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

Ez Mart,

Appellant,

v.

Office of Retailer Operations and Compliance,

Respondent.

Case Number: C0250866

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to impose a six month disqualification against Ez Mart (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), § 278.6(e)(5 and 6), and § 278.6(f)(1) in its administration of the SNAP when it imposed a six month period of disqualification against Appellant.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, "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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period December 29, 2021, through January 9, 2022. The investigation determined that personnel at the Appellant firm accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. All three transactions were deemed clearly violative and warrant a six month disqualification period. The items sold are best described in regulatory terms as common nonfood items such as paper towels, hand soap, shampoo, and toothpaste. The investigative report indicates that these violative transactions were handled by

two different clerks. The report notes that a third clerk in Exhibit B refused to allow SNAP benefits to be used to purchase nonfood items while one of the two violative clerks refused to exchange SNAP benefits for cash in Exhibit D, but did allow the purchase of two ineligible items in Exhibit D.

As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant, in a letter dated March 29, 2022, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations ". . . warrant a disqualification period of six months (Section 278.6(e)(5)). The letter also states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1))."

Appellant responded to the charges in an email dated May 9, 2022, in which it blamed the violations on an employee who had been trained but thought he was doing a good thing by allowing some toiletries. A reduced penalty or a warning was also requested in this response. After giving consideration to the evidence, the Office of Retailer Operations and Compliance notified Appellant in a letter dated June 3, 2022, that it determined that violations had occurred at the firm, and that a six month period of disqualification from participating as an authorized firm in SNAP was warranted. This determination letter also states that Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated ". . . you are not eligible for the CMP because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices."

By a request sent via email on June 9, 2022, Appellant, now through counsel, appealed the Office of Retailer Operations and Compliance's decision and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review. Subsequent correspondence was also received.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant 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 untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Section 278. In particular, Sections 278.6(a) and (e)(5) establish the authority upon which a six month disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 271.2 states that: Eligible foods means any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot food and hot food products prepared for immediate consumption.

7 CFR § 278.2(a) states that: Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food. Further, the citation specifies that coupons may not be accepted in exchange for cash, in payment of interest on loans, or for any other nonfood use.

7 CFR § 278.6(a) states 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, 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(e)(5) 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) states that, "FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm's disqualification would cause hardship to SNAP 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. FNS may disqualify a store which meets the criteria for a CMP if the store had previously been assigned a sanction. A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

7 CFR § 278.6(p) Freedom of Information Act (FOIA) requests and appeals states that, "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."

APPELLANT'S CONTENTIONS

The following may represent a summary of Appellant's contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

- This case was issued after the USDA's new rules regarding FOIA. Specifically, the Appellant was not permitted FOIA requests and the abatement of this matter.
- Appellant summarized store size, staple foods carried, and cited demographic data for area residents including statistics on households with children or older members as well as the median income of SNAP households.
- Appellant summarized the violative transactions using verbatim language from the investigative report and emphasizing that the clerks in Exhibits B and D refused to traffick SNAP benefits for nonfood items and cash, respectively.
- Appellant vehemently denies any violation of SNAP regulations which would warrant a

six-month disqualification and denied that the violations occurred at the store as relayed by the investigator as the store has a policy against SNAP violations and the sale of ineligible items as a whole. Appellant further cited statute and regulations pertaining to USDA's authority.

- Even if the allegations were accurate then the store's violations warrant a warning letter rather than a six month disqualification. In order to qualify for a six month disqualification, the regulation indicates that the evidence must show that carelessness or poor supervision by ownership or management sold ineligible items. Furthermore, SNAP regulations require the Department to conduct a three part analysis in addition to determining whether or not FNS can issue a six month disqualification and the analysis should include the following elements: (1) The nature and scope of the violations committed by personnel of the firm; (7 CFR § 278.6(d)) (2) Any prior action taken by FNS to warn the firm about the possibility that violations are occurring; (7 CFR § 278.6(d)) (3) Any other evidence that shows the firm's intent to violate the regulations; (7 CFR § 278.6(d)) (4) Violations were committed by the store personnel such as the sale of common nonfood items; (7 CFR § 278.6(e)(5)) and (5) The sale of such common nonfood items was due to carelessness or poor supervision by the store's ownership or management. There is no evidence whatsoever in the record that the alleged sales of common nonfood items was due to carelessness or poor supervision by the store's ownership or management. The mere presence of the alleged violation – even in a certain volume – is not a prima facie case for "carelessness or poor supervision." Store owners and management are not expected to sit over their employee's shoulder for every transaction to verify their accuracy. Furthermore, a concealed problem (such as where there is no way for the store owner/manager to have known about these specific alleged problems) is not the same as acting careless or neglectful. Careless/neglectful qualifies for store owners who never trained their staff, or who govern their store on an absentee basis without any ongoing concern for how the store is operating. A determination that a certain number of ineligible sales over a certain number of visits is the very definition of arbitrary: a determination based upon individual preference or convenience rather than by the intrinsic nature of the transactions.
- A six-month disqualification under 7 CFR § 278.6(e)(5) can only be issued where the evidence supports all of the different regulatory factors, in addition to those set out in 7 CFR § 278.6(d).
- The Investigator's affidavit is "hearsay" by definition (an out of court statement made by a declarant offered to prove the truth of the matter asserted). Pursuant to Section 556(d) of the Administrative Procedure Act, hearsay evidence may only be relied upon in an administrative proceeding if found to be "reliable and credible". As such, the admission of the hearsay evidence at issue herein is dependent on "(1) whether the hearsay declarant was interested or biased, (2) whether the party opposing the hearsay had access to the information containing the hearsay and could have subpoenaed the declarant, (3) whether the information is inconsistent on its face, and (4) whether courts have recognized the information as inherently reliable." Appellant referenced court cases pertaining to hearsay.
- FNS is to send the firm a warning letter if violations are too limited to warrant a disqualification per 7 CFR § 278.6(e)(7). Appellant referenced court cases pertaining to this. The store would ask that a warning letter be issued in lieu of a six month

