

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

Ava Food & Family Center,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0257122

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to assess a hardship civil money penalty (CMP) against Ava Food & Family Center (hereinafter Appellant) in lieu of a six month disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), § 278.6(e)(5), and § 278.6(f)(1) in its administration of the SNAP when it assessed a hardship CMP in lieu of a six month period of disqualification against Appellant.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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

A USDA investigator conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period September 6, 2022, through September 22, 2022. The investigation determined that personnel at the Appellant firm accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. All four transactions were deemed clearly violative and warrant a six month disqualification period. The items sold are best described in regulatory terms as common nonfood items such as dishwashing detergent,

bathroom tissue, deodorant, a birdhouse, a whiskey decanter, two porcelain figurines, and a clock. Additionally, three of the four transactions involved major ineligible items. The investigative report indicates that these violative transactions were handled by the same clerk. It is noted for the record that the clerk did refuse to exchange SNAP benefits for cash in Exhibit D. It is also noted that the clerk asked for the investigator's PIN in each of the four transactions and also overcharged the investigator by \$0.44 in Exhibit A. Asking for a recipient's PIN and overcharging are both additional violations of SNAP rules and regulations.

As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant, in a letter dated November 2, 2022, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations “. . . warrant a disqualification period of six months. The letter also states that under certain conditions, FNS may impose a CMP in lieu of a disqualification (Section 278.6(f)(1)).” Appellant responded to the charges in a letter dated November 6, 2022.

After giving consideration to the evidence, the Office of Retailer Operations and Compliance notified Appellant in a letter dated February 15, 2023, that it determined that violations had occurred at the firm, and that an assessment of a hardship CMP in the amount of \$8,964.00 in lieu of a six month SNAP disqualification was an appropriate penalty for the violations committed and in accordance with Section 278.6(f)(1). This determination was made because the Appellant firm is selling a substantial variety of staple food items and its disqualification would cause hardship to SNAP households.

By a request sent via email on February 19, 2023, Appellant appealed the Office of Retailer Operations and Compliance's decision and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review. Subsequent correspondence was received.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Section 278. In particular, Sections 278.6(a) and (e)(5) establish the authority upon which a hardship CMP may be assessed against a retail food store or wholesale food concern in lieu of a six month disqualification.

7 CFR § 271.2 states that: 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 § 278.2(a) states that: Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food. Further, the citation specifies that coupons may not be accepted in exchange for cash, in payment of interest on loans, or for any other nonfood use.

7 CFR § 278.6(a) states that: 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)(5) of the SNAP regulations states, in part, that a firm is to be disqualified 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 or poor supervision by the firm's ownership or management.”

7 CFR § 278.6(f)(1) states that, FNS may impose a CMP 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. FNS may disqualify a store which meets the criteria for a CMP if the store had previously been assigned a sanction. A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

7 CFR § 278.6 Disqualification of retail food stores... and imposition of civil money penalties in lieu of disqualifications states in part: “(p) Freedom of Information Act (FOIA) requests and appeals. A FOIA request or appeal for records shall not delay or prohibit FNS from making a determination regarding disqualification or penalty against a firm under paragraphs (c) and (d) of this section, or delay the effective date of a disqualification or penalty listed in paragraph (e) of this section.

APPELLANT’S CONTENTIONS

The following may represent a summary of Appellant’s contentions 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 herein:

- The owner has operated the business since 1975 without any issues with USDA or the Food Stamp program. He takes prides in offering this service to the indigent in Ava. The owner apologized and stated that this would not happen again;
- The owner described a customer coming in at closing who said she was paying by card so the owner tried to ring it up as a credit card transaction, but it wouldn’t go through. The customer said it was a SNAP card from Missouri and the owner asked if they could get

non-food items on the card in Missouri and she said yes. The customer told him her PIN and the SNAP transaction went through. The owner remembers the customer coming in one other time and he rang-up the purchases the same way as before;

- The owner was flustered because of trying to close the store, and then the card not going through as a credit card, and the different color of the card from Missouri confused him;
- The owner realized he had made a mistake when he was getting gas in Missouri after this and asked the clerk if SNAP in Missouri could buy nonfood items and was told no;
- As previously explained, the owner was confused by the different card from Missouri and also distracted by trying to close the business for the day. He regrets his mistake and understands he was wrong, but this was not a normal situation. He knows each of his regular customers and stocks food to meet their needs. There is little risk of anyone from outside of the community coming to his store for their Food Stamp needs. He has reviewed the requirements and promises to adhere to them. He understands that an out of state card does not change the requirements;
- The store was once thriving, but has struggled for years due to competition from major stores in other towns. Vendors won't deliver due to the decreased volume or charge exorbitant fees to do so. The owner shops in the evenings and Sundays at other retailers since it is cheaper than paying the delivery fees. His daughters have worked to add a consignment piece to the business to help bring in additional revenue;
- Sales have decreased significantly, but he keeps grocery items to serve the indigent people in Ava without transportation;
- The owner does not have the ability to pay this penalty. He is an 80 year old who lives off of his social security in a home owned by his daughter. He does not receive a salary or any income from the store. The owner's wife died in 2017 and the store is the owner's main purpose and keeps him occupied. He has no credit or money to pay the fine so the family would have to pay it; and,
- The penalty appears very excessive based on the minimal purchases and long history without any issues. A significant reduction in the HCMP amount is requested.

Appellant submitted no evidence or other rationales in support of these contentions.

