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

Triangle Mart,

Appellant,

v.

Case Number: C0200974

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 Triangle Mart (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 February 2, 2018, 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 February 13, 2018, 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 February 22, 2018, 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 §278.6(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, #CH47499, which indicates that investigative work was undertaken at Appellant's firm from November 7 through December 19, 2017 and reflects that five investigative visits were made to the firm during which a store clerk 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 three 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 Charge Letter, in its written request for review dated February 22, 2018, and in subsequent correspondence, Appellant provided information in which it was argued that:

1. Appellant denies any intentional violation of SNAP regulations on the part of the store. Only one employee was involved in the violative transactions noted in the Investigative Report. This employee was not originally employed to operate the register but rather to maintain inventory and provide general assistance; the employee was not regularly responsible for the register at any point in his employment and did not begin training until a number of months after his March 2017 hire date. The violations occurred within one investigation during three consecutive days (November 7, 8 and 9, 2017). The refusals to violate occurred during two subsequent investigations (November 20th and December 19th, 2017). The later refusals reflect, at most, a short-lived misunderstanding by the Clerk regarding eligible versus ineligible items.
2. The Investigator could have been biased. The name of the Investigator is not disclosed and is not available for cross examination. Nor is there a surveillance tape. The agency has to prove by a preponderance of the evidence that the violations were the result of carelessness or neglect, neither of which appears to have taken place in this case. Thus the Department has not met its burden.
3. That the store carries a substantial amount of the staple food items desirable to the local population, it is unlikely that a store with Appellant's history would have intentionally sold ineligible items. Appellant contends that the violations were not due to carelessness or poor supervision, as required by 7 C.F.R. § 278.6(e)(7) and thus did not warrant a six-month disqualification. The firm has training, as it had in the past, and was under the belief that the Clerk was operating the register pursuant to store policies, as demonstrated prior to the completion of his training. The firm maintains a strict set of rules for compliance with SNAP regulations. A store manager is not expected to oversee every transaction; 5 U.S.C. § 552 (b)(6) & (b)(7)(C) than a legitimate transaction do not stand out on their own accord. The store wasn't required to maintain a computerized point of sale system. With no direct tie-in to store inventory, no review, other than a detailed audit, would have shown anything amiss in the transactions. There were no warning signs that Appellant could have noticed that more supervision was needed. Thus Appellant cannot be considered careless in reviewing the transactions or as having provided poor supervision. Appellant cites case law in support thereof.
4. The violations were too limited to warrant a sanction, in accordance with 7 C.F.R §278.6(e)(7). Appellant cites case law in support thereof. Accordingly, a warning letter is requested in lieu thereof. The items purchased are common household items, related to food preparation and normally found in a standard grocery shopping trip. The violations were minimal. Thus a lesser sanction is more appropriate and equally effective. Appellant cites case law in support thereof.
5. Upon learning of the employee's confusion, he was immediately re-trained regarding the SNAP. That the Clerk was retrained is evidenced in the last two investigations where the Clerk refused to sell ineligibles or to engage in SNAP-benefit trafficking.
6. The firm had no prior history of violations and has never had a prior warning. Compliance history should mitigate the sanction decision.

7. Appellant serves and urban area with limited opportunities for SNAP customers to purchase staple groceries. A disqualification will work a hardship upon SNAP customers. Additionally, customers would be burdened and inconvenienced. Appellant therefore requests a hardship civil money penalty.

ANALYSIS AND FINDINGS

In regard to contention 1 above, Appellant may imply that the Owner(s) did not personally commit violations of the SNAP regulations and notes that an employee committed the violations. 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 May 9, 2014, 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. 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.

Appellant argues 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 (three clearly violative sales of ineligible items) exceeded the standard for warranting a warning letter only, the ROD Office was afforded no latitude to issue a warning letter and, therefore, properly assigned a six-month disqualification.

There is no provision in the statute or regulations allowing/requiring the ROD Office to disregard or consider as mitigating violations by only one employee in order to impose a six-month disqualification. Additionally, it is noted for the record that all five visits to the firm were part of a single investigation, as documented by the Investigation Report.

That the violations occurred over the course of three days does not reduce their severity or in any way affect the propriety of the sanction decision made by the ROD Office. The violations committed, three clearly violative sales of ineligible items during an investigation, warrants the sanction imposed, a six-month disqualification which, it is noted, is the least severe disqualification period allowed by regulation. The regulations focus primarily upon the type and frequency of the violations (whether they constitute firm practice), whether the firm has

committed prior violations and whether there was ownership/management involvement: findings of SNAP-benefit trafficking, a firm's third sanction, or falsifying substantive eligibility information, warrants a permanent disqualification; five and three-year disqualifications are imposed for lesser violations involving firm practice and one-year disqualifications for lesser violations involving ownership/management in the sale of ineligible items (or the firm committed violations warranting a six-month disqualification but was once before sanctioned); six-month disqualifications are imposed for a specified minimum number of clearly violative sales of ineligibles in the absence of evidence demonstrating firm practice and/or ownership/management involvement (thus merely due to carelessness or poor supervision). As noted, the language "due to careless or poor supervision," in the context of the statute and regulations, has been consistently applied by the agency to a specified number of clearly violative sales of ineligible items in which the evidence does not demonstrate firm practice and/or owner/management involvement. However, in *addition*, entrusting an unsupervised, inexperienced and/or untrained clerk to handle SNAP benefits is reasonably viewed as careless and/or the exercise of poor supervision.

