

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

**Ernest Grocery Store,**

**Appellant,**

**v.**

**Case Number: C0185264**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

The record supports by a preponderance of the evidence that Ernest Grocery Store (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP) regulations. It is the decision of the U.S. Department of Agriculture (USDA) that there is sufficient evidence to sustain a one year disqualification of Appellant as an authorized retail food store from the SNAP as imposed by the Retailer Operations Division (Retailer Operations).

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.6(f)(1) and 7 CFR § 278.6(a) and (e)(5 and 6) in its administration of the SNAP, when it imposed a one year period of disqualification against Appellant.

**AUTHORITY**

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

**CASE CHRONOLOGY**

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of November 28, 2017 through January 11, 2018. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on multiple separate occasions that warrant a six month disqualification period. The items sold are best described as common nonfood items.

By letter dated April 5, 2018, as a result of evidence compiled during the investigation, Retailer Operations charged the owner with violating the terms and conditions of the SNAP regulations. Misuse of SNAP benefits was noted in Exhibits A, B, D, and E that warrants a disqualification as a SNAP retail food store for a period of one year. The letter also states that under certain conditions FNS may impose a civil money penalty (CMP) in lieu of a disqualification. The owner's son replied to the Charge letter by letter dated April 17, 2018. By letter dated May 24, 2018, the agency provided a FOIA reply to the owner in response to the April 17, 2018 letter.

The record shows that the owner's son sent emails on September 10, 2018, and September 24, 2018. On September 13, 2018, Retailer Operations issued a credit account charge letter to the owner, stating that the acceptance of SNAP benefits as payment for items sold to a household on credit is a violation of SNAP regulations at Section 278.2(f), which warrants a one year disqualification from the program.

Retailer Operations informed the owner by Determination letter dated October 17, 2018, that the violations cited in the Charge letter occurred at the firm and that a one year period of disqualification was warranted. The letter also stated that eligibility for a hardship CMP was not applicable as there are other authorized retail food stores in the area selling as large a variety of staple foods at comparable prices.

The owner appealed the determination by an undated, unsigned letter postmarked November 1, 2018. The administrative review was granted by letter dated November 8, 2018.

## **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the 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 argument 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 § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e)(6) establish the authority upon which a one year disqualification may be imposed against a retail food store or wholesale food concern.

Section 278.2 (a) states: "Coupons may be accepted by an authorized retail food store only from eligible households or the households' authorized representative, and only in exchange for eligible food."

7 CFR § 278.6(a) states: “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: “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)(6) states: “Double the appropriate period of disqualification prescribed in paragraphs (e) (2) through (5) of this sections as warranted by the evidence of violations if the same firm has once before been assigned a sanction.”

7 CFR § 278.6(f)(1) states: “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.”

### **SUMMARY OF THE CHARGES**

A report of the investigation was provided to the Appellant as Exhibits with the Charge letter. The investigative report provides details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during four store visits. The violations involved the sale of nonfood items for SNAP benefits in violation of the regulations at 7 CFR § 278.2(a). The record shows Appellant had a previous sanction, and thus the penalty of a one year disqualification was charged.

### **APPELLANT’S CONTENTIONS**

Consideration of all contentions was made whether recapitulated here or not.

- It says some items had no price and if that were the case how could we tell if they were charged for the items in the first place? All our items are priced.
- It describes a man age 35-40, 6-1 to 6-5 and another male with gray hair about 6-3 in height.
- The owner is 5-10 and has been completely bald for over 25 years. I am 38 and stand 5-9 in height.
- Disqualifying us would be catastrophic to our business.
- The pictures and information we received are really hard to read and some of the details on the slips can barely be made out. We are having a hard time with the products and people in question. Only one of those occasions seems even memorable to me and it was the one where the customer was asked if they were new to the area, and in this case the item

could've been given to the customer on an I.O.U basis where the customer would pay later. This is very common in our store because the area is poverty stricken and a lot of times the people in the community depend on our store in desperate times of need.

