

**U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review Branch  
Alexandria, VA 22302**

**Citgo Food Mart,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0193952**

**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 Citgo Food Mart by the Retailer Operations Division. It is also USDA's final decision that the firm is not eligible for a civil money penalty in lieu of disqualification.

**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 Citgo Food Mart.

**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, Citgo Food Mart, was initially authorized for SNAP participation as a convenience store on August 13, 2009. Between January 10, 2017 and March 31, 2017, 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 Citgo Food Mart accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. According to the report, the Appellant firm sold plastic cups, plastic cutlery, trash bags, and toilet paper in exchange for SNAP benefits, which benefits are only permitted to be used in exchange for eligible foods.

In a letter dated May 17, 2017, 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 stated that the violation of accepting SNAP benefits in exchange for ineligible nonfood items warrants a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5). 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.

The record shows that the Appellant did not respond to the charge letter.

After further consideration of the evidence in the case, the Retailer Operations Division issued a letter of determination dated June 1, 2017. This 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 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 retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked June 15, 2017, the Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and implementation of the sanction has been held in abeyance pending completion of this review.

## **STANDARD OF REVIEW**

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. This means that an appellant has the burden of providing relevant evidence which a reasonable mind, considering the

record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

## CONTROLLING LAW AND REGULATIONS

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

7 CFR § 278.2(a) states, *inter alia*:

*[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, *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.... **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, *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:*

*(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, *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.*

### **INVESTIGATION DETAILS**

During an undercover investigation conducted between January 10, 2017 and March 31, 2017, the USDA completed seven compliance visits at Citgo Food Mart. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the May 17, 2017 charge letter. The investigation report included Exhibits A through G, which provided full details on the results of each compliance visit. SNAP violations were documented during three of the seven visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report noted that the following nonfood items were purchased by an investigator using SNAP benefits:

- One 16-count package of plastic cups (*Party Essentials* brand), Exhibit B
- One 24-count box of heavy duty plastic cutlery (*Ri-Pac* brand), Exhibit B
- One 24-count box of heavy duty plastic cutlery (*Ri-Pac* brand), Exhibit C
- One 15-count box of 13-gallon kitchen bags (*Toss It* brand), Exhibit C
- One 16-count package of 16-ounce plastic cups (*DoWin* brand), Exhibit C
- One 16-count package of "Cool Party Cups," 16-ounce, Exhibit E
- One roll of "green heritage" toilet paper (*Atlas* brand), Exhibit E
- One 8-count box of 30-gallon trash bags (*Zippies* brand), Exhibit E

The report noted that in Exhibit F, the clerk on duty refused to allow an ineligible container of antifreeze to be purchased with SNAP benefits. On another occasion, the investigator attempted to exchange SNAP benefits for cash (i.e. trafficking), but the clerk refused. This refusal is noted in Exhibit G. The report indicates that the investigator did not attempt to commit any violations in Exhibits A or D. According to the report, the investigator attempted to purchase ineligible items on four separate trips to the store. Only once did the clerk on duty refuse the transaction.

The charge letter states that the violations that occurred in Exhibits B, C, and E warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5). According to the report, two separate clerks conducted the three violative transactions during the investigation.

### APPELLANT'S CONTENTIONS

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

- Appellant claims to have not received the original charge letter. This is why the firm did not respond. It was not until the Appellant received the determination letter that the firm's owner was made aware of the charges against it. Because the firm's owner has still not received the charge letter or report of investigation, she cannot speak to the specifics of the allegations. She can only express remorse for the allegations.

*[It should be noted that upon learning of this contention, the administrative review officer sent Appellant's counsel an e-mail on June 21, 2017. Attached to the e-mail were a copy of the May 17, 2017 charge letter and a copy of the investigation report. The review officer explained that the agency's tracking records show that the charge letter was received and signed for by the firm on May 18, 2017. However, to ensure that the firm was given full opportunity to respond to the charges, the review officer re-sent the charging documents. The review officer then gave the Appellant until July 17, 2017 to provide any additional information it wished to submit in support of its contentions. The review officer received no response to this e-mail and received no additional arguments or contentions from either the Appellant or its counsel.]*

- Since its notification of the violations, the owner has taken more aggressive steps to ensure that the store does not make any more mistakes regarding the use of SNAP benefits.
- Appellant does not agree that the firm is not eligible for a civil money penalty in lieu of disqualification.
- Citgo Food Mart is the highest grossing SNAP-authorized convenience store in the area. The other nearby convenience stores do not have as much staple food inventory as Citgo Food Mart. Some do not even sell milk or eggs. The Appellant provided five undated photographs showing fully stocked shelves at Citgo Food Mart, but only partially stocked shelves at a nearby competitor store.
- Many SNAP households are single-parent households with schedules that limit flexibility. The 24-hour availability at Citgo Food Mart offers such households the ability to purchase necessary grocery items at all times of the day.

