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

U-Save Fuel Express,

Appellant,

v.

Case Number: C0203362

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 U-Save Fuel Express (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 27, 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 reply to the Charge Letter. By a letter dated March 20, 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 March 31, 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, #HO01499, which indicates that investigative work was undertaken at Appellant's firm from November 8 through 28, 2017 and reflects that five investigative visits were made to Appellant's 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 four separate occasions, indicative of clearly violative activity; on one occasion a clerk sold a "major" ineligible item (in this case, alcohol), in exchange for SNAP benefits, a serious violation and 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 written request for review dated March 31, 2018, Appellant provided information in which it was argued that:

1. Appellant denies that it has violated SNAP regulations. The ROD Office has erroneously concluded that Appellant sold ineligible items in exchange for SNAP benefits. The alleged purchases were made by unidentified undercover individuals whom Appellant asserts lack investigative training and are therefore unreliable.
2. This case did not involve a typical compliance visit, but was a planned, pre-conceived and targeted action with the sole intent of claiming that Appellant violated SNAP regulations.
3. The six-month disqualification is extremely severe based upon the allegations. Appellant requests that Appellant be provided a Warning Letter and that the disqualification be withdrawn.
4. Appellant has not been provided any reliable, credible evidence of SNAP violations that it would be responsible for, thereby precluding Appellant from fully responding to the Charge Letter. Thus Appellant has been denied due process. Appellant requested this and other information pursuant to the Freedom of Information Act (FOIA).
5. SNAP regulations allowing the sanction in the present case violate due process of law, the Equal Protection Clause, the Contracts Clause and the Takings Clause of the U.S. Constitution; Appellant cites case law in support thereof.
6. Appellant requests consideration of a civil money penalty; the store is located in an area not sufficiently covered by other retailers who accept SNAP benefits. Appellant provides a very important benefit to the residents surrounding the store.

ANALYSIS AND FINDINGS

In regard to contention 1 above, Appellant bears the burden of demonstrating through a preponderance of the evidence that the violations as charged, including SNAP-benefit trafficking, in fact did not occur and that the sanction imposed by the SNAP Office should therefore be reversed (see page 2 above). Appellant offers statements of denial indicating that the firm did not participate in said violations; such does not constitute compelling evidence that the firm accepted SNAP benefits in exchange for eligible foods only. It is acknowledged that demonstrating that violations did *not* occur does indeed place a difficult burden upon Appellant; however, that the burden is considerable does not render invalid the evidence of SNAP violations existing in the record or the actions taken by the SNAP Office on the basis of that evidence.

The charges of violations are based on the findings of a formal Department of Agriculture investigation; all transactions cited were conducted under the direct supervision of a Department Investigator. All such transactions are fully documented and a review of this documentation has yielded no indication of substantial error or discrepancy in the reported findings; the investigative record is specific and thorough with regard to the dates and other specifics of the violations and in all other critically pertinent detail. Additionally, investigative results are routinely supported by documentation that confirms items purchased at a retail firm in the course of an investigation are donated to and signed for by a charitable organization following the

transactions. Such documentation includes the signature and title of the official of the charitable organization accepting the donated item, the name and address of the organization, the date the donation was made and the official's certification that the items described were in fact received. The record also includes photographs of the items purchased at the store during the investigation, along with the dated receipts clearly showing that they were obtained at the Appellant store. The purchase costs of each of the transactions involved in the investigation are documented on SNAP terminal receipts obtained during each transaction. Moreover, transaction data generated by each investigative purchase at Appellant's firm is stored in agency data systems (see table excerpted from data below).

5 U.S.C. § 552 (b)(7)(E)

In reply to the Charge Letter, Appellant provided cash register receipts confirming four of five of the above purchases. Appellant also provided copies of product purchase receipts/invoices, credit/debit card summary statements and a statement by an employee stating that the employee was trained with regard to SNAP rules. The product purchase receipts/invoices and credit/debit summaries provide no specific evidence relevant to the case. The employee statement is of marginal significance, as the disqualification under review, a six-month suspension for the sale of ineligible items, cannot be mitigated by consideration of a firm's compliance policy and training (as is the case with trafficking cases under 7 C.F.R. § 278.6(i)).

Accordingly, Appellant offers no compelling information or supporting documentation which would constitute evidence that any relevant detail is incorrect in any substantial respect. As such, Appellant's denial of the charges exerts little force in the context of the considerable information and documentation presented by the SNAP Office, as referenced above, which indicate that the merchandise as described was in fact obtained at the Appellant firm on the dates noted, that the manner in which it was obtained is accurately described and that the clerk in attendance throughout did in fact conduct the transactions described.

