

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

**Super Carnival Grocery,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0244089**

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**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA) that there is sufficient evidence to support the assessment of a \$33,000.00 hardship civil money penalty (CMP) against Super Carnival Grocery (Appellant) in lieu of a one-year disqualification from the Supplemental Nutrition Assistance Program (SNAP). Please note that failure to pay the CMP will result in a one-year 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(a) and (e)(5) in its administration of the SNAP, when it imposed a CMP in lieu of a one year period of disqualification against Appellant.

**AUTHORITY**

7 USC § 2023 and the 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**

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of March 19, 2021, through April 2, 2021. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. As a result of evidence compiled during this investigation, by letter dated May 3, 2021, the Retailer Operations Division charged ownership

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with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a) and noted the violations warranted a one-year disqualification period. The letter also stated that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

Appellant replied to the charge letter by email on May 10, 2021 Appellant explained that it now has an upgraded POS system, and these mistakes will not happen again. After considering the retailer's reply and the evidence, the Retailer Operations Division notified Appellant in a letter dated June 14, 2021, that the violations cited in the charge letter occurred at the firm and that a one-year period of disqualification was warranted. However, the Retailer Operations Division determined that the Appellant was eligible for a hardship CMP in lieu of a one-year 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 \$33,000.00 hardship CMP in lieu of a one-year 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 one-year disqualification.

By letter postmarked June 23, 2021, ownership requested an administrative review of the Retailer Operations Division's determination. The appeal was granted and implementation of the penalty has been held in abeyance pending completion of this review.

### **STANDARD OF REVIEW**

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That 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.

### **CONTROLLING LAW**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e)(5) establish the authority upon which a one-year disqualification may be imposed against a retail food store or wholesale food concern.

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 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, that a firm is to be disqualified for six months:

[I]f 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. (6) 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 § 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.

In addition, 7 CFR § 278.6(f)(1) provides for civil money penalty (CMP) assessments in lieu of disqualification in cases where disqualification would cause "hardship" to SNAP households benefit because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It reads, *inter alia*:

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 benefit because there is no other authorized retail food store in the area selling as large a variety of staple food items.

### **SUMMARY OF CHARGES**

Super Carnival Grocery Market is a medium grocery originally authorized by FNS on December 7, 2005. During an investigation conducted between March 19, 2021, and April 2, 2021, an investigator conducted three compliance visits at Appellant. A report of the investigation dated April 14, 2021, was provided to Appellant as an attachment to the charge letter. The investigation report included Exhibits A through C which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during each of the three compliance visits and involved the sale of ineligible items including: soap, laundry detergent, stainless steel scrubber, and hand soap. Upon review, the evidence indicates that Appellant established a record of selling non-food items, as defined by Section 271.2 of the regulations, on multiple occasions as noted in Exhibits A, B, and C, furnished with the charge letter.

### **APPELLANT'S CONTENTIONS**

Appellant made the following summarized contentions in its administrative review request postmarked June 23, 2021, in relevant part:

- Appellant was affected by the Pandemic.
- A new employee who was trained made the mistakes.
- Appellant has been in business for 15 years.
- Appellant requests a small CMP amount.

The preceding may represent only a brief summary of the Appellant's contentions presented 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.

## **ANALYSIS AND FINDINGS**

The investigation report documents that the charges of violations are based on the findings of a formal investigation. The transactions cited in the letter of charges are thoroughly documented. A complete review of this documentation has yielded no 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 EBT receipts in the record show the name and location of Appellant, and all transactions were identified in the system data to support that they did occur at Appellant. The documentation presented by the Retailer Operations Division provides through a preponderance of the evidence that the violations as reported occurred at the Appellant firm.

7 CFR § 278.6(e)(5) states, as noted above, 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. As the firm had been previously subjected to a six-month disqualification, pursuant to 7 CFR § 278.6(e)(6) of the SNAP regulations, this time period is doubled. Therefore, a one-year disqualification is the appropriate sanction in this case.

### **No Previous Violations**

Appellant reports that it has been in business for 15 years and it does not have any previous violations. 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 the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

### **Appellant Hardship**

Appellant explains that this business is suffering from the Pandemic. It is recognized that economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To excuse ownership from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that the firm will incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposition.

### **Ownership Involvement**

Appellant states that the transactions were conducted by a new employee. Regardless of whom the ownership of a store may utilize to handle store business, the ownership is accountable for the proper training of staff and the monitoring and 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 and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Ownership signed the FNS reauthorization application for SNAP retailers on November 3, 2005, which included a certification and confirmation that the owner 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 for cash and as payment for ineligible items, a violation of the SNAP rules and regulations. The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations.

### **Corrective Action**

Appellant explains that it has installed a new POS machine to prevent future mistakes. 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 what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not within the authority of this review to consider what subsequent remedial actions may have been taken or will be taken in the future so that a store may begin to comply with program requirements. There is 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. Therefore, Appellant's contention that it took corrective action to prevent future violations does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Civil Money Penalty**

The violations cited in the investigation report would normally warrant a one-year disqualification. However, the Retailer Operations Division determined that the assessment of a \$33,000.00 hardship CMP in lieu of a one-year 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.”

Appellant request that the CMP be reduced. 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 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 correctly calculated the amount of the hardship CMP as \$33,000.00.

### **CONCLUSION**

The determination by the Retailer Operations Division to impose a one-year disqualification against Super Carnaval Grocery from participating as an authorized retailer in SNAP is sustained. In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective 30 days after receipt of this letter. A new application for participation in SNAP may be submitted ten days prior to the expiration of the one-year disqualification period.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7CFR § 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’s owner resides or is 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 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.

MARY KATE KARAGIORGOS  
Administrative Review Officer

December 9, 2021