

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

Dylan's Corner,

Appellant,

v.

Case Number: C0199474

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 the hardship civil money penalty (CMP) in the amount of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** imposed upon Dylan's Corner (hereinafter Appellant) by Retailer Operations Division is hereby sustained.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a), 7 CFR § 278.6 (e), (f) and (g) in its administration of the SNAP when it determined that a six-month disqualification against Appellant was warranted, and further determined that SNAP participants in the area would endure a hardship with the implementation of the disqualification. Retailer Operations Division therefore assessed a hardship civil money penalty in the amount of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, in lieu of the disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provides 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 USDA conducted an investigation of the compliance of Appellant with Federal SNAP law and regulations during the period June 13, 2018 through June 27, 2018. The Report of Positive Investigation (hereinafter, "Investigative Report"), number LA10406, dated July 10, 2018, delineated that three (3) unidentified female personnel at Appellant exchanged SNAP benefits for ineligible merchandise with a USDA Investigator on three (3) separate occasions. The

items exchanged during the violations were ineligible and included items, best described in regulatory terms as “conspicuous and common ineligible nonfood items and major nonfood items” consisting of Tide to Go Stain Remover, Bounce Fabric Softener, Bulbs, and Air Fresheners.

By charge letter dated August 3, 2018, Retailer Operations Division informed Appellant of the agency’s intention to disqualify Dylan’s Corner from participation in the SNAP as an authorized retailer for a period of six-months, in accordance with 7 CFR §278.2(a), based on information contained in the Investigative Report. A copy of the Investigative Report was provided to Appellant as an attachment to the charge letter.

The Retailer Operations Division record indicates that Appellant did not responded to the charge letter. After considering the evidence of the case and the Appellant’s non-response to the charge letter dated August 3, 2018. By letter dated August 21, 2018, Retailer Operations Division notified Appellant that there was a finding that the violations cited in the charge letter occurred at your firm. Retailer Operations Division determined that the assessment of a hardship civil money penalty (CMP) of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), in lieu of a six-month period of disqualification, is the appropriate penalty for these violations because the firm is selling a substantial variety of staple food items and the firm’s disqualification would cause hardship to SNAP households. This is in accordance with Section 278.6(f)(1) of the SNAP regulations.

In a letter dated August 27, 2018, the Appellant requested an administrative review of the Retailer Operations Division’s determination. The appeal was accepted and the implementation of the six-month disqualification was held in abeyance pending completion of this review.

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

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, at 7 U.S.C. § 2021 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6 (e) of the Regulations establish the authority upon which a disqualification, or a civil money penalty in lieu thereof, may be imposed upon a retail food store or wholesale food concern.

7 U.S.C. § 2021 states, *inter alia*: (1) IN GENERAL. An approved retail food store or wholesale food concern that violates a provision of this Act or a regulation under this Act may be:

(A) disqualified for a specified period of time from further participation in the supplemental nutrition assistance program; (B) assessed a civil penalty of up to \$100,000 for each violation; or (C) both.

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 & 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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system.”

7 CFR § 278.6(e)(5) prescribes the general period of disqualification for the sale of common ineligible nonfood items and states: “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) applies to the criteria for CMPs on the basis of hardship and reads, in part, “FNS may impose a civil money penalty as a sanction in lieu of disqualification when 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 store in the area selling as large a variety of staple food items... FNS may disqualify a store which meets the criteria for a civil money penalty if the store had previously been assigned a sanction.”

7 CFR §278.6(h)(1),(2) and (3) state, *inter alia*:

1. Disqualify the firm for the period determined to be appropriate under paragraph (e) of this section if the firm refuses to pay any of the civil money penalty.
2. Disqualify the firm for a period corresponding to the unpaid part of the civil money penalty if the firm does not pay the civil money penalty in full or in installments as specified by the regional office.
3. Disqualify the firm for the prescribed period if the firm does not present a collateral bond or irrevocable letter of credit within the required 15 days, if applicable. If the firm presents the required bond during the disqualification period, the civil money penalty may be reinstated for the duration of the disqualification period.

Agency policy stipulates, *inter alia*, that a Hardship Civil Money Penalty is:

...imposed instead of a disqualification when removing a store from the Program would cause a hardship, rather than just an inconvenience, to recipients that normally frequent the store

The following steps, based on the regulations at 7 CFR § 278.6(g), applies to the calculation of hardship CMPs, stating, in part: “FNS shall determine the amount of the civil money penalty as follows:

- (1) Determine the firm's average monthly redemption of coupons 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."

7 CFR § 278.6(g) and § 3.91(b)(3)(i) of this title establish an \$11,000.00 per violation limit as the maximum amount for a CMP.

APPELLANT'S CONTENTIONS

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

1. The employees that were originally cited for incorrect transaction procedures were informed that if a penalty is assessed to the store they would be liable for payment of fine or will be terminated for poor performance.
2. All employees have been retrained and new employees are provided a separate document from normal store policy that specifically states all procedures and implications if they are found to be performing the transaction properly. (Sic).

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

ANALYSIS AND FINDINGS

With regards to Appellant's contentions, the regulations stipulate "FNS shall disqualify the firm for six 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 as the sale of common nonfood items, due to carelessness and poor supervision by the firm's ownership or management." The regulations further stipulate "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 food stamp 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."

It should be added that a six-month disqualification, or a civil money penalty in lieu thereof, is the least severe disqualification period allowed by regulation. Beyond the assessment of a civil money penalty in lieu of a six-month disqualification, there is no appropriate lesser sanction

contemplated by the statute, the regulations or agency policy. The purpose of this review is to ascertain whether Retailer Operations Division has arrived at a correct decision; accordingly, the review officer is not extended the latitude to alter or modify decisions correctly made based on requests for leniency.

CIVIL MONEY PENALTY

The Retailer Operations Division determined that the Appellant was eligible for a hardship 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.” It is important to note that neither the Retailer Operations Division nor this administrative review has the authority to modify the hardship CMP formula mandated by SNAP regulations at 7 CFR § 278.6(g).

Under the formula mandated by 7 CFR § 278.6(g), the initial CMP calculation equals 5 U.S.C. § 552 (b)(6) & (b)(7)(C) which is under the maximum allowable CMP of \$33,000.00. Because the SNAP regulations provide no discretion to the agency in the calculation of this formula, modification to the CMP amount may occur only when there is an error in calculation or the amount exceeds the statutory limit. The case record documents that the Retailer Operations Division correctly calculated the hardship CMP for Dylan’s Corner at 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

CONCLUSION

As noted herein, the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted by a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no error or discrepancy. The Investigative Report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions.

A review of the evidence in this case indicates that the Appellant firm, Dylan’s Corner, exchanged SNAP benefits for common ineligible items on three different compliance visits. However, Retailer Operations Division determined that a six-month disqualification of Dylan’s Corner would create a hardship for SNAP households, as there is no other authorized retail food store in the area selling a substantial variety of staple food items.

It is therefore the decision of USDA that a CMP is appropriate and fully in accord with 7 CFR §278.6(f). A review of the calculations shows that the amount of the CMP was correct and proper and the decision in this case is hereby sustained and will become effective upon the 30th day following your firm’s receipt of this document. In the event a six-month disqualification is imposed for failure to pay the civil money penalty, or some lesser disqualification period reflecting the unpaid portion of the civil money penalty, Appellant may reapply for authorization to participate in the SNAP up to 10 days prior to the end of the disqualification period.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (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 (FOIA), 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.

Monique Brooks
Administrative Review Officer

January 31, 2019