

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

Istanbul Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0236665

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 assessment of a \$12,138.00 hardship civil money penalty (CMP) against Istanbul Market in lieu of a six-month disqualification from the Supplemental Nutrition Assistance Program (SNAP). Please note that failure to pay the CMP will result in a six-month disqualification.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(1) and 7 CFR § 278.6(g), when it assessed a hardship CMP in the amount of \$12,138.00 against the Appellant.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulation 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 Istanbul Market with Federal SNAP law and regulations in January 2021. In a letter dated March 2, 2021, the Retailer Operations Division charged the Appellant store with accepting SNAP benefits in exchange for merchandise which included ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on three (3) out of six (6) compliance visits. The letter further informed the Appellant that the chargeable violations warranted a six-month disqualification period as provided in 7 CFR § 278.6(e)(5). The Appellant was informed it could respond to the charges within ten (10) calendar days following delivery of the charge letter. The charge letter was delivered to the store via UPS on March 3, 2021.

The Appellant responded to the charge letter in a series of email replies from March 3, 2021 through March 8, 2021. The Appellant admitted that a former store clerk sold some surgical masks in exchange for SNAP benefits (Exhibit E of the investigation report) but did not charge the investigator for any of the other non-food items in Exhibits C and D of the investigation report. The Appellant asked that it be given a second chance.

After considering the Appellant's reply and the evidence in the case, the Retailer Operations Division issued a determination letter dated March 29, 2021. The Retailer Operations Division concluded that the violations did occur at the store as described in the investigation report. However, the Retailer Operations Division determined that the Appellant was eligible for a hardship CMP in lieu of a six-month disqualification because the firm's disqualification would cause a hardship to SNAP households. As a result, the determination letter informed the Appellant it was assessed with a \$12,138.00 hardship CMP in lieu of a six-month disqualification in accordance with 7 CFR § 278.6(f)(1). The store was informed that failure to pay the hardship CMP would result in a six-month disqualification.

In a letter postmarked April 8, 2021, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. The request for review was granted. Upon acceptance of the administrative review request, the assessment of the hardship CMP 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, 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 law in this matter is covered 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 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 ... 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:

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....

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 ... (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 non-food items** due to carelessness or poor supervision by the firm's ownership or management. [Emphasis added.]

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'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.

SUMMARY OF THE CHARGES

During an investigation conducted in January 2021, the USDA conducted six (6) compliance visits at Istanbul Market. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated March 2, 2021. The investigation report included Exhibits A through F which provide full details on the results of each compliance visit.

The investigation report documents that SNAP violations were recorded during three (3) compliance visits as documented by Exhibits C, D and E. The chargeable violations in Exhibits C, D and E involved the sale of seven (7) common non-food items in exchange for SNAP benefits. These non-food items were (5) rolls of bathroom tissue, a bottle of lavender hand soap and a package of surgical masks.

The chargeable violations in Exhibits C, D and E were committed by a single clerk. In Exhibit A, another clerk refused to exchange non-food items for SNAP benefits and instead gave the two (2) items to the investigator without charge; in Exhibit F, this same clerk refused to exchange SNAP benefits for cash. However, these refusals do not mitigate or ameliorate the violations committed by the clerk in Exhibits C, D and E.

APPELLANT'S CONTENTIONS

The Appellant in its response to the charge letter and its request for an administrative review made the following summarized contentions, in relevant part:

- The store only exchanged surgical masks for SNAP benefits.
- This violation was not intentional but was a mistake.
- The store has taken the opportunity to more thoroughly train store employees.
- The store owners request a review of the CMP amount and whether it was correctly calculated.
- Any documentation from the investigation should be turned over to the Appellant's attorney.

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

Investigation Report

The Appellant alleges that the store clerk in Exhibits C and D did not charge the investigator for the non-food items and only accepted SNAP benefits for surgical masks in Exhibit E. This is contrary to the investigation report which documents that the investigator was not charged for non-food items in Exhibit A only.

