

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

Center Market 23,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0239555

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support that a six-month disqualification from the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a six-month disqualification against Center Market 23.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulation at 7 CFR § 279.1 provides 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

The USDA conducted an investigation of the compliance of Center Market 23 with Federal SNAP law and regulations in February 2021. In a letter dated March 2, 2021, the Retailer Operations Division charged the Appellant store with accepting SNAP benefits in exchange for merchandise which included ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred during three (3) out of three (3) compliance visits. The letter further informed the Appellant that the chargeable violations warranted a six-month disqualification period as provided in 7 CFR § 278.6(e)(5). The Appellant was informed it could respond to the charges within ten (10) calendar days following delivery of the charge letter. The charge letter was delivered to the Appellant on March 3, 2021 as documented by a UPS delivery notification in the case record.

The case record documents that, after requesting and receiving an extension, the Appellant, through counsel, replied to the charges in an emailed letter dated April 13, 2021. The Appellant did not deny the facts established by the investigation report but stated that the violations were minimal and requested a warning letter in lieu of a six-month disqualification. Among other contentions, the Appellant stated that corrective action had been taken including firing the clerk who committed the violations and the installation of a new cash register system.

After considering the Appellant's contentions and the evidence in the case, the Retailer Operations Division issued a determination letter dated April 19, 2021. The determination letter informed the Appellant it was disqualified from the SNAP for a six-month period in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a hardship CMP under 7 CFR § 278.6(f)(1). The Retailer Operations Division determined that the Appellant was not eligible for a hardship CMP in lieu of the six-month disqualification because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked April 23, 2021, the Appellant requested an administrative review of the Retailer Operations Division's determination. The request for review was granted. Upon acceptance of the administrative review request, implementation of the six-month disqualification was held in abeyance pending completion of this 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, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

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

7 CFR § 278.2(a) states, in part:

Coupons may be accepted by an authorized retail food store only from eligible households ... and only in exchange for eligible food.

7 CFR § 271.2 states that the definition of "coupon" includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the "Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

7 CFR § 271.2 states, in part:

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 § 278.6(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....

7 CFR § 278.6(e) states, in part:

FNS **shall** take action as follows against any firm determined to have violated the Act or regulations ... (5) **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 non-food items** due to carelessness or poor supervision by the firm's ownership or management. [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'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**. [Emphasis added.]

SUMMARY OF THE CHARGES

During an investigation in February 2021, the USDA conducted three (3) compliance visits at Center Market 23. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated March 2, 2021. The investigation report included Exhibits A through C which provide full details on the results of each compliance visit.

The investigation report documents that SNAP violations were recorded during all three (3) compliance visits as documented by Exhibits A, B, and C. The chargeable violations in Exhibits A, B, and C involved the total sale of seven (7) common ineligible non-food items in exchange for SNAP benefits.

The violations were all conducted by the same clerk. Although this clerk refused to exchange cash for SNAP benefits in Exhibit C, this refusal does not negate or mitigate the chargeable violations documented in Exhibits A, B, and C.

APPELLANT'S CONTENTIONS

The Appellant store owner made the following summarized contentions in its request for administrative review, in relevant part:

- Even though there are other convenience and grocery stores in the area, we are the only ones open 24/7 with great service in our area. We have hundreds of regular customers, some that come in every single day, and purchase items using their EBT card.
- Disqualification to this store will result in a huge loss for our business and the many customers we serve. We also serve people from the neighborhood trailer park who don't have access to a vehicle. The residents of this trailer park have to walk to this store to get their items. Taking away their ability to purchase EBT goods from our store will cause them difficulty purchasing their needs.
- Not only will this negatively affect the customers, it will also have a negative effect on my business and family. Through my business, I am able to provide for my family, as it is our primary source of income, but suffering a loss this big may affect my ability to provide my family with its needs.
- If we can no longer accept SNAP, within the 6 months of the disqualification, the business will slowly decrease in sales and customers, forcing us to cut down on our hours, and eventually, shut down the entire business. If the store itself shuts down, the employees will lose their jobs, some of which have been working with us for years.
- Along with the severe impact this will have on my business, it has also negatively impacted my personal mental health in the form of anxiety. It is extremely difficult to find trustworthy and reliable employees, especially due to the COVID-19 pandemic, which only adds to my stress.
- As the investigator first stated, our employee did refuse to sell the items using the EBT card but was then pressured and manipulated into selling the items anyway. The investigator also asked for cash back, which the employee refused. This incident is isolated to an employee, and this is not a standard practice in our business. In fact, we train our employees against such behavior.
- This incident is the first time our business has had any violation in the eight years it has operated. It is unfair to incite my business for the mistake of one employee, whom we terminated immediately upon discovering this behavior. Additionally, we have upgraded our point of sale system, in order to ensure this is unable to occur in the future, should an employee have the mind to break the rules.
- The owners, accurately and fully train our employees with the knowledge and skills needed to perform their job honestly. We apologize for the employee's mistake, but we do not believe that this mistake was a result of our incompetence.
- We propose a reduction of the disqualification to 30 days, along with the civil money penalty.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Investigation Report

The Appellant states that the investigation report shows that the employee refused to sell the non-food items in exchange for SNAP benefits but was then pressured and manipulated into selling the items anyway. A review of the investigation report does not support this interpretation. In Exhibit A, the clerk exchanged the non-food items for SNAP benefits without making a comment. In Exhibit B, the clerk stated that non-food items could not be purchased with SNAP benefits but did so anyway when asked by the investigator. In Exhibit C, the clerk merely nodded her head and processed the transaction after the investigator asked to purchase non-food items with SNAP benefits.

