

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

**Harbor West Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0257636**

**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 finding that a six month disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Harbor West Market (hereinafter “Harbor West Market” or “Appellant”) by the Retailer Operations Division of FNS.

**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 period of disqualification against Harbor West Market.

**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 Harbor West Market with Federal SNAP law and regulations during the period October 14, 2022 through October 25, 2022. In a letter dated November 21, 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 four 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). 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 November 23, 2022.

In a response to the Retailer Operations Division of November 27, 2022, the Appellant responded 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 response and the evidence of this case, the Retailer Operations Division issued a determination letter dated December 9, 2022. The determination letter informed the Appellant that the firm 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 the Retailer Operations Division considered the Appellant's eligibility for a hardship civil money penalty 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 were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In an email correspondence of December 20, 2022, the Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. FNS granted the Appellant's request for administrative review by letter dated December 28, 2022. Upon acceptance of the administrative review request, implementation of the six month disqualification was held in abeyance pending completion of this review. In an email correspondence of January 16, 2023, the Appellant, through counsel, submitted additional information in support of the request for administrative 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 promulgated through regulations under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e) establish the authority upon which a 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 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, 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.

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 disqualification 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.

### **SUMMARY OF THE CHARGES**

During an investigation conducted from October 14, 2022 through October 25, 2022, USDA conducted four compliance visits at Harbor West Market. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated November 21, 2022. 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 recorded during three of the four compliance visits and involved the sale of a variety of items best described in regulatory terms as "common nonfood items" and a "major ineligible item". The misuse of SNAP benefits noted in Exhibits A, B, and C warrants a disqualification as a SNAP retail food store for a period of six months. The exchange of these ineligible items for SNAP benefits is in violation of 7 CFR § 278.2(a).

### **APPELLANT'S CONTENTIONS**

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

In the reply to the charge letter, in the administrative review request, and in subsequent correspondence, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- Recently the Appellant has been struggling to keep employees for a long period of time.
- When attempting a surveillance check of the specific transactions noted during the investigation, the Appellant could not view them as the system's storage capacity is only two weeks.
- The SNAP violations were mistakes made by two clerks and were unintentional, minimal and isolated instances.
- The clerk in Exhibit D refused to sell ineligible nonfood items with SNAP benefits and refused to traffick SNAP benefits which demonstrates that the firm's policy is in fact to comply with the SNAP rules. This shows that employees are trained on the SNAP rules and not to exchange SNAP benefits for ineligible nonfood items or for cash.
- The six month SNAP disqualification should be reversed given the nature and scope of the alleged violations.
- The amount of the ineligible items purchased was minimal, to wit \$49.58, purchased over the course of three separate visits of a total of four visits. Only one major ineligible item was purchased and the rest were common nonfood items.
- The Appellant has no previous history of SNAP program violations or warnings.
- The Appellant was not given any warning that SNAP violations were occurring.
- The Appellant has identified needed improvements/changes to avoid future SNAP violations.
- The Appellant has reviewed and shared the training guidelines as well as the educational videos available on the SNAP website with staff. Going forward, monthly SNAP training will be conducted with employees.
- The Appellant has updated the cash register to automatically print detailed transaction receipts (both EBT and cash register receipts) and hand to the customer.
- The Appellant has identified a bad practice of a new cashier starting to scan products and bag merchandise while the customer is still shopping which, in turn, will be eliminated so that ineligible nonfood items will not be scanned with eligible foods.
- The Appellant is considering hiring a company that will install a new scanning system that would mark eligible and ineligible products to assist in sorting these products.
- The price increase difference between EBT receipts and the cash register screen is due to cashiers possibly forgetting to hit the subtotal on all items so it appears that all items except the last one is noted on the customer screen.
- Going forward the cash register will automatically print the receipts and the cashiers will hand both the cash register and EBT receipts to customers.
- The Appellant is eligible for a hardship civil money penalty in lieu of a SNAP disqualification as a SNAP disqualification would impose a hardship on area customers. The Appellant sells a wide variety of groceries, baked goods, dairy products, household goods, and snacks. There are no supermarkets in the area and the closest mini market selling similar items is a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) located 0.5 miles away, so well beyond walking distance. The only other store within walking distance is a gas station convenience store which only sells snacks, candy bars, and the like. The Appellant offers a larger variety at better prices than these two area competitors. The Appellant also sells many items in family-size or bulk quantities which are not sold by area competitors. Naturally, the family-size and bulk items are more economical and affordable. The Appellant services many customers from several large apartment complexes within walking distance, many of whom are SNAP recipients. There are many disabled and elderly residents in the nearby residential communities who are incapable of driving to other area stores for groceries. Within walking distance of the Appellant are also several motels and a Catholic Center as well as a major bus

stop. There are no other markets nearby which are open during the early morning and late night hours.

- The six month SNAP disqualification action taken against 5 U.S.C. § 552 (b)(6) & (b)(7)(C) should be dismissed. The submitted Bureau of Alcoholic Beverage Control License and Business Tax Certificate do not note that she is an owner of the business. She is a spouse of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and not an owner, manager, or employee of the firm. She has no involvement in the firm.

In support of these contentions, the Appellant, through counsel, submitted the following information for review:

- Business License Tax Receipt;
- Department of Alcoholic Beverage Control Alcoholic Beverage License;
- Food stock photos (24 total);
- Google Map comparing the Appellant to the location of 5 U.S.C. § 552 (b)(6) & (b)(7)(C);
- Google map showing nearby convenience stores; and
- Photos of food stock at local gas station (3 total).

## **ANALYSIS AND FINDINGS**

### **SNAP Violations**

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.

