

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

**Ashby Supermarket,**

**Appellant,**

**v.**

**Case Number: C0206256**

**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 a six-month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Ashby Supermarket (hereinafter “Appellant”) by the Retailer Operations Division.

**ISSUE**

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it imposed a six-month disqualification against Ashby Supermarket.

**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**

FNS records show that the Appellant firm, Ashby Supermarket, was initially authorized for SNAP participation as a convenience store on October 30, 2013. Between March 27, 2018, and May 14, 2018, FNS conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigative report documented that personnel at Ashby Supermarket accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. According to the report, the Appellant firm sold plastic spoons, scrub sponges, and facial tissue in exchange for SNAP benefits, which benefits may only be used to purchase eligible foods.

In a letter dated August 7, 2018, the Retailer Operations Division charged the Appellant with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). The charge letter states that the violation of accepting SNAP benefits in exchange for ineligible nonfood items warrants a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further states that under certain conditions and in accordance with 7 CFR § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

In verbal and written correspondence between August 8, 2018, and August 20, 2018, the Appellant, through counsel, provided the following summarized response to the charges:

- The investigation report contains several items of mistaken information. For instance, on two occasions, the report indicates that the store clerk was between 30 and 45 years old. The only person in that age category who has ever been employed at the store is the owner, who was on a prolonged visit to Yemen during one of the investigator's visits to the store. Another error is that on two of the pages of the report, the prices of the items charged are incorrectly added up.
- On two occasions, the report lists more than one ineligible item being sold to the investigator. Only the store owner and his son "work the store," and they are extremely careful and responsible. It is possible that one ineligible item could have been mistakenly sold, but the Appellant challenges any report which claims that more than one ineligible item was ever sold on any occasion.
- One of the ineligible items allegedly sold was a package of plastic spoons. It is possible that a customer purchased soup or Top Ramen and was required to have a spoon in order to consume it. Even in the face of extreme caution, it is possible that the spoons were sold with that necessity in mind.
- The monetary amounts listed in the report are truly negligible. The owners, who have provided years of faithful and consistent service, are hard-working, serious-minded store operators who value USDA rules and are not likely to offend or risk disqualification for no discernible gain.
- The store is strictly a purveyor of food and related items, sells no alcohol, is ADA accessible, and represents the primary location for a large neighborhood as it relates to the residents' ability to shop for food items in their neighborhood. Disqualification of the store would impose a significant hardship on the many people who rely on the store due to a lack of transportation and access to alternate food providers. Appellant has several letters to this effect from members of the community and would be happy to provide these.

After considering the Appellant's response to the charges and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated September 10, 2018. This letter informed the Appellant that it was the determination of the Retailer Operations Division that violations did occur as outlined in the letter of charges and that a six-month disqualification penalty would be imposed in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that consideration for a hardship CMP was given, but that the Appellant was not eligible for a CMP because there were other authorized stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked September 13, 2018, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and implementation of the sanction has been held in abeyance pending completion of this review.

### STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 AND REGULATIONS

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

7 CFR § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food.

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...

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.... **Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction;** for [a] period of 12 months to 10 years for a firm's second sanction; and disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section. [Emphasis added.]

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination...

7 CFR § 278.6(e) states, in part:

FNS shall take action as follows against any firm determined to have violated the Act or regulations...The FNS regional office shall:

(5) 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.

### INVESTIGATION DETAILS

During an undercover investigation conducted between March 27, 2018, and May 14, 2018, the Food and Nutrition Service completed four compliance visits at Ashby Supermarket. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the August 7, 2018, charge letter. The investigation report includes Exhibits A through D, and provides full details on the results of each compliance visit. SNAP violations were documented during each of the four visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report states that the following nonfood items were purchased by an investigator using SNAP benefits:

- One 24-count box of plastic spoons (*Parade* brand), Exhibit A
- Two scrub sponges (*Scotch-Brite* brand), Exhibit B
- One 24-count box of plastic spoons (*Parade* brand), Exhibit B
- One scrub sponge (*Scotch-Brite* brand), Exhibit C
- One scrub sponge (*Chore Boy* brand), Exhibit C
- One 24-count box of plastic spoons (*Parade* brand), Exhibit C
- One 10-count package of facial tissues (*Kleenex* brand), Exhibit C
- One 24-count box of plastic spoons (*Parade* brand), Exhibit D

The report indicates that in Exhibit D, the clerk on duty allowed the sale of ineligible plastic spoons, but refused to allow two scrub sponges to be purchased with SNAP benefits. Also in Exhibit D, the investigator attempted to obtain cash in exchange for SNAP benefits (i.e. trafficking), but this request was refused by the clerk. According to the report, it appeared that three different cashiers conducted the four violative transactions.

The charge letter states that the violations that occurred in Exhibits A, B, and C warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5).

## APPELLANT'S CONTENTIONS

The Appellant did not submit any additional contentions, but simply referred the administrative review officer to its written response to the charge letter. This original response was submitted on August 20, 2018.

It should be noted that in reaching a decision in this matter, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced in this document.

## ANALYSIS AND FINDINGS

The Appellant claims that the investigator's report contains several errors. For instance, the Appellant argues that the owner, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and his son are the only persons who work at the store, and only 5 U.S.C. § 552 (b)(6) & (b)(7)(C) matches a description of being between 30 and 45 years of age. According to the Appellant, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was on a prolonged vacation in Yemen during one of the compliance visits, so the investigator's information is mistaken.

