

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

**99 Cents and Oriental Grocery,**

**Appellant,**

**v.**

**Case Number: C0197640**

**Retailer Operations Division,**

**Respondent.**

**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 \$1,560.00 hardship civil money penalty (CMP) against 99 Cents and Oriental Grocery in lieu of a six-month disqualification from the Supplemental Nutrition Assistance Program (SNAP).

**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 \$1,560.00 against the Appellant.

**AUTHORITY**

7 U.S.C. § 2023 and its 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 99 Cents and Oriental Grocery with Federal SNAP law and regulations from May 2017 through September 2017. In a letter dated December 5, 2017, the Retailer Operations Division charged the Appellant store with accepting SNAP benefits in exchange for

merchandise which included ineligible nonfood items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on three (3) out of four (4) compliance visits. The letter further informed the Appellant that the violations warranted a disqualification period of six months 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 December 6, 2017; however, the Appellant did not respond to the charge letter.

After reviewing the evidence in the case, the Retailer Operations Division issued a determination letter dated January 5, 2018. The Retailer Operations Division determined that the Appellant was eligible for a hardship CMP because the store was selling a substantial variety of staple food items including Asian foods and the firm's disqualification would cause a hardship to SNAP households. The determination letter informed the Appellant it was assessed with a \$1,560.00 hardship CMP in lieu of a six-month disqualification in accordance with 7 CFR § 278.6(f)(1).

In a letter dated January 11, 2018, the Appellant requested an administrative review of the Retailer Operations Division's determination. The request for review was granted and 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 action 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and Section 278 of Title 7 of the Code of Federal Regulations (CFR).

7 CFR § 278.2(a) states, in part:

Coupons may be accepted by an authorized retail food store only from eligible households... 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:

(1) 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)(5) states, in part:

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(f)(1) states, in part:

FNS may impose a civil money penalty 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.

7 CFR § 278.6(g) states, in part:

Amount of civil money penalties for hardship and transfer of ownership. FNS shall determine the amount of the civil money penalty as follows:

(1) Determine the firm's average monthly redemptions ... 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 ....

Notwithstanding the above, there is an agency limit of \$11,000 per violation as the maximum TOCMP amount.

### **APPELLANT'S CONTENTIONS**

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

- The store owner acknowledges the violations and states that he did not fully understand the SNAP regulations due to a lack of English proficiency.
- The violations will never happen again as the owner now has a better understanding of the SNAP rules after reviewing the violations and regulations with his daughter.
- The Appellant requests a reduction of the \$1,560 hardship CMP or an installment plan due to financial hardship.

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**

During an investigation conducted from May 2017 through September 2017, the USDA conducted four (4) compliance visits at 99 Cents and Oriental Grocery. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated December 5, 2017. The investigation report included Exhibits A through D which provide full details on the results of each compliance visit.

The investigation report documents that SNAP violations were recorded during three (3) of the four (4) compliance visits. The chargeable violations involved the sale of ineligible non-food items in exchange for SNAP benefits in violation of 7 CFR § 278.2(a). The Retailer Operations Division determined that the assessment of a hardship CMP of \$1,560.00 in lieu of a six-month disqualification was the appropriate penalty for these violations. A preponderance of the evidence supports the decision of the Retailer Operations Division.

## **Owner Responsible for Violations**

The Appellant states that it did not fully understand the SNAP rules and regulations at the time of the violations. However, the store owner signed the SNAP application for 99 Cents and Oriental Grocery on April 16, 2007 and acknowledged that the owner was aware of the SNAP regulations and understood those regulations. That application 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 in exchange for cash, otherwise known as trafficking, and other violations including accepting SNAP benefits in exchange for ineligible non-food items.

In addition, an authorization packet was sent to the firm when it was first authorized and contained training materials which gave guidance on SNAP rules and regulations. SNAP authorized firms are responsible for reviewing the training materials, providing training for its employees, and generally familiarizing themselves with all SNAP rules and regulations pertaining to retailers.

## **Corrective Action**

The Appellant contends that the store owner has now taken additional training and reviewed the regulations and that these violations will never occur in the future. With regard to 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 Retailer Operations Division’s 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.

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 corrective actions implemented subsequent to investigative 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

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 (12) 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 \$1,560.00. That calculation is shown below:

### 5 U.S.C. § 552 (b)(7)(E)

The Appellant asks for a reduced hardship CMP due to financial difficulties. However, the SNAP regulations at 7 CFR § 278.6(g) prescribes how to calculate the amount of the hardship CMP utilizing a mandated formula. As such, there is no discretion in the calculation of the hardship CMP amount and a reduced hardship CMP cannot be granted.

## CONCLUSION

The charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted under the direction of a USDA investigator and 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.

A review of the evidence in this case documents that personnel at 99 Cents and Oriental Grocery exchanged SNAP benefits for ineligible nonfood items during three (3) out of four (4) compliance visits. However, the Retailer Operations Division determined that a six-month disqualification of 99 Cents and Oriental Grocery would create a hardship for SNAP households as there is no other authorized retail food store in the area selling a comparable variety of staple food including Asian food products. Therefore, in lieu of a six-month disqualification, the Retailer Operations Division assessed a hardship CMP against the Appellant of \$1,560.00. 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.

## **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.

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

March 26, 2018