

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

**Flagstone Food Mart,**

**Appellant,**

**v.**

**Case Number: C0199353**

**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 there is sufficient evidence to support a six-month disqualification of Flagstone Food Mart (hereinafter Appellant), from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) as initially imposed by the Retailer Operations Division.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a six-month 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 Flagstone Food Mart with Federal SNAP law and regulations from May 24, 2017 through August 4, 2017. In a letter dated October 31, 2017, Retailer Operations Division charged the Appellant firm with accepting SNAP benefits in exchange for merchandise which included major ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on three (3) out of eight (8) compliance visits. The letter further informed the Appellant that the violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5).

In correspondence dated November 2, 2017, Appellant replied to the charge letter and generally stated that it is clear that several clerks were involved in possible violations of the Food Stamp Program. Appellant indicated that it had personally informed/trained the clerks about how to accept EBT cards for certain food/grocery items but, due to their irresponsibility, a few clerks sold “Fidget Spinners.” Strict action has been taken on the clerks who were involved and they have been given a 30 day notice to find another job and are under strict surveillance. Appellant apologized for the incident and stated that if SNAP was to be terminated, it would greatly affect the sales and financials at the location. Appellant requested a first time violation warning.

After reviewing the evidence and the response from the Appellant, Retailer Operations Division issued a determination letter dated November 28, 2017. The determination letter informed the Appellant it was disqualified from the SNAP for a period of six months in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that Retailer Operations Division considered Appellant’s eligibility for a hardship CMP under 7 CFR § 278.6(f)(1). Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the six-month disqualification because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter dated November 2, 2017 and postmarked December 7, 2017, 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, would 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 & 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) establish the authority upon which a period of disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, inter alia: “Coupons 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 food 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 1977, 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, inter alia: “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 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.”

### **APPELLANT’S CONTENTIONS**

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

1. I had personally informed/trained my clerks about how to accept EBT cards for certain food/grocery items. Still due to irresponsibility, a few clerks sold “Fidget Spinners” on EBT.
2. Strict action has been taken on the clerks who were involved.
3. SNAP termination would greatly affect the sales and financials at this location.
4. Please help us out by not termination the program and possibly issuing a first time violation warning.

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**

FNS initially authorized Flagstone Food Mart as a convenience store on April 6, 2016. During an investigation from May 24, 2017 through August 4, 2017, the USDA conducted eight (8) compliance visits at Appellant’s store. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated October 31, 2017. The investigation report included Exhibits A through H which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were committed during three (3) of the eight (8) compliance visits and involved the sale of three Fidget Spinners (no brand).

Store personnel refused the sale of a Fidget Spinner in Exhibits D and H and also refused the exchange of an undisclosed amount of cash for SNAP benefits during Exhibits G and H. In its review request, Appellant did not refute the sale of the major ineligible items during the investigation.

With regard to Appellant's contentions, 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 store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the 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 regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that its SNAP termination would greatly affect sales and its financial standing based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant did not deny that the violations occurred during the investigation but contends that the violations were as a result of irresponsible workers and that strict action has been taken on the clerk involved. With regards to this contention, it cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. As owners of the store, Appellants are liable for all violative transactions handled by store personnel. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food Stamp Act and the enforcement efforts of the USDA. Moreover, it is important to clarify for the record that the purpose of this review is to determine if the earlier decision of the Retailer Operations Division, to disqualify Appellant from participation in the SNAP for a period of six months, was in fact a correct one. It is not within the scope of this review to consider what subsequent actions Appellant may have taken so that its store may begin to comply with program requirements.

Appellant requested that the firm be issued a first time violation warning. With regard to this contention, FNS may send a warning letter in lieu of a disqualification only under specific circumstances. SNAP regulations at 7 CFR §278.6(e)(7) states that FNS should "send the firm a warning letter if violations are too limited to warrant a disqualification."

**5 U.S.C. § 552 (b)(7)(E)**

As previously noted, the investigation report documents the exchange of three major ineligible items during eight visits. Therefore, under agency guidelines, these violations do not meet the definition of “violations that are too limited to warrant a disqualification” and are evidence of carelessness on the part of ownership or management.

**CIVIL MONEY PENALTY**

The Retailer Operations Division considered Appellant’s eligibility for a hardship CMP under 7 CFR §278.6(f)(1). The Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the six-month disqualification because there were at least two (2) other authorized retail stores, within a one-mile radius of Appellant, including another convenience store and a supermarket, selling as large a variety of staple foods at comparable prices.

**CONCLUSION**

The documentation presented by Retailer Operations Division provides through a preponderance of the evidence that the violations as reported occurred at the Appellant firm. 7 CFR § 278.6(e)(5) specifies that 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, the sale of major non-food items due to carelessness or poor supervision by the firm’s ownership or management.

The violations were determined by Retailer Operations Division to represent the first sanction for the firm and evidence carelessness and poor supervision. Therefore, the imposition of a six-month disqualification, the least severe penalty allowed by regulation, is appropriate.

It is therefore established that the violations as described in the letter of charges did in fact occur at the Appellant firm warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5). Based on the discussion herein, the decision to impose a six-month disqualification against Flagstone Food Mart is appropriate and the action is sustained. In accordance with the Act and regulations, the six-month period of disqualification shall become effective thirty (30) days after receipt of this letter. The Appellant may submit a new application for SNAP participation ten (10) days prior to the expiration of the six-month 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

March 19, 2018