disqualification. The violations were minor in nature, and while the Department is tasked with maintaining compliance with the regulations, it should be reluctant to resort to draconian sanctions where a lesser sanction would be more appropriate and equally effective. In this instance, the ownership had taken reasonable and fiscally practical steps to prevent SNAP violations. Their efforts cannot be reasonably described as careless or as poor supervision, as would be required to support a six month disqualification under the regulation. Rather, it would seem as though the violations are exceptionally minor in nature, and while certainly in need of correction, proper corrective action can be achieved by the issuance of a warning letter. Appellant referenced additional court cases.

- Appellant discussed what issues comprise a hardship to SNAP and the requirements for a warning letter as well as Appellant's SNAP training. A warning letter is requested or in the alternative, a hardship CMP as the Appellant firm has a superior inventory of staple food items sold at lower prices than the other stores located within a mile of the store.

Appellant submitted the 2018 FNS Washington State SNAP Profile for Congressional District 6 in support of these contentions.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Office of Retailer Operations and Compliance and is limited to what circumstances were at the basis of the action at the time such action was made. In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant 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 untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations. While store ownership may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, that ownership is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. The SNAP retailer application contains a certification page whereby applicants must confirm their understanding of and agreement with SNAP retailer requirements in order to complete the application/reauthorization process. Store ownership did certify its understanding and agreement to abide by program rules and regulatory provisions when it applied to become a SNAP retailer and again when it applied for reauthorization. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time, or part-time regardless of the amount of time the owner(s) is present at the subject firm. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP.

The FNS investigative report clearly shows that two employees working at the Appellant firm accepted SNAP benefits for ineligible items on three separate occasions during the investigative period indicating a pattern of SNAP violations most likely resulting from poor or no supervision. The report shows that the nature and scope of the violations under review do violate SNAP regulations, and the transaction amounts cited in the report also match FNS transaction records for the dates in question. Additionally, a review of the report shows no errors or discrepancies. There is no regulatory threshold for the dollar value of the ineligible items purchased or for the timeframe in which they were purchased. The acceptance of SNAP benefits for ineligible items is a violation of SNAP rules and regulations. The ineligible items sold were obvious nonfood items and would not readily be confused with eligible edible food items. SNAP regulations explicitly state that FNS shall disqualify a store for a six month period 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. The applicable regulations do not specify intent as being a required element for a six month disqualification.

The transaction amounts cited in the investigative report have been matched to SNAP transactions posted by the Appellant firm on the dates in question with no disagreements and a comparison of the dates/times/amounts on the four POS receipts issued by the Appellant firm to the investigator correspond to the dates/times/amounts provided to FNS by the firm's EBT processor when it submitted the transactions to FNS for reimbursement. Also, evidence consisting of photos of the eligible and ineligible items purchased using SNAP, photos of the POS receipts with the firm's name, and detailed donation records signed by a local charitable organization provide conclusive evidence supporting the details provided in the report.

