

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

Brothers Petroleum LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0247120

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to assess a hardship civil money penalty (CMP) against Brothers Petroleum LLC (hereinafter Appellant) in lieu of a six-month disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it imposed a civil money penalty against Appellant.

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

FNS records show that between October 13, 2021, and October 27, 2021, FNS conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigation report documented that personnel at Appellant firm accepted SNAP benefits in exchange for ineligible items on three separate occasions. According to the report, the Appellant firm sold party cups, plastic forks, plastic spoons, and paper plates.

In a letter dated January 26, 2022, the Retailer Operations Division charged the Appellant with violating SNAP regulations at 7 CFR § 278.2(a). The charge letter stated that the acceptance of SNAP benefits in exchange for ineligible nonfood merchandise warranted a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further stated that under certain conditions and in accordance with § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification. The record indicates that the Retailer Operations Division never received Appellant's response.

After further evaluating the evidence in the case, the Retailer Operations Division determined that violations did occur as outlined in the letter of charges and that the violations warranted disqualification from SNAP for a period of six months. However, rather than impose a six-month disqualification against the firm, the Retailer Operations Division determined that the firm was eligible for a civil money penalty in lieu of disqualification because it was selling a substantial variety of staple food items and a disqualification would cause hardship to SNAP households.

The Agency's determination letter, dated February 16, 2022, notified the Appellant of the decision to impose a CMP for \$4,482.00, and stated that the firm must either pay the penalty in full or establish an installment plan within 15 calendar days of receipt of the letter.

In an email dated February 17, 2022, the Appellant appealed the agency's determination by requesting an administrative review. The request was granted, and the case was assigned to an administrative review officer. Implementation of the monetary sanction has been held in abeyance pending completion of this review. On October 18, 2023, the case was reassigned to administrative review officer David Shively.

STANDARD OF REVIEW

In an appeal of adverse action, such as the imposition of a civil money penalty, an 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 AND 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)(5), and (f)(1) 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:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food.

7 CFR § 271.2 states, in part:

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.... Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section.... FNS may, in lieu of a disqualification, subject a firm to a civil money penalty of up to an amount specified in § 3.91(b)(3)(i) of this title for each violation if FNS determines that a disqualification would cause hardship to participating households.

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination...

7 CFR § 278.6(e) states, in part:

FNS shall take action as follows against any firm determined to have violated the Act or regulations...The FNS regional office shall:

(5) 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 [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.

7 CFR § 278.6(g) outlines the steps for calculating the CMP amount:

- (1) Determine the firm's average monthly redemptions of [SNAP benefits] 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. The civil money penalty may not exceed an amount specified in § 3.91(b) (3) (i) of this title for each violation.

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review dated February 17, 2022, in relevant part:

- Offending employee no longer works at the store and has been moved to gas attendant.
- As to store not having prices, Appellant was under impression that since majority of items have a SKU number, they are already priced in the POS system and need only be scanned.
- After finds, have added prices to shelves.
- Brothers Petroleum has an alternate name of City Center Mart as a trade name.
- POS system and EBT will be changed to reflect Brothers Petroleum

The preceding may represent 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 presented, including any not specifically summarized or explicitly referenced in this document. Appellant also included State of New Jersey Registration of Alternative Name form and documents from the New Jersey Department of the Treasury.

ANALYSIS AND FINDINGS

This purpose of 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 charges of violations are based on the findings of a formal USDA investigation conducted of the compliance of Brothers Petroleum LLC with Federal SNAP law and regulations. Investigators are trained thoroughly before entering any retail establishment and all protocols, including but not limited to what can and cannot be said. Investigators sign, under penalty of perjury, that investigative reports are true and correct. The investigators in these cases are licensed by the states and on top of being prosecuted for perjury, can lose their jobs and their licenses giving them no incentive to fabricate the information contained in the Reports of Investigation.

