

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

**Commerce Road Shell,  
Appellant,**

**v.**

**Retailer Operations Division,  
Respondent.**

**Case Number: C0245489**

**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 a one-year disqualification of Commerce Road Shell (hereinafter Appellant), from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) as initially imposed by the Retailer Operations Division.

**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 in its administration of the SNAP, when it imposed a one-year disqualification against Appellant.

**AUTHORITY**

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provides 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 Commerce Road Shell, with Federal SNAP law and regulations from September 17, 2021, through September 29, 2021. In a letter dated November 9, 2021, Retailer Operations Division charged the Appellant firm with accepting SNAP benefits in exchange for merchandise which included common ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on three (3) out of three (3) compliance visits. The letter further informed the Appellant that the violations warranted a disqualification period of one year as provided in 7 CFR § 278.6(e)(5) and (6).

In correspondence dated November 18, 2021, Appellant, through counsel, replied to the charge letter and generally stated that based on the materials provided by the FNS, the proffered penalty imposed is unduly harsh. It is important to note that my client has never been accused of any other misconduct pertaining to the store at issue. Furthermore, my client has developed an effective compliance policy regarding SNAP benefits, which reflects a commitment to ensure that the business is operated in a proper manner. Based on the description of the employee who purportedly committed the subject malfeasance, it appears that this single bad actor has been terminated and no longer works at the premises. Additionally, my client will take corrective action to thwart and further misconduct.

After reviewing the evidence and the response from the Appellant, Retailer Operations Division issued a determination letter dated November 23, 2021. The determination letter informed the Appellant it was disqualified from the SNAP for a period of one year in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that Retailer Operations Division considered Appellant's eligibility for a hardship CMP under 7 CFR § 278.6(f)(1). Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the one-year disqualification because there was another authorized retail store in the area selling as large a variety of staple foods at comparable prices.

In a letter dated November 29, 2021, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. The appeal was accepted and the implementation of the one-year disqualification was held in abeyance pending completion of this review.

## **STANDARD OF REVIEW**

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an 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 & Nutrition Act of 2008<sup>1</sup>, as amended, 7 U.S.C. § 2021, and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e) establish the authority upon which a period of disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, inter alia: "Coupons may be accepted by an authorized retail food store only from eligible households.... Only in exchange for eligible food"

7 CFR § 271.2 states, inter alia: "Eligible food means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products

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<sup>1</sup> Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246

prepared for immediate consumption”

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 1977, 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) states, inter alia: “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(e)(6) states, inter alia: “Double the appropriate period of disqualification prescribed in paragraphs (e)(2) through (5) of this section as warranted by the evidence of violations if the same firm has once before been assigned a sanction.”

7 CFR § 278.6(f)(1) states, inter alia: “FNS may impose a civil money penalty as a sanction in lieu of when... the firm’s disqualification would cause hardship to Food Stamp [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.”

### **APPELLANT’S CONTENTIONS**

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

1. Based on the materials provided by FNS, the proffered penalty imposed is unduly harsh. My client has never been accused of any other misconduct pertaining to the store at issue.
2. My client has developed an effective compliance policy regarding SNAP benefits, which reflects a commitment to ensure that the business is operated in a proper manner. This was in effect at the time the subject allegations occurred.
3. Based on the description of the employee who purportedly committed the subject malfeasance, it appears that this single bad actor has been terminated and no longer works at the premises.
4. My client will take corrective action to thwart any further misconduct.

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

### **ANALYSIS AND FINDINGS**

FNS initially authorized Commerce Road Shell as a convenience store which was previously disqualified from SNAP for six-months. The Appellant’s store was reinstated in the SNAP program on July 24, 2017. During an investigation from September 17, 2021, through

September 29, 2021, the USDA conducted three (3) compliance visits at Appellant's store. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated November 9, 2021. 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 committed during all three (3) of the compliance visits. They involved the sale of one (1) 150 sheet 2-ply roll of Member's Mark Super Premium Towels, one (1) 7-ounce bottle of Dawn Ultra dishwashing liquid, one (1) 12.6 oz bottle of Joy Ultra lemon scent dishwashing liquid, one (1) 15 count box of GoodSense tall kitchen bags, one (1) 40 count pack of Value Star foam plates, and one (1) 24 count box of Daily super strong luncheon size forks. The clerk refused the exchange of an undisclosed amount of SNAP benefits for cash in exhibit C.

