanged included: Vaseline rosy lips, Downy Concentrado laundry detergent, and Crest toothpaste.

APPELLANT’S CONTENTIONS

Consideration was made of all contentions as presented and submissions, whether recapitulated here or not. One owner provided vendor invoices dated 9/29/20, 10/6/20, 10/13/20, and 10/20/20. Each invoice appears to be from the same vendor however, the vendor name is blocked and not identifiable. The invoices contain a listing of non-food items, i.e., Downy and other detergents, drain cleaner, spray paint, food containers, etc. The responding owner also submitted: a copy of Exhibit A with hand noted prices, a copy of Exhibit B with a handwritten note, medical information for two named female individuals, a copy of a receipt dated 11/03/2020, and a copy of an April 5, 2021 USDA letter to one owner regarding her FOIA request.

- The store owner was surprised and disappointed to receive the charge letter; she thought there could never be an EBT card violation in the store because she trained the staff correctly. The owner strongly educates her staff and trusts them.
- The store owner spoke with her staff and they told her they never sold the ineligible items.

- There are multiple reasons why I believe that the violations brought up are not accurate representations of what occurred in my store. I felt very unfair so I can not accept your decision. I am convinced that this kind of violation has not occurred in my store.
- Your report is not matching with my store items. I do not understand your investigator's report. I would like to see the receipts and know what exactly happened. I would like to ask you, is there any suspicious transaction for my snap account since I have opened my store for 10 years? However in maximum concession, human mistake is accrued in my store, you can give us a warning. Then I will supervise with more weight.
- Your report counted my store's not accurate receipt's time is one violation. The problem is whether I violate it or not. I strongly said I am not. That is why I felt cramped and unfair.
- Since I opened this store I am proud that I provided good products and lower prices. In the situation of covid19, we followed the regulation of guidance and tried to make the best condition for our customers. To share my appreciation for running my store during this difficult period, I donated 10000 500ml bottles of sanitizer to the Salvation army. I know this is not proof of this case but I want to express myself I do not deserve 6 month disqualification and penalty.
- The store is a dollar store. 10/23/20 visit - The store carries the lip balm, but it is 99 cents so would cost \$1.98 for 2. The other items purchased are priced as follows: milk - \$4.49; pancake mix - \$1.49; chocolate mix - \$1.00; and eggs - \$2.00 or \$2.49. The purchase price of the 10/23/20 visit would not total **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** as shown in the report. The store doesn't carry 32 oz. of Downy for \$10.99; the store carries 48 oz. and it costs \$2.99. The investigator placed all the items on the counter and presented the EBT card, but the lip balm is not in the store. It is an item that the staff must take out from the counter and hand it to the customer when the customer requests it. The owner feels the documentation is incorrect.
- There is no way that the description of what happened 10-27-20 could have occurred. There was 1 non-food item that is not found in the store. The item is Downy detergent and it says it's priced at \$10.99, but the store doesn't have that item. Usually if the store has Downy, it sells 48 oz. at \$2.99 so 32 oz. of laundry detergent would never have been sold for \$10.99.
- The store staff told the investigator that they couldn't pay for non-food items with the EBT card and everything went well because only food items were purchased on 11/3/20 with SNAP. The report states the transaction time on the receipt was not correct. When the owner checked it, there was a difference of 8 minutes. The owner fixed the register's clock.
- On 11/11/20 the investigator bought 3 items **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The owner cannot trust that this is correct because the documents from the previous visits are not accurate. The owner thinks that if presented an EBT card with nonfood items, her staff could try to charge cash on the EBT card. If this is a SNAP benefit payment, than that is a human mistake. The owner believes in the integrity of her staff and is confident the store will never cheat on EBT cards.
- THE MERCHANDISE INVESTIGATIVE TRANSACTION REPORT LISTED IS NOT MATCH WITH OUR ITEMS. IT MEANS THE INVESTIGATOR MISSED SOME ITEMS OR MADE INCORRECT REPORT. AS INCORRECT INFORMATION, YOU COULD NOT GIVE US RIGHT DECISION. (I ATTACHED FIRST AND SECOND VISITS REPORT WITH CORRECTION)
- I COULD SEE THAT THE INVESTIGATOR PLACED ALL ITEMS ON THE COUNTER AND NOT PRESENTED THE EBT CARD. THE INVESTIGATOR WAITED UNTIL THE CASHIER PUNCHED ALL ITEMS AND PUT IN THE BAG AND TOLD THE TOTAL PRICES TO THE INVESTIGATOR THEN HE

PRESENTED THE EBT CARD. SO MY CASHIER TOOK OUT ALL TAX ITEMS AND HE VOID TAX ITEMS TRANSACTION. IT WAS VERY TRICKY.