- Also reading back through the comments the descriptions of the people in question do not match me or my father at all. Is it at all possible that we were confused with another store?
- I know that everyone is human and makes mistakes but we really do run a decent business.
- I received the letter you wrote back about the items discussed in my prior letter and I believe there was a misunderstanding. I was saying that items that cannot be purchased with EBT were possibly given to customers on a credit basis to pay back later, but not using EBT benefits. I was simply saying that in the instance that items are needed and cannot be purchased in the past we have given items on credit to be paid back at a later time. I was not at all saying that we give items on credit to be paid with EBT benefits.
- We are in the process of setting up a POS system which will itemize all products in the store and prevent any mix ups like this from happening. System should be in place in about 3 weeks. This system will not allow non-qualified items to be purchased. It separates the food and nonfood items at time of purchase.

## **ANALYSIS AND FINDINGS**

This review is to either validate or to invalidate the determination made by Retailer Operations. It is limited to the facts at the basis of Retailer Operations' determination at the time it was made. Upon review, the evidence supports that Appellant established a record of selling nonfood items as defined by Section 271.2 of the regulations, on multiple occasions. Exhibits A, B, D, and E furnished with the Charge letter warrant a disqualification period of one year.

The matter of clerk descriptions and estimates of age and heights is often subjective and may involve features that are relative with respect to the point of view of the observer. In this case the two parties differ on whether one clerk was bald or had gray hair. As to the age and height contentions, the investigative report estimates one male clerk was age 60-65 and 5'10" - 6'1" in height, and another male clerk was age 35-40 and 6' - 6'3" tall. The son states that the owner is 69 years old and 5'10" and that he is 38 years old and 5'9". The slight variations in the reported descriptions in the record and the contentions by the son, do not disprove that the violations in fact did occur at Appellant. Furthermore, the son failed to address violations committed by the female clerk cited in Exhibit B of the investigative report. This Exhibit supports that persons other than the father and son worked in the store and handled SNAP benefits.

The FOIA reply provided to Appellant includes photos of the items purchased at Appellant with SNAP benefits. The photos are clear and the nonfood items are easily identifiable as described in the investigative report including: Lysol disinfectant spray, Clorox bleach, Gain laundry detergent, and dish soap. The EBT receipts with the store name were also photographed for each Exhibit. The donation forms of items to non-profit organizations in each Exhibit were also provided. The record by a preponderance of the evidence supports that Appellant sold nonfood items on multiple store visits in exchange for SNAP benefits, a program violation.

Ownership contends that a SNAP disqualification will have a negative financial impact on Appellant's business. 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 resulting from imposition of such penalty. To allow the owner 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 and the enforcement efforts of the USDA. Furthermore, giving special consideration to possible 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, the 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**

Retailer Operations rendered a finding that it was not appropriate to impose a CMP in lieu of a one year period of disqualification. The record documents that there are other authorized stores within a nearby radius of Appellant that stock a variety of comparable staple foods at comparable prices. The preponderance of the evidence does not support that it will cause hardship for SNAP recipients if Appellant is disqualified. Therefore, Appellant is not eligible for a hardship CMP.

### **CONCLUSION**

The preponderance of the evidence in the record supports that the program violations, as charged, did occur at Appellant. The USDA investigative record is specific, thorough, and fully documented with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail. The record documents that Retailer Operations considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the regulations, and properly denied it. Therefore, the one year disqualification of Appellant from participation as an authorized retail food store in the SNAP is sustained.

### **RIGHTS AND REMEDIES**

This penalty shall become effective thirty (30) days after receipt of this decision. A new application for participation in the SNAP may be submitted ten days prior to the expiration of the period of disqualification. Please contact the Retailer Center at 877-823-4369 with any questions regarding the SNAP application process.

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and to the regulations at 7 CFR § 279.7 with respect to your right to judicial review of this decision. 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 owner resides or is 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, 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.

M. Viens  
Administrative Review Officer

December 7, 2018