

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

**Ash's Bp,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0218393**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a three year disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Ash's Bp (hereinafter "Ash's Bp" or "Appellant") by the Retailer Operations Division. It is also USDA's final decision that a civil money penalty in lieu of disqualification is not appropriate in this case.

**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 three year disqualification against Ash's Bp.

**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**

Ash's BP was initially authorized as a convenience store on July 27, 2012. Between May 28, 2019 and August 13, 2019, the USDA conducted an undercover investigation to ascertain Ash's Bp's compliance with Federal SNAP laws and regulations. During the investigation, an FNS investigator determined that Ash's Bp's SNAP authorization number was being used at a store that was not authorized to accept SNAP benefits. This unauthorized store, North Side Market, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, is under the same ownership as Ash's Bp. On three separate occasions, the undercover investigator successfully made purchases for eligible food items at

North Side Market. It is noted that on one occasion, the investigator attempted to purchase an ineligible item, and on another, attempted to exchange SNAP benefits for cash. However, these attempts were denied by the clerk at North Side Market.

In a letter dated November 7, 2019 (Note: The Charge Letter dated October 29, 2019 was rescinded by the Retailer Operations Division and the Charge Letter of November 7, 2019 was issued), the Retailer Operations Division charged the Appellant with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). Specifically, Ash's Bp violated the regulations when it allowed North Side Market to use its authorization to illegally accept and process EBT SNAP benefits. Allowing another business, even if owned by the same ownership, to utilize its authorization number to process EBT SNAP benefits at a different location is in violation of Section 278.2(a) of the regulations.

The Charge Letter stated that the violations warrant a disqualification period of three years pursuant to 7 CFR § 278.6(e)(3)(ii). The letter further stated 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 a response to the Retailer Operations Division of November 5, 2019, the Appellant replied to the charges therein stating that it was able to contact the CC processor and found information regarding the Merchant IDs for both Ash's Bp and North Side Market. The processor did not have any answers as to how the Appellant's FNS identification was programmed into North Side Market's terminal. The Appellant has always followed every law regarding the SNAP regulations since 2012. The Appellant was recertified to keep accepting SNAP. A lot of stores sell everything and anything with SNAP benefits like hot food. The Appellant would appreciate any lenience in this matter and would be willing to make this situation right. The Appellant submitted a copy of an email, dated June 26, 2013, from the Retailer Operations Division requesting additional information in support of North Side Market's SNAP application received on June 26, 2013.

After considering the Appellant's reply and the evidence in this case, the Retailer Operations Division issued a Determination Letter dated November 21, 2019. The letter informed the Appellant that it was the determination of the Retailer Operations Division that the violations did occur as outlined in the letter of charges and that a three year 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 civil money penalty was given, but that the Appellant was not eligible for a CMP as there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked November 30, 2019, the Appellant appealed the Retailer Operations Division's determination and requested an administrative review. FNS granted the appeal by letter dated February 7, 2020 and implementation of the sanction was 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, 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 law in this matter is found in the Food & 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)(3) establish the authority upon which a three year disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, inter alia:

Coupons [i.e., SNAP benefits] may be accepted by an authorized retail food store only from eligible households... and only in exchange for eligible food... An authorized retail food store may not accept coupons from another retail food store, except that public or private nonprofit homeless meal providers may redeem coupons for eligible food through authorized retail food stores. [Emphasis added.]

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.... 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.

7 CFR § 278.6(c) states, inter alia:

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, inter alia:

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

(3) Disqualify the firm for 3 years if it is to be the first sanction for the firm and the evidence shows that:

(ii) Any of the situations described in paragraph (e)(2) of this section occurred and FNS had not previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating the regulations.

7 CFR § 278.6(e)(2)(v) states:

Personnel of the firm knowingly accepted coupons from an unauthorized firm or an individual known not to be legally entitled to possess coupons.

7 CFR § 278.6(f)(1) states, inter alia:

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.