The Appellant contends that the SNAP violations were mistakes made by two clerks and were unintentional, minimal and isolated instances. However, 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.

The FNS investigative report shows that employees 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. Therefore, the evidence supports the conclusion that the Appellant was not misidentified as the offending store and that the SNAP violations as noted occurred.

The Appellant contends that the amount of the ineligible items purchased with SNAP benefits was minimal. However, 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 D refused to sell ineligible nonfood items with SNAP benefits as well as refused to traffick SNAP benefits, the acceptance of SNAP benefits for ineligible items as noted in Exhibits A, B, and C is a violation of the SNAP rules and regulations and warrant a disqualification as a SNAP retail food store for a period of six months. 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 or poor supervision by the firm's ownership or management.

The Appellant contends that the clerk's refusal in Exhibit D to sell ineligible nonfood items with SNAP benefits as well as to traffick SNAP benefits demonstrates that the firm's policy is in fact to comply with the SNAP rules. This shows that employees are trained on the SNAP rules and not to exchange SNAP benefits for ineligible nonfood items or for cash.

However, had an effective compliance policy and program been in effect at the firm, it is unlikely that the employees would have made such obvious mistakes. The more likely explanation is that store ownership and/or management failed to properly train and subsequently supervise the employees. Additionally, had store ownership and/or management been supervising the employees through occasionally monitoring them using videotape, if available, or in person, it would have readily noticed that they were allowing the sale of ineligible nonfood items in exchange for SNAP benefits. It also would have been immediately evident to store ownership and/or management that the employees were deficient in their knowledge of SNAP rules and regulations had it periodically spot checked the employees' knowledge and abilities by asking questions about SNAP eligible/ineligible items. Either of these basic supervisory techniques would have provided a no cost method for store ownership and/or management to ensure that store employees were not putting the firm's SNAP authorization at risk.

These are clear signs of poor or no supervision by store ownership and/or management. It is highly improbable, based on the willingness of the employees to exchange SNAP benefits for ineligible nonfood items, that the only instances of SNAP violations were those transactions identified as part of the FNS undercover investigation. These actions more likely than not represent an ongoing pattern of SNAP violations at the Appellant firm.

As previously stated, store ownership is responsible for all SNAP transactions at the firm and therefore, a certain minimal level of oversight and training on the part of ownership to ensure employees, especially new employees, are not violating SNAP laws or regulations is expected. It would be unusual and irresponsible for store ownership to not have a program of ongoing supervision of employee performance and conduct by periodically monitoring store transactions, including those involving SNAP, and reviewing daily balance sheets to ensure store employees were not stealing from the firm or conducting other activities that would jeopardize the licenses and income that the firm is dependent upon. As noted previously, under SNAP regulations, the penalty for allowing the

purchase of ineligible nonfood items using SNAP benefits as the result of poor supervision by ownership or management is a six month disqualification. The regulations do allow SNAP retailers to pay a hardship CMP, if eligible, as explained in the Civil Money Penalty section of this Final Agency Decision.

The Appellant is correct that the firm has no previous history of SNAP program violations or warnings. However, a record of participation in the 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.

With regard to the Appellant's contention that the firm was not given any warning that SNAP violations were occurring, 7 CFR § 278.6(d)(2) & (3) of the SNAP regulations provides that "The FNS office making a disqualification or penalty determination . . . shall consider . . . any prior action . . . to warn the firm about the possibility that violations are occurring . . .". The citation simply requires FNS to consider any prior warnings when determining a sanction. It does not require FNS to give such warnings. FNS did not consider prior actions to warn the Appellant about the possibility that violations were occurring because there were no prior warnings.

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. The Appellant did not provide any evidence that the violations cited in the charge letter did not occur.

Based on this discussion, the decision by the Retailer Operations Division 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.

### **Corrective Actions**

With regard to the Appellant's contentions with respect to the implementation of corrective actions to ensure that future SNAP violations do not occur, 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.

### **Change in Ownership**

With regard to the Appellant's contentions with respect to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) not being an owner of the Appellant, the most recent SNAP reauthorization application submitted by the firm, which was signed by 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on October 16, 2020, lists 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as "Owners/Officers" of the Appellant. If there has been a change in store ownership, please contact the Retailer Service Center at 1-877-823-4369 to notify and provide documentation of an ownership change.

### **CIVIL MONEY PENALTY**

The Appellant contends that a SNAP disqualification would impose a hardship on area SNAP customers and requests the imposition of a civil money penalty in lieu of a SNAP disqualification.

The Retailer Operations Division determined that the Appellant was not eligible for a hardship civil money penalty (CMP) 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] 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." [Emphasis added]. 5 U.S.C. § 552 (b)(7)(E).

Based on the evidence, the disqualification of Harbor West Market would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division's decision not to assess a hardship CMP in lieu of a six month disqualification is sustained as appropriate under 7 CFR § 278.6(f)(1).

### **CONCLUSION**

It is therefore established that the violations as described in the letter of charges did in fact occur at Harbor West Market warranting a disqualification of six months in accordance with 7 CFR § 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 nonfood items due to carelessness or poor supervision by the firm's ownership or management". Therefore, the decision to impose a six month disqualification, the least severe penalty allowed by regulation, against Harbor West Market, the Appellant firm, is appropriate and the action is sustained.

In accordance with the Food and Nutrition Act of 2008 and the regulations there under, the six month period of disqualification shall become effective thirty (30) days after receipt of this letter. A new application for participation may be submitted by the firm ten (10) days prior to the expiration of this six month period.

## **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

March 22, 2023