Regarding contention 2 above, Appellant suggests that the Investigator was in some way biased, though it provides no evidence or information in support thereof. No evidence of bias exists in the record. Additionally, in order to charge a firm with violations, the ROD Office must have information/evidence that it regards as an adequate basis for a sanction. The firm is given the opportunity to provide any evidence it deems relevant in reply to the charge letter. The ROD Office must then consider its own evidence and that provided by the retailer and determine if a sanction is warranted or unwarranted, based upon a preponderance of the evidence. Similarly, in administrative review, a determination is made upon whether the Appellant or the ROD Office presents a preponderance of evidence. Accordingly, a review decision that sustains a ROD Office sanction does not hinge upon whether the ROD Office's case has been proven to the Appellant; similarly, a review decision that reverses a ROD Office sanction does not hinge upon whether Appellant's case has been proven to the ROD Office. In the present case, as will be discussed in further detail, this review finds that there is a preponderance of evidence in the record that the violations at issue occurred as determined by the ROD Office and that the sanction imposed was consistent with the statute and regulations; the record contains, in addition to the Investigation Report, copies of purchase receipts, records documenting that items obtained during the investigation were donated to charity, photographs of the items obtained and digital records of each transaction.

With regard to contention 3 above, Appellant asserts that a connection existed between the firm's inventory, its history (though what is meant by 'history' is not explained) and the firm's lack of intent to commit violations. The argument is taken to mean that the firm operated a legitimate business and thus would not have purposely committed violations. However, it is noted that virtually all firms found during investigations to have sold ineligible items also operated legitimate businesses at the time and were authorized on the basis thereof to participate in the SNAP. Nonetheless, whether the connection Appellant asserts is true or not is largely irrelevant in the present case; sanctions for violations are not limited to only those committed intentionally. 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 (a specified minimum number of clearly violative transactions in the absence of evidence of firm practice and/or

ownership/management involvement) warrant a six-month disqualification or a hardship civil money penalty in lieu thereof, provided the firm is qualified for such alternate sanction.

Appellant contends that the firm conducted training and maintained a strict set of rules for complying with the SNAP (though provided no documentation of either in support thereof) and believed that the Clerk completed said training, though Appellant also notes that the Clerk was not hired to operate the register and did not regularly do so. Additionally, as noted, while the phrase "due to careless or poor supervision," in the context of the statute and regulations, refers to lack of firm practice or owner/management involvement in a specified number of clearly violative transactions, entrusting an inexperienced or untrained clerk to handle SNAP benefits is reasonably viewed as careless and/or the exercise of poor supervision - especially when mere mistakes can and do result in SNAP disqualifications. Moreover, appropriate care and supervision would reasonably be exercised for every transaction conducted by an inexperienced and/or untrained or insufficiently-trained clerk. Furthermore, as noted, a sufficient number of clearly violative transactions is adequate evidence for the ROD Office to determine that they were due to careless and/or poor supervision. While a particular firm may or may not choose to supervise each SNAP transaction, a sufficient number of clearly violative transactions found during an investigation warrants a sanction, in accordance with the statute and regulations.

Appellant cites case law in support of its arguments. Considerations of legal precedent through case law, or the lack thereof in relation to the present case, are beyond the scope of this review; this review relies upon the statute and regulations governing the SNAP and evaluates whether the decision of the ROD Office to impose a disqualification upon Appellant was in accordance with same and sustainable by a preponderance of the evidence; Appellant's case law references are addressed within this context only.

In regard to contention 4 above, common ineligible items, including household items and/or those used in food preparation, not being "eligible food" in accordance with 7 C.F.R. § 271.2, fall squarely within the concept of ineligible items as envisioned in the statute and implemented in the regulations. The proportion of such items sold in combination with eligible foods is relevant, but in the present case that standard was also clearly met.

Regarding contention 5 above, Appellant's refusals to commit violations on two occasions, as noted in the investigative report, are duly acknowledged; such refusals tend to indicate that violations were not firm practice; moreover, there was no indication of owner or management involvement in the violations. The record reflects that the ROD Office carefully weighed such factors in the present case. Had the SNAP Office determined that violations were seen as firm practice and/or involved ownership or management, a more severe sanction would quite likely have been imposed. It is reiterated that a six-month disqualification is the least severe sanction allowed by regulation given the violations in this case.

With regard to contention 6 above, Appellant contends that a record of no prior SNAP violations at the store 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..." As noted in the foregoing, such accurately describes the nature and extent of violations in the present case.

In regard to contention 7 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 12 other similarly or better-stocked stores within a one-mile radius. The ROD Office further notes that one of these firms was a large grocery store. Agency information reflects that there are currently 20 other SNAP-authorized firms within a one-mile radius, including one large grocery store, seven combination grocery/other stores (from just over 350 feet to just under one-half mile from the Appellant firm), one bakery specialty firm (at just under one-fifth of a mile) and 11 other convenience stores (seven of which are from just over 475 feet to just under one-half mile). 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. 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 Triangle Mart for a period of six months from participation in the SNAP is hereby sustained and will become effective upon the 30th day following Appellant's (or its legal representative'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
Administrative Review Officer

September 4, 2018