

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

Eds Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0246081

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 the Retailer Operations Division's assessment of a **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** hardship civil money penalty (CMP) against Eds Market (hereinafter "Eds Market" or "Appellant") in lieu of a six month disqualification from the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(5), 7 CFR § 278.6(f)(1), and 7 CFR § 278.6(g) in its administration of the SNAP, when it imposed a hardship CMP of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in lieu of a six month disqualification against Eds Market.

AUTHORITY

7 U.S.C. § 2023 and its 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

The Department of Agriculture conducted an investigation of the compliance of Eds Market with Federal SNAP law and regulations during the period November 15, 2021 through November 19, 2021. In a letter dated February 28, 2022, the Retailer Operations Division charged the Appellant with accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on three out of three compliance visits. The letter further informed the Appellant that the violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5). The letter also stated that under certain

conditions, FNS may impose a hardship civil money penalty (CMP) in lieu of a disqualification as provided in 7 CFR § 278.6(f)(1).

The charge letter noted that per SNAP regulations Section 278.6(b), the Appellant has the right to present any information, explanation or evidence regarding the charges and must reply within 10 calendar days of the date of receipt of the charge letter. Per UPS confirmation of delivery, the charge letter was delivered to the Appellant at the store address of record on March 3, 2022.

In responses to the Retailer Operations Division of March 4, 2022, March 9, 2022, and March 11, 2022, the Appellant replied to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

After considering the Appellant's responses and the evidence in the case, the Retailer Operations Division issued a determination letter dated April 15, 2022 informing the Appellant that the violations cited in the charge letter occurred at the firm and that a six month period of disqualification was warranted. The determination letter also stated that the Appellant was eligible for a hardship CMP as Eds Market is selling a substantial variety of staple food items and the firm's disqualification would cause hardship to SNAP households. Thus, a hardship CMP in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was imposed in lieu of the six month SNAP disqualification.

In a letter postmarked April 19, 2022, the Appellant requested an administrative review of the Retailer Operations Division's decision to impose a hardship CMP in lieu of a six month disqualification of Eds Market from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated April 26, 2022 and implementation of the hardship CMP was held in abeyance pending completion of this review. In an email correspondence of April 26, 2022, the Appellant submitted additional information in support of the request for administrative review and stated that it would be setting up a payment plan.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e) establish the authority upon which a one year 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 or the households' authorized representative, 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: (1) 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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system...”

7 CFR § 278.6(e)(5) states, in part: “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 food stamp 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) states, in part: “Amount of civil money penalties for hardship and transfer of ownership. FNS shall determine the amount of the civil money penalty as follows:

- (1) Determine the firm's average monthly redemptions ... 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”

Notwithstanding the above, there is an agency limit of \$11,000 per violation as the maximum CMP amount.

SUMMARY OF THE CHARGES

During an investigation conducted from November 15, 2021 through November 19, 2021, USDA conducted three compliance visits at Eds Market. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated February 28, 2022. 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 three of the three compliance visits and involved the sale of a variety of items best described in regulatory terms as “common nonfood items”. The misuse of SNAP benefits noted in Exhibits A, B, and C warrant a

disqualification as a SNAP retail food store for a period of six months. The exchange of these ineligible items for SNAP benefits is in violation of 7 CFR § 278.2(a).

The Retailer Operations Division determined that the assessment of a hardship CMP of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in lieu of a six month disqualification was the appropriate penalty for these violations as Eds Market is selling a substantial variety of staple food items and the firm's disqualification would cause hardship to SNAP households.

APPELLANT'S CONTENTIONS

In the replies to the charge letter, in the request for administrative review, and in subsequent correspondence, the Appellant made the following summarized contentions, in relevant part:

- The owner apologizes for the SNAP violations.
- The owner was not aware that ineligible items were being purchased with SNAP benefits during his absence.
- Since the pandemic, the owner has had a hard time getting good employees to work at the Appellant.
- The employee that was hired did a lot of damage to the property, lost cash, lost customers, and perhaps more.
- The owner trained the employee on the SNAP rules and what items can and cannot be purchased with SNAP benefits.
- The owner is aware that he is responsible for what occurs at the store.
- One of the owner's friends is helping out at the store in the owner's absence due to illness.
- The owner promises that these types of SNAP violations will not occur again.
- The owner requests reconsideration of the imposed sanction.
- The Appellant has not been cited for prior SNAP transactions.
- The imposed CMP sanction would impose a financial hardship on the firm as the firm has already been struggling.

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

ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the determination made by the Retailer Operations Division, and it is limited to the facts at the basis of the Retailer Operations Division's determination at the time it was made. Upon review, the evidence supports that the Appellant established a record of selling nonfood items as defined by Section 271.2 of the regulations, on three out of three compliance visits. There are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of claims that the sales of ineligible items were completed by an employee during the owner's absence. Regardless of who the store owner utilizes to handle store business, the owner is accountable for the proper handling of SNAP benefit transactions.

The regulations establish that an authorized food store may be disqualified from participating in SNAP when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. While the Appellant is correct that the firm has not been cited for prior SNAP violations, the acceptance of SNAP benefits for ineligible items is a violation of the SNAP rules and regulations. 7 CFR Section 278.6(e)(5) specifies that FNS shall “disqualify the firm 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 nonfood items due to carelessness or poor supervision by the firm’s ownership or management.” 5 U.S.C. § 552 (b)(7)(E). Therefore, the violations in this case are not too limited to warrant a disqualification.

There are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective actions implemented subsequent to findings of program violations. Therefore, the owner’s contention that he promises that these types of SNAP violations will not occur again and that one of the owner’s friends is working at the store in the owner’s absence does not provide any valid basis for dismissing the charges or mitigate the penalty imposed.

Regarding the Appellant’s contention that the imposed hardship civil money penalty would impose a financial hardship on the firm, there is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused 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 competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been sanctioned in the past for similar violations. Therefore, the Appellant’s contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

The Retailer Operations Division correctly concluded that the Appellant was eligible for a hardship CMP in lieu of a six month SNAP disqualification as Eds Market is selling a substantial variety of staple food items and the firm’s disqualification would cause hardship to SNAP households. Thus, a hardship CMP in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was imposed in lieu of the six month SNAP disqualification.

The case record documents that the Retailer Operations Division correctly calculated the amount of the hardship CMP under 7 CFR § 278.6(g). That regulation states that the hardship CMP is to be calculated on a formula which includes the SNAP redemption volume of the store during the twelve months prior to the firm being notified of the violations. Modifications to the hardship CMP may occur only when there is an error in calculation or the amount exceeds the agency limit. The Retailer Operations Division correctly determined, using the methodology described in 7 CFR § 278.6(g), that the calculated amount of the hardship CMP was 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

CONCLUSION

Accordingly, the determination by the Retailer Operations Division to assess a hardship CMP in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in lieu of a six month disqualification from participating as an authorized retailer in the SNAP is sustained. Based on the discussion above, the amount of the hardship CMP was properly computed by the Retailer Operations Division. Please note that if the penalty is not paid, the six month SNAP disqualification will be imposed. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). You may contact the FNS Retailer Repayment Team at 1-703-605-0483 to discuss any issues related to payment of the civil money penalty.

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. In the event a six month disqualification is imposed for failure to pay the CMP, or some lesser disqualification period reflecting the unpaid portion of the CMP, the Appellant may reapply for authorization to participate in the SNAP up to 10 days prior to the end of the disqualification period. When eligible, the 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 1-877-823-4369.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to 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.

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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

June 10, 2022