

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

**Bull Market Convenience,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0205839**

**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 a finding that a six month disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Bull Market Convenience (hereinafter “Bull Market Convenience” or “Appellant”) by the Retailer Operations Division of FNS.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a six month period of disqualification against Bull Market Convenience.

**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 Department of Agriculture conducted an investigation of the compliance of Bull Market Convenience with Federal SNAP law and regulations during the period January 30, 2018 through March 2, 2018. In a letter dated April 12, 2018, the Retailer Operations Division charged the Appellant 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 four out of five 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 letter also stated that under certain conditions, FNS may impose a hardship civil money penalty (CMP) in lieu of a disqualification as provided in 7 CFR § 278.6(f)(1).

The Appellant, through counsel, responded to the charges in a letter dated April 25, 2018 that also included a request for information and documents from FNS with regard to the agency's case against Bull Market Convenience pursuant to the Freedom of Information Act (FOIA). Appellant's counsel received FNS's response to the FOIA request on May 18, 2018. In a letter dated August 10, 2018 and received by FNS on August 13, 2018, the Appellant's counsel filed a FOIA appeal of the documents provided by FNS in response to the FOIA request. The record reflects that FNS provided a response to counsel's FOIA appeal, dated November 16, 2020. On November 19, 2020, the Retailer Operations Division sent a 10 day letter to counsel providing the opportunity to respond to the letter of charges. No additional information was received from the Appellant or counsel.

After considering the Appellant's response and the evidence of this case, the Retailer Operations Division issued a determination letter dated December 15, 2020. The determination letter informed the Appellant that the firm was disqualified from the SNAP for a period of six months in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a hardship civil money penalty under 7 CFR § 278.6(f)(1). The Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the six month disqualification because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked December 31, 2020, the Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. FNS granted the Appellant's request for administrative review by letter dated January 14, 2021. Upon acceptance of the administrative review request, implementation of the six month disqualification 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulations under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e) establish the authority upon which a disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, inter alia:

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, inter alia:

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, 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.

7 CFR § 278.6(e)(5) states, inter alia:

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, inter alia:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when . . . the firm's disqualification would cause hardship to Food Stamp [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**

During an investigation conducted from January 30, 2018 through March 2, 2018, USDA conducted five compliance visits at Bull Market Convenience. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated April 12, 2018. The investigation report included Exhibits A through E which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during four of the five compliance visits and involved the sale of a variety of items best described in regulatory terms as "common nonfood items". The misuse of SNAP benefits noted in Exhibits B, C, D and E warrant a disqualification as a SNAP retail food store for a period of six months. The exchange of these ineligible items for SNAP benefits is in violation of 7 CFR § 278.2(a).

## 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 administrative review request, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant vehemently denies that the firm has engaged in accepting SNAP benefits in exchange for common ineligible nonfood items.
- The owner has some doubts of the issue of the conduct of the investigation. The investigation report makes him question the consistency of the visits and the entire investigation. The owner and his partner are willing to submit an affidavit under oath that they never intended to violate the SNAP rules. They would never allow any violations to occur while they are in charge of the business. The transactions or their occurrences were never brought to the attention of the owner and he had absolutely no knowledge of them.
- Since being authorized to participate the SNAP, the owner has continuously trained and tested his employees concerning the SNAP rules relating to the prohibitions against sales of ineligible items and exchanging cash for SNAP benefits. The owner and employees are well trained to handle SNAP and other transactional activities. The owner is very aware that violations associated with SNAP or other vending transactions have severe consequences. The owner personally guards the EBT particularly from any unusual transactions related to SNAP for cash or any nonfood items in addition to other issues concerning SNAP transactions.
- The firm has met the criteria listed in 7 CFR 278.6(i) in that it has developed and effective compliance policy. The firm's compliance policy and program were in operation prior to the occurrence of the SNAP violations.
- As there have been no named employees designated by FNS as individuals who have violated the SNAP regulations, there have been no violating employee(s) who have been disciplined.
- Since being authorized, the Appellant has maintained an exemplary record and this allegation is the first occasion in which a member of the firm and its management are aware of conduct of any SNAP violations. Such an unblemished record is evidence of the Appellant's continued compliance with the law and training and supervision of employees.
- The investigator failed to make a genuine effort during the investigation to determine the true identity and full name of the clerks who allegedly committed the wrongdoing as noted in the Exhibits. All that is furnished is a general description of the clerk, no name or his relationship to the owner after five visits to the store. The amount (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) involved in the alleged ineligible sale activities is of such an insignificant amount that it raises a question about the appropriateness and credibility of the investigative reports. The behavior and activity of the investigator also

effects the investigations, as his attempt to engage the cashier in trafficking raises an issue of credibility.

