

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

**Countyline Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0203125**

**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 participation as an authorized retailer in the Supplemental Nutrition Assistance Program<sup>1</sup> was properly imposed against Countyline Market (hereinafter “Countyline Market” and/or “Appellant”) and its owner of record, by the Retailer Operations Division of the FNS.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a) and (e) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a six-month disqualification against Countyline Market in a letter dated March 8, 2018.

**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.

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<sup>1</sup> Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

## **CASE CHRONOLOGY**

The USDA conducted an investigation of the compliance of Countyline Market with Federal SNAP law and regulations which consisted of six (6) visits completed between November 17, 2017, and December 21, 2017.

The USDA-FNS Report of Positive Investigation (hereinafter, "Investigative Report") number HO01121 dated December 22, 2017 disclosed that on five (5) separate occasions Countyline Market personnel accepted SNAP benefits for merchandise that was ineligible for purchase with such benefits from a USDA Investigator. Identification information ascertained from the Investigative Report indicates that these SNAP violations were handled at Appellant firm by two (2) unidentified male clerks.

As a result of the evidence compiled during the USDA investigation, in a letter dated February 20, 2018, the Retailer Operations Division, charged Appellant with violating 7 CFR § 278.2(a) of the SNAP regulations.

The Retailer Operations Division record indicates Appellant did not respond, therefore, the Retailer Operations Division issued a final determination letter, dated March 8, 2018, assessing a six-month disqualification from participation as an authorized retailer in the SNAP against Countyline Market.

In a letter dated March 19, 2018, received in the offices of the Administrative Review Branch on March 22, 2018, Appellant, through counsel, submitted an appeal of the Retailer Operations Division's assessment, requesting an administrative review of the action. The appeal was granted and implementation of the sanction has been held in abeyance, in accordance with 7 CFR § 279.4(a).

In a letter dated April 13, 2018 Appellant, through counsel, request the provision of the administrative record under the Freedom of Information Act (FOIA). The record reflects a FOIA response completed in materials dated April 23, 2018. In a letter dated May 11, 2018, Appellant, through counsel, provided contentions in support of the appeal for consideration.

## **STANDARD OF REVIEW**

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)<sup>2</sup>, 7 USC 2023 and 278 of Title 7 of the Code of Federal Regulations (CFR).<sup>3</sup>

7 CFR § 278.2(a) “Use of Coupons”, states, in relevant part, “Coupons may be accepted by an authorized retail food store only from eligible households... only in exchange for eligible food.”

7 CFR § 271.2 defines **Eligible foods**” in relative part as “**Any food and food product** intended for human consumption **except** alcoholic beverages, tobacco and hot foods and hot food products prepared for immediate consumption...” (Emphasis Added)

7 CFR § 278.6 establishes the authority upon which a period of disqualification may be imposed against an authorized food store or wholesale food concern in the event that it has failed to comply with the Act.

7 CFR § 278.6(e) provides the following, in relevant part, with respect to penalties that may be assessed against firms determined to have violated the Act or regulations:

“...For the purposes of assigning a period of disqualification, a warning letter shall not be considered to be a sanction. A civil money penalty and a disqualification shall be considered sanctions for such purposes...”

7 CFR § 278.6(e)(5) applies to the period of disqualification under review, and specifies that FNS **shall**: [Emphasis added]

“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(e)(7), states, that FNS shall,

“Send the firm a warning letter if violations are too limited to warrant a disqualification.”

7 CFR § 278.6(f)(1) provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP households because of the unavailability of a comparable participating food store in the area to meet their shopping needs.

7 CFR §278.6(f)(1) reads, in part,

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<sup>2</sup> Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment through P.L. 113-79, enacted February 7, 2014.

<sup>3</sup> Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at [https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab\\_02.tpl](https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl)

“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**

USDA conducts investigations of the compliance of retail food stores, in part, to ascertain the nature and extent of SNAP violations that may be occurring. In the instant case the Investigative Report dated December 22, 2017, reveals that a USDA Investigator completed six (6) total investigative visits at Countyline Market between November 17, 2017 and December 21, 2017.

The report materials were provided to Appellant as attachments to the charge letter dated February 20, 2018, and included exhibits A through F that provide detail of the investigative results.

The Investigative Report reveals SNAP violations were recorded during five (5) of the six (6) reported visits, included as exhibits B, C, D, E and F of the Investigative Report with the exchange of SNAP benefits for non-food items including foam cups and paper towels. The violations are documented to have involved two (2) unidentified male clerks.

The Investigative Report further discloses that exchange of paper towels was refused in exhibit F, by one (1) of the unidentified male clerks. The exchange of cash for SNAP benefits is documented to have been refused on two (2) occasions delineated in Exhibit D and Exhibit F.

The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf.

### **APPELLANT’S CONTENTIONS**

In the letter dated March 19, 2018, Appellant, through counsel requested administrative review; and, in a letter dated May 11, 2018 contentions were provided for consideration on appeal including:

- Argument that the purchase of foam cups @ 0.25 each cannot be a violation of SNAP regulations because selling cups to customers for use with drinks purchased is no different than stores with fountain drink machines including a cup for the fountain drink in the cost of the drink. Because Countyline does not have fountain drink machines it allows the purchase of foam cups to use with bottled drinks and should not be punished for not having fountain drink machines.
- The allowance of the sale of paper towels was initially refused, and only allowed following the Investigator’s insistence, which is viewed as a form of entrapment in the first instance (Exhibit D). The allowance of the sale of paper towels in Exhibit E is assumed to have occurred based on the clerk’s memory of the transaction recounted in Exhibit D.
- Appellant’s having no former violations; the persuasiveness of the investigator; and, the value of the non-food items exchanged should be considered variables in the decision to

impose an appropriate penalty. In the instant case it is considered that the penalty is grossly disproportionate to the violations; and, is therefore considered arbitrary and capricious.

