

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

Fox's General Store,

Appellant,

v.

Case Number: C0250732

Retailer Operations Division,

Respondent.

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 the Retailer Operations Division's assessment of a \$3,276.00 hardship civil money penalty (CMP) against Fox's General Store (hereinafter "Fox's General Store" or "Appellant") in lieu of a one year disqualification from the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(5), 7 CFR § 278.6(f)(1), and 7 CFR § 278.6(g) in its administration of the SNAP, when it imposed a hardship CMP of \$3,276.00 in lieu of a one year disqualification against Fox's General Store.

AUTHORITY

7 U.S.C. § 2023 and its 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 Department of Agriculture conducted an investigation of the compliance of Fox's General Store with Federal SNAP law and regulations during the period May 24, 2022 through June 8, 2022. In a letter dated July 19, 2022, the Retailer Operations Division charged the Appellant with accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on three out of five 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). The letter also stated that under certain conditions, FNS may

impose a hardship civil money penalty (CMP) in lieu of a disqualification as provided in 7 CFR § 278.6(f)(1).

The charge letter noted that per SNAP regulations Section 278.6(b), the Appellant has the right to present any information, explanation or evidence regarding the charges and must reply within 10 calendar days of the date of receipt of the charge letter. Per UPS confirmation of delivery, the charge letter was delivered to the Appellant at the store address of record on July 20, 2022.

In responses to the Retailer Operations Division of July 22, 2022, July 25, 2022, and July 26, 2022, the Appellant replied to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

After considering the Appellant's responses and the evidence in the case, the Retailer Operations Division issued a determination letter dated August 8, 2022 informing the Appellant that the violations cited in the charge letter occurred at the firm and that a one year period of disqualification was warranted. The determination letter also stated that the Appellant was eligible for a hardship CMP as Fox's General Store is selling a substantial variety of staple food items and the firm's disqualification would cause hardship to SNAP households. Thus, a hardship CMP in the amount of \$3,276.00 was imposed in lieu of the one year SNAP disqualification.

In an email correspondence of August 17, 2022, the Appellant requested an administrative review of the Retailer Operations Division's decision to impose a hardship CMP in lieu of a one year disqualification of Fox's General Store from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated September 9, 2022 and implementation of the hardship CMP was 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, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e) establish the authority upon which a one year disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2 (a) states, in part: "Coupons may be accepted by an authorized retail food store only from eligible households or the households' authorized representative, and only in exchange for eligible food."

7 CFR § 271.2 states that the definition of "coupon" includes: ... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

7 CFR § 271.2 states, in part: (1) 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 § 278.6(a) states, in part: “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: “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, in part: “FNS may impose a civil money penalty 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 food stamp 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, in part: “Amount of civil money penalties for hardship and transfer of ownership. FNS shall determine the amount of the civil money penalty as follows:

- (1) Determine the firm's average monthly redemptions ... for the 12-month period ending with the month immediately preceding that month during which the firm was charged with violations.
- (2) Multiply the average monthly redemption figure by 10 percent.
- (3) Multiply the product arrived at in paragraph (g)(2) by the number of months for which the firm would have been disqualified under paragraph (e) of this section”

Notwithstanding the above, there is an agency limit of \$11,000 per violation as the maximum CMP amount.

SUMMARY OF THE CHARGES

During an investigation conducted from May 24, 2022 through June 8, 2022, USDA conducted five compliance visits at Fox’s General Store. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated July 19, 2022. The investigation report included Exhibits A through E which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during three of the five compliance visits and involved the sale of a variety of items best described in regulatory terms as “common nonfood items”. The misuse of SNAP benefits noted in Exhibits A, B, and D warrant a disqualification period

of one year as provided in 7 CFR § 278.6(e)(6). The exchange of these ineligible items for SNAP benefits is in violation of 7 CFR § 278.2(a).

The Retailer Operations Division determined that the assessment of a hardship CMP of \$3,276.00 in lieu of a one year disqualification was the appropriate penalty for these violations as Fox's General Store is selling a substantial variety of staple food items and the firm's disqualification would cause hardship to SNAP households.

APPELLANT'S CONTENTIONS

In the replies to the charge letter and in the request for administrative review, the Appellant made the following summarized contentions, in relevant part:

- The owners run an honest business.
- The store manager was responsible for the three violative SNAP transactions. The manager claims that the investigator did not show or make her aware that an EBT card was being used for the purchase. The video watched by the owner supports this (Note: No video was provided by the Appellant in support thereof).
- On June 8, 2022, the store manager sent out a group text to employees who work the cash registers stating that there was a problem with a customer coming in and hiding an EBT card and trying to make the manager think it was a credit card.
- Once the manager enters in the amount, the customer will enter the code for what type of card is being used. Clerks have to pay attention to the type of card that is being used by customers.
- The owners are aware that it is their responsibility to know what card is being used. This is one area where the Appellant failed. This procedure will be corrected.
- The owners train employees on the SNAP rules but unfortunately they cannot be at the store from opening to closing.
- For the improper handling of SNAP benefits at the Appellant, the owners will take the following steps to prevent future occurrences: (1) Retrain all employees on what is allowed to be purchased with SNAP benefits; (2) Reinforce procedures to prevent violations; and (3) Hold all employees accountable for following the procedures.
- The Appellant is a small country store in a rural area and services a farming community of around 300 families. The Appellant is the only business in the area. The nearest store is approximately 8-10 miles away.
- Times have been hard on small businesses, especially since the beginning of the pandemic. The Appellant has had a difficult retaining employees and sometimes has to take what it can get.
- Over the past year the Appellant conducted approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP sales. The Appellant's profit at approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is about 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Appellant pays 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per month for the EBT processor. That is 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per year subtracted from the store's profit from EBT. As such, the Appellant makes very little profit accepting SNAP benefits. A CMP of \$3,276.00 would be about 5 U.S.C. § 552 (b)(6) & (b)(7)(C) times greater than the store would profit from for the next year in EBT sales.
- While the loss of the firm's ability to accept SNAP does not drastically affect the Appellant's bottom line, it does affect the people in the community who rely on SNAP benefits.

