

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

Elmwood Bp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0245741

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS) finds there is sufficient evidence to support the determination by the Retailer Operations Division to assess a \$1,272.00 hardship civil money penalty (CMP) against Elmwood Bp (“Appellant”) for program violations in the Supplemental Nutrition Assistance Program (SNAP).

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 assessed a CMP against Elmwood Bp.

AUTHORITY

7 U.S.C. § 2023 and implementing regulations, at 7 CFR § 279.1, provide that “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may . . . file a written request for review of the administrative action with FNS.”

CASE CHRONOLOGY

Elmwood Bp was initially authorized to participate in SNAP on March 24, 2015. Between July 29, 2021, and August 18, 2021, the USDA conducted an undercover investigation of Elmwood Bp to ascertain its compliance with Federal SNAP law. The investigative report documented that personnel of Elmwood Bp violated SNAP regulations by accepting SNAP benefits in exchange for ineligible non-food items on three separate occasions.

In a letter dated October 12, 2021, the Retailer Operations Division charged Appellant with accepting SNAP benefits in exchange for ineligible non-food merchandise, in violation of 7 CFR § 278.2(a). The charge letter informed Appellant that the violations warranted a six-month

disqualification period from SNAP, as provided in 7 CFR § 278.6(e)(5). The letter further stated that under certain conditions, and in accordance with § 278.6(f)(1), FNS may impose a CMP in lieu of disqualification.

Appellant responded to the charge letter on October 18, 2021. In the letter, Appellant denied personal involvement in the violations and said the clerk involved in the violative transactions was fired for other issues.

After considering the Appellant's response and further evaluating the evidence, the Retailer Operations Division issued a determination letter, dated October 20, 2021. This letter informed Appellant that the Retailer Operations Division found that the violations did occur as outlined in the charge letter. The determination letter also stated that because the firm sells a substantial variety of staple food items and the firm's disqualification would cause hardship to SNAP households, the Retailer Operations Division was assessing a CMP of \$1,272.00 in lieu of a six-month disqualification. The letter provided the six-month disqualification would be imposed if Appellant failed to pay the CMP.

In an October 31, 2021, letter, Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and assessment of the CMP has been held in abeyance pending completion of this review.

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. This means the appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and is promulgated through regulation under Title 7 CFR Part 278. Specifically, 7 CFR § 278.6(a), (e)(5), and (f)(1) establish the authority upon which a CMP or six-month disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for 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.... Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section.... **FNS may, in lieu of a disqualification, subject a firm to a civil money penalty of up to an amount specified in § 3.91(b)(3)(i) of this title for each violation if FNS determines that a disqualification would cause hardship to participating households.** [Emphasis added.]

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 nonfood items due to carelessness or poor supervision by the firm's ownership or management.

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 subject to a disqualification is selling a substantial variety of staple food items, and the firm's disqualification would cause hardship to SNAP households because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices.

7 CFR § 278.6(g) outlines the steps for calculating the CMP amount:

- (1) Determine the firm's average monthly redemptions of [SNAP benefits] for the 12-month period ending with the month immediately preceding that month during which the firm was charged with violations.
- (2) Multiply the average monthly redemption figure by 10 percent.
- (3) Multiply the product arrived at in paragraph (g)(2) by the number of months for which the firm would have been disqualified under paragraph (e) of this section. The civil money penalty may

not exceed an amount specified in § 3.91(b)(3)(i) of this title for each violation.

7 CFR § 284.1 Pandemic Electronic Benefits Transfer (P-EBT) states in part:

(a) Overview. Section 1101 of the Families First Coronavirus Response Act (FFCRA; Pub. L. 116-127), as amended, authorized supplemental allotments to certain households. These benefits shall be referred to as Pandemic Electronic Benefits Transfer (P-EBT) benefits. This section establishes the retailer integrity regulations for P-EBT for retailers in any State as defined in Section 3(r) of the Food and Nutrition Act.

(b) Definitions. For this section:

(1) Trafficking means the activities described in the definition of trafficking at § 271.2 of this chapter when such activities involve P-EBT benefits.

(2) Firm's practice means the activities described in the definition of firm's practice at § 271.2 of this chapter when such activities involve P-EBT benefits.

(3) Involving P-EBT benefits or involve P-EBT benefits means activities involving PEBT benefits as well as supplemental nutrition assistance program (SNAP) benefits, or only P-EBT benefits.

