

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

**Kosher Express Si,
Appellant,**

V.

**Retailer Operations Division,
Respondent.**

Case Number: C0233955

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the hardship civil money penalty (CMP) in the amount of \$28,968.00 imposed upon Kosher Express Si (hereinafter Appellant) by Retailer Operations Division is hereby sustained.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a), 7 CFR § 278.6 (e), (f) and (g) in its administration of the SNAP when it determined that a six-month disqualification against Appellant was warranted, and further determined that SNAP participants in the area would endure a hardship with the implementation of the disqualification. Retailer Operations Division therefore assessed a hardship civil money penalty in the amount of \$28,968.00, in lieu of the disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations 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 Appellant with Federal SNAP law and regulations during the period January 8, 2021 through April 7, 2021. The Report of Positive Investigation (hereinafter, “Investigative Report”), dated April 21, 2021, delineated that three (3) unidentified personnel (two females and one male) at Appellant exchanged SNAP benefits for ineligible merchandise with a USDA Investigator on three (3) separate occasions. The items exchanged during the violations were ineligible and included items, best described in

regulatory terms as “conspicuous and common ineligible nonfood items” consisting of bathroom tissue, trash bags, and plastic spoons.

By letter dated May 21, 2021, Retailer Operations Division informed Appellant of the agency’s intention to disqualify Kosher Express Si from participation in the SNAP as an authorized retailer for a period of six-months, in accordance with 7 CFR §278.2(a), based on information contained in the Investigative Report. A copy of the Investigative Report was provided to Appellant as an attachment to the May 21, 2021, charge letter.

The Retailer Operations Division record indicates that Appellant responded to the charge letter in email correspondence dated June 7, 2021. Appellant generally stated that the system is set up where we manually select each item that qualifies for EBT. In some instances, the system could skip this and have been instructed to ask customer to swipe card a second time to cover the food items that were not automatically charged to EBT. However, a recent glitch in the coding in the system has allowed non-food items to be included when the customer swipes a card a second time. As soon as this was brought to our attention, we had the POS supplier fix this and this is no longer an issue. Appellant also stated that we have made it clear to all cashiers, - full time, part time and temporary cashiers alike - to pay full attention to what is being scanned as an EBT item and to make sure we comply to all the rules that I have explained to them by reading your welcome package sent to us.

After considering the evidence of the case and the Appellant’s response to the charge letter dated May 21, 2021, Retailer Operations Division notified Appellant, in correspondence dated June 22, 2021, that we have determined that the assessment of a hardship civil money penalty (CMP) of \$28,968.00 in lieu of a 6-month period of disqualification is the appropriate penalty for these violations. This is in accordance with Section 278.6(f)(1) of the Supplemental Nutrition Assistance Program (SNAP) regulations. We have assessed this CMP because your firm is selling a substantial variety of staple food items and the firm’s disqualification would cause hardship to SNAP households.

In a letter postmarked July 8, 2021, the Appellant requested an administrative review of the Retailer Operations Division’s determination. The appeal was accepted, and the implementation of the SNAP HCMP payment requirement/disqualification 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, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

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

7 U.S.C. § 2021 states, *inter alia*: (1) IN GENERAL. An approved retail food store or wholesale food concern that violates a provision of this Act or a regulation under this Act may be: (A) disqualified for a specified period of time from further participation in the supplemental nutrition assistance program; (B) assessed a civil penalty of up to \$100,000 for each violation; or (C) both.

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 & 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) prescribes the general period of disqualification for the sale of common ineligible nonfood items and states: “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) applies to the specific period of disqualification of which the CMP is in lieu and reads, in part, “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) applies to the criteria for CMPs on the basis of hardship and reads, in part, “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm...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 store in the area selling as large a variety of staple food items... FNS may disqualify a store which meets the criteria for a civil money penalty if the store had previously been assigned a sanction.”

7 CFR §278.6(h)(1),(2) and (3) state, *inter alia*:

1. Disqualify the firm for the period determined to be appropriate under paragraph (e) of this section if the firm refuses to pay any of the civil money penalty.
2. Disqualify the firm for a period corresponding to the unpaid part of the civil money penalty if the firm does not pay the civil money penalty in full or in installments as specified by the regional office.
3. Disqualify the firm for the prescribed period if the firm does not present a collateral bond or irrevocable letter of credit within the required 15 days, if applicable. If the firm

presents the required bond during the disqualification period, the civil money penalty may be reinstated for the duration of the disqualification period.

Agency policy stipulates, *inter alia*, that a Hardship Civil Money Penalty is:

...imposed instead of a disqualification when removing a store from the Program would cause a hardship, rather than just an inconvenience, to recipients that normally frequent the store

The following steps, based on the regulations at 7 CFR § 278.6(g), applies to the calculation of hardship CMPs, stating, in part: “FNS shall determine the amount of the civil money penalty as follows:

- (1) Determine the firm’s average monthly redemption of coupons 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.”