- In each of the Exhibits, the time of entry and departure by the investigator to and from the subject premises is redacted. The time spent in the store by the investigator is important for the following reasons: (a) was the time sufficient for the investigator to complete the selection of the multiple items from the various locations in this grocery store, wait on line at the counter, have the purchases totaled at said counter and pay for same, and (b) based on the hour of any given day, the owner herein can identify the clerk who was on duty at the time. The clerk's identity is of importance particularly when it will directly impact a business.
- It should be further noted that due to the failure of FNS to timely advise the owner of potential issues with an employee, any surveillance cameras in this store are self-erasing and the images taken during the investigative period of January 30, 2018 through March 2, 2018 are no longer available for viewing.
- The Appellant is entitled to know whether there was one or multiple investigators who exchanged information concerning the activities in the subject store. There is a denial of receipt of the cash register tape. The price of each product displayed and sold in this store is carefully marked. Each customer receives a cash register receipt or tape when a purchase is made. The owner denies that USDA representatives were not given such tapes at the time that they were presented with the EBT receipts.
- These inadequacies, inaccuracies and insufficiencies affect the reliability, veracity and sufficiency of the investigative reports and the meager and questionable sale of ineligible items charged. This charge cannot be sustained as a matter of fairness and justice to disqualify this vendor for six months from participation in the SNAP.
- A very substantial portion of the Appellant's sales and revenues result from its participation in the SNAP. SNAP sales provide the income necessary to keep the business profitable so it can continue its operation. A SNAP disqualification would cause irreparable injury and damage to the owner forcing him out of business due to the loss of revenue.
- A SNAP disqualification will impose a hardship on members of the community who rely on this medium-sized retail deli/grocery store to regularly purchase food with SNAP benefits. The store is at all times well stocked with staple food inventory to accommodate those low income customers who regularly purchase items with SNAP benefits, receiving regular deliveries. The Appellant provides necessary items to the community which is comprised of numerous houses and multi-story apartment buildings, family homeless shelters and other commercial enterprises. In addition, there is a hospital, numerous schools, churches and family shelters in the immediate area. There is no other similar SNAP provider in the area.

## **ANALYSIS AND FINDINGS**

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

without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. 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. Additionally, a claim of having a record of participation in 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.

The FNS investigative report shows that two employees working at the Appellant firm accepted SNAP benefits for ineligible nonfood items on four separate occasions during the investigative period 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.

The Appellant contends that the amount (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) involved in the alleged ineligible sale activities is of such an insignificant amount that it raises a question about the appropriateness and credibility of the investigative reports. However, there is no regulatory threshold for the dollar value of the ineligible items purchased or for the timeframe in which they were purchased. The acceptance of SNAP benefits for ineligible items is a violation of SNAP rules and regulations. The ineligible items sold were obvious nonfood items and would not readily be confused with eligible edible food items. SNAP regulations explicitly state that FNS shall disqualify a store for a six month period 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 the sale of common nonfood items in exchange for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management.

SNAP benefits, in general, are only authorized to be used for the purchase of foods for the household to eat as well as seeds and plants which produce food for the household to eat. The common nonfood items purchased are clearly not edible foods and are not plants or seeds, so one has to question the level of training the employee received by store ownership and/or management. The basic concept of "if you can't eat it, you can't buy it using SNAP" is not a difficult one for employees to grasp, yet the employees allowed the purchase of ineligible items using SNAP benefits on multiple occasions.

