

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

West 3rd Deli Grocery,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0221553

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA) that the record supports that West 3rd Deli Grocery (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(a), 7 CFR § 278.6(e), and 7 CFR § 278.6(f)(1), 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 January 29, 2019 through February 5, 2019. The investigative report dated February 7, 2019, documented that store personnel at Appellant accepted SNAP benefits in exchange for ineligible common nonfood items on multiple separate dates. As a result of evidence compiled during the investigation, by letter dated March 28, 2019,

Retailer Operations charged Appellant with violating the terms and conditions of the SNAP regulations. Misuse of SNAP benefits was noted in Exhibits A, C, 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. A representative responded to the Charge letter by letter dated April 6, 2019. This response included a FOIA request. The agency provided a FOIA reply dated May 7, 2019. A different attorney appealed the FOIA reply by letter dated August 6, 2019. Retailer Operations informed current counsel to reply to the Charge letter once the agency provided a reply to the FOIA appeal.

Retailer Operations informed Appellant and a different attorney by Determination letter dated March 8, 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.

Current counsel requested review of the determination by letter dated March 16, 2021. The review was granted by letter dated April 9, 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(a) states: “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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system.”

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(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 at (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

The investigative report details on the results of each of five compliance visits to Appellant as part of a USDA onsite investigation. The investigative report documents that SNAP violations were recorded during multiple store visits, that warrant a six month disqualification. The SNAP violations of 7 CFR § 278.2(a) involved the sale by store personnel, of ineligible nonfood items for SNAP benefits. The nonfood items exchanged for benefits included: sandwich bags, toilet paper, and cleaner.

APPELLANT’S CONTENTIONS

Consideration was made of all contentions whether recapitulated here or not.

- The USDA, based on alleged transactions on three occasions has charged, and I submit wrongfully concluded, that his firm and enterprise did engage in accepting SNAP benefits in exchange for merchandise which included common ineligible non-food items.
- My clients vehemently deny that they personally engaged in any type of illegal activity and were unaware, until the receipt of the letter of charges, that anyone else in their store or employed by them in this business is alleged to have engaged in such activities.
- The FNS has failed to make any effort during the investigation of this owner’s store to determine the true identity and full name of the one clerk allegedly employed by the owner, and specifically the identity of the clerk during each transaction who allegedly committed the wrongdoing as noted in the Exhibits A, C and E. During this investigation there is no description of the clerk, no name, no title, no means of identification or his relationship to the

owner is set forth, after three undercover visits to the store. There is no one of such description who was working as a cashier in the store.

- The amounts involved in the alleged sale of ineligible items are of such an insignificant amount that it raises a question about the appropriateness and credibility of the investigation.
- In each of the alleged transactions, there is no time of entry and departure by anyone to and from the subject premises. There is no information about time spent in the store which is important for the following reasons: was the time sufficient to complete the selection of the multiple items from the various locations in this grocery store, wait on line at the counter, have the purchases totaled at said counter and pay for same, and based on the hour of any given day, the owners herein can identify the clerk who was on duty at the time. The clerk's identity is of importance in any investigation when it will directly impact a business.
- Any surveillance cameras in this store are self-erasing and the images taken from January 29, 2019 thru February 5, 2019 are no longer available for viewing.
- The name of anyone connected with the investigation for the FNS on each transaction described has never been disclosed, I submit that the owner is entitled to know whether there was an investigation and who was involved.
- There are no cash receipts or cash register receipt. I am informed that the price of each product is displayed and sold in this store is carefully marked. Each customer receives a cash register receipt or tape when a purchase is made. The owner denies that sales were made without receipts.
- There is a major issue as to what was exchanged or purchased, so that the entire substance of the sale of ineligible items allegation is not supported in the record. Additionally, there are no reports to indicate that this firm ever exchanged cash for an EBT transaction, contradicting the determination of the FNS.
- These inadequacies, inaccuracies and insufficiencies affect the reliability, veracity and sufficiency of the investigative reports and the meager and questionable sale of ineligible items charge. This charge cannot be sustained as a matter of fairness and justice to permanently disqualify this owner from participation in the SNAP.
- Should the FNS determine that this firm and owner violated Section 278.2(a) of the SNAP regulations, then and in that event, the FNS should impose a CMP as a sanction in lieu of disqualification, as it would be a violation of due process to prosecute this owner for alleged transactions that occurred without any warning letter to correct any issue with one employee.
- This firm has met the criteria listed in SNAP regulations, Section 278.6(i) in that (1) the firm has developed an effective compliance policy as specified in §278.6(i)(1); (2) the firm has established that both its compliance policy and program were in operation at the location where the alleged violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; (3) the firm had developed and instituted an effective personnel training program as specified in § 278.6(i)(2); and that the owner was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of alleged sale of common non-food ineligible items and as set forth herein in the letter of charges and it is only the first occasion in which a member of firm management has become aware that the FNS has alleged conduct of supposed violations by the firm.
- That upon request this firm will not only provide to the FNS written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with Section 278 of current FSP regulations and current FSP policy on the proper acceptance and handling of EBT transactions, but upon request will submit invoices which

would show that the recorded food stock supports the EBT transactions of this store and notarized statements from EBT cardholders stating that no exchanges for common non-food ineligible items occur in this store.