In support of these contentions, the Appellant submitted for review an image from a text thread dated June 8, 2022.

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

ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the determination made by the Retailer Operations Division; it is limited to the facts at the basis of the Retailer Operations Division's determination at the time it was made.

When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, 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.

Regardless of who the store owner utilizes to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf.

While the Appellant contends that it provided training on the SNAP rules to employees prior to receipt of the charge letter, the FNS investigative report shows that a female employee working at the Appellant firm accepted SNAP benefits for ineligible nonfood items on three separate occasions during the investigative period indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. 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. Additionally, a review of the report shows no errors or discrepancies.

Investigative personnel stand by their report that the items listed in the investigation report were, in fact, purchased and have documentation on file that confirms the items listed were donated to and signed for by a charitable organization following each transaction. Also supporting the conclusion that the investigation did take place at the subject store are EBT receipts obtained during the investigation whose transaction amounts correspond exactly to the purchase amounts and times indicated in each of the Exhibits of the investigation report, and clearly bear the name and address of the subject store.

There is no regulatory threshold for the dollar value of the ineligible items purchased or for the timeframe in which they were purchased. While the Appellant is correct that the employee in Exhibit E refused to allow ineligible nonfood items to be purchased with SNAP benefits and refused to traffick SNAP benefits, the acceptance of SNAP benefits for ineligible items as noted in Exhibits A,

B, and D 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.

The 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 or poor supervision by the firm's ownership or management. However, the SNAP regulations state that this sanction shall be doubled as warranted by the evidence of violations if the same firm has once before been assigned a sanction. 7 CFR § 278.6(e)(6) of the SNAP regulations states, "Double the appropriate period of disqualification prescribed in § 278.6(e)(5) as warranted by the evidence of violations if the same firm has once before been assigned a sanction". FNS's records indicate that the Appellant was sanctioned a hardship civil money penalty in lieu of a six month disqualification on October 2, 2019 for selling ineligible nonfood items with SNAP benefits during an undercover compliance investigation that was conducted at the Appellant during the period April 29, 2019 through July 16, 2019.

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, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. 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. The Appellant did not provide any evidence that the violations cited in the charge letter did not occur.

Corrective Action

With regard to the Appellant's contentions with respect to the implementation of corrective actions to prevent future SNAP violations from occurring, 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 the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that it has taken or will take corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Financial Hardship

Regarding the Appellant's contention that the imposed hardship civil money penalty would impose a financial hardship on the firm, there is no provision in the SNAP regulations or internal agency policy directives 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 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 sanctioned in the past for similar violations. Therefore, the 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.

CIVIL MONEY PENALTY

The Appellant contends that a SNAP disqualification would impose a hardship on area SNAP customers. The Retailer Operations Division correctly concluded that the Appellant was eligible for a hardship CMP in lieu of a one year SNAP disqualification as Fox's General Store is selling a substantial variety of staple food items and the firm's disqualification would cause hardship to SNAP households. Thus, a hardship CMP in the amount of \$3,276.00 was imposed in lieu of the one year SNAP disqualification.

The case record documents that the Retailer Operations Division correctly calculated the amount of the hardship CMP under 7 CFR § 278.6(g). 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 twelve months prior to the firm being notified of the violations. Modifications to the hardship CMP may occur only when there is an error in calculation or the amount exceeds the agency limit. The Retailer Operations Division correctly determined, using the methodology described in 7 CFR § 278.6(g), that the calculated amount of the hardship CMP was \$3,276.00.

CONCLUSION

Accordingly, the determination by the Retailer Operations Division to assess a hardship CMP in the amount of \$3,276.00 in lieu of a one year disqualification from participating as an authorized retailer in the SNAP is sustained. Based on the discussion above, the amount of the hardship CMP was properly computed by the Retailer Operations Division. Please note that if the penalty is not paid, the one year SNAP disqualification will be imposed. The Appellant may contact the FNS Financial Management Accounting Division at 1-703-605-0483 to discuss a monthly payment plan, or follow the instructions in the Retailer Operations Division's letter dated August 8, 2022, 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 one year disqualification is imposed for failure to pay the CMP, or some lesser disqualification period reflecting the unpaid portion of the CMP, the Appellant may reapply for authorization to participate in the SNAP up to 10 days prior to the end of the disqualification period. When eligible, the Appellant may reapply for SNAP authorization using the application instructions contained on the FNS web site. Questions regarding the application process can be answered by the FNS Retailer Service Center at 1-877-823-4369.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (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, FNS is 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

November 4, 2022