Had an effective compliance policy and program been in effect at the firm, it is unlikely that the employees would have made such obvious mistakes. The more likely explanation is that store ownership and/or management failed to properly train and subsequently supervise the employees. Additionally, had store ownership and/or management been supervising the

employees through occasionally monitoring them using videotape, if available, or in person, it would have readily noticed that they were allowing the sale of ineligible nonfood items in exchange for SNAP benefits. It also would have been immediately evident to store ownership and/or management that the employees were deficient in their knowledge of SNAP rules and regulations had it periodically spot checked the employees' knowledge and abilities by asking questions about SNAP eligible/ineligible items. Either of these basic supervisory techniques would have provided a no cost method for store ownership and/or management to ensure that store employees were not putting the firm's SNAP authorization at risk.

These are clear signs of poor or no supervision by store ownership and/or management. It is highly improbable, based on the willingness of the employees to exchange SNAP benefits for ineligible nonfood items, 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. As previously stated, store ownership is responsible for all SNAP transactions at the firm and therefore, a certain minimal level of oversight and training on the part of ownership to ensure employees, especially new employees, are not violating SNAP laws or regulations is expected. It would be unusual and irresponsible for store ownership to not have a program of ongoing supervision of employee performance and conduct by periodically monitoring store transactions, including those involving SNAP, and reviewing daily balance sheets to ensure store employees were not stealing from the firm or conducting other activities that would jeopardize the licenses and income that the firm is dependent upon. Under SNAP regulations, the penalty for allowing the purchase of ineligible nonfood items using SNAP benefits as the result of poor supervision by ownership or management is a six month disqualification. The regulations do allow SNAP retailers to pay a hardship CMP, if eligible, as explained in the next section.

The Appellant is correct that the firm has no previous history of SNAP program violations or warnings. However, this does not necessarily mean that the firm has not been conducting violative transactions. Neither FNS nor the Appellant has sufficient data to conclusively prove that the firm was or was not conducting violative transactions prior to the start of the undercover investigation. However, the matter under review is the first time that the firm has been investigated by FNS and the results of the investigation showed SNAP violations conducted by two employees in four of the five visits to the firm. While it is not definitive, it can be readily inferred that violative transactions were more likely than not occurring in previous months based on these investigatory visits.

Regarding the Appellant's other contentions, no statutory or regulatory requirements exist for investigative personnel to positively identify store employees that have committed violations of SNAP rules and regulations. The descriptions contained in the Report of Positive Investigation are provided only to assist store ownership in identifying those employees responsible for the violative transactions. Many variables can affect the description of an employee (e.g. whether the employee was sitting or standing or on a platform, the fit of their clothing, changing hair styles/lengths/colors, etc.) so these descriptions may not be one hundred percent accurate which does not mean that the violations did not occur. Disclosing the identity of investigative personnel would cause a clearly unwarranted invasion of personal privacy. The store entry/exit times could also be used to identify investigative personnel and cannot be provided. The

owner's denial of cash register tapes not being provided to the USDA investigator does not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

Based on this discussion, the decision by the Retailer Operations Division to disqualify the firm for a six month period was the appropriate penalty and there is no valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Financial Hardship**

With regards to the Appellant's contentions that a SNAP disqualification will impose a financial hardship to the firm, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm or to ownership resulting from imposition of such penalty. To allow ownership 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 of 2008, as amended, 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. Therefore, 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**

With regard to the Appellant's contentions that a SNAP disqualification will impose a hardship on SNAP customers, 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 Bull Market Convenience 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 six month disqualification is sustained as appropriate under 7 CFR § 278.6(f)(1).

### **CONCLUSION**

It is therefore established that the violations as described in the letter of charges did in fact occur at Bull Market Convenience warranting a disqualification of six months in accordance with



7 CFR § 278.6(e)(5). That regulation states that FNS shall “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”. Therefore, the decision to impose a six month disqualification, the least severe penalty allowed by regulation, against Bull Market Convenience, the Appellant firm, is appropriate and the action is sustained.

In accordance with the Food and Nutrition Act of 2008 and the regulations there under, the six month period of disqualification shall become effective thirty (30) days after receipt of this letter. A new application for participation may be submitted by the firm ten (10) days prior to the expiration of this six month period.

### **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

February 22, 2021