

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

Many's Market,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0236241

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 Office of Retailer Operations and Compliance to assess a hardship civil money penalty (CMP) against Many's Market (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 the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), § 278.6(e)(5), and § 278.6(f)(1) in its administration of the SNAP when it assessed a hardship CMP in lieu of a six month period of disqualification against Appellant.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, "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

A USDA investigator conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period January 7, 2021, through January 9, 2021. The investigation determined that personnel at the Appellant firm accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions (Exhibits A, B, and C). All three transactions were deemed clearly violative and warrant a six month disqualification period. The items sold are best described in regulatory terms as common nonfood items such as sponges,

dishwashing detergent, laundry detergent, dryer sheets, and motor oil. The investigative report indicates that these violative transactions were handled by two clerks. The report notes that the second clerk refused to exchange SNAP benefits for cash on one occasion (Exhibit C), but allowed the exchange of SNAP benefits for three ineligible items in the same Exhibit.

As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant, in a letter dated March 12, 2021, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations “. . . warrant a disqualification period of six month. The letter also states that under certain conditions, FNS may impose a CMP in lieu of a disqualification (Section 278.6(f)(1)).”

Appellant responded to the charges in an email dated March 19, 2021, that did not request a hardship CMP. After giving consideration to the evidence, the Office of Retailer Operations and Compliance notified Appellant in a letter dated May 4, 2021, that it determined that violations had occurred at the firm, and that an assessment of a hardship CMP in the amount of \$5,154.00 in lieu of a six month SNAP disqualification was an appropriate penalty for the violations committed and in accordance with Section 278.6(f)(1). This determination was based on Appellant’s disqualification causing hardship to SNAP households as there were no other authorized retail stores in the area selling a similar variety of staple foods at comparable prices.

By letter postmarked May 12, 2021, Appellant appealed the Office of Retailer Operations and Compliance’s decision and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review. No subsequent correspondence was received.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means 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.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Section 278. In particular, Sections 278.6(a) and (e)(5) establish the authority upon which a hardship CMP may be assessed against a retail food store or wholesale food concern in lieu of a six month disqualification.

7 CFR § 271.2 states that: 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 § 278.2(a) states that: Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food. Further, the citation specifies that coupons may not be accepted in exchange for cash, in payment of interest on loans, or for any other nonfood use.

7 CFR § 278.6(a) states that: 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) of the SNAP regulations states, in part, that a firm is to be disqualified 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 or poor supervision by the firm's ownership or management.”

7 CFR § 278.6(f)(1) states that, FNS may impose a CMP 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. FNS may disqualify a store which meets the criteria for a CMP if the store had previously been assigned a sanction. A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

APPELLANT’S CONTENTIONS

The following may represent a summary of Appellant’s contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- The owner is sorry for the violations because they follow SNAP guidelines very strictly at the store. The owner wasn’t sure if it was him or the other male clerk in the first two transactions. The female employee in the third transaction was still under training and it was her first shift in the morning;
- Reconsideration is requested since this is the store’s first violation and was due to a lack of knowledge and misunderstanding about eligible items under SNAP. The owner has since trained all employees, including himself, on SNAP guidelines and these violations won’t happen in the future; and
- The HCMP of \$5,154.00 is a very big amount for the business to pay because sales have been low since the pandemic started and it’s hard to even survive.

Appellant submitted no evidence or other rationales in support of these contentions.

ANALYSIS AND FINDINGS

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 Office of Retailer Operations and Compliance and is limited

to what circumstances were at the basis of the action at the time such action was made. 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. There is also no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations. While store ownership may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, that ownership is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. 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 two different employees working at the Appellant firm accepted SNAP benefits for ineligible items on three separate occasions during the investigative period indicating a series of SNAP violations most likely resulting from little or no training and poor or no supervision. 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. There is no regulatory threshold for the dollar value of the ineligible items purchased or for the timeframe in which they were purchased. The acceptance of SNAP benefits for ineligible items is a violation of SNAP rules and regulations. 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 applicable regulations do not specify intent as being a required element for a six month disqualification.

SNAP benefits, in general, are only authorized to be used for the purchase of foods for the household to eat as well as seeds and plants which produce food for the household to eat. The common nonfood items purchased are clearly not edible foods and are not plants or seeds, so one has to question the level of training these employees received by store ownership and/or management. The basic concept of "if you can't eat it, you can't buy it using SNAP" is not a difficult one for employees to grasp, regardless of their primary language, yet these employees allowed the purchase of ineligible items using SNAP benefits on multiple occasions. Had an effective compliance policy and program been in effect at the firm, it is unlikely that these

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 these employees. Additionally, had store ownership and/or management been supervising these 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 these employees were deficient in their knowledge of SNAP rules and regulations had it periodically spot checked their 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 license 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 these 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. Common sense dictates that these actions more likely than not represented 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. 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 next section.

A review of the investigative report shows no errors or discrepancies and a comparison of the dates/times/amounts on the POS receipts issued by the Appellant firm to the USDA investigator correspond to the dates/times/amounts provided to FNS by the firm's EBT processor when it submitted the transactions to FNS for reimbursement. Other evidence provided (photos of the items purchased and detailed donation records signed by a local charitable organization) also support the details provided in the investigative report. While a firm that has previously received warnings of possible violations or that has been sanctioned before could receive a more severe penalty, SNAP regulations do not provide any grounds for dismissing or reducing penalties for those firms that have not received warnings or previously been sanctioned. The record shows no evidence that the Appellant firm received any prior warnings or has been sanctioned and there is no evidence that the firm's ownership or management intentionally violated SNAP regulations.

Based on this discussion, the decision by the Office of Retailer Operations and Compliance 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.

CIVIL MONEY PENALTY

Appellant is not eligible for a trafficking CMP as these only apply in cases of permanent disqualifications. The matter under review is a term disqualification of six months and does not involve trafficking therefore a trafficking CMP cannot be considered under 7 CFR § 278.6.

The Office of Retailer Operations and Compliance determined that the Appellant 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. Thus, pursuant to 7 CFR § 278.6(f), it is the decision of USDA that a six month disqualification would create a hardship to SNAP recipients, and that a CMP in lieu of disqualification is appropriate in this case. The case record documents that, under 7 CFR § 278.6(g), the Office of Retailer Operations and Compliance correctly calculated the amount of the hardship CMP. 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 12 months prior to the firm being notified of the violations that led to the store's disqualification. Modifications to the hardship CMP may occur only when there is an error in calculation or the amount exceeds the statutory limit.

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did occur as charged and as admitted to by the Appellant. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted by a USDA investigator and signed under penalty of perjury. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and accurate with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail. Accordingly, the determination by the Office of Retailer Operations and Compliance to assess a hardship CMP in the amount of \$5,154.00 in lieu of a six month disqualification from participating as an authorized retailer in SNAP is sustained. Based on the discussion above, the amount of the hardship CMP was properly computed by the Office of Retailer Operations and Compliance. Please note that if the penalty is not paid, the six month SNAP disqualification will be imposed. Appellant may contact the USDA-FNS Financial Management Accounting Division at (703) 605-0483 to discuss a monthly payment plan, or follow the instructions in the Office of Retailer Operations and Compliance's letter dated May 4, 2021, regarding payment options.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (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, Appellant may reapply for authorization to participate in the SNAP up to 10 days prior to the end of the disqualification period. When eligible, Appellant may reapply for SNAP authorization using the application instructions contained on the FNS web site. Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

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 a judicial review is desired, 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 receipt of this decision.

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.

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

October 6, 2021