

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

**Circle K #5189,**

**Appellant,**

**v.**

**Case Number: C0218174**

**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 Circle K #5189 (hereinafter “Appellant”) by FNS’s 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 Circle K #5189.

**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, Circle K #5189, was initially authorized for SNAP participation as a convenience store on January 10, 2018. Between September 10, 2019, and November 5, 2019, FNS conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigation report documented that personnel at Circle K #5189 accepted SNAP benefits in exchange for ineligible items on three separate occasions. According to the report, the Appellant firm sold plastic cutlery, batteries, plastic plates, storage bags, and plastic food wrap in exchange for SNAP benefits, which benefits may only be used for the purchase of eligible food.

In a letter dated November 27, 2019, the Retailer Operations Division charged the Appellant with violating SNAP regulations at 7 CFR § 278.2(a). The charge letter stated that the acceptance of SNAP benefits in exchange for ineligible merchandise warrants a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further stated that under certain conditions and in accordance with § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

In a letter dated December 3, 2019, the Appellant responded to charges, acknowledging that violations occurred, but arguing that they were the result of high employee turnover at the store and a checkout system that does not automatically separate eligible items from ineligible items, which forces the employees to do so. According to the Appellant, both employees who committed violations had been trained but were “clearly negligent in their duties.” The Appellant outlined several corrective actions that were immediately implemented, including disciplining the offending employees, retraining all employees, and using mystery shoppers to prevent further SNAP violations.

After considering the Appellant’s response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated December 6, 2019. This letter informed the Appellant that it was the determination of the Retailer Operations Division that violations did occur as outlined in the charge letter 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 December 17, 2019, the Appellant appealed the agency’s determination by requesting an administrative review. The request was granted and implementation of the disqualification has been held in abeyance pending completion of this review.

It should be noted that the store in this case had its SNAP authorization withdrawn by FNS on March 26, 2020. Agency records show that a SNAP retailer application was submitted by a new owner at the same location on January 27, 2020. According to records provided by the new owner, a change of ownership occurred in December 2019. As a result of this change in ownership, the authorization of Circle K #5189 under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was withdrawn. The change of ownership does not affect this administrative review, however, as the violations in this case occurred before the ownership change took place. As such, the conclusions of this review will only affect the Appellant, not any present or future owners at the location.

## **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 September 10, 2019, and November 5, 2019, FNS completed five compliance visits at Circle K #5189. The agency's record indicates that a report of the investigation was provided to the Appellant as an attachment to the November 27, 2019, charge letter. The investigation report includes Exhibits A through E, and provides full details on the results of each compliance visit. SNAP violations were documented during three of the five 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 24-count boxes of plastic cutlery (*Solo* brand), Exhibit A
- One 2-count package of D batteries (*Circle K* brand), Exhibit A
- Two 15-count packages of plastic plates (*Solo* brand), Exhibit C
- One 20-count box of one-gallon storage bags (*Glad* brand), Exhibit C
- One box of 100-square-foot plastic cling wrap (*Glad* brand), Exhibit D
- Two 20-count boxes of one-gallon storage bags (*Glad* brand), Exhibit D

The report indicates that in Exhibits B and E, the clerk on duty did not permit the investigator to purchase ineligible items with SNAP benefits. In Exhibit E, the clerk also refused to allow the exchange of SNAP benefits for cash (i.e. trafficking). The report states that two different clerks conducted the three violative transactions. The charge letter states that the violations that occurred in Exhibits A, C, and D warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5).

## APPELLANT'S CONTENTIONS

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

- The store was being sold at the time of the violations. It had been in escrow since August 23, 2019, and was scheduled to close on November 20, 2019 (it was delayed due to business reasons of the buyer). As a result of the impending sale, the firm lost all experienced employees in October and the early part of November, which resulted in the hiring of new employees. Had this not occurred, the firm would not have had these violations, and it did not have any violations during the previous two years.
- New employees were trained regarding SNAP and all other regulations.
- FNS did not consider the nature and scope of the violations, the fact that the firm did not have any previous violations in its records, the fact that no prior notices had been sent by FNS to warn the firm about the possibility that violations were occurring, and the fact that there is no evidence which shows the firm's intent to violate the regulations.
- A disqualification will cause undue economic hardship to the firm's ownership. A substantial portion of the firm's revenue is derived from EBT sales. A disqualification may result in store closure or even bankruptcy.
- A disqualification will cause undue hardship for SNAP customers, especially those with insufficient transportation as well as the elderly, disabled, and homeless.

