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

Super Stop Gas & Food Inc,

Appellant,

v.

Office of Retailer Operations and Compliance,

Respondent.

Case Number: C0227149

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 Super Stop Gas & Food Inc ("Appellant") from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of Code of Federal Regulations (CFR) § 278.6(e)(5) in its administration of SNAP when it imposed a six-month period of disqualification against Appellant on February 3, 2021.

AUTHORITY

According to 7 U.S.C. § 2023 and its 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 Appellant's compliance with federal SNAP law and regulations during the period of September 25, 2020 through October 23, 2020. The investigation reported that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. These items sold during these impermissible transactions are best described in regulatory terms as "common ineligible nonfood items." The investigation revealed that three unidentified clerks were involved in the impermissible transactions. As a result of evidence compiled from this investigation, the Office of Retailer

Operations and Compliance informed Appellant, in a letter dated December 16, 2020, 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)). Under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1))."

Appellant replied to the Office of Retailer Operations and Compliance's charges in writing. The record reflects that the Office of Retailer Operations and Compliance received and considered the information provided prior to making a determination.

The Office of Retailer Operations and Compliance notified Appellant in a letter dated February 3, 2021 that the firm was being disqualified for six months from participation as an authorized retailer in SNAP. This determination letter also stated that Appellant's eligibility for a hardship civil money penalty (CMP) according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated to Appellant that ". . . 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."

On February 16, 2021, Appellant appealed the Office of Retailer Operations and Compliance's decision to impose a six-month disqualification, and requested an administrative review of the action. The appeal was granted and implementation of the sanction has been on hold pending completion of this review.

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 Part 278. In particular, 7 CFR § 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.

Section 278.6(e)(5) of the SNAP regulations states, in part, when a firm is to be disqualified for six months:

> If it is to be the first sanction for the firm and the evidence shows that personnel of the firm have committed violations such as but not limited to the sale of common nonfood items due to carelessness or poor supervision by the firm's ownership or management.

7 CFR § 278.6(a) states, in part:

> FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system . . . .

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- Not holding determinations in abeyance while a FOIA response is pending violates 7 CFR §278.6(b)(1) according to *Triple E Express vs. ROD*, Case No. C0191279 because Appellant is not given a full opportunity to respond.
- There is no corroborating evidence or sworn affidavits.
- Appellant refused trafficking on two occasions and refused to sell tobacco.
- The clerks allegedly committed the violations without the knowledge of ownership or management.
- Appellant denies the allegations.
- The investigators used flirtation, sexual advances, distraction and misrepresentation to compel store clerks to violate regulations.
- FNS must consider 7 CFR § 278.6(d) before imposing a sanction.
- There is no evidence of carelessness or poor supervision by management. Deciding that clerks who repeatedly allow the purchase of common ineligible items violates 278.6(e)(5) is arbitrary.
- The clerks had been properly trained in the handling of SNAP transactions.
- Appellant has terminated employees who have violated SNAP rules and regulations.
- There is no audio or video of violations.
- The investigative report is hearsay. Hearsay in administrative matters can only be relied upon if four conditions are met. Appellant cites *U.S. Pipe & Foundry Co. v. Webb, Veg-Mix, Inc. v. U.S. Dep't of Agric., Glaros v. Immigration & Naturalization Serv.,* and *J.A.M. Builders, Inc. v. Herman.*
- The burden of proof at this state rests with the Office of Retailer Operations and Compliance to demonstrate a violation occurred.
- Appellant requests a warning letter.
- A warning letter is appropriate according to *Primo Meat Market vs. Retailer Operations Division*.
- The violations were minor in nature. A warning letter is the appropriate sanction according to *Dale & Selby Superette & Deli v. U.S. Dep't of Agric.,* 836 F. Supp. 669, 673 (D. Minn. 1993) and *Kim v. United States*, 903 F. Supp. 118 (D.D.C. 1995)
- Appellant requests a CMP. Disqualification would pose a hardship to SNAP participants who rely on the firm. Appellant included a one-page demographic summary of SNAP participants located in Appellant's congressional district.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

As to Appellant's denial of violations, this review examines the relevant information regarding the determination. Once the Office of Retailer Operations and Compliance establishes a violation occurred, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that that the permanent disqualification should be reversed. If this is not demonstrated, the case will be sustained. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

Appellant alleges not holding determinations in abeyance while FOIA responses are pending violates 7 CFR §278.6(b)(1) according to *Triple E Express vs. ROD*, Case No. C0191279 because Appellant is not given a full opportunity to respond. Effective October 26, 2020, the changes to 7 CFR §278.6 and 7 CFR §279.4 went into effect. These changes prohibit holding determinations and administrative reviews in abeyance while FOIA responses are pending. The finding in *Triple E Express* was based on outdated regulations.

