

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

**550 East 139<sup>th</sup> Street Inc.,**

**Appellant,**

**v.**

**Office of Retailer Operations and  
Compliance,**

**Respondent.**

**Case Number: C0207253**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), that the record supports that 550 East 139<sup>th</sup> Street Inc. (Appellant), committed violations of the Supplemental Nutrition Assistance Program (SNAP) regulations. There is sufficient evidence to sustain a six-month disqualification of Appellant from the SNAP, as imposed by the Office of Retailer Operations and Compliance (Retailer Operations).

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action in its administration of the SNAP, consistent with 7 CFR § 278.6(a), 7 CFR § 278.6(e), and 7 CFR § 278.6(f)(1), when it imposed a six-month period of disqualification against Appellant.

**AUTHORITY**

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7, may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

**CASE CHRONOLOGY**

The USDA investigated of the compliance of Appellant with federal SNAP law and regulations during the period of July 17, 2018, through July 25, 2018. The investigative report dated August 6, 2018, documented that on multiple separate dates, different store personnel at Appellant accepted SNAP benefits in exchange for common ineligible nonfood items. As a result of evidence compiled during the investigation, by letter dated August 20, 2018, Retailer Operations charged Appellant with violating the terms and conditions of the SNAP regulations. Misuse of SNAP benefits were noted in Exhibits A, B, C, and D, that warrants a disqualification as a SNAP retail food store for a period of six months. The letter also states that under certain conditions FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

The record supports that by letter dated August 29, 2018, an authorized representative responded to the Charge letter, and made a FOIA request. The FOIA office provided a response dated September 13, 2018. Current counsel filed a FOIA appeal dated December 8, 2018. The FOIA office replied to the FOIA appeal on December 14, 2020. Retailer Operations noticed counsel to reply to the Charge letter. The record supports that no reply was received to the ten-day notice delivered December 18, 2020.

Retailer Operations informed Appellant by Determination letter dated January 4, 2021, that the violations cited in the Charge letter occurred at the firm, and that a six-month period of disqualification was warranted. The letter also stated that eligibility for a hardship CMP was not applicable as there are other authorized retail food stores in the area selling as large a variety of staple foods at comparable prices.

Counsel requested review of the determination by letter dated January 10, 2021. The review was granted by letter dated February 3, 2021. The case was reassigned to this office June 25, 2021.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing relevant, credible evidence that a reasonable mind, considering the record, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true.

### **CONTROLLING LAW AND REGULATIONS**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 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 six-month disqualification may be imposed against a retail food store.

7 CFR § 278.2(a) states: “SNAP benefits may be accepted by an authorized retail food store only from eligible households or the households’ authorized representative, and only in exchange for eligible food.”

7 CFR § 278.6(a) states: “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 based on 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) of the SNAP regulations states 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) provides for civil money penalty assessments in lieu of disqualification in

cases where disqualification would cause hardship to SNAP benefit households because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It states: “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to SNAP benefit 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**

The investigative report details in Exhibits, the results of each of four compliance visits to Appellant. The investigative report documents that SNAP violations were recorded during each of the four store visits, that warrant a six-month disqualification. The SNAP violations of 7 CFR § 278.2(a) involved the sale by different store personnel, of ineligible nonfood items in exchange for SNAP benefits. The nonfood items exchanged for SNAP benefits included: dishwashing liquid, dishwashing soap, all purpose cleaner, scrubber sponge, liquid soap, air freshener, hand soap, and Clorox.

## **APPELLANT’S CONTENTIONS**

Consideration was made of all contentions whether recapitulated here or not.

- The USDA, based on alleged transactions on four occasions has charged, and I submit wrongfully concluded, that his firm and enterprise did engage in accepting SNAP benefits in exchange for merchandise which included common ineligible non-food items.
- My client vehemently denies that he or anyone involved with or employed by this business has engaged in such activities or intended to engage in such activities.
- A disqualification from participation in the SNAP for any period will so adversely affect this business that it would cause irreparable injury and damage to the owner by forcing him out of business due to the loss of revenue. In addition, current employees will lose their source of livelihood, and members of the community who rely on this retail deli/grocery store to regularly purchase food with SNAP benefits will be severely inconvenienced and suffer hardships. This vendor would not knowingly or intentionally jeopardize this source if business and his livelihood, by engaging in the illegal activity charged herein.
- This vendor has established and implemented an effective compliance policy and program to prevent violations of the SNAP which was in effect at the time of the alleged charges. Furthermore, during the time the vendor has been in the Program he has maintained an exemplary record, and this allegation is the first occasion in which a member of this firm and its management was aware of conduct of any violations by the firm. Such an unblemished record is evidence of his continued compliance with the law and his training and supervision of his employees, up and including the present time.
- This firm has met the criteria listed in SNAP regulations Section 278.6(i).
- There are no other similar providers or eligible SNAP providers in the immediate area, and as such a six-month disqualification would result in hardship to the community, in lieu of disqualification, FNS should offer this vendor a CMP in that as per Section 278.6(a), disqualification would cause hardship to participating households.
- The charges of sales of ineligible items are vehemently denied. It would be irrational and illogical to accept and conclude that the owner of a solvent and successful business would jeopardize that business and his livelihood by risking a six-month disqualification from

participation in the SNAP considering the meager amount of the alleged items to have been sold. The amount involved in the alleged ineligible sale activities is of such an insignificant amount that it raises a question about the credibility of the investigative reports.