Regarding contention 2 above, to the extent Appellant may imply that entrapment played a role in the firm's tendency/willingness to commit violations, the presence of entrapment depends upon whether or not the government's actions leading up to the violations amounted to inducing violative activity in persons who had no such inclination to violate. However, mere solicitation to commit a crime is not inducement, nor does the government's use of artifice, stratagem, pretense or deceit (although there is no indication of same in the present case) establish inducement. Inducement is shown only if the investigator's behavior was such that a law-abiding citizen's will to obey the law could have been overborne. The Department maintains that if investigators merely provide an opportunity for a suspected violator to engage in violative conduct, such activity does not constitute entrapment. Moreover, even if inducement has been shown, a finding of defendant's predisposition to violate is fatal to an entrapment defense. Predisposition may be said to exist even without prior violative involvement: the ready commission of an offense, such as a person's prompt acceptance of an undercover investigator's offer of an opportunity to commit violations may itself establish predisposition. In the present case, the employee in Exhibits A, B, C, D and E in the Investigation Report was approached by the Investigator and willingly engaged in the sale of ineligible items in exchange for SNAP benefits on five of five visits to the store. The goal of undercover investigative visits is to

determine if there are compliance issues and, if so, to determine the nature and extent thereof; the agency clearly has a justifiable interest, on behalf of the public trust, in achieving this very reasonable goal.

With regard to contention 3 above, the regulations at 7 CFR § 278.6(e)(5) state that the agency *shall* (emphasis added) 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; such accurately describes the nature and extent of the violations in the present case. Thus, the SNAP Office's determination is affirmed as correct and appropriate. It should be noted that a six-month disqualification is the least severe disqualification period allowed by statute and regulation.

As to Appellant's contention that the decision to impose a disqualification is too severe given the alleged violations, it is noted for the record that the average percentage of ineligible items (as a percentage of the total number of all items) purchased during the investigation was approximately 40%. Neither the Food & Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto, requires, in order to be defined as violative, any minimum dollar amount of SNAP benefits used in transactions involving the sale of ineligible items. No mention of minimum cost is cited in Section 278.6(e)(5) of the SNAP regulations, which, as noted, states that FNS shall disqualify a store 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 the sale of common nonfood items in exchange for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management.

Additionally, the regulations at 7 CFR § 278.6(e)(7) state that FNS shall send a firm a warning letter if violations are too limited to warrant a disqualification. This section of the regulations provides for a continuum of sanctions, beginning with permanent disqualification for trafficking, term disqualifications from several years to six months for lesser violations, and warning letters for firms committing violations less severe than that provided for by the standard for imposing six-month disqualifications. The violations in the present case exceed the severity allowed for issuing a warning letter. A warning letter, in the present case, is therefore incorrect. As such, the ROD Office imposed the sanction required by the statute and regulations.

In regard to contention 4 above, Appellant may imply that the Owner did not personally commit violations of the SNAP regulations, that an employee committed the violations and thus Appellant is not responsible for same. 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 2, 2011, as well as similar documents during reauthorization contacts since initial authorization, 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.

It should be noted that the ROD Office did in fact provide Appellant with a redacted copy of the Report of Positive Investigation, #HO01499, which provides substantial detail about each investigative visit to the Appellant firm. Additionally, while the ROD Office is required to consider and evaluate all evidence and responses, in accordance with 7 CFR § 278.6(c), that are provided by the Appellant, the ROD Office is under no obligation in the determination letter to expound, point-by-point, on every contention or piece of evidence presented. The determination letter clearly states that consideration was given to the information and evidence available to the Retailer Operations Division and to the reply made by the Appellant. After an evaluation of all information, the Retailer Operations Division determined that the violations cited in the charge letter had occurred at the firm. Implied in the letter is the determination that the evidence or response by the Appellant was either not credible or was insufficient to prove that violations had not occurred. While the Charge and Determination Letters may not have been as comprehensive as the Appellant wishes, this review finds that due process was appropriately applied and that there was no negligence on the part of the Retailer Operations Division in the manner in which it explained its disqualification decision.

With regard to Appellant's FOIA request, the record reflects that the agency's FOIA Office replied to Appellant via a letter dated June 18, 2018 which noted that FOIA fee information had been provided to Appellant on May 14 and 29, 2018 but had received no response from Appellant; the letter indicated that the request was therefore administratively closed. No further findings are rendered in this regard.

Regarding contention 5 above, Appellant has contended that the ROD Office's actions do not meet the requirements of the United States Constitution. This review finds that the ROD Office properly implemented the sanction at issue in accordance with the statute and regulations. The administrative review process cannot properly include an assessment of the constitutionality of the statute and regulations under which the agency imposed adverse actions, but rather assesses whether the agency actions undertaken were proper pursuant to those laws and regulations and sustainable by a preponderance of evidence. As such, this office does not have the authority to determine whether the United States Congress, in its enactment of legislation, has conformed to constitutional mandates or whether the regulations issued pursuant to those mandates conform thereto. Additionally, considerations of legal precedent through case law, or the lack thereof in relation to the present case, are likewise beyond the scope of this review; as noted, 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 the 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. Moreover, challenges to the laws and regulations governing the SNAP are more appropriately within the scope of judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

With regard to contention 6 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 13 similarly or better-stocked stores within a one-mile radius, including one super store, two supermarkets, two medium grocery stores, one small grocery store, one combination grocery/other store and six other convenience stores. Agency information reflects that there are currently 14 other SNAP-authorized firms within a one-mile radius, including one super store, two supermarkets, three medium grocery stores, one small grocery store, one combination grocery/other store and six 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 U-Save Fuel Express 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 (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

October 11, 2018