Appellant contends that the clerks had been properly trained in the handling of SNAP transactions, and Appellant has terminated employees who have violated SNAP rules and regulations. Appellant provided no evidence in support of these contentions. Unsubstantiated arguments such as these do not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant stated the investigators used flirtation, sexual advances, distraction and misrepresentation to compel store clerks to violate regulations. Appellant did not provide any specific examples in support of these vague allegations.

Appellant insists the clerks allegedly committed the violations without the knowledge of ownership or management. When ownership signed the FNS application to become a SNAP authorized retailer, this included a certification and confirmation that Appellant would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time." The violations listed on this certification document include selling ineligible non-food items. Regardless of whom the ownership of a store may use to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions.

Appellant asserts the burden of proof at this state rests with the ROC to demonstrate a violation occurred. As stated above in the Standard of Review, the burden of proof rests with Appellant to prove by a preponderance of evidence that the administrative action should be reversed.

Hearsay in Administrative Hearings

Appellant contends that the investigative report is hearsay, and that according to U.S. Pipe & Foundry Co. v. Webb, Veg-Mix, Inc. v. U.S. Dep't of Agric., Glaros v. Immigration & Naturalization Serv., and J.A.M. Builders, Inc. v. Herman. hearsay is only admissible in this case if it meets four criteria: "(1) the Investigator was not biased and had no interest in the result of the case; (2) that [the owner] could have obtained the information contained in the statement before the hearing and subpoenaed the investigator; (3) the information is not inconsistent on its face; and (4) the information has been recognized by the courts has inherently reliable." These cases also state hearsay must be reliable and credible.

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. The revisions became effective September 8, 2003. Accordingly, these case citations are not relevant to this administrative review.

Proper Reading of Regulations

Appellant asserted that FNS must consider 7 CFR § 278.6(d) before imposing a sanction: the nature and scope of the violations; whether the firm was warned violations were occurring; and, any evidence of intent to violate the regulations. This argument is based on an incorrect understanding of the regulations. The severity of the penalties, set forth in the subsequent paragraph 7 CFR § 278.6(e), are based on the factors listed in 7 CFR § 278.6(d). For example, permitting the sale of cigarettes with SNAP benefits results in a three-year disqualification, but this becomes five years if the firm had been previously warned. Other sanctions consider intent, such as whether false information on an application was "knowingly submitted" or whether the sale of nonfood items was "the firm's practice" (which carries a three-year disqualification) rather than "due to carelessness or poor supervision" (which results in a six-month disqualification).

Penalty Appropriate

Appellant is correct that clerks refused trafficking on two occasions and refused to sell tobacco. These violations carry more severe penalties. In addition, the investigation report shows that of the five times that nonfood violations were attempted, store personnel permitted them three times.

Appellant assists that there is no evidence of carelessness or poor supervision by management, and deciding that clerks who repeatedly allow the purchase of common ineligible items violates 278.6(e)(5) is arbitrary. If management had been properly supervising clerks - such as reviewing transactions to ensure proper processing of SNAP benefits and disciplining clerks who failed to adhere to proper procedures – clerks would not repeatedly allow the purchase of ineligible items with SNAP benefits. Repeatedly entrusting an unsupervised, inexperienced and/or untrained clerk(s) to handle SNAP benefits is reasonably viewed as careless or the exercise of poor supervision. Accordingly, the Office of Retailer Operations and Compliance attributed violations

to "carelessness, or poor supervision by the firm's ownership or management," pursuant to 7 CFR § 278.6(e)(5) of the SNAP regulations, which results in a disqualification of six months. This penalty is only permitted if the firm has not been previously sanctioned. This is consistent with Appellant's contention that it committed violations in error. Therefore, a six-month disqualification for the violations committed, the minimum, is the appropriate sanction in this case.