- Insufficient time was given to the firm to consult with and hire an attorney to clearly present the facts and dispute the information used in the disqualification process.
- Consideration was not given to the fact that the firm's EBT card processing system does not separate and identify ineligible items at the point of sale. This means that employees must manually do so, which sometimes results in a few nonfood items being processed through EBT, though not acceptable to the firm's business standards.
- Consideration was not given to the fact that the two employees who committed the violations were recently hired and went through a thorough training process.
- No consideration was given to the fact that immediate and prompt corrective action was taken, including disciplining the offending employees, retraining all employees, and using mystery shoppers to prevent further SNAP violations.

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 in this document.

## ANALYSIS AND FINDINGS

The Appellant has not provided any information or evidence to counter FNS's investigation report. In fact, the Appellant appears to admit that violations took place, blaming them on new employees and a cash register system that did not separate eligible items from ineligible items. Because the violations themselves do not appear to be in dispute, it is the determination of this review, through a preponderance of the evidence, that SNAP violations did occur as charged and a penalty is warranted.

### Store Was Being Sold

The Appellant contends that at the time of the violations the store was in the process of being sold. According to the Appellant, the store had been in escrow since August 2019 and was scheduled to close on November 20, 2019. As a result of the impending sale, the firm lost all experienced employees, which resulted in the hiring of new employees. The Appellant claims that if this had not occurred, the firm would not have had these violations.

Unfortunately, this contention does not provide a valid basis for a reversal or modification of the agency's disqualification determination. Regardless of an impending sale, the store was still under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) throughout the duration of FNS's investigation. As such, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) are the responsible parties. When the Appellant owners initially signed their SNAP application, they 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 shows 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. This responsibility did not end when the firm was placed in escrow, as a change of ownership had not officially occurred.

## **Nature of the Violations / Warning Letter**

The Appellant contends that FNS did not consider the following: the nature and scope of the violations; the fact that the firm did not have any previous violations; the fact that no prior notices had been sent by FNS to warn the firm about the possibility that violations were occurring; and the fact that there was no evidence which shows the firm's intent to violate the regulations.

This contention mirrors the language of SNAP regulations at 7 CFR § 278.6(d), which states: (d) Basis for determination. The FNS regional office making a disqualification or penalty determination shall consider:

- (1) The nature and scope of the violations committed by personnel of the firm,
- (2) Any prior action taken by FNS to warn the firm about the possibility that violations are occurring, and
- (3) Any other evidence that shows the firm's intent to violate the regulations.

With regard to these contentions, it is clear to this review that FNS appropriately considered Section 278.6(d) before reaching a disqualification determination. The case record indicates that the Retailer Operations Division evaluated the firm's history with SNAP compliance (no prior violations were found) and determined that due to the seriousness of the allegations, a warning was not appropriate in this case. USDA is under no obligation to warn retailers when violations are occurring. The law is clear that when serious violations occur, such as an exchange of ineligible items for SNAP benefits, a six-month disqualification is the required penalty, even on the first occasion, as noted in 7 CFR § 278.6(e)(5).

It is the finding of this review that the six-month disqualification imposed by the Retailer Operations Division for this first-time violation wholly conforms to SNAP regulations and is entirely consistent with sanctions imposed upon other retailers that have committed similar violations.

## **Hardship to Appellant**

The Appellant contends that a disqualification will cause undue economic hardship to the firm's ownership. According to the Appellant, a substantial portion of the firm's revenue is derived from EBT sales, and a disqualification may result in store closure or even bankruptcy.

With regard to this contention, SNAP regulations do not permit this review to consider a waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm itself. To allow an exemption from penalties based on a purported economic hardship to the firm or its ownership would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of 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 requirements, but also to those retailers who have been disqualified from the program in the past for similar violations.