SNAP benefits, in general, are only authorized to be used for the purchase of foods for the household to eat as well as seeds and plants which produce food for the household to eat. The common nonfood items purchased are clearly not edible foods and are not plants or seeds, so one has to question the level of training these employees received by store ownership and/or management. The basic concept of "if you can't eat it, you can't buy it using SNAP" is not a difficult one for employees to grasp, yet these employees allowed the purchase of ineligible items using SNAP benefits on multiple occasions. Had an effective compliance policy and program been in effect at the firm, it is unlikely that these employees would have made such obvious mistakes. The more likely explanation is that store ownership and/or management failed to properly train and subsequently supervise these employees. Additionally, had store ownership and/or management been supervising these employees through occasionally monitoring them using videotape, if available, or in person, it would have readily noticed that they were allowing the sale of ineligible nonfood items in exchange for SNAP benefits. It also would have been immediately evident to store ownership and/or management that these employees were deficient in their knowledge of SNAP rules and regulations had it periodically spot checked their knowledge and abilities by asking questions about SNAP eligible/ineligible items. Either of these basic supervisory techniques would have provided a no cost method for store ownership and/or management to ensure that store employees were not putting the firm's SNAP license at risk. These are clear signs of poor or no supervision by store ownership and/or management.

It is highly improbable, based on the willingness of these employees to exchange SNAP benefits for ineligible nonfood items, that the only instances of SNAP violations were those transactions identified as part of the FNS undercover investigation. Common sense dictates that these actions more likely than not represented an ongoing pattern of SNAP violations at the Appellant firm. As previously stated, store ownership is responsible for all SNAP transactions at the firm and therefore a certain minimal level of oversight and training on the part of ownership to ensure employees, especially new employees, are not violating SNAP laws or regulations is expected. It would be unusual and irresponsible for store ownership to not have a program of ongoing supervision of employee performance and conduct by periodically monitoring store transactions, including those involving SNAP, and reviewing daily balance sheets to ensure store employees were not stealing from the firm or conducting other activities that would jeopardize the licenses and income that the firm is dependent upon. Under SNAP regulations, the penalty for allowing the purchase of ineligible nonfood items using SNAP benefits as the result of poor supervision by ownership or management is a six month disqualification. The regulations do allow SNAP retailers to pay a hardship CMP, if eligible, as explained in the next section.

A review of the investigative report shows no errors or discrepancies and a comparison of the dates/times/amounts cited in the report as well as on the POS receipts issued by the Appellant firm to the USDA investigator correspond to the dates/times/amounts provided to FNS by the firm's EBT processor when it submitted the transactions to FNS for reimbursement. Other evidence provided (photos of the items purchased and detailed donation records signed by a local charitable organization) also support the details provided in the investigative report. While a firm that has previously received warnings of possible violations or that has been sanctioned before could receive a more severe penalty, SNAP regulations do not provide any grounds for dismissing or reducing penalties for those firms that have not received warnings or previously been sanctioned. There is no evidence that the Appellant firm received any prior warnings or has been sanctioned and there is no evidence that the firm's ownership or management intentionally violated SNAP regulations.

Based on this discussion, the decision by the Office of Retailer Operations and Compliance to disqualify the firm for a six month period was the appropriate penalty and there is no valid basis for dismissing the charges or for mitigating the penalty imposed.

Other Contentions

Contrary to Appellant's contention, the three criteria from SNAP regulations at section 278.6(d) listed below are not bases to be met in order for a firm to be disqualified, but are those areas that FNS considers in determining the appropriate level of sanction for firms that have violated SNAP regulations. The level of sanction could include temporary or permanent disqualification.

1) The nature and scope of the violations committed by personnel of the firm,
2) Any prior action taken by FNS to warn the firm about the possibility that violations are occurring, and
3) Any other evidence that shows the firm's intent to violate the regulations.

The Report of Positive Investigation shows that the nature and scope of the violations under

review do violate SNAP regulations, and the transaction amounts cited in the Report also match FNS transaction records for the dates in question. Additionally, a review of the Report shows no errors or discrepancies. While a firm that has previously received warnings of possible violations or that has been sanctioned before could receive a more severe penalty, SNAP regulations do not provide any grounds for dismissing or reducing penalties for those firms that have not received warnings or previously been sanctioned. There is no evidence that the Appellant firm received any prior warnings or has been sanctioned and there is no evidence that the firm's ownership or management intentionally violated SNAP regulations. Based on this discussion, the decision by the Office of Retailer Operations and Compliance to disqualify the firm for a six month period was the appropriate penalty.

Regarding Appellant's contentions relating to the FOIA process, the FOIA is governed by current FOIA rules and regulations which fall outside of the purview of this administrative review and so are not addressed further.

In regard to case law cited by Appellant, considerations of relevant 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 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 acknowledged in this context only.