The preceding represents only a brief summary of Appellant's contentions in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

## **ANALYSIS AND FINDINGS**

That SNAP benefits are not for the purchase of non-food items is clear in the "Act" and in the SNAP regulations, with noted exceptions, such as seeds used to grow food, and hunting equipment in remote areas of Alaska. This and other rules governing SNAP were provided to Appellant upon initial SNAP authorization in May 2015, and have been restated in various retailer notifications routinely provided to all SNAP authorized retailers.

The SNAP regulations at 7 CFR § 278.6(e)(5) defines the period of disqualification applicable in the circumstance under review, and specifies 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." There is no discretion to consider Appellant's lack of former violations; the persuasiveness of the investigator; the value of the non-food items exchanged, or any other variables. Although Appellant contends that the penalty in the instant case is grossly disproportionate to the violations; the regulations are clear and precise that a six (6) month disqualification shall be imposed.

### **Foam Cups similar to Fountain Drink cups:**

Although Appellant contends that the purchase of foam cups @ 0.25 each cannot be a violation of SNAP regulations because selling cups to customers for use with drinks purchased is no different than stores with fountain drink machines including a cup for the fountain drink in the cost of the drink. Because Countyline does not have fountain drink machines it allows the purchase of foam cups to use with bottled drinks and should not be punished for not having fountain drink machines.

On review it is considered that the argument is not persuasive. Cups sold with fountain drinks are the vessel for carrying the fountain drink out of the store; in the case of foam cups sold for bottled drinks the drink itself is already in a container. Additionally, it is noted that Appellant is contending that "they offer their customers the ability to purchase a bottled drink along with a foam cup to use their desired destination". However the details of Exhibit B indicate that Appellant did not usually sell foam cups with bottled drinks but only arranged the transaction at the suggestion of the investigator.

## **Entrapment:**

Appellant alleges that the sale of paper towels occurred following entrapment by the investigator; however, on review of the details included in the Investigative Report it is noted that the investigator merely said “hook me up” (Exhibit D) when the sale was rebuffed. Because the penalty in review is administrative and not criminal “entrapment” as it applies in general legal arguments is not a factor in the determination of the appropriateness of the SNAP penalty imposed. Nonetheless, the suggestion to “hook me up” does not diminish the information in the Investigative Report indicating that the clerk knew the paper towels were not an allowable SNAP purchase; and charged “double” for the product to compensate for the illegal transaction. The Investigative Report does not indicate either what the original cost of the paper towels was (Exhibits D and E) therefore whether or not “double” the cost was charged cannot be verified with the information provided.

## **Civil Money Penalty**

7 CFR § 278.6(f)(1) 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 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.” The record reflects that the Retailer Operations Division has rendered a finding that pursuant to 7 CFR § 278.6(f)(1), it would not be appropriate to impose a civil money penalty in lieu of a period of disqualification on Appellant firm.

The Retailer Operations Division record reflects that Countyline Market is classified within FNS definitions as a convenience store; and, that there are 23 SNAP authorized firms within a one (1) mile radius of Appellant including a 19 competitor convenience stores, and a supermarket that is identified as 0.9 miles from Appellant, or an unobstructed 18 minute walk per Google maps. The availability of alternative SNAP Authorized venues is verified with a review of the SNAP Retailer Locator tool located at <https://www.fns.usda.gov/snap/retailerlocator> .

Based on the availability of the alternative SNAP authorized retailers the Retailer Operations Division has determined that the temporary disqualification of Appellant would not create a hardship to customers.

It is recognized that some degree of inconvenience to SNAP customers is inherent from the temporary disqualification of any participating food store. Although the normal shopping pattern of such SNAP customers may be temporarily altered during the period of disqualification, the determination that the disqualification of Countyline Market would not create a hardship to customers, as differentiated from potential inconvenience is sustained and a civil money penalty in lieu of disqualification is found not to be appropriate in this case.

## **CONCLUSION**

The charges of violations are based on the findings of a formal USDA investigation in which all transactions cited in the letter of charges were fully documented and evidentiary materials are

included in the record that validate the report as provided. A complete review of this documentation has yielded no swaying error or discrepancy. The Investigative Report is specific and thorough with regard to the dates of the violations and the specific related facts.

The documentation presented by the Retailer Operations Division clearly provides a preponderance of the evidence that the violations as reported occurred at Appellant firm and, 7 CFR §278.6(e)(5) specifies 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.”

It is established that the violations as described in the letter of charges dated February 20, 2018, did in fact occur at Appellant’s firm, warranting a disqualification of six (6) months in accordance with 7 CFR §278.6(e)(5).

Based on the discussion above, the decision to impose a six-month disqualification against Countyline Market is proper and the action is sustained.

In accordance with the Act and regulations, **the six (6) month period of disqualification shall become effective thirty (30) days after receipt of this letter.** Appellant may submit a new application for SNAP participation ten (10) days prior to the expiration of the six (6) month disqualification period.

#### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant’s owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (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.

NANCY BACA-STEPAN  
Administrative Review Officer

July 2, 2018