- The store is located next to Harwell Road in Atlanta, which leads to many multifamily and single-family households. These residents create much of the traffic at the store.
- Because the neighboring stores do not offer as large a variety of foods at reasonable prices compared with Citgo Food Mart, and because they do not have the same extended operating hours, the disqualification of Citgo Food Mart would create a hardship to SNAP households.
- Appellant requests monetary penalty in lieu of SNAP disqualification.

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 did not, at any point, provide information or documentation to counter FNS's investigation report. Rather, the Appellant appears to concede that the violations may have occurred. Therefore, 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.

#### **Remedial Actions Taken**

The Appellant contends that after receiving notification of the violations, the owner has taken more aggressive steps to ensure that the store does not make any more mistakes regarding the use of SNAP benefits.

With regard to this contention, it is important to clarify that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. This review is limited to the circumstances that existed at the time the Appellant was charged with committing program violations and at the time that the Retailer Operations Division made its determination. It is not the authority of this review to consider any subsequent remedial actions that may have been taken or 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 subsequent to findings of program violations.

Therefore, the Appellant's contention that corrective action has taken place or that further remedial actions are planned does not provide a valid basis for dismissing the charges or for modifying the penalty imposed.

## Civil Money Penalty

The Appellant states that although there are other SNAP-authorized stores in the area, the other firms do not offer as large a variety of staple foods and do not have extended store hours to accommodate SNAP households that need to shop at different times of the day. The Appellant argues that if the store were to be disqualified, SNAP households would experience hardship. In support of these contentions, the Appellant submitted five undated color photographs showing fully stocked shelves at Citgo Food Mart, and one partially stocked refrigeration unit at a nearby competitor store.

Unfortunately, a civil money penalty is not permissible in this case. SNAP regulations at 7 CFR § 278.6(f)(1) state that a civil money penalty in lieu of a temporary disqualification is only allowable when the firm's disqualification would cause hardship to SNAP households. According to this regulation, hardship is defined as "no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices" (emphasis added).

It is the determination of this review that a disqualification of Citgo Food Mart, classified as a convenience store, would not cause hardship to SNAP households because there are three other SNAP-authorized convenience stores with similar inventory in the area. All three are located within a one-mile radius of the Appellant firm. As the Retailer Operations Division has done, this review has examined the most recent agency store visit reports and photographs for each of the three nearby convenience stores and has found similar staple food inventory at each location. There is not sufficient evidence from either the store visit reports or the Appellant's photographs and anecdotal explanations to prove that Citgo Food Mart has a larger variety of staple foods or lower prices than its competitors.

It should be noted that a store's operating hours is not a consideration in this matter, as SNAP regulations make no mention of a store's hours when evaluating hardship to households.

It is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and the households are forced to use their benefits elsewhere. However, in accordance with regulation cited above, hardship exists only when there are no other authorized stores in the area selling as large a variety of staple foods at comparable prices. It is the determination of this review that such a situation does not exist in this instance. Therefore, pursuant to 7 CFR § 278.6(f)(1), a hardship civil money penalty in lieu of disqualification cannot be granted in this case.

## **CONCLUSION**

Based on a review of the evidence in this case, there is no question that program violations of 7 CFR § 278.2(a) did occur 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 is specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for ineligible, nonfood items, and in all other critically pertinent details. Pursuant to 7 CFR § 278.6(a) and (e)(5) the decision to impose a six-month disqualification against the Appellant, Citgo Food Mart, is sustained.

Further, the decision by the Retailer Operations Division to not impose a civil money penalty in lieu of disqualification is also sustained. Pursuant to 7 CFR § 278.6(f)(1) it is the determination of this review that SNAP households will not incur hardship as a result of the Appellant's disqualification because there are other authorized stores in the area selling as large a variety of staple foods at comparable prices.

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

## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. If a judicial review is desired, the complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

JON YORGASON  
Administrative Review Officer

December 12, 2017