

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

**Downtown Super Market,  
Appellant,**

**V.**

**Retailer Operations Division,  
Respondent.**

**Case Number: C0228932**

**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 six-month disqualification of Downtown Super Market., (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 six-month 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 Downtown Super Market, with Federal SNAP law and regulations from May 7, 2020, through May 16, 2020. In a letter dated June 24, 2020, 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 four (4) out of four (4) 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).

In correspondence dated June 30, 2020, Appellant responded to the charge letter and generally stated I reviewed the incident with my employees, and they indicated that with the COVID-19 situation, they were trying to get customers out of the store as quickly as possible and had become too lax about ringing the taxable items separately. I reviewed the program regulations once again with all of my employees and stressed to them that they cannot accept SNAP benefits for taxable items, like non-food items and prepared food items. They understand the seriousness of this issue and have promised me that they will be more diligent in ringing out customers properly. I would ask that the USDA impose a civil money penalty (CMP) in lieu of a disqualification.

After reviewing the evidence of the case and the Appellant's response, Retailer Operations Division issued a determination letter dated July 8, 2020. The determination letter informed the Appellant it was disqualified from the SNAP for a period of six months 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 six-month disqualification because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter dated July 13, 2020, Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. The appeal was accepted, and the implementation of the six-month 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, 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 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(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

In correspondence dated August 18, 2020, Appellant, through counsel, submitted a Freedom of Information Act (FOIA) request for case information. The record reflects that the FOIA was completed and closed on October 5, 2022.

In correspondence dated October 26, 2022, Appellant through counsel, submitted the following summarized contentions in its request for administrative review, in relevant part:

1. The absence of a large grocery store in the area has a direct impact on how the local SNAP participants rely upon the subject store.
2. This store provides a higher portion of the households eligible food items and is often utilized for supplemental shopping trips.
3. The store has three employee clerks who operate the cash register. Each of these clerks have been trained by the owner in how to operate the cash register. (*Counsel explained training but no supporting documentation was provided*)
4. There was no prior notice sent to my client by FNS to indicate that violations had occurred. If there was, FNS would not be seeking a six-month term disqualification (as it only qualifies where prior notice has not been sent). So, from the outset there is no indication that the store ownership or management had any notice that alleged violations were occurring in SNAP transactions at the Store.
5. Furthermore, there is no evidence demonstrating that the store’s ownership or management were careless or exercised poor oversight of the store or its employees. The Store’s clerks were all trained in exactly how to process the EBT transactions, what items were eligible, and how to avoid mistakes.
6. In the instant case, the issuance of a warning letter is more consistent with the circumstances presented in this case, the considerations under 7 C.F.R. §278.6(d), and the requirements set out in 7 C.F.R. §278.6(e)(5) for a greater sanction of disqualification.

No additional documentation was provided during this review. 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 Downtown Super Market. as a medium grocery store on December 29, 2017. During an investigation from May 7, 2020, through May 16, 2020, the USDA conducted four (4) compliance visits at Appellant's store. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated June 24, 2020. The investigation report included Exhibits A through D, which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were committed during four (4) of the four (4) compliance visits. They involved the sale of the following:

- 1 Pack of Krasdale Compostable White paper coffee filters
- 1 Box of Reynolds KITCHENS Slow Cooker Liners Regular Size (4 LINERS)
- 1 Box of Reynolds KITCHENS Oven Bags Large Size (5 BAGS)
- 1 Box of Reynolds Slow Cooker LINERS (4 LINERS)
- 1 Box of Hefty BAGGIES SANDWICH BAGS (150 SANDWICH BAGS)
- 1 Box of Krasdale heavy duty forks (48 forks)
- 1 Box of Krasdale large snap & seal sandwich bags (30 SINGLE ZIPPER BAGS)
- 1 Box of GLAD Zipper Sandwich Bags ( 50 BAGS)

The clerk refused the exchange of an undisclosed amount of SNAP benefits for cash in Exhibit D.

The record reflects that ownership did not refute the SNAP violations in its June 30, 2020, response to the charge letter dated June 24, 2020. Regarding Appellant's contentions, through counsel, it is important to note that as owner of the store, Appellant is liable for all volatile 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.

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 contentions, through counsel, do not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Furthermore, it is 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 six months, 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.

It is also 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. As previously stated, Appellant through counsel, provided an explanation of the compliance procedures and training program for employees but did not provide any documentation in support of training explanations.

Based on a review of the evidence in this case, there is no question that program violations did occur. Clerks working at Appellant sold common ineligible items to an FNS investigator on four (4) separate investigative visits which have been verified through EBT receipts received during each visit, and items purchased, photographed, and donated during the investigation. 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. Moreover, the record reflects that ownership admitted to ineligible items being sold for SNAP benefits based on conversations with its employees.

The cost of the ineligible items purchased with SNAP benefits does not determine if the purchase is a violation. The purchase of any ineligible item, regardless of cost, is considered a SNAP violation. 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.

### **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 six-month disqualification because there are at least 32 authorized retailers within a one-mile radius of Appellant's store. The record reflects that there is at least one (1) supermarket and two (2) other medium grocery stores, and all are 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.

The violations were determined by Retailer Operations Division to represent the first sanction for the firm and evidence carelessness and poor supervision. Therefore, the imposition of a six-month 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 six months in accordance with 7 CFR § 278.6(e)(5). Based on the discussion herein, the decision to impose a six-month disqualification against Downtown Super Market is appropriate and the action is sustained.

In accordance with the Act and regulations, the six-month 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 six-month 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

November 28, 2022