ANALYSIS AND FINDINGS

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 Office of Retailer Operations and Compliance and is limited to what circumstances were at the basis of the action at the time such action was made. In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. There is also no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, while the owner has reviewed the SNAP requirements and promises to adhere to them

is a positive step, it does not provide any valid basis for dismissing the charges, or for mitigating the penalty imposed. When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer in 1975 and again during the 2020 reauthorization, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. Additionally, a claim of having a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

The FNS investigative report clearly shows that an employee, subsequently identified as the store owner, accepted SNAP benefits for ineligible items on four separate occasions during the more than two week investigative period indicating a series of SNAP violations most likely resulting from little or no training. The report shows that the nature and scope of the violations under review do violate SNAP regulations, and the transaction amounts cited in the report also match FNS transaction records for the dates in question. There is no regulatory threshold for the dollar value of the ineligible items purchased or for the timeframe in which they were purchased. The acceptance of SNAP benefits for ineligible items is a violation of SNAP rules and regulations. The ineligible items sold were obvious nonfood items and would not readily be confused with eligible edible food items. SNAP regulations explicitly state that FNS shall disqualify a store for a six month period 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 the sale of common nonfood items in exchange for SNAP benefits due to carelessness and a lack of training by the firm's ownership or management. The applicable regulations do not specify intent as being a required element for a six month disqualification. It is noted that store ownership admitted to conducting the transactions in its reply to the charges dated November 6, 2022.

A review of the investigative report shows no errors or discrepancies and a comparison of the dates/times/amounts on the POS receipts issued by the Appellant firm to the USDA investigator correspond to the dates/times/amounts provided to FNS by the firm's EBT processor when it submitted the transactions to FNS for reimbursement. Other evidence provided (photos of the items purchased and detailed donation records signed by a local charitable organization) also support the details provided in the investigative report. While a firm that has previously received warnings of possible violations or that has been sanctioned before could receive a more severe penalty, SNAP regulations do not provide any grounds for dismissing or reducing penalties for those firms that have not received warnings or previously been sanctioned. The record does show that store ownership received a USDA FNS voluntary compliance letter in May 2021 advising that transactions at the firm were exhibiting unusual patterns indicative of trafficking or other SNAP violations and reminding ownership of the penalties associated with SNAP violations.

Appellant is correct that the firm has no previous history of SNAP program violations or warnings. However, this does not necessarily mean that the firm has not been conducting

violative transactions. Neither FNS nor Appellant has sufficient data to conclusively prove that the firm was or was not conducting violative transactions prior to the start of the undercover investigation. However, the results of the investigation showed SNAP violations conducted by the store owner in all four of the four visits to the firm that included attempts to purchase ineligible items over a period of more than two weeks. While it is not definitive, it can be readily inferred that violative transactions were more likely than not occurring in previous months based on these investigatory visits.

Regarding store ownership's claimed confusion over a SNAP EBT card from another state that was a different color, the SNAP Training Guide for Retailers, which is one of the primary training resources for store owners and employees, explains that each State has its own EBT card and may even have their own name for SNAP. The Training Guide makes clear that non-food sales are not permitted using SNAP and provides a toll-free number for the USDA FNS Retailer Service Center to call for any questions. Additionally, the Training Guide for Retailers specifically states that only the customer is allowed to enter his or her PIN into a Point of Sale (POS) device and that store personnel should not ask customers for their PIN.

Based on this discussion, the decision by the Office of Retailer Operations and Compliance to disqualify the firm for a six month period was the appropriate penalty and there is no valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

Appellant is not eligible for a trafficking CMP as these only apply in cases of permanent disqualifications. The matter under review is a term disqualification of six months and does not involve trafficking therefore a trafficking CMP cannot be considered under 7 CFR § 278.6.

The Office of Retailer Operations and Compliance determined that the Appellant firm is selling a substantial variety of staple food items and the firm's disqualification would cause hardship to SNAP households. Thus, pursuant to 7 CFR § 278.6(f), it is the decision of USDA that a six month disqualification would create a hardship to SNAP recipients, and that a CMP in lieu of disqualification is appropriate in this case. The case record documents that, under 7 CFR § 278.6(g), the Office of Retailer Operations and Compliance correctly calculated the amount of the hardship CMP. 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 12 months prior to the firm being notified of the violations that led to the store's disqualification. Modifications to the hardship CMP amount may occur only when there is an error in calculation or the amount exceeds the statutory limit.

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did occur as charged and as admitted to by store ownership. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted by a USDA investigator and signed under penalty of perjury. A review of this documentation has yielded no indication of error or discrepancy in any of the reported

findings. Rather, the investigative record is specific and accurate with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail. Accordingly, the determination by the Office of Retailer Operations and Compliance to assess a hardship CMP in the amount of \$8,964.00 in lieu of a six month disqualification from participating as an authorized retailer in SNAP is sustained. Based on the discussion above, the amount of the hardship CMP was properly computed by the Office of Retailer Operations and Compliance. Please note that if the penalty is not paid, the six month SNAP disqualification will be imposed. Appellant may contact the USDA-FNS Financial Management Accounting Division at (703) 605-0483 to discuss a monthly payment plan, or follow the instructions in the Office of Retailer Operations and Compliance's letter dated February 15, 2023, regarding payment options.

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, Appellant may reapply for authorization to participate in the SNAP up to 10 days prior to the end of the disqualification period. When eligible, Appellant may reapply for SNAP authorization using the application and instructions contained on the FNS web site. Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (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.

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

March 21, 2023