

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

**Bacchus West Indian Market Inc.,**

**Appellant,**

**v.**

**Case Number: C0208128**

**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 while a hardship civil money penalty (CMP) in lieu of a 6-month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Bacchus West Indian Market Inc. (hereinafter “Appellant”) by the Retailer Operations Division, the amount of the penalty was incorrectly calculated. The correct CMP that shall be assessed is \$1,974.00

**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 assessed a hardship civil money penalty in lieu of a six-month disqualification against Bacchus West Indian Market Inc.

**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**

Bacchus West Indian Market Inc. was initially authorized for SNAP participation as a small grocery store on April 17, 1989. Between August 15, 2018, and September 4, 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 Bacchus West Indian Market Inc. accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. According to the report, the Appellant firm sold powder and medicated soap,

first aid antiseptic, skin cream, and bitters tonic in exchange for SNAP benefits, which may only be used to purchase eligible foods.

In a letter dated October 4, 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 6 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 CMP in lieu of disqualification.

In a letter received by FNS on October 19, 2018, the Appellant replied to the charges. In the letter, the Appellant said the firm had been in business since 1993 and has been adherent to all laws, and did not willfully try to defraud the government. The Appellant explained that at checkout, the firm's clerks were trying to process the customer transactions as quickly as possible and did not realize that the items being purchased included non-food items. Finally, the Appellant said the infractions should not have occurred and will never happen again, and begged for leniency so that the firm could continue to accept SNAP benefits.

Because it appeared, based upon statements in the Appellant's reply, that the firm's owner was involved in the violative transactions, the Retailer Operations Division issued a second charge letter dated November 1, 2018, which imposed a 1 year disqualification.

After considering the Appellant's response to the charge letters and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter, dated November 29, 2018. This letter informed the Appellant that it was the determination of the Retailer Operations Division that the violations did occur as outlined in the charge letter. However, the record shows that in the time between the second charge letter and the determination letter, the Retailer Operations Division again reviewed the investigative report and determined that the firm's owner had not been involved in the violative transactions and therefore a 6-month disqualification was appropriate, instead of a 1-year disqualification. Also, the Retailer Operations Division determined that in lieu of disqualification from the program for 6 months, the firm was eligible for a hardship CMP because it was selling a substantial variety of staple food items and the firm's disqualification would cause hardship to SNAP households because there were no other authorized retail food store in the area selling as large a variety of West Indian staple food items at comparable prices. Accordingly, the letter informed the Appellant that a monetary penalty of \$3,936.00 was due 15 calendar days from receipt of the determination letter, unless if a written request for administrative review was submitted timely.

In a letter postmarked December 10, 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 an 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 (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 FNS may impose a 6 month disqualification against a retail food store or wholesale food concern for program violations.

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.... **FNS may, in lieu of a disqualification, subject a firm to a civil money penalty of up to an amount specified in § 3.91(b)(3)(i) of this title for each violation if FNS determines that a disqualification would cause hardship to participating households.** [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...

(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.

7 CFR § 278.6(g) outlines the steps for calculating the CMP amount:

- (1) Determine the firm's average monthly redemptions of [SNAP benefits] 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. The civil money penalty may not exceed an amount specified in § 3.91(b)(3)(i) of this title for each violation.

### **SUMMARY OF INVESTIGATION DETAILS**

During an undercover investigation conducted between August 15, 2018, and September 4, 2018, FNS completed six compliance visits at Bacchus West Indian Market Inc. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the October 4, 2018, and November 1, 2018, charge letters. The investigation report includes Exhibits A through F, and provides full details on the results of each compliance visit. SNAP violations were documented during four of the six 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:

- Two bars of soap (Mystic Blue brand), Exhibit C
- One bar of soap (Mystic Blue brand), Exhibit D
- One bottle first aid antiseptic (Dettol brand), Exhibit D
- One container skin cream (Nixoderm brand), Exhibit E
- One package medicated soap (Roberts brand), Exhibit F
- One package tonic (Living Bitters brand), Exhibit F

The report indicates that in Exhibit F, the investigator attempted to obtain cash in exchange for SNAP benefits, but this request was rejected by the cashier. No violations occurred in Exhibits A or B. According to the report, one cashier conducted the four violative transactions.

The violations that occurred in Exhibits C, D, E, and F warrant a disqualification period of 6 months pursuant to 7 CFR § 278.6(e)(5) or, if criteria are met, a civil money penalty in lieu of disqualification pursuant to 7 CFR § 278.6(f)(1).

### **APPELLANT'S CONTENTIONS**

The Appellant made the following summarized contentions in the request for administrative review, and subsequent correspondence, dated January 4, 2019, in relevant part:

- Appellant responded to the Retailer Operations Division's charge letter by phone calls, phone messages, letters, and faxes;
- Appellant has no evidence to prove innocence, is aware there may be a penalty, and is requesting leniency in accessing penalties;
- The firm has been in business since 1993 and has fully adhered to all laws and regulations, including Federal, State, or city agency;
- It is an honor and privilege to do business, and the Appellant did not willfully try to defraud the government or the SNAP program in any way;
- Appellant's only explanation is that for both infractions, the clerk was trying to get the customer processed quickly as possible, not realizing that items included in the sales were non-food items;
- The infractions should not have occurred and will never happen again; and
- Appellant requests a review of the case, and reconsideration of the firm's disqualification from SNAP authorization.

