

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

**Moms Country Store,

Appellant,

v.

Retailer Operations Division,

Respondent.**

Case Number: C0231620

FINAL AGENCY DECISION

It is the decision of the United State Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the six-month disqualification of Moms County Store (Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate. However, the determination is modified to permit a civil money penalty in the amount of \$834.00 as an option in lieu of the six-month disqualification.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(1) and 7 CFR § 278.6(a) and (e)(4) in its administration of the SNAP, when it imposed a six-month period of disqualification against Appellant.

AUTHORITY

7 USC § 2023 and the 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 USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of October 3, 2020, through October 17, 2020. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. As a result of evidence compiled during this investigation, by letter dated January 6, 2021, the Retailer Operations Division charged

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ownership with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a) and noted the violations warranted a six-month disqualification period. The letter also stated that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

After considering the retailer's reply and the evidence, the Retailer Operations Division notified Appellant in a letter dated November 30, 2021, that the violations cited in the charge letter occurred at the firm and that a six-month period of disqualification was warranted. The letter stated that eligibility for a hardship CMP was not applicable as there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

By letter dated December 2, 2021, Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. The appeal was granted and implementation of the penalty has been held in abeyance pending completion of this review.

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, 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). 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 § 278.6(a) states, inter alia:

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, that a firm is to be disqualified for six months:

[I]f 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 § 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.

In addition, 7 CFR § 278.6(f)(1) provides for civil money penalty (CMP) assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP households benefit because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It reads, inter alia:

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 benefit because there is no other authorized retail food store in the area selling as large a variety of staple food items.

SUMMARY OF CHARGES

During an investigation conducted between October 3, 2020, and October 17, 2020, an investigator conducted six compliance visits at Appellant. A report of the investigation dated December 14, 2020, was provided to Appellant as an attachment to the charge letter. The investigation report included Exhibits A through F which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during four of the compliance visits and involved the sale of ineligible items including mouthwash, facial tissues, party cups, paper plates, plastic forks, plastic cups, and beer. Upon review, the evidence indicates that Appellant established a record of selling non-food items, as defined by Section 271.2 of the regulations, on multiple occasions as noted in Exhibits A, B, C, and D, furnished with the charge letter.

APPELLANT’S CONTENTIONS

Appellant, through counsel, made the following summarized contentions in its administrative review request dated December 2, 2021, and subsequent correspondence submitted on December 17, 2021, in relevant part:

- The review was not held in abatement while documents were requested under FOIA which is a violation of the regulations.
- The Department lacks sufficient evidence upon which to have a six-month disqualification.
- Appellant vehemently denies that the violations occurred at the store.
- If the allegations were accurate, it would warrant a warning letter.
- The nature and scope of the violations, any prior action taken by FNS to warn the firm about violations, and any other evidence to show the firm’s intent must be considered.
- There is no evidence exists in the record which would indicate that these transactions were the result of ownership or managerial carelessness or poor supervision – a prerequisite for a six-month disqualification under 7 CFR 278.6(e)(5).

- Appellant maintains a strict set of rules for the transactions to be run in compliance with SNAP regulations and have reviewed the regulations.
- To say that the store owner/manager was careless or failed to supervise the employees is without basis.
- Appellant asks that a warning letter be issued in lieu of a six-month disqualification pursuant to 7 CFR §278.6(e)(7), where the violations are “too limited to warrant a disqualification.”
- The store utilizes a computerized point of sale system which was intended to avoid ineligible item sales and to track transactions more accurately.
- Appellant submitted transaction receipts that show that the items which were purchased by the investigator were errantly labeled “food” within the system or were categorized as “unknown” and then permitted to process on EBT because of the errant labels.
- Ownership had taken reasonable and fiscally practical steps to prevent SNAP violations.
- The violations are exceptionally minor in nature and proper corrective action can be achieved by the issuance of a warning letter.
- The investigator’s affidavit is “hearsay” by definition – an out of court statement offered to prove the truth of the matter asserted.
- Appellant is in an area with no authorized SNAP retailers within a mile and only a handful within four miles and therefore should be eligible for a CMP.
- There are no stores in the area that offer fresh vegetables and meats.
- Appellant has items such as fresh Jalapeños, chorizo, cilantro, potatoes, onions, garlic, and serrano peppers, and then Canned menudo, jalapenos, salsa, cactus, ramen noodles, dry beans, bacon, yogurt, deli meats, cheese, and butter.
- The loss of Mom’s Country Store would be a loss to this community as one of the few stores that carry fresh foods for miles

The preceding may represent only a brief summary of the Appellant’s contentions presented 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.

ANALYSIS AND FINDINGS

The investigation report documents that the charges of violations are based on the findings of a formal investigation. The transactions cited in the letter of charges are thoroughly documented. A complete review of this documentation has yielded no 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 that confirms specific details of the transactions. The EBT receipts in the record show the name and location of Appellant, and all transactions were identified in the system data to support that they did occur at Appellant. The documentation presented by the Retailer Operations Division provides through a preponderance of the evidence that the violations as reported occurred at the Appellant firm.

Not Carelessness or Poor Supervision

7 CFR § 278.6(e)(5) states, as noted above, that FNS shall disqualify a 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 common non-food items due to carelessness or poor supervision by the firm's ownership or management. Counsel argues that the transactions were not the result of carelessness or poor supervision. The investigation report documents that the chargeable violations in this case consisted of seven non-food items over four transactions. The violations were determined by the Retailer Operations Division to represent the first sanction for the firm and evidence carelessness or poor supervision. The imposition of a six-month disqualification, the least severe penalty allowed by regulation, is appropriate.

Hearsay

Appellant states that the investigation report is "hearsay" under the Federal Rules of Evidence and the Administrative Procedures Act. Regarding this contention, the administrative review process and administrative determinations made by the SNAP Administrative Review Branch are not subject to the Federal Rules of Evidence or the Administrative Procedures Act. This is because the SNAP administrative review process has its own separate authority under Section 14(a)(5) of the Food and Nutrition Act of 2008.

Warning Letter

Counsel contends that a warning letter is more appropriate than a six-month disqualification. It should be noted that a warning letter is not prerequisite to a disqualification. However, the SNAP regulations do provide for a warning letter in some cases. Specifically, 7 CFR 278.6(e)(7) states the following: "Send the firm a warning letter if violations are too limited to warrant a disqualification." As previously stated, the investigative report documented that a total of seven ineligible items were exchanged for SNAP benefits on seven separate occasions. These violations are not considered "violations that are too limited to warrant a disqualification." Therefore, Appellant's contention does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

Civil Money Penalty

There is insufficient evidence to support the denial of a civil money penalty. A civil money penalty in the amount of \$834.00 is assessed as an option in lieu of the six-month disqualification.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to impose a disqualification of six months against Moms Country Store from participating as an authorized retailer in SNAP is modified. Consistent with 7 CFR § 278.6(f), a civil money penalty shall be imposed as an option in lieu of completion of the six-month disqualification period. In accordance with 7 CFR § 278.6(g), this civil money penalty shall be in the amount of \$834.00. The Retailer Operations Division will be informed of this decision. Appellant may expect to hear from that office in the near future with respect to the arrangements for payment of this 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. Should Appellant

choose to accept disqualification rather than pay the civil money penalty, 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 USC § 2023 and 7CFR § 279.7. 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 the Appellant's owners 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 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

May 19, 2022