Appellant contends that the investigative report is hearsay, and that pursuant to Section 556(d) of the Administrative Procedure Act, hearsay evidence may only be relied upon in an administrative proceeding if found to be "reliable and credible". As such, the admission of the hearsay evidence at issue herein is dependent on "(1) whether the hearsay declarant was interested or biased, (2) whether the party opposing the hearsay had access to the information containing the hearsay and could have subpoenaed the declarant, (3) whether the information is inconsistent on its face, and (4) whether courts have recognized the information as inherently reliable." Appellant referenced court case pertaining to hearsay. However, the cases cited by Appellant refer to criteria for documents submitted into evidence in lieu of witness testimony in administrative hearings. Revisions to parts 278 and 279 of the Supplemental Nutrition Assistance Program regulations eliminated administrative hearings effective September 8, 2003. Accordingly, these case citations are not relevant to this administrative review.

That the Appellant firm is located in a low income area does not provide any meaningful basis to mitigate the SNAP violations conducted by the employees of the Appellant firm. There are many SNAP retailers located in high poverty areas that do not allow the exchange of SNAP benefits for ineligible items.

Regarding Appellant's other contentions, SNAP regulations do not establish any minimum dollar amount that exchanges of SNAP benefits for common ineligible nonfood items must exceed in order to be considered violative. Therefore, any allegations that transactions involving insignificant or de minimis amounts not being grounds for the disqualification are baseless.

Regarding a warning letter, there are no requirements in existing FNS regulations that require

stores suspected of trafficking or misusing SNAP benefits be provided with a written or verbal notification that violations of SNAP regulations may be occurring and the potential penalties. Warning letters are issued in those situations where the SNAP violations are of a limited nature that would not warrant a disqualification and therefore would not have been appropriate in this situation.

Lastly, Appellant's claim regarding that ineligible items were sold on three of the investigative visits at the Primo Meat Market is accurate; however, only two of these transactions met FNS requirements for a transaction to be considered violative. The Final Agency Decision for this case states:

> *"While common non-food items were sold on three (3) of the eight (8) compliance visits the evidence does not show that there were sufficient ineligible items sold in exchange for SNAP benefits to warrant a six month disqualification. Appellant established a record of selling nonfood items however, after careful review of the investigative report, the violations do not rise to the level to merit a disqualification period in accordance with 7 CFR § 278.6(e)(5). However; the violations do meet the requirements of 7 CFR § 278.6(e)(7), and as such, the determination is modified accordingly. An Official USDA Warning Letter is to be issued to Appellant."*

As previously stated, warning letters are issued in those situations where the SNAP violations are of a limited nature that would not warrant a disqualification. Therefore, while a warning letter was wholly appropriate in the Primo Meat Market case, it would not have been appropriate in the case under review.

The Appellant offered no evidence to validate its claims. Since Appellant's contentions are only assumptions, not facts, and no basis has been presented to substantiate them, they are found to be without merit.

Based on this discussion, the decision by the Office of Retailer Operations and Compliance to disqualify the firm for a six month period was the appropriate penalty and there is no valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

Appellant is not eligible for a trafficking CMP as these only apply in cases of permanent disqualifications. The matter under review is a term disqualification of six months and does not involve trafficking therefore a trafficking CMP cannot be considered under 7 CFR § 278.6.

A hardship CMP as an optional penalty in lieu of a six month disqualification was considered in this case. Such a finding is appropriate only if a store sells a substantial variety of staple food items and its disqualification would create a hardship to SNAP 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. FNS records show there are least 15 comparably sized or larger authorized retail food stores within a 0.99 mile radius that include one super store, two supermarkets, one

large grocery store, two medium grocery stores, and nine small grocery stores. The nearest supermarket is approximately 7.5 blocks from Appellant's location. There are many additional larger stores located slightly further away. All of the comparable stores stock adequate varieties of food in all four staple food categories and in perishables as required by FNS.

The nearby stores appear readily accessible to SNAP recipients and offers a variety of staple foods comparable to, or better than, those offered by Appellant. It is acknowledged that some level of inconvenience to SNAP users is inherent in the disqualification from SNAP of any participating food store as the normal shopping pattern of such SNAP benefit holders may be altered. Inconvenience, however, does not rise to the level of hardship required by the regulations.

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did occur as charged and as admitted to by store ownership in its response to the charges. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted by a USDA investigator and signed under penalty of perjury. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and accurate with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail. Accordingly, the determination by the Office of Retailer Operations and Compliance to impose a disqualification of six months against the Appellant firm from participating as an authorized retailer in SNAP is sustained. Furthermore, the Office of Retailer Operations and Compliance properly determined that Appellant was not eligible for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations as there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after delivery of this decision. A new application for SNAP participation may be submitted ten (10) days prior to the expiration of the six month disqualification period. When eligible, Appellant may reapply for SNAP authorization using the application instructions contained on the FNS web site. Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

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 Appellant desires a judicial review, 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 delivery of this decision. The judicial filing deadline is stipulated by statute; FNS has no authority to grant an extension.

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.

ROBERT T. DEEGAN January 8, 2024
ADMINISTRATIVE REVIEW OFFICER