Appellant contends the violations were minor in nature, and states that a warning letter is the appropriate sanction according to *Dale & Selby Superette & Deli v. U.S. Dep't of Agric.,* 836 F. Supp. 669, 673 (D. Minn. 1993) *Vasudeva v. United States*, 3 F.Supp.2d 1138, 1146 (W.D. Wash. 1998), aff'd, 214 F.3d 1155 (9th Cir. 2000), *Wolf v. United States*, 662 F.2d 676, 679 (10th Cir. 1981) and *Kim v. United States*, 903 F. Supp. 118 (D.D.C. 1995). In *Dale*, the court found the FNS violated its own regular procedures in imposing a more severe sanction, which did not occur in the present case. In *Vasudeva*, the court found that the retailer had met the stringent requirements for a trafficking civil money penalty through evidence of SNAP training and compliance program. Again, these circumstances did not exist in the current case. In *Wolf*, the court upheld the six-month disqualification sanction. The judge's decision in *Kim* was inconsistent with other court rulings. To require Appellant to receive a warning of violations before administrative action can be taken would render the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA virtually meaningless.

Appellant contends that a warning letter is the appropriate sanction based on *Primo Meat Market vs. Retailer Operations Division.* With regard to this contention, this review cannot address specific circumstances of other firms' sanctions beyond what is already publicly available, except to state that for reasons that may not be readily apparent to the Appellant, the transactions in some cases may not meet agency standards for chargeable violations. In cases where the standard is met, such as the present case, a firm is considered to have committed violations that warrant a disqualification pursuant to regulations at 7 CFR § 278.6(e)(5). The six-month disqualification imposed by the Office of Retailer Operations and Compliance for this first-time violation conforms to SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations.

Evidence of Violation

Appellant contends there is no corroborating evidence, audio or video of violations, or sworn affidavits. As previously stated, 7 CFR § 278.6(a) states, in part:

> FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established **through on-site investigations** . . . . (Emphasis added.)

Appellant was provided a copy of the investigation report, redacted to protect the identity of the investigative operative, which details each occasion during which violations occurred, their dates, the amount of cash provided in exchange for SNAP benefits, and the descriptions and any comments of the clerk involved. The evidence in the record includes EBT receipts which

substantiate the amounts of the trafficking transactions cited in the investigative report and photos of the items purchased. In contrast to Appellant's assertions, there is substantial evidence that the violations occurred.

Investigative Record

Based on a review of the evidence, it appears that the program violations at issue did, in fact, occur as charged. 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 under the supervision of a USDA investigator and all are fully documented. 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.

CIVIL MONEY PENALTY

Appellant requested a fine in lieu of the six-month disqualification. A CMP as an optional penalty in lieu of a six-month disqualification was considered in this case. Such a finding is appropriate only if: 1) a store sells a substantial variety of staple food items, and; 2) 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.

In this regard, some degree of inconvenience to SNAP benefit users is inherent in the disqualification from the SNAP of any participating food store, since the normal shopping pattern of such SNAP benefit holders may temporarily be altered during that period. In this case, however, the Office of Retailer Operations and Compliance has rendered a finding pursuant to 7 CFR § 278.6(f) that it would not be appropriate to impose a CMP in lieu of a period of disqualification. The Office of Retailer Operations and Compliance has determined that Appellant is not the only authorized retail food store in the area "selling as large a variety of staple food items at comparable prices." In addition, the Office of Retailer Operations and Compliance notes that the subject store is classified in the FNS SNAP retailer database as a convenience store. That database also shows four medium grocery stores and one supermarket located within a one-mile radius. All of these stores are easily accessible to customers and offer a variety and quality of staple foods comparable to, or better than, those offered by Appellant. Appellant does not carry any unique items or foods that cannot be found at other stores. Therefore, the earlier determination that Appellant's disqualification would not create a hardship to customers, as differentiated from potential inconvenience, is sustained, and a CMP in lieu of disqualification is not appropriate in this case.

CONCLUSION

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a disqualification of six months against Super Stop Gas & Food Inc from participating as an authorized retailer in SNAP is sustained.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. A new application for participation in SNAP may be submitted ten (10) days prior to the expiration 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 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 receipt 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.

RICH PROULX
ADMINISTRATIVE REVIEW OFFICER

April 5, 2021