The investigation report documents that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges 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 investigation report documents by a preponderance of the evidence that personnel at the store exchanged ineligible items for SNAP benefits.

Owner Responsibility

The Appellant states that any violations were committed by a former clerk who should have known better. Regarding this contention, store owners are at all times accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store owners to disclaim accountability for the acts of persons chosen to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

In addition, a store owner signed the SNAP authorization application for Istanbul Market on December 2, 2019. That application included a signed certification that the owner(s) would

“accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations including accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible non-food items.

Intent to Violate

The Appellant contends that the firm or its employees did not intend to violate any SNAP regulations. Regarding this contention, please note that the violation of exchanging ineligible non-food items for SNAP benefits at 7 CFR § 278.6(e) does not require an element of intent on the part of the violator. Therefore, whether or not the Appellant firm or its employees intended to violate SNAP regulations in this case is irrelevant.

Corrective Action

The Appellant states that it has trained its staff more thoroughly since receiving the charge letter. Regarding this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is **limited** to what circumstances existed at the time of the violations that was the basis of the Retailer Operations Division’s action. It is not within the authority of this review to consider what subsequent remedial actions may be planned or taken so that a store may 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 assessment on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations. Therefore, the Appellant’s contention that corrective action has taken place does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Hardship CMP in Lieu of a Six-Month Disqualification

The SNAP regulation at 7 CFR § 278.6(e)(5) states, in part, that “FNS **shall** take action as follows against any firm determined to have violated the Act or regulations ... **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 non-food items due to carelessness or poor supervision** by the firm’s ownership or management.” [Emphasis added.] The investigation report documents that the number of chargeable violations over multiple transactions in this case equate to carelessness or poor supervision by ownership.

The violations cited in the investigation report would normally warrant a six-month disqualification. However, the Retailer Operations Division determined that the assessment of a \$12,138.00 hardship CMP in lieu of a six-month disqualification was appropriate 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.]

7 CFR § 278.6(g) states that the hardship CMP is to be calculated on a formula which includes the SNAP redemption volume of the store during the twelve (12) months prior to the firm being charged with violations. Modifications to the hardship CMP may occur only when there is an error in calculation or the amount exceeds the agency limit of \$11,000 per violation. Using the methodology described in 7 CFR § 278.6(g), Retailer Operations Division **incorrectly** calculated the amount of the hardship CMP as \$12,138.00. The correct CMP calculation is shown below:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

The determination letter dated March 29, 2021 stated that the hardship CMP amount was \$12,138.00. However, as shown above, the correct amount should have been \$14,130.00. Nevertheless, the Appellant will not be responsible for the higher amount but will be assessed the \$12,138.00 amount stated in the determination letter.

Records Request

The Appellant’s counsel requested records relating to this case. However, the administrative review for SNAP retailers does not have a discovery process and administrative review officers are not authorized to release such documents. Discovery may be more properly conducted in a judicial review. Also, please note that this administrative review is not subject to the Administrative Procedures Act as SNAP administrative reviews have their own separate statutory authority.

Outside of a judicial review, any request for documents pertaining to this case must be requested as a Freedom of Information Act (FOIA) request directly through the agency’s FOIA office. Please note that, due to a recent regulatory change, FOIA requests are entirely separate actions and have no impact on the administrative review process.

CONCLUSION

It is established that the violations as described in the letter of charges did in fact occur at Istanbul Market warranting a disqualification of six (6) 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 non-food items due to carelessness or poor supervision by the firm’s ownership or management.” However, the Retailer Operations Division determined that a six-month disqualification of Istanbul Market would create a hardship for SNAP households. Therefore, in lieu of a six-month disqualification, the Retailer Operations Division assessed a hardship CMP against the Appellant of \$12,138.00. The decision in this case is hereby **sustained**. Please note that failure to pay the CMP will result in a six-month disqualification.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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. Please note that the judicial filing timeframe is specified in the Act, and this office cannot grant an extension.

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.

RONALD C. GWINN
Administrative Review Officer

September 2, 2021