7 CFR § 278.6(g) and § 3.91(b)(3)(i) of this title establish an \$11,000.00 per violation limit as the maximum amount for a CMP.

APPELLANT’S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review and in subsequent correspondence, in relevant part:

1. The failures to meet the rules of USDA at the investigation was a total error and certainly not intentional. We have really been struggling with staff since the start of the pandemic.
2. To train in new staff, many which were temporary, was a very difficult endeavor whilst at the same time trying to source product, stock shelves and keep customers satisfied.
3. With all that was going on, we did not realize the simple glitch in the system of it allowing to charge the EBT card for non-food items when swiped a second time. I have attached my initial defense letter which explains the error and what we did to fix this.
4. I can assure you this error will not happen again as I pay very close attention to this. Please do not place this amount of penalty on my business. I feel for an unintentional error the amount we were penalized is out of proportion.

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

With regards to Appellant's contentions, the regulations stipulate "FNS shall disqualify the 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."

In this case, a six-month disqualification, or a civil money penalty in lieu thereof, is the least severe disqualification period allowed by regulation. Beyond the assessment of a civil money penalty in lieu of a six-month disqualification, there is no appropriate lesser sanction contemplated by the statute, the regulations or agency policy. The purpose of this review is to ascertain whether Retailer Operations Division has arrived at a correct decision; accordingly, the review officer is not extended the latitude to alter or modify decisions correctly made on the basis of requests for leniency.

It is further noted that during the on-site investigation, the investigative report shows that the clerks clearly allowed the purchase of the non-food items by conducting a second transaction specifically for the balance which was non-foods only. These transactions were intentional and not mistakenly completed as Appellant's system adequately excluded them during the first transactions which were for eligible food items only. It is important to note that as owner of the store, Appellant is liable for all violative transactions handled by store personnel. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food Stamp Act and the enforcement efforts of the USDA.

Additionally, 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 that was the basis of the Retailer Operations Division' action. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that a store may begin to comply with program requirements.

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 after-the-fact corrective actions implemented subsequent to investigative findings of program violations. Therefore, Appellant's contention that corrective action will take place or that further remedial actions are planned does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

As noted, Retailer Operations Division determined that a disqualification would work a hardship upon SNAP customers and therefore calculated the hardship civil money penalty as noted below:

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 initial calculated amount of the hardship CMP was \$28,968.00. That calculation is shown below:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

USDA conducts investigations of the compliance of retail food stores, in part, to ascertain the nature and extent of violations that may be occurring, i.e., to see how far a firm will go in violating the SNAP rules and regulations. In the investigation of Kosher Express Si, common ineligible products were exchanged in three (3) compliance visits with all three (3) being marked as clear violations.

CONCLUSION

As noted herein, the charges of violations are based on the findings of a formal USDA investigation. 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 error or discrepancy. The Investigative 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.

A review of the evidence in this case indicates that the Appellant firm, Kosher Express Si, exchanged SNAP benefits for expensive or conspicuous non-food items on three (3) different compliance visits. However, Retailer Operations Division determined that a six-month disqualification of Kosher Express Si would create a hardship for SNAP households as there is no other authorized retail food store in the area selling a substantial variety of staple food items.

In lieu of a six-month disqualification, Retailer Operations Division assessed a hardship CMP against Kosher Express Si of \$28,968.00. No sufficient basis has been disclosed in this review for modification of the Retailer Operations Division's initial decision in this matter. The earlier action is consistent with the provisions of the SNAP. It is, therefore, the decision of USDA that a six-month period of disqualification of Kosher Express Si, determined by the Retailer Operations Division to be warranted, is fair and proper. However, because the Retailer Operations Division determined that participating households in the area of Appellant would suffer a hardship if precluded from shopping at Appellant with SNAP benefits, it was the further determination of the Retailer Operations Division that a hardship civil money penalty

(CMP) in the amount of \$28,968.00 should be imposed in lieu of the six-month of disqualification in this case.

It is therefore the decision of USDA that a CMP is appropriate and fully in accord with 7 CFR §278.6(f). A review of the calculations shows that the amount of the CMP was correct and proper and the decision in this case is hereby sustained and will become effective upon the 30th day following your firm's receipt of this document. In the event a six-month disqualification is imposed for failure to pay the civil money penalty, or some lesser disqualification period reflecting the unpaid portion of the civil money penalty, 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

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (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 (FOIA), 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.

Monique Brooks
ADMINISTRATIVE REVIEW OFFICER

February 22, 2022