Unfortunately, much of this argument is not believable. According to the Appellant's original SNAP application there are actually two owners of the store – 5 U.S.C. § 552 (b)(6) & (b)(7)(C) – and both are roughly the same age. If it is true that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and his son were the only actual employees at the store, and if 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was on a prolonged vacation to Yemen during a portion of the investigation, this would mean that only his son was operating the store at that time. Agency records show that the store is open 14 hours a day, seven days a week. This review finds it very doubtful that the son operated the store by himself during 5 U.S.C. § 552 (b)(6) & (b)(7)(C) prolonged vacation. Not only would it mean working at the store a minimum of 98 hours a week, it would also mean operating the cash register, ordering inventory, stocking shelves, and conducting all other business related to the store's operation, and doing it by himself. This is very unlikely.

It should be noted that the ages of the clerks as noted by the investigator are listed in ranges and are merely estimates. It is of little consequence that an investigator over- or underestimates one's age by a few years.

The Appellant also argues that on two occasions, the prices of the items are incorrectly added up.

With regard to this claim, it must be noted that most items in the report do not have a price indicated. The price is listed in the report only when there is a price tag affixed to the product or if there is a price marked on the shelf. Very often, no prices are indicated. For example, in Exhibit A, the investigator purchased a box of plastic spoons for \$1.59 and a box of sugar for \$1.99. The investigator also purchased a container of coffee, but there was no price indicated for this product, either on the product itself or on the shelf. Accordingly, the investigator noted the absence of a price as "NPI," meaning no price indicated. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The clerk did not give the investigator an itemized cash register receipt, so there is no way to tell how each item was entered into the cash register or if sales tax was added to the purchase.

Unfortunately, the Appellant has not offered any evidence to show how the prices were incorrectly totaled. As such, this argument has little significance.

The Appellant further states that store personnel are extremely careful and responsible. The Appellant “challenges” the allegation that more than one ineligible item could have ever been sold on any occasion.

Unfortunately, the Appellant’s challenge is not supported by any kind of evidence or further explanation to prove that the investigator’s report was inaccurate. Conversely, the investigator provided a detailed written report, photos of the items purchased, and EBT receipts from each transaction. The evidence in this case leans heavily in the agency’s favor.

As to the claim that the Appellant might have sold plastic spoons to the investigator who was buying ramen or soup because a spoon was necessary to consume the soup, this claim is wholly without merit. There are no circumstances in which the purchase of a non-food item with SNAP benefits is permitted. As noted earlier, regulations at 7 CFR § 278.2(a) state that SNAP benefits may be accepted by an authorized retail food store only in exchange for eligible food.

Finally, the Appellant argues that the monetary amounts listed in the report are truly negligible. The Appellant insists that after years of “faithful and consistent service,” the hard-working store owners would not likely commit offenses or risk disqualification for no discernible gain.

With regard to these claims, this review can make no judgment about the Appellant owners’ likelihood of committing violations or risking disqualification. However, the evidence shows that firm personnel committed program violations every time the investigator visited the store, strongly suggesting a lack of oversight or supervision by the firm’s owners or managers. The regulations are clear that FNS “shall disqualify the firm ... if ... 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” (emphasis added). It is notable that the regulations do not address the value or price of the nonfood items. The only concern is whether the items sold were eligible or ineligible to be purchased with SNAP benefits. As such, the fact that the ineligible items in this case were inexpensive is immaterial.

Because the Appellant has not provided any evidence or documentation to counter FNS’s investigation report and has offered little more than assertion, it is the determination of this review that program violations did occur as charged by the Retailer Operations Division and a six-month disqualification is warranted.

### **Hardship to Households / Civil Money Penalty**

The Appellant contends that a disqualification of the store would impose a significant hardship on the many people who rely on the store due to a lack of transportation and access to alternate food providers.

With regard to this contention, it is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and households are forced to use their benefits elsewhere. Accordingly, regulations at 7 CFR § 278.6(f) do allow, in some circumstances, for a civil money penalty to be imposed in lieu of disqualification. Paragraph (f)(1) of this regulation states that a CMP in lieu of temporary disqualification is allowable when the firm's disqualification would cause hardship to SNAP households because there are "no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices."

It is the determination of this review that a disqualification of Ashby Supermarket, a convenience store, would not cause hardship to SNAP households because there are many other shopping options in the area. According to agency records, there are approximately 30 comparable or larger SNAP-authorized retail stores located within a one-mile radius of Ashby Supermarket, including a full service superstore just a quarter of a mile away.

In accordance with regulation cited above, hardship exists only when there are no other authorized stores in the area selling as large a variety of staple foods at comparable prices. Because such conditions do not exist in this case, a hardship civil money penalty in lieu of disqualification cannot be assessed.

## **CONCLUSION**

Based on an analysis of all information in this case, this review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at Ashby Supermarket during a USDA investigation. All transactions cited in the letter of charges were either conducted or supervised by a USDA investigator and all are thoroughly documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record appears to be specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for ineligible, nonfood merchandise, and in all other critically pertinent details. Pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, Ashby Supermarket, is sustained.

In accordance with the Act and regulations, the disqualification penalty shall become effective 30 days after receipt of this decision. A new application for SNAP participation may be submitted 10 days prior to the expiration of the six-month disqualification period.

## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON  
Administrative Review Officer

March 22, 2019