The investigator's actions were not improper as the investigator was merely doing what SNAP recipients will sometimes attempt to do in real life situations. Store owners are required to train their employees in order to respond to these real life situations and not to violate SNAP rules and regulations under any circumstances. The investigation report and narrative does not reveal any evidence that the investigator did not follow acceptable procedures for an undercover compliance visit.

In conclusion, the investigation report documents that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges are thoroughly documented. A complete review of this documentation has yielded no known error or discrepancy. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation in the case record that confirms specific details of the transactions. The investigation report documents by a preponderance of the evidence that personnel at the store exchanged ineligible items for SNAP benefits.

Owner Accountability

The Appellant states it is unfair to disqualify the store for violations conducted by a single clerk who chose not to follow the rules. Regarding this contention, store owners are at all times accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions.

In addition, the store owner signed the SNAP authorization application for Center Market 23 on March 26, 2018. That application included a signed certification that the owner(s) 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 include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations including accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible non-food items.

Violations Warrant a Six-Month Disqualification

The Appellant states that it should have received a warning letter taking into consideration that this is the firm's first SNAP violation. With regard to this contention, the Retailer Operations

Division will send a warning letter when investigation findings consist of only one (1) or two (2) sales of inexpensive non-food items. However, the investigation report documents that the chargeable violations in this case consisted of seven (7) common non-food items purchased over three (3) transactions; therefore, the Retailer Operations Division correctly determined that a warning letter was not appropriate in this case.

The Appellant states that this is the firm's first SNAP violation. However, the SNAP regulations at 7 CFR § 278.6(e)(5) states, in part, that "FNS **shall take action as follows** against any firm determined to have violated the Act or regulations ... **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 non-food items** due to **carelessness or poor supervision** by the firm's ownership or management." [Emphasis added.]

The Appellant also contends that violations were of limited dollar value and were a mistake on the part of the employee. Please note that the violation of selling SNAP ineligible items as described at 7 CFR § 278.6(e)(5) does not require a minimum dollar value or an element of intent on the part of the violator. Therefore, whether or not the store or clerk intended to conduct any violations is not relevant.

The investigation report documents that the number of chargeable violations over multiple transactions in this case equate to carelessness or poor supervision by ownership. Therefore, the Retailer Operations Division correctly determined that the violations warranted a six-month disqualification, the least severe penalty allowed by regulation under these circumstances. This review does not have the authority to waive or reduce the regulatory six-month disqualification in this case.

Corrective Action

The Appellant states that it has taken corrective action including firing the clerk and acquiring a new cash register system that will identify SNAP ineligible items. With regard to this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. It is not within the authority of this review to consider what subsequent remedial actions may have been taken so that a store may begin to comply with program requirements.

In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations. Therefore, the Appellant's contention that corrective action has taken place does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Hardship to the Store

In its response to the charge letter, the Appellant stated that a six-month disqualification will create a financial hardship for the owner, the store and the store employees. With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence

whenever a store is disqualified from participation in the SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to either the owner, the firm or its employees resulting from the imposition of such penalty. To allow stores to be excused from assessed administrative penalties based on a purported economic hardship would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

HARDSHIP CIVIL MONEY PENALTY

The Retailer Operations Division determined that the Appellant was not eligible for a hardship CMP under 7 CFR § 278.6(f)(1). That regulation reads, in part, “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.” [Emphasis added.]

The case record documents that the Retailer Operations Division determined that a six-month disqualification of Center Market 23, a marginally stocked convenience store located in a rural area, would not cause a hardship to SNAP households as there are other comparable or larger SNAP authorized stores in the area. Within a three-mile radius of Center Market 23 there are 14 SNAP authorized stores. These SNAP authorized stores include seven (7) other convenience stores, three (3) combination grocery stores, a bakery specialty store, a meat/poultry specialty store, a small grocery store, and a supermarket. The meat/poultry specialty store is located only 0.05 miles away; a combination grocery store is only 0.15 miles away; and the supermarket is located 1.55 miles away. In addition, there is no evidence that Center Market 23 carries any international or specialty foods that could not be obtained at these nearby competitor stores.

Based on the analysis above, a six-month disqualification of Center Market 23 would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division decision not to assess a hardship CMP in lieu of a six-month disqualification is **sustained** as appropriate under 7 CFR § 278.6(f)(1).

CONCLUSION

It is established that the violations as described in the letter of charges did in fact occur at Center Market 23 warranting a disqualification of six (6) months in accordance with 7 CFR § 278.6(e)(5). That regulation states that 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 non-food items due to carelessness or poor supervision by the firm’s ownership or management.” Therefore, the decision to impose a six-month disqualification, **the least severe penalty** allowed by regulation, against Center Market 23, Appellant, is appropriate and the action is **sustained**.

In accordance with the Act and regulations, the six-month period of disqualification shall become effective thirty (30) days after receipt of this letter. The Appellant may submit a new

application for SNAP authorization ten (10) days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this determination. Please note that 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 you reside or are 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 receipt of this Decision. Please note that the judicial filing timeframe is specified in the Act, and this office cannot grant an extension.

Under the Freedom of Information Act, 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.

RONALD C. GWINN
Administrative Review Officer

September 2, 2021