- USUALLY EBT CUSTOMER MENTION EBT CARD CHARGE BEFORE CASHIER STARTING CHARGE SO HE CAN SEPARATE THE TAX AND NON TAX ITEMS. IF HE PRESENT AFTER A CASHIER FINISHED CHARGE ALL ITEMS, IT IS POSSIBLE TO CASHIER FORGOT ONE SMALL TAX ITEM IS IN THE BAG AND COMPLETED EBT TRANSACTION. I ALREADY REQUESTED RECEIPTS AND PHOTOS TO FNS FOIA OFFICE TO MAKE SURE WHAT HAPPEN. (I ATTACHED I WAITED BUT I CAN NOT RECEIVE YET) I BELIEVE THERE ARE SOME HUMAN MISTAKES.
- DURING 10 YEARS SINCE I OPENED MY STORE, THE INVESTIGATOR MIGHT VISITED MY STORE BUT I DID NOT RECEIVE ANY NOTICE. IT MEANS WE FOLLOW THE USDA REGULATION. I FEEL SORRY IT HAPPENED DURING MY CASHIER'S ABSENCE. (THEY WORK WITH US 10 AND 6 YEARS) HOWEVER DURING THIS EMERGENCY SITUATION (10-18 TO 12-14 2020) OUR EBT SALE IS NOT SPECIALLY RAISED. AND I COULD NOT FIND ANY SUSPICIOUS TRANSACTION.

ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the determination made by Retailer Operations, and it is limited to the facts at the basis of Retailer Operations' determination at the time it was made. The responding owner noted handwritten prices on a copy of the USDA Exhibit A. The investigative report does not show that Downey was purchased in Exhibit A. The two lip items are seen in the photo provided by the investigator of the items acquired during this store visit. Appellant did not provide an itemized cash register receipt to support what was sold and for what price on this date. Her handwritten prices total 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The record includes an EBT receipt with Appellant's identifying information, showing the SNAP total sale amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The record also includes documentation that the items listed were donated by the investigator to and signed for by a non-profit organization.

Exhibit B shows the investigator recorded the ineligible item as "Bottle of DOWNY CONCENTRADO laundry DETERGENT (32 FL OZ)" priced for \$10.99. The owner's clipped notation states: "We never carr[sic] 10.99 Deter." The record includes a photo for Exhibit B that shows a unit of Downy Concentrado perfume collection laundry detergent 2.8L. Based on the vendor information advanced by the owner, there is a same size detergent sold to Appellant for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) a case listed as Downy 2.8 Ltrs Elegance Perfume Collection. There is a written notation on the vendor document, apparently applied by the owner, with a price of 4.99 next to the published unit price of 3.75. An internet search the photographed product that has a Spanish description shows it originates in Mexico and the unit price is \$3.87. Absent an itemized cash register tape, there is no way for this reviewer to know the sale price of this detergent at Appellant. The donation record supports that 1 Bottle of DOWNY CONCENTRADO laundry DETERGENT (32 FL OZ) was donated to a non-profit. The size of the product listed on the investigative and donation reports is different than the size seen of the detergent in the photograph. Nevertheless, it is likely that this detergent was stocked and sold at Appellant, with an applied markup. Exhibit E includes a photo of the ineligible toothpaste purchased by the investigator, with the EBT receipt total, and donation documentation to a non-profit.

Upon review, the evidence supports that Appellant established a record of selling nonfood items as defined by Section 271.2 of the regulations, on multiple occasions. The regulations at 7 CFR § 278.6(e)(5) specify that FNS shall "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 nonfood items due to carelessness or poor supervision by the firm's ownership or management." Three violations are considered evidence of carelessness. Therefore, the violations in this case are not too limited to warrant a disqualification period of six months.

The documentation under review supports that the violative transactions were conducted at Appellant by store personnel, on different dates. While the responding owner submitted vendor evidence to support that the store did not carry the photographed detergent purchased by the investigator, the invoices support that the product was purchased by Appellant. The owner did not provide itemized detailed cash register receipts to show the price of the detergent at Appellant. She did provide one receipt dated November 3, 2020 that lists items by tax and no tax. That receipt totaled to the same amount as the EBT receipt in the record for Exhibit C. No similar receipt was advanced for Exhibits A, B or E. Retailers are informed that it is their responsibility to ensure that store personnel are properly trained regarding the SNAP rules. Regardless of whom the owner of a store may utilize to handle store business, the firm's ownership is accountable for the proper training of personnel, and the effective monitoring and handling of SNAP benefit transactions.

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 mitigate the impact of the violations upon which they are based. There is no provision in the Act, or regulations, that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees. The preponderance of evidence under review supports that Appellant's personnel sold nonfood items on multiple store visits in exchange for SNAP benefits, a program violation that warrants a six month disqualification.

CIVIL MONEY PENALTY

Retailer Operations rendered a finding that it was not appropriate to impose a CMP in lieu of a six month period of disqualification from SNAP. The record documents that there are other authorized stores within a nearby radius of Appellant that stock a variety of comparable staple foods at comparable prices. Retailer Operations concluded that the evidence does not support that it will cause hardship for SNAP recipients if Appellant is disqualified. Therefore, Appellant was deemed not eligible for a hardship CMP.

CONCLUSION

The preponderance of the evidence in the record supports that the program violation charged did occur at Appellant. The record documents that Retailer Operations properly evaluated Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the regulations. On review, it is decided that Retailer Operations properly denied a CMP. Therefore, the six month disqualification of Appellant from participation as an authorized retail

food store in the SNAP is sustained. This penalty shall become effective thirty (30) days after delivery of this decision.

A new application for participation in the SNAP may be submitted ten days prior to the expiration of the six month period of disqualification. Please contact the Retailer Center at 877-823-4369 with general questions regarding the SNAP application process.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023), and to the regulations at 7 CFR § 279.7 with respect to the owners' right to judicial review of this decision. 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 owners 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 delivery 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.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

May 4, 2021