Appellant, through counsel, contends that the penalty imposed is unduly harsh and that Appellant has never been accused of any other misconduct pertaining to store issues. Appellant, through counsel also contends that the employee who purportedly committed the malfeasance was a single bad actor and has been terminated. With regard to these contentions, it is important to note that as owner of the store, Appellant is liable for all violative transactions handled by either paid or unpaid store personnel. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food Stamp Act and the enforcement efforts of the USDA. The record also reflects that there were three (3) separate clerks involved in the SNAP violations and not just one single clerk.

It is recognized that some degree of 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 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, as amended, 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 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.

Furthermore, it is important to note that 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. There is no provision in the Act, regulations, or agency policy that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

It is also important to clarify for the record that the purpose of this review is to determine if the earlier decision of the Retailer Operations Division, to disqualify Appellant from participation in the SNAP for a period of one year, was in fact a correct one. It is not within the scope of this review to consider what subsequent actions Appellant may have taken so that its store may begin to comply with program requirements.

Based on a review of the evidence in this case, there is no question that program violations did occur. Three separate clerks working at Appellant sold common ineligible items to an FNS investigator on three (3) separate investigative visits. The investigative record is specific and accurate with regard to the dates of the violations, the exchange of SNAP benefits for ineligible items, and in all other critically pertinent detail. As such, the contentions presented do not constitute valid grounds for dismissal of the current charges of violations, or for mitigating the impact of those charges. Based on a review of the evidence in this case, it appears that the SNAP violations at issue did, occur as charged.

The record reflects that Appellant was previously disqualified from SNAP, for violations against the program, for a period of six-months. In this regard, SNAP regulations at 7 CFR § 278.6(e)(6) states, inter alia: “Double the appropriate period of disqualification prescribed in paragraphs (e)(2) through (5) of this section as warranted by the evidence of violations if the same firm has once before been assigned a sanction.” Therefore, in this case, the disqualification period of one-year is appropriate.

### **CIVIL MONEY PENALTY**

Retailer Operations Division considered Appellant’s eligibility for a hardship CMP under 7 CFR §278.6(f)(1). The Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the 1-Year disqualification because there were at least one (1) authorized retailer within a one-mile radius of Appellant including a medium grocery store, selling as large a variety of staple foods at comparable prices.

### **CONCLUSION**

The documentation presented by 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) 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 common nonfood items due to carelessness or poor supervision by the firm’s ownership or management. As previously stated, 7 CFR § 278.6(e)(6) states, inter alia: “Double the appropriate period of disqualification prescribed in paragraphs (e)(2) through (5) of this section as warranted by the evidence of violations if the same firm has once before been assigned a sanction.”

The violations were determined by Retailer Operations Division to represent the second sanction for the firm and evidence carelessness and poor supervision. Therefore, the imposition of a 1-year disqualification, the least severe penalty allowed by regulation, is appropriate.

It is therefore established that the violations as described in the letter of charges did in fact occur at the Appellant firm warranting a disqualification of one year in accordance with 7 CFR § 278.6(e)(6). Based on the discussion herein, the decision to impose a 1-year disqualification against Commerce Road Shell is appropriate and the action is sustained.

In accordance with the Act and regulations, the one-year period of disqualification shall become effective thirty (30) days after receipt of this letter. The Appellant may submit a new application for SNAP participation ten (10) days prior to the expiration of the 1-year disqualification period.

### **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (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 (FOIA), 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.

Monique Brooks  
ADMINISTRATIVE REVIEW OFFICER

October 20, 2022