- The representatives of the USDA failed to make a genuine effort during the investigation of this vendor's store to determine the identity and full name of the clerks employed by said vendor. The names of the Investigator for the FNS on each occasion described has been redacted, therefore, it is not known whether the transaction was conducted by the same FNS Investigator, or by different FNS Investigators who exchanged information concerning the activities in the subject store. The vendor is entitled to know whether there was one FNS Investigator or FNS Investigators.
- These inadequacies, inaccuracies and insufficiencies affect the reliability, veracity and sufficiency of the investigative reports and the meager and questionable sale of ineligible items charge especially taken together with Exhibit E where the clerk refuses to exchange EBT benefits for cash, this charge cannot be sustained as a matter of fairness and justice to disqualify this vendor for six months from participation in the SNAP.
- As there is no other basis to disqualify this owner from SNAP, in lieu of disqualification, FNS should subject him to a CMP in that as per Section 278.6(a), disqualification would cause hardship to participating households as it is the only retail SNAP participating store on the block.
- The USDA, FNS has failed to establish intent, which is an essential element of the basis for its decision to disqualify this owner for six months. Your review and analysis based on these Transaction Attachments are not and cannot be a basis for your determination that the firm's intent was to violate the regulations.

## **ANALYSIS AND FINDINGS**

This review is to either validate or to invalidate the determination made by Retailer Operations, and it is limited to the facts at the basis of Retailer Operations' determination at the time it was made. The report shows that the one investigator declared under penalty of perjury, that the report is true and correct. The record under review includes the EBT receipts with the store's name and address, for the total SNAP benefit amounts recorded in each of the four Exhibits. The record also includes photographs of the items exchanged at Appellant for SNAP benefits, and documentation that confirms that the items as noted in the Exhibits, were donated to a local non-profit by the investigator.

The different violating store personnel are described by gender, and ranges of estimated age, weight, height, hair and other identifiers. There is no provision in the regulations that an investigator must provide the name(s) of the store personnel who conduct a violative transaction(s) for the FNS to take administrative action against an authorized store. The evidence in the record supports that Appellant was the offending store, and the nonfood items identified were exchanged for SNAP benefits by different store clerks at Appellant.

Regardless of the cost of items, Appellant established a record of selling nonfood items on multiple store visits. The record supports that some prices of items are listed in the Exhibits. The SNAP regulations make no mention of minimum cost for a common ineligible nonfood item exchanged for SNAP benefits to be considered a violative exchange. The regulations are clear that benefits can only be exchanged for eligible foods. Therefore, the contention that the transactions involved "an insignificant amount," is not relevant.

The contention that FNS did not consider evidence that shows the firm's intent to violate the regulations is an incorrect reading of the regulations. The FNS is required to consider any prior warnings and evidence of a firm's intent to violate when determining a sanction. It does not require FNS to give such warnings or to prove a firm's intent to violate. The evidence considered by Retailer Operations included the information obtained during the onsite store investigation conducted by a USDA investigator. The regulations allow 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, and that such disqualification shall result from a finding of a violation based on evidence that may include facts established through onsite investigations.

Counsel contends that a SNAP disqualification will have a negative financial impact on Appellant's business. It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in the SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty based on possible economic hardship to the firm resulting from imposition of such penalty. To allow the owner to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act, and the enforcement efforts of the USDA. Furthermore, 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.

The owner submitted no evidence to support that the transactions did not occur at Appellant. A record of participation in the SNAP with no previously documented instance of violations does not constitute grounds for dismissal of the current charges of violations. There is no provision in the Act, or regulations that reverses or reduces a prescribed sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees. Retailers are informed that it is their responsibility to ensure that store personnel are properly trained regarding the SNAP rules and regulations. Regardless of whom the owner of a store may utilize to handle store business, the firm's ownership is accountable for the proper training of personnel, and the effective monitoring and handling of SNAP benefit transactions. Counsel did not provide evidence to support that Appellant had a SNAP training program.

The preponderance of evidence under review supports that Appellant's personnel sold ineligible nonfood items on multiple store visits, in exchange for SNAP benefits. Such repetitive violations are considered evidence of carelessness and/or poor supervision. The regulations at 7 CFR § 278.6(e)(5) state 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.

### **CIVIL MONEY PENALTY**

Retailer Operations rendered a finding that it was not appropriate to impose a CMP in lieu of a six-month period of disqualification from SNAP on Appellant. The record documents that there are many other authorized stores within a nearby radius of Appellant that stock as large a variety of comparable staple foods at comparable prices. Retailer Operations concluded that the

evidence does not support that it will cause hardship for SNAP recipients if Appellant is disqualified. Therefore, Appellant was deemed not eligible for a hardship CMP.

### **CONCLUSION**

The preponderance of the evidence in the record supports that Appellant violated the SNAP regulations as charged. The record documents that Retailer Operations properly evaluated Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the regulations. On review, it is decided that Retailer Operations properly denied a CMP. Therefore, the six-month disqualification of Appellant from participation as an authorized retail food store in the SNAP is sustained. This penalty shall become effective thirty (30) days after delivery of this decision.

A new application for participation in the SNAP may be submitted ten days prior to the expiration of the six-month period of disqualification. Please contact the Retailer Center at 877-823-4369 with general questions regarding the SNAP application process.

### **RIGHTS AND REMEDIES**

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023), and to the regulations at 7 CFR § 279.7 with respect to the owner's right to judicial review of this decision. 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 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 (30) days of delivery 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.

M. Viens  
ADMINISTRATIVE REVIEW OFFICER

July 2, 2021