- As there have been no named employees designated by the FNS as individuals who have violated the SNAP regulations, there have been no violating employee(s) who have been disciplined.
- A six month disqualification from participation in the SNAP will have an adverse effect on his future business endeavors and that it would cause him irreparable injury and damage to his reputation in the business community.
- The owner would not knowingly or intentionally jeopardize this source of business, his livelihood and his reputation in the community by engaging in the illegal activity charged herein. He have invested large sums of his personal savings to renovate his store in the effort to provide financial support to his family.
- The owner has maintained an exemplary record and that the allegations contained in the letter of charges is the first occasion in which a member of this firm or its management has been made aware of conduct of any violations by the firm. Such an unblemished record is evidence of his continued compliance with the law and his training and supervision of his employees, up and including the present time.
- By virtue of the hours that this retail deli/grocery store was open for business, the owner could not be in attendance at all times. He relied upon the competence, honesty and good judgment of his employees, particularly the clerks and cashiers, during his absence. The cashier who had been employed during the period in question was an elderly man who was inexperienced as a cashier. Despite this fact, this owner denies that the incidents forming the basis of the complaint as set forth in the letter of charges, and the exhibits took place, as he was not in the store during this period.
- That the owner acted in a way to violate the rules and regulations are vehemently denied, especially in light of the meager amount of the alleged ineligible items to have been purchased.
- The USDA has failed to establish intent, which is an essential element of the basis for its decision to disqualify this owner for six months. This charge cannot be sustained as a matter of fairness and justice. It is requested that the aforesaid demands to vacate the disqualification and assess a Civil Money Penalty (CMP) be in all respects granted.

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 report shows that the one investigator declared under penalty of perjury that the report is true and correct. The record under review includes the EBT receipts with the store's name and address, for the total SNAP benefit amounts recorded in the Exhibits. The record also includes photographs of the items exchanged at Appellant for SNAP benefits, and documentation that confirms that the items as noted in the Exhibits, were donated to local community organizations by the investigator.

The different violating store personnel are described by gender, and ranges of estimated age, weight, height, hair and other identifiers. There is no provision in the regulations that an investigator must provide the name(s) of the store personnel who conduct a violative transaction(s) for the FNS to take administrative action against an authorized store. Notwithstanding potential discrepancies between the investigator's descriptions and the owner's descriptions of his personnel, the evidence supports that Appellant was the offending store, and the report supports that the nonfood items identified were exchanged for SNAP benefits by different clerks as charged.

Regardless of the cost of items, Appellant established a record of selling nonfood items on multiple store visits. The record supports that some prices of items are listed in the Exhibits. The SNAP regulations make no mention of minimum cost for a common ineligible nonfood item exchanged for SNAP benefits to be considered a violative exchange. The regulations are clear that benefits can only be exchanged for eligible foods. Therefore, the contention that transactions involved "an insignificant amount" is not relevant.

The contention that FNS did not consider evidence that shows the firm's intent to violate the regulations is an incorrect reading of the regulatory citation. The citation requires FNS to consider any prior warnings and evidence of a firm's intent to violate when determining a sanction. It does not require FNS to give such warnings or to prove a firm's intent to violate. The evidence considered by Retailer Operations included the information obtained during the aforementioned onsite store investigation conducted by a contracted USDA investigator. The regulations allow that FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, and that such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through onsite investigations.

The owner contends that a SNAP disqualification will have a negative financial impact on Appellant's business. It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow the owner to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Act, and the enforcement efforts of the USDA. Furthermore, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations.

The owner submitted no evidence to support that the transactions did not occur at Appellant. 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. Counsel did not provide evidence to support that Appellant had a SNAP training program. Even if the firm had

the alleged training program, the owner is responsible for all violative transactions completed by the firm. A record of participation in the SNAP with no previously documented instance of violations does not constitute grounds for dismissal of the current charges of violations. 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. Such repetitive violations are considered evidence of carelessness. The regulations at 7 CFR § 278.6(e)(5) state 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.

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 on Appellant. The record documents that there are many 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 Appellant violated the SNAP regulations as charged. 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 owner's 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 owner resides or is

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 7, 2021