### **SUMMARY OF THE CHARGES**

Between May 28, 2019 and August 13, 2019, the USDA conducted an undercover investigation to ascertain Ash's Bp's compliance with Federal SNAP laws and regulations. During the investigation, an FNS investigator determined that Ash's Bp's SNAP authorization number was being used at a store that was not authorized to accept SNAP benefits. This unauthorized store, North Side Market, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is under the same ownership as Ash's Bp. As noted below and in the investigative report, on three separate occasions the undercover investigator successfully made purchases for eligible food items at North Side Market in which Ash's Bp's SNAP authorization number was used to process the transactions:

5 U.S.C. § 552 (b)(7)(E).

It is noted that on one occasion, the investigator attempted to purchase an ineligible item (Exhibit B), and on another, attempted to exchange SNAP benefits for cash (Exhibit C). However, these attempts were denied by the clerk at North Side Market.

### **APPELLANT'S CONTENTIONS**

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the reply to the Charge Letter and in the administrative review request, the Appellant stated the following summarized contentions, in relevant part:

- The Appellant was able to contact the CC processor and obtained the following information: (1) Merchant ID for Ash's Bp 5 U.S.C. § 552 (b)(6) & (b)(7)(C); and (2) Merchant ID for North Side Market 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The processor did

not have any answers as to how the Appellant's FNS identification was programmed into North Side Market's terminal.

- Ash's Bp has never shared its SNAP ID with any other location nor has it ever violated any SNAP policies or rules. There would have never been, is, or will be any reason for the Appellant to share its SNAP ID with another establishment or authorize any other vendor to use its SNAP ID. The Appellant has no knowledge of anyone or any store having used its SNAP ID. If the Appellant's SNAP ID has been used, it has been without the Appellant's knowledge and it will pursue criminal charges against that individual.
- The Appellant has always followed every law, policy and guideline regarding the SNAP since it was authorized in 2012.
- The Appellant was recertified to keep accepting SNAP.
- A lot of stores sell everything and anything with SNAP benefits like hot food.
- A SNAP disqualification will adversely affect the well-being of the Appellant and could ultimately endanger its existence.
- The Appellant requests that it be allowed to continue its participation in the SNAP. The Appellant would appreciate any lenience in this matter and would be willing to make this situation right.

In support of these contentions, the Appellant submitted a copy of an email, dated June 26, 2013, from the Retailer Operations Division requesting additional information in support of the North Side Market's SNAP application received on June 26, 2013.

### **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 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. 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.

The Appellant has provided several contentions with regard to the imposed charges including a claim that Ash's Bp has never shared its SNAP ID with any other location nor has it ever violated any SNAP policies or rules. There would have never been, is, or will be any reason for the Appellant to share its SNAP ID with another establishment or authorize any other vendor to use its SNAP ID. The Appellant has no knowledge of anyone or any store having used its SNAP ID. If the Appellant's SNAP ID has been used, it has been without the Appellant's knowledge and it will pursue criminal charges against that individual.

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. Both the SNAP retailer application and retailer reauthorization application contain a certification page whereby applicants must confirm their understanding of and agreement with SNAP retailer requirements in order to complete the application/reauthorization process. Store ownership did

certify its understanding and agreement to abide by program rules and regulatory provisions when it initially applied to become a SNAP retailer. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time regardless of the amount of time the owner(s) is present at the subject firm. 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. This certification also states that SNAP authorization may not be transferred to new owners, partners, or corporations and that an unauthorized individual or firm accepting or redeeming SNAP benefits is subject to substantial fines and administrative sanctions.

The FNS investigative report shows that three employees working at the unauthorized firm transacted SNAP benefits on three separate occasions during the investigative period using the SNAP authorization for the Appellant firm indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. 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. Additionally, a review of the report shows no errors or discrepancies. There is no regulatory threshold for the dollar value of the unauthorized transactions or for the timeframe in which the transactions occurred. The acceptance of SNAP benefits by unauthorized firms is a violation of SNAP rules and regulations. SNAP regulations explicitly state that FNS shall disqualify a store for a three year period if it is to be the first sanction for the firm.

