

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

**A Country Store Inc.,

Appellant,

v.

Retailer Operations Division,

Respondent.**

Case Number: C0250046

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA) that there is sufficient evidence to support the assessment of a \$9,078.00 hardship civil money penalty (CMP) against A Country Store Inc. (Appellant) in lieu of a six-month disqualification from the Supplemental Nutrition Assistance Program (SNAP). Please note that failure to pay the CMP will result in a 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 CMP in lieu 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 January 31, 2022, through March 15, 2022. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. As a result of evidence compiled during this investigation, by letter dated May 18, 2022, 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.

Appellant, through counsel, replied to the charges by letter dated May 24, 2022, and explained that the owner a disqualification will cause a hardship and the owner took corrective action measures. After considering the retailer's reply and the evidence, the Retailer Operations Division notified Appellant in a letter dated June 21, 2022, that the violations cited in the charge letter occurred at the firm and that a six-month period of disqualification was warranted. However, the Retailer Operations Division determined that the Appellant was eligible for a hardship CMP in lieu of a six-month disqualification because the firm's disqualification would cause a hardship to SNAP households. As a result, the determination letter informed the Appellant it was assessed with a \$9,078.00 hardship CMP in lieu of a six-month disqualification in accordance with 7 CFR § 278.6(f)(1). The store was informed that failure to pay the hardship CMP would result in a six-month disqualification.

By letter dated June 23, 2022, ownership 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 January 31, 2022, and March 15, 2022, an investigator conducted six compliance visits at Appellant. A report of the investigation dated March 22, 2022, 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 each of the three compliance visits and involved the sale of ineligible items including: a bottle of whisky, a can of beer, and a roll of paper towels. 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 C, D, and F furnished with the charge letter.

APPELLANT'S CONTENTIONS

Appellant made the following summarized contentions in its administrative review request dated June 23, 2022, in relevant part:

- Appellant wishes to appeal the amount of the CMP.
- Appellant does not have the income from the business to justify the mount of the fine.
- The sum of \$9,078.00 will cause extreme hardship.
- Appellant passed three out of the six transactions, and this shows this was not an organized attempt to defraud.
- One employee was re-trained and one was terminated.

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 regarding 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.

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

Counsel argues that there were no violations on three of the visits. The investigation report documents that the chargeable violations in this case consisted of three non-food items over three transactions conducted by two different employees. 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.

Civil Money Penalty

The violations cited in the investigation report would normally warrant a six-month disqualification. However, the Retailer Operations Division determined that the assessment of a \$9,078.00.00 hardship CMP in lieu of a six-month disqualification was appropriate 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 6 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 that the hardship CMP is to be calculated on a formula which includes the SNAP redemption volume of the store during the twelve (12) months prior to the firm being charged with violations. Modifications to the hardship CMP may occur only when there is an error in calculation, or the amount exceeds the agency limit of \$11,000 per violation. Using the methodology described in 7 CFR § 278.6(g), Retailer Operations Division correctly calculated the amount of the hardship CMP as \$9,078.00.

Appellant Hardship

Appellant, through counsel, explains that the amount of the CMP will cause an extreme hardship. It is recognized that economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment based on possible economic hardship to the firm resulting from imposition of such 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 competing stores and 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 any valid basis for dismissing the charges or for mitigating the penalty imposition.

Corrective Action

Counsel explains that the owner re-trained one employee and then terminated another employee. It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not within the authority of this review to consider what subsequent remedial actions may have been taken or will be taken in the future so that a store may begin to comply with program requirements. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment based on corrective actions implemented after investigative findings of program violations. Therefore, Appellant's contention that it took corrective action to prevent future violations does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CONCLUSION

The violations as described in the letter of charges did in fact occur at Appellant warranting a disqualification of six months in accordance with 7 CFR § 7 278.6(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." However, the Retailer Operations Division determined that a six-month disqualification of Appellant would create a hardship for SNAP households. Therefore, in lieu of a six-month disqualification, the Retailer Operations Division assessed a hardship CMP against the Appellant of \$9,078.00. The decision in this case is hereby sustained. Please note that failure to pay the CMP will result in a six-month disqualification.

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 owner resides or is 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

December 22, 2022