In support of its contentions, the Appellant also submitted copies of the firm's October 12, 2018, and November 7, 2018, responses to the charge letters, the determination letter, and FNS's December 20, 2018, letter acknowledging the request for administrative review.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

### **ANALYSIS AND FINDINGS**

The Appellant has not provided any evidence or documentation that the violations did not take place as described in the charge letter. In fact, the Appellant concedes that the violations occurred, while attributing the errors to employees trying to get customers processed as quickly as possible and not realizing items sold were non-food items. Because the violations themselves do not appear to be in dispute, it is the determination of this review that program violations did occur as charged by the Retailer Operations Division. The balance of this review will address the Appellant's remaining contentions.

## **Ineligible Items Sold by Mistake**

Appellant asserts that ineligible items were sold for SNAP benefits during the investigation only because the employees were trying to process transactions quickly without realizing items sold were non-food items, and that there was no willful intention to defraud the government in any way.

With regard to this contention, the record shows that the Appellant owner signed an application to participate as a SNAP retailer on April 16, 1989. By signing this application, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. The record clearly establishes that the Appellant owner agreed to abide by program rules, including taking responsibility for violations committed by any of the firm's employees, whether paid or unpaid, new, full-time or part-time.

Sanctions for violations are not limited to only those committed intentionally. Although the firm's employees may not have intentionally violated SNAP rules, their mistakes indicate inadequate training and poor supervision. The penalty imposed is the minimum penalty, and it is only imposed if the firm has not been previously sanctioned. Therefore, the contention that the violations were due to mistakes made by store employees does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

## **Request for Leniency**

Appellant requests leniency in the assessment of the administrative penalty because it has been in business since 1993 and has fully adhered to all laws during this time.

SNAP regulations, at 7 CFR § 278.6(e)(5), require that when serious violations occur, such as the exchange of common nonfood items for SNAP benefits, a six-month disqualification is the necessary penalty, even on the first occasion. Alternatively, a CMP may be assessed only if the criteria in 7 CFR § 278.6(f)(1) are met.

As long as the administrative action taken by the agency fully conforms to SNAP regulations, this review has no authority to dismiss or reduce a period of disqualification, or a CMP. In this case, the type of sanction imposed by the Retailer Operations Division for this first-time violation is entirely in line with SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations. As such, the firm's compliance history does not provide a valid basis for this review to consider reversing or reducing the agency's disqualification action.

## **CIVIL MONEY PENALTY**

As noted earlier, the Retailer Operations Division has determined that the Appellant is eligible for a civil money penalty in lieu of a six-month disqualification because the firm 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 West Indian staple food items at comparable prices. The Retailer Operations Division determined that without access to such food items, SNAP households would experience hardship.

The sanction of a civil money penalty is in accordance with 7 CFR § 278.6(a) and (f)(1). After reviewing the evidence in this case, this review agrees that a civil money penalty in lieu of disqualification was imposed in accordance with the regulation cited above. However, this review finds that the CMP amount of \$3,936.00 was calculated incorrectly.

Regulations at 7 CFR § 278.6(g) outline the steps for calculating the CMP amount. The CMP is calculated on the basis of the store's SNAP redemptions during the 12 months immediately prior to the firm being charged with SNAP violations. Modifications to the CMP by the Administrative Review Officer may occur only when there is an error in calculation or when the CMP exceeds the statutory limit. This review has no authority to reduce or lessen a CMP amount for any other reason.

In this case, it appears that the CMP calculation was erroneously based upon a 12-month disqualification period, instead of the appropriate 6-month disqualification period. Because there was an error in the calculation of the amount of the CMP in this case, the CMP is modified in accordance with the calculation as follows:

#### 5 U.S.C. § 552 (b)(7)(E)

Based on the information above and the regulations cited at 7 CFR § 278.6(g), it is the determination of this review that the CMP amount is modified and should be assessed for \$1,974.00.

### CONCLUSION

Based on an analysis of all information in this case this review finds, by a preponderance of the evidence, that program violations of 7 CFR § 278.2(a) did occur at Bacchus West Indian Market Inc. 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.

As discussed above and in accordance with 7 CFR § 278.6(g), the determination by the Retailer Operations Division to assess a CMP against Bacchus West Indian Market Inc. in lieu of a 6-month period of disqualification from participating as a SNAP authorized retailer is modified with a corrected sanction amount of \$1,974.00. Appellant should contact Financial Management at 703-605-0483 to discuss payment of this penalty in installment payments or online in one lump sum, as provided in the November 29, 2018, determination letter.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. Should Appellant choose to accept disqualification rather than pay the civil money penalty, a new application for participation in the SNAP may be submitted ten (10) days prior to the expiration of the six-month period of disqualification.

### **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.

MICHELLE WATERS  
Administrative Review Officer

May 2, 2019