As previously stated, SNAP regulations specifically prohibit the acceptance of SNAP benefits from unauthorized firms. The SNAP retailer application form contains a certification page whereby applicants must confirm their understanding of and agreement with SNAP retailer requirements in order to complete the application process. Store ownership did certify its understanding and agreement when it applied for authorization as a SNAP retailer. The “SNAP Retailer Training Guide” is also provided to retailers upon their authorization and specifically states, “You must obtain a SNAP permit for each store location where you want to accept SNAP benefits.” Additionally, the Appellant firm’s SNAP license clearly states, “This permit is valid only for the owner(s)/officer(s) listed and operating at the location above.” Therefore, it would be very unlikely that store ownership would not be aware that his actions were in violation of SNAP regulations. This is further supported by the fact (and as noted in the June 26, 2013 email submitted by the Appellant) that the store owner applied for SNAP authorization for the unauthorized firm in June 2013. If the store owner had truly believed that it was acceptable to use his SNAP license at unauthorized firms, then it would make no sense for him to apply for a SNAP license for the unauthorized firm.

It is highly improbable, based on the willingness of the three employees cited in the investigative report, that the only instances of SNAP violations were those transactions identified as part of the FNS undercover investigation. These actions more likely than not represent an ongoing pattern of SNAP violations at the Appellant firm. The Appellant has the burden to provide relevant evidence to rebut the charges. This burden has not been met. The Appellant has provided no evidence to support its contentions that Ash’s Bp has never shared its SNAP ID with any other location nor has it ever violated any SNAP policies or rules. Under the SNAP regulations, the

penalty for accepting SNAP benefits by unauthorized firms is a three year disqualification. The regulations do allow SNAP retailers to pay a hardship CMP, if eligible, as explained in the Civil Money Penalty section below.

Based on the discussion above, there is not any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **No Prior Violations**

The Appellant contends that it has always followed every law, policy and guideline regarding the SNAP since it was authorized in 2012. However, 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 those charges.

### **Corrective Action**

The Appellant contends that if its SNAP ID was used without its knowledge, it will pursue criminal charges against that individual. The Appellant would be willing to make this situation right.

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 the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that it has taken or will take corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Financial Hardship**

The Appellant contends that a SNAP disqualification will adversely affect the well-being of the Appellant and could ultimately endanger its existence. However, there is no provision in the SNAP regulations or internal agency policy directives for 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 allow store ownership from being excused 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, the Appellant's contention that the firm may 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 imposed.

### **CIVIL MONEY PENALTY**

The Retailer Operations Division determined that the Appellant was not eligible for a hardship civil money penalty (CMP) 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." [Emphasis added]. **5 U.S.C. § 552 (b)(7)(E).**

Based on the evidence, the disqualification of Ash's Bp would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division's decision not to assess a hardship CMP in lieu of a three year disqualification is sustained as appropriate under 7 CFR § 278.6(f)(1).

### **CONCLUSION**

A review of the evidence in this case supports that the program violations at issue did occur as charged. 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, that SNAP benefits were being accepted from an unauthorized firm, and in all other critically pertinent detail.

Accordingly, the determination by the Retailer Operations Division to impose a disqualification of three years against the Appellant firm from participating as an authorized retailer in SNAP is sustained. Furthermore, the Retailer Operations Division properly determined that the Appellant was not eligible for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations as there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this decision. A new application for SNAP participation may be submitted ten (10) days prior to the expiration of the three year disqualification period. When eligible, Appellant may reapply for SNAP authorization using the application instructions contained on the FNS web site at [www.fns.usda.gov](http://www.fns.usda.gov). Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.



## **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to 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.

LORIE L. CONNEEN  
ADMINISTRATIVE REVIEW OFFICER

April 6, 2020