### **Insufficient Time to Respond**

The Appellant argues that it was not given sufficient time to consult with and hire an attorney to clearly present the facts and dispute the information used in the disqualification process.

With regard to this contention, this review cannot find any evidence to suggest that Circle K #5189 was not fully afforded its due process rights. SNAP regulations at 7 CFR § 278.6(b)(1) state that, “any firm considered for disqualification or imposition of civil money penalty... shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination.” This regulation further explains that a firm must respond either orally or in writing within 10 days of receiving the charge letter. The 10-day response timeframe is the same for all retailers. Due to the complexity of some cases, it is common for some retailers to believe that they need more than 10 days to gather and submit all the evidence they need to present their cases. In such instances, reasonable extensions of time are frequently granted – upon request – to ensure that the firm has full opportunity to formulate a response. This review cannot find any evidence that the Appellant requested such an extension. Accordingly, it is the finding of this review that the Appellant’s due process rights were not violated.

### **Appellant’s EBT Processing System / Employee Training**

The Appellant contends that consideration was not given to the fact that the firm’s EBT card processing system does not separate and identify ineligible items at the point of sale. This means that employees must manually do so, which the Appellant claims sometimes results in a few nonfood items being processed through EBT. The Appellant further claims that FNS did not consider that the two employees who committed the violations were recently hired and had gone through a thorough training program regarding SNAP and all other regulations.

With regard to these contentions, the record shows that the Retailer Operations Division did consider these issues, but found that they were not valid reasons to prevent a disqualification from being imposed. It should be noted that the Appellant’s EBT processing situation is not unique. Circle K #5189 is one of thousands of stores across the country that do not have sophisticated cash register systems that automatically separate SNAP-eligible items from ineligible items. In such situations, it is incumbent upon store ownership and management to fully and properly train employees to ensure that anyone who runs the cash register is familiar with and abides by SNAP rules. In this case, two of the firm’s employees committed program violations, and at no time did either of them deny a purchase of ineligible items with SNAP benefits. This strongly suggests that the violations were due to either employee carelessness or failure on the part of ownership or management to properly train and supervise the employees. Accordingly, a six-month disqualification penalty is appropriate and is entirely in line with SNAP regulations.

### **Remedial Actions Taken**

The Appellant contends that FNS did not consider the fact that immediate and prompt corrective action was taken after receiving the charge letter, including disciplining the offending

employees, retraining all employees, and using mystery shoppers to prevent further SNAP violations.

Regarding these steps taken by the Appellant, it must be noted that the agency's decision regarding a potential disqualification is limited to the facts that existed at the time the violations were committed. The same holds true for this administrative review. This review has no authority to consider any subsequent remedial actions that may have been taken or that will take place so that a store may enhance or 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 on the basis of alleged or planned corrective actions implemented after the discovery of program violations.

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

The Appellant argues that a disqualification will cause undue hardship for SNAP customers, especially those with insufficient transportation as well as the elderly, disabled, and homeless.

With regard to this contention, it is recognized that some degree of inconvenience to SNAP recipients is likely whenever a retail food store is disqualified and households are forced to use their benefits elsewhere. To address potential hardship situations that SNAP households might incur when a firm is disqualified, regulations at 7 CFR § 278.6(f) allow, in certain circumstances, for a civil money penalty to be imposed instead of disqualification. Paragraph (f)(1) of this regulation states that this alternative sanction is allowed when a firm's disqualification would cause "hardship" to SNAP households. According to this regulation, hardship occurs when there is "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 Circle K #5189 would not cause hardship to SNAP households because there are other shopping options in the area. According to agency records, there are at least a dozen similarly-stocked or larger SNAP-authorized retail stores located within a one-mile radius of Circle K #5189, including a full-service supermarket just a quarter of a mile away. There is also no evidence that the Appellant sells its inventory at unusually low prices in comparison to nearby stores.

Because hardship conditions do not exist in this case, a civil money penalty in lieu of disqualification is not an available option.

### **CONCLUSION**

Based on a review of all information in this case, this administrative review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at Circle K #5189 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. Furthermore, the Appellant has not offered any compelling evidence that would persuade this review to dismiss or modify the penalty. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, Circle K #5189, under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), 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 authorization 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. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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

April 20, 2020