(c) Participation of retail food stores and wholesale food concerns, and redemption of PEBT benefits. Requirements and restrictions on the participation of retail food stores and wholesale food concerns and the redemption of coupons described at §§ 278.2, 278.3 and 278.4 of this chapter, including the acceptance of coupons for eligible food at authorized firms, also apply to activities involving P-EBT benefits....

(e) Penalties. For firms that commit certain violations described at §§ 278.6 and 278.2 of this chapter where such violations involve P-EBT benefits, FNS shall take the corresponding action prescribed at § 278.6 or § 278.2 for that violation. For the purposes of assigning a period of disqualification, a warning letter shall not be considered to be a sanction. Specifically, FNS shall: (7) Disqualify the firm for ineligibles violations for such circumstances and corresponding time periods as described at § 278.6(e)(2)(i), (e)(3)(i), (e)(4)(i), and (e)(5) of this chapter, where such violations involve P-EBT benefits....

(g) Administrative and Judicial review. Firms aggrieved by administrative action under paragraphs (d), (e), and (f) of this section may request administrative review of the administrative action with FNS in accordance with part 279, subpart A, of this

chapter. Firms aggrieved by the determination of such an administrative review may seek judicial review of the determination under 5 U.S.C. 702 through 706.

SUMMARY OF INVESTIGATION

During an undercover investigation conducted between July 29, 2021, and August 18, 2021, FNS completed four compliance visits at Elmwood Bp. A report of the investigation was provided to Appellant as an attachment to the charge letter, dated October 12, 2021. The report included Exhibits A through D and provided full details on the results of each compliance visit. SNAP violations documented during three of the four visits included the exchange of ineligible non-food merchandise for SNAP benefits. Two different clerks committed the violations. According to the report, the Appellant firm sold toothpaste, a toothbrush, rolls of bath tissue, packages of bath tissue, and bottles of hand sanitizer in exchange for SNAP benefits.

The report noted that an investigator attempted to exchange SNAP benefits for ineligible non-food merchandise on one occasion but was refused by the clerk on duty. On that same occasion, the investigator attempted to exchange SNAP benefits for cash, but was also refused. These refusals are documented in Exhibit D. The charge letter stated that the violations that occurred in Exhibits A, B, and C warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5) or, if criteria are met, a CMP in lieu of disqualification pursuant to 7 CFR § 278.6(f)(1).

APPELLANT'S CONTENTIONS

Appellant's contentions regarding this matter are summarized as follows:

- As a business owner, I take responsibility for the misuse of food stamps. However, personally I have no involvement in this.
- The clerk involved in these transactions has a lot of other issues as well like stealing, drug use, addiction, etc.
- The clerk has been fired because of some other issues. I gave the clerk a warning because of stealing and the clerk intentionally did this to hurt the business.
- The clerk only worked part-time and from day one I told the clerk the rules and responsibilities and how mistakes impact me.
- I truly apologize for this and I have no personal involvement and will be extra careful in the future.
- I hope you reconsider and please keep in mind that because of COVID and winter business is slowing down. I experience hardships in the winter and now COVID and this will make it even harder for me.

Appellant provided no additional evidence in support of its contentions on administrative review.

The preceding may represent only a summary of Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or referenced herein.

ANALYSIS AND FINDINGS

If a store has never been sanctioned and its personnel, due to carelessness or poor supervision, sells common nonfood items for SNAP benefits, then the penalty under SNAP regulations is a six-month disqualification of the store's SNAP authorization. However, regulations permit FNS to assess a civil money penalty in lieu of disqualification if the firm sells a substantial variety of staple food items, and 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.

This review examines the relevant information regarding the Retailer Operation Division's determination. Once the Retailer Operations Division establishes a violation occurred, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that the finding 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.

In this case, the report of investigation, signed by the investigator under penalty of perjury, documents that the charges of violations are based on the findings of a formal USDA investigation. A complete review of this documentation has yielded no known error or discrepancy. The investigation report is specific and thorough regarding the dates of the violations, the critical facts related thereto, and is supported by documentation that confirms details of the transactions. The Retailer Operations Division has thoroughly documented the transactions in which personnel at the store exchanged ineligible items for SNAP benefits.

In response to the charge letter and on administrative review, Appellant did not offer any evidence or alternative theories to counter the agency's investigative report. In fact, Appellant, concedes that the violations occurred and has fired an employee for conducting the violative transactions. Because the violations themselves do not appear to be in dispute, this review finds, by a preponderance of the evidence, that program violations did occur as charged by the Retailer Operations Division. The assessment of a CMP in lieu of a six-month disqualification is also sustained.

