

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

Summit Mobil,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0244647

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 5 U.S.C. § 552 (b)(6) & (b)(7)(C) hardship civil money penalty (CMP) against Summit Mobil (hereinafter "Summit Mobil" or "Appellant") in lieu of a six-month disqualification from the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is to determine 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 when it imposed a hardship CMP of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in lieu of a six-month disqualification against Summit Mobil.

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

Summit Mobil was originally authorized to participate as a retailer in SNAP on November 14, 2007. Between July 29, 2021 and August 17, 2021, USDA conducted an undercover investigation at Summit Mobil to ascertain the firm's compliance with Federal SNAP laws and regulations. It was reported that during the course of the investigation, store personnel violated SNAP rules by allowing ineligible nonfood items to be purchased with SNAP benefits on three occasions. The investigation revealed that one clerk was involved in the transactions involving the sale of ineligible nonfood items with SNAP benefits.

In a letter dated September 22, 2021, the Retailer Operations Division charged the Appellant with violating the terms and conditions of the SNAP regulations 7 CFR § 278.2(a). The charge letter informed the Appellant that the violations “...warrant a disqualification period of 6 months (Section 278.6(e)(5)). Under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1))”.

The record reflects that on September 30, 2021, and again on October 1, 2021, the Appellant replied to the Retailer Operations Division’s charges verbally and in writing. The record reflects that the Retailer Operations Division received and evaluated the information prior to making a determination in the case.

The Retailer Operations Division concluded that the violations cited in the charge letter occurred and issued a determination letter dated October 5, 2021. This letter informed the Appellant that a six-month period of disqualification was warranted. However, the determination letter also stated that the Appellant was eligible for a hardship CMP as Summit Mobil was 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 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was imposed in lieu of the six- month SNAP disqualification.

In a letter postmarked October 14, 2021, the Appellant, through counsel, appealed the Retailer Operations Division’s determination by requesting an administrative review. The request was granted, and the implementation of the sanction was put on hold pending completion of this review. No additional information was submitted in support of the request for administrative review.

STANDARD OF REVIEW

In an appeal of adverse action, the appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 & REGULATIONS

The controlling law in this matter is found in the Food and 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), (e), and (f) establish the authority upon which a six-month disqualification or hardship civil money penalty 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(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”

SUMMARY OF THE CHARGES

During an investigation conducted from July 29, 2021 to August 17, 2021, USDA made four compliance visits at Summit Mobil. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated September 22, 2021. The investigation report included Exhibits A through D, which provided full details on the results of each compliance visit. The investigation report documented 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.” The misuse of SNAP benefits noted in Exhibits A, B, and C warrant 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).

The Retailer Operations Division determined that the assessment of a hardship CMP of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in lieu of a six-month disqualification was the appropriate penalty for

these violations as Summit Mobil was selling a substantial variety of staple food items and the firm's disqualification would cause hardship to SNAP households.

APPELLANT'S CONTENTIONS

The following represents only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions submitted, including any not specifically summarized or listed here.

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

- The Appellant takes full responsibility for the SNAP violations.
- The Appellant hired a new employee who conducted the violative SNAP transactions.
- The employee had been trained on the SNAP rules.
- The responsible employee has been terminated.
- The penalty assessed is unduly burdensome and unwarranted for the minor infractions.
- The alleged employee conduct was de minimis and not intentional.
- This is the first time that the Appellant has been cited for SNAP violations.
- To prevent future SNAP violations, the Appellant is having long-time SNAP customers from the community come to the store and attempt to get employees to violate the SNAP rules by requesting to purchase ineligible nonfood items with SNAP benefits. If any employee violates the SNAP rules, they will be fired.
- The Appellant has also told clerks to attach every SNAP receipt to the cash register so they can be verified the next day.
- A SNAP disqualification would impose a hardship on area customers.

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.

It is also important to note that the owners are liable for all SNAP transactions conducted at the store, regardless of whom the ownership of the store utilizes to conduct transactions, including any paid or unpaid individual. To allow the store ownership to disclaim accountability for the acts performed at the store, including SNAP transactions, would render meaningless enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA.

The transactions cited in the letter of charges were conducted by a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no known error or discrepancy. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions.

The FNS investigative report shows that one 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. The investigation report documents by a preponderance of the evidence that a store employee engaged in the misuse of SNAP benefits noted in Exhibits A, B, and C and warrants a disqualification as a SNAP retail food store for a period of six months.

The Appellant contends that the penalty is unduly burdensome and unwarranted for the minor infractions. However, neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto cite any minimum dollar amount of SNAP benefits for transactions involving the sale of ineligible items to be defined as violative. No mention of minimum cost or types of ineligibles is cited in Section 278.6(e)(5) of the SNAP regulations, which states that FNS shall disqualify a store 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 in exchange for SNAP benefits due to carelessness by store employees or poor supervision by the firm's ownership or management.

The Appellant contends that the employee had been trained on the SNAP rules. However, had an effective compliance policy and program been in effect at the firm, it is unlikely that the employee would have made such mistakes. The more likely explanation is that store ownership and/or management failed to properly train and subsequently supervise the employee.

The employee's actions more likely than not represent an ongoing pattern of SNAP violations at the Appellant firm. 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.

As previously noted, in an appeal of adverse action, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means the 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. The Appellant did not provide any evidence that the violations cited in the charge letter did not occur.

Corrective Action

The Appellant contends that to prevent future SNAP violations, the store is having long-time SNAP customers from the community come to the store and attempt to get employees to violate the SNAP rules by requesting to purchase ineligible nonfood items with SNAP benefits. If any employee violates the SNAP rules, they will be fired. The Appellant has also told clerks to attach every SNAP receipt to the cash register so they can be verified the next day.

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 the circumstances that 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 subsequent remedial actions that may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty 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 does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

The Retailer Operations Division concluded that the Appellant was eligible for a hardship CMP in lieu of a six-month SNAP disqualification, as Summit Mobil 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 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was imposed in lieu of the six-month 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). This 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.

CONCLUSION

The determination by the Retailer Operations Division to assess a hardship CMP in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in lieu of a six-month disqualification from SNAP is sustained. This review finds that the amount of the hardship CMP was properly computed by the Retailer Operations Division. Please note that if the penalty is not paid, the six-month SNAP disqualification will be imposed. The Appellant may contact FNS's Financial Management Accounting Division at (703) 605-0483 to discuss a monthly payment plan, or follow the instructions in the Retailer Operations Division's letter dated October 5, 2021, regarding payment options.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective 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, the Appellant may reapply for authorization to participate in the SNAP up to 10 days prior to the end of the disqualification period.

RIGHTS AND REMEDIES

Rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and to Section 279.7 of the SNAP regulations (7 CFR § 279.7). 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 the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within thirty (30) days of receipt of this decision. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

JAMIE SLACK
Administrative Review Officer

January 31, 2023