All transactions are fully documented, and a complete review of this documentation has yielded no known error or discrepancy in the reported findings. 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 documentation on record includes EBT receipts and photos showing that 5 ineligible nonfood items, and 7 eligible food items were purchased with SNAP benefits by the investigator. Also on record is documentation that confirms that the ineligible nonfood items and the eligible food items were donated to and signed for by a charitable organization following the transaction. Such documentation includes the signature and title of the official of the charitable organization accepting the donated item, the name and address of the organization, the date the donation was made, and the official's initials next to the items donated. Moreover, the total purchase costs of each of the transactions involved in the investigation is documented on SNAP terminal receipts obtained during each transaction and matches the reported purchase totals indicated in the investigation report.

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

The Retailer Operations Division determined that the violations committed by Appellant represent the first sanction for the firm and evidence carelessness or poor supervision. 7 CFR §278.6(e)(5) states that FNS shall disqualify a 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 and poor supervision by the firm's ownership or management. The imposition of a six-month disqualification, the least severe penalty allowed by regulation, is appropriate for a first offense.

As stated above, 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.

In its appeal, Appellant states that the offending employee is no longer working at the store but has been moved to gas attendant. Regarding this contention, it must be noted that this review is limited to the facts that existed at the time the violations were committed. This review has no authority to consider any subsequent remedial actions that may have been taken or that will take place so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of alleged or planned corrective actions implemented after the discovery of program violations. Additionally, the failure to display prices for the subject items or the confusion as to the name of the store had no impact on the penalty determination. The Retailer Operations Division imposed a six-month disqualification based only upon Appellant selling ineligible items.

Civil Money Penalty

As noted earlier, the Retailer Operations Division determined that the Appellant is eligible for a civil money penalty in lieu of a six-month disqualification because the firm is selling a substantial variety of staple food items and the firm’s disqualification would cause hardship to SNAP households. After reviewing all evidence in this case, this review agrees with the agency’s conclusion regarding hardship to SNAP households and agrees that a CMP is appropriate.

Regulations at 7 CFR § 278.6(g) outline the steps for calculating the CMP amount. The CMP is based on the store’s SNAP redemptions during the 12 months immediately prior to the firm being charged with program violations. Modifications to the CMP by the administrative review officer may occur only when there is an error in calculation that disadvantages the Appellant or when the CMP exceeds the statutory limit. This review has no authority to modify a CMP amount for any other reason. The calculation of the CMP in this case is as follows:

Month	Total SNAP Redemptions	Month	Total SNAP Redemptions
December 2021	\$8,907.44	June 2021	\$6,383.72
November 2021	\$8,966.69	May 2021	\$7,505.72
October 2021	\$10, 864.69	April 2021	\$5,709.22
September 2021	\$10, 851.91	March 2021	\$4,683.20
August 2021	\$8,857.07	February 2021	\$3,941.20
July 2021	\$8,479.32	January 2021	\$4,465. 77

Cumulative SNAP redemptions for the 12-month period preceding the charge letter	\$89,615.95
Average Monthly Redemptions (AMR) – to the nearest dollar	\$7,468.00
Multiply the AMR by 10 percent – to the nearest dollar	\$747

Multiply the rounded AMR by the number of months of the disqualification (\$364.20 X 6 months)	\$4,482.00
Sanction Limit. Multiply the number of violative transactions (4) by \$11,000	3 X \$11,000 = \$33,000.00

In this case, the calculated CMP of \$4,482.00 is less than the agency sanction limit of \$33,000.00. Consequently, based on the information above, it is the determination of this review that the proper CMP amount in this matter was charged.

CONCLUSION

Based on a review of all available information in this case, this administrative review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at Brothers Petroleum LLC during a USDA investigation. Furthermore, the contentions provided by the Appellant do not persuade this review to dismiss or modify the disqualification or penalty in any way. Therefore, pursuant to 7 CFR § 278.6(a), (e)(5), (f)(1) and (g), the decision to impose a \$4,482.00 civil money penalty in lieu of a six-month disqualification against the Appellant is sustained.

This review acknowledges that Appellant has already paid the CMP in full.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant’s owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of delivery of this decision. The judicial filing deadline is stipulated by statute; FNS has no authority to 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.

David A. Shively
Administrative Review Officer

November 21, 2023