Lack of Knowledge of SNAP Violations

Appellant claims to have no personal involvement in the SNAP violations. Appellant says that a clerk with other disciplinary issues committed the violations and may have done so intentionally to harm the business.

With regard to this contention, the record shows that the Appellant owner signed a reauthorization application to continue participating as a SNAP retailer on November 18, 2020. By signing this application, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. The record clearly establishes that the Appellant owner agreed to abide by program rules, including taking responsibility for violations committed by any of the firm's employees, whether paid or unpaid, new, full-time or part-time. Therefore, the contention that the owner was not personally involved in the violations does not provide a valid basis for dismissing the charges or

for mitigating the penalty imposed. Likewise, any subsequent actions taken so that the store may be to comply with program regulations does not impact the sanction. The penalty imposed is the minimum penalty, and it is only imposed if the firm has not been previously sanctioned.

Hardship to the Store Owner

Appellant contends business is slowing down because of winter and the COVID-19 pandemic, and that a sanction will cause further hardship to the 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 are no provisions in SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty. To excuse ownership from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to 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. Therefore, Appellant's contention that the firm will incur economic hardship based on the assessment of an administrative penalty does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Hardship Civil Money Penalty (CMP)

As noted earlier, the Retailer Operations Division has determined that the Appellant is eligible for a CMP in lieu of a six-month disqualification because the firm is selling a substantial variety of staple food items and the store'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.

The sanction of a civil money penalty is in accordance with 7 CFR § 278.6(a) and (f)(1). After reviewing the evidence in this case, this review agrees with the Retailer Operations Division that a CMP is appropriate in this case.

Regulations, at 7 CFR § 278.6(g), outline the steps for calculating the CMP amount. The CMP is calculated on the basis of the store's SNAP redemptions during the 12 months immediately prior to the firm being charged with SNAP violations. Modifications to the CMP by the Administrative Review Officer may occur only when there is an error in calculation or when the CMP exceeds the statutory limit. This review has no authority to reduce or lessen a CMP amount for any other reason. The calculation of the CMP in this case is as follows:

Month	Total SNAP Redemptions	Month	Total SNAP Redemptions
October 2020	\$1,170.64	April 2021	\$1,878.78
November 2020	\$931.16	May 2021	\$2,997.09
December 2020	\$716.62	June 2021	\$3,467.19
January 2021	\$364.60	July 2021	\$3,384.89
February 2021	\$1,204.76	August 2021	\$3,741.97
March 2021	\$1,271.68	September 2021	\$4,332.73

Cumulative SNAP Redemptions for the 12-Month Period Preceding the Charge Letter	\$25,462.11
Average Monthly Redemptions (AMR) – to the nearest dollar	\$2,122.00
Multiply the AMR by 10 percent – to the nearest dollar	\$212.00
Multiply by the number of months of the disqualification \$212.00 X 6	\$1,272.00
Maximum Limit – Multiply the number of violative transactions (3) by \$11,000	3 X \$11,000 = \$33,000.00

The calculated CMP of \$1,272.00 is less than the sanction limit of \$33,000.00. The penalty imposed is the lesser of these amounts. Based on the information above and the regulations cited at 7 CFR § 278.6(g), it is the determination of this review that a CMP in the amount of \$1,272.00 was properly assessed in this matter. Accordingly, a modification to the CMP is not appropriate.

CONCLUSION

This review finds, by a preponderance of the evidence, that program violations of 7 CFR § 278.2(a) did occur at Elmwood Bp during a USDA investigation. Accordingly, the Retailer Operations Division's determination to assess a CMP against Elmwood Bp is sustained. Appellant should contact Financial Management at 703-605-0483 to discuss payment of this penalty in installment payments or online in one lump sum, as provided in the October 20, 2021, determination letter.

In accordance with the Food and Nutrition Act and SNAP regulations, this penalty shall become effective 30 days after receipt of this decision. Should Appellant choose to accept disqualification rather than pay the civil money penalty, a new application for participation in the SNAP may be submitted ten (10) days prior to the expiration of the six-month period of disqualification.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this determination are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in SNAP regulations, at 7 CFR § 279.7. If 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 Appellant owner resides or is engaged

in business, or in any court of record of the State having competent jurisdiction. If a Complaint is filed, it must be filed within 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.

MICHELLE WATERS
Administrative Review Officer

February 8, 2022