

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

**Friendly Food Store,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0221768**

**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 from the Supplemental Nutrition Assistance Program (SNAP) as 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, when it imposed a six-month disqualification against Friendly Food Store.

**AUTHORITY**

7 U.S.C. § 2023 and its implementing regulation 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 Friendly Food Store with Federal SNAP law and regulations from November 2019 through December 2019. In a letter dated January 7, 2020, the Retailer Operations Division charged the Appellant store with accepting SNAP benefits in exchange for merchandise which included ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred during four (4) out of four (4) compliance visits. The letter further informed the Appellant that the chargeable violations warranted a six-month disqualification period as provided in 7 CFR § 278.6(e)(5). The Appellant was informed it could respond to the charges within ten (10) calendar days following

delivery of the charge letter. The charge letter was delivered to the store by UPS on January 10, 2020.

The Appellant responded to the charges in a telephone conversation on January 14, 2020 and an e-mail dated January 15, 2020. Allegedly, a store owner questioned a clerk who stated that the violations may have happened. After that, the Appellant store owner gave strict instructions to all clerks on what is eligible for SNAP benefits and conveyed the gravity of the case. The Appellant stated it would make sure violations like this do not happen in the future and requested a civil money penalty (CMP) of less than \$1,000 in lieu of a six-month disqualification.

After considering the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated January 23, 2020. The determination letter informed the Appellant it was disqualified from the SNAP for a six-month period in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that the Retailer Operations Division considered the 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 other authorized retail stores in the area selling as large a variety of staple foods at comparable prices. The determination letter was delivered by UPS on January 24, 2020.

In a letter postmarked February 3, 2020, the Appellant requested an administrative review of the Retailer Operations Division's determination. The request for review was granted. Upon acceptance of the administrative review request, 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 AND REGULATIONS**

The controlling law in this matter is covered 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 disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, in part:

Coupons may be accepted by an authorized retail food store only from eligible households ... and only in exchange for eligible food.

7 CFR § 271.2 states that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the “Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

7 CFR § 271.2 states, in part:

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, in part:

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) states, in part:

FNS **shall** take action as follows against any firm determined to have violated the Act or regulations ... (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 non-food items** due to carelessness or poor supervision by the firm’s ownership or management. [Emphasis added.]

7 CFR § 278.6(f)(1) states, 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.

### SUMMARY OF THE CHARGES

During an investigation conducted from November 2019 through December 2019, the USDA conducted four (4) compliance visits at Friendly Food Store. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated January 7, 2020. The investigation report included Exhibits A through D which provide full details on the results of each compliance visit.

The investigation report documents that SNAP violations were recorded during all four (4) compliance visits as documented by Exhibits A, B, C, and D. The chargeable violations in Exhibits A, B, C and D involved the sale of eight (8) SNAP ineligible non-food items which included two (2) scrub sponges, two (2) packages of facial tissues, electrical tape, duct tape, a package of foam bowls, and a box of plastic spoons. The violations were conducted by two (2)

different clerks. In Exhibit D, one of these clerks also refused to exchange SNAP benefits for cash but this does not negate the other violations documented in Exhibit D.

## **APPELLANT'S CONTENTIONS**

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

- The six-month disqualification is a very harsh punishment.
- Since receiving the first notice of violations, the store has taken corrective action. The store has posted a list of ineligible items and have given priority to employee training on SNAP education to all new employees.
- One of the reasons for not granting a CMP was the existence of similar stores in the neighborhood. But the closest convenience store is more than half mile away. Friendly Food Store is in the middle of a densely populated neighborhood; it would be very easy for a person without a car to walk to Friendly Food Store and purchase items like milk, bread and sausages. Moreover, it would be very difficult for a mother of a newborn without a car to walk another half mile down the road and carry all the essential food items back home. The store requests reconsideration for a CMP.

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**

### **Investigation Report**

The investigation report documents that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted under the direction of a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no known error or discrepancy. The investigation 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. The investigation report documents by a preponderance of the evidence that personnel at the store exchanged ineligible items for SNAP benefits.

### **Owner Accountability**

Store owners are accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. A store owner signed the SNAP application for Friendly Food Store on June 8, 2015. That application included a signed certification that the owner(s) would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time." The violations listed on this certification include accepting SNAP benefits in exchange for cash,

otherwise known as trafficking, and other violations including accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible non-food items.

### **Violations Warrant a Six-Month Disqualification**

The Appellant states that a six-month disqualification is too harsh. However, the SNAP regulation at 7 CFR § 278.6(e)(5) does not allow for a lesser disqualification period and states, in part, that “FNS **shall** take action as follows against any firm determined to have violated the Act or regulations ... **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 non-food items due to carelessness or poor supervision** by the firm’s ownership or management.” [Emphasis added.]

The investigation report documents that the number of chargeable violations over multiple transactions in this case equate to carelessness or poor supervision by ownership. Therefore, the Retailer Operations Division correctly determined that the violations warranted a six-month disqualification, the least severe penalty allowed by regulation under these circumstances.

### **Corrective Action**

The Appellant states the store has taken corrective action by posting a list of SNAP ineligible items and prioritizing training for new employees on SNAP regulations. The Appellant also states that this will ensure that no violations occur in the future. Regarding this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is **limited** to what circumstances existed at the time of the violations that was the basis of the Retailer Operations Division’s action. It is not within the authority of this review to consider what subsequent corrective actions may be planned or taken so that a store may 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 assessment on the basis of alleged or planned corrective actions implemented **after** findings of program violations. Therefore, the Appellant’s contention that corrective action has now taken place does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Hardship to the Business**

It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in the SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to either the ownership personally or the firm resulting from the imposition of such penalty. To allow stores to be excused from assessed administrative penalties based on a purported economic hardship would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

## HARDSHIP CIVIL MONEY PENALTY

The Appellant asks that its eligibility for a CMP be reconsidered as the closest competitor convenience store is half a mile away. Therefore, the Appellant alleges that a six-month disqualification would create a hardship for SNAP recipients who do not have cars, including mothers with newborns.

The Retailer Operations Division determined that the Appellant was not 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.” [Emphasis added.]

The case record documents that the Retailer Operations Division determined that a six-month disqualification of Friendly Food Store, a convenience store, would not cause a hardship to SNAP households as there are other comparable or larger SNAP authorized stores in the area. The Retailer Operations Division determined through agency mapping systems that there were ten (10) SNAP authorized retail stores within a one-mile radius of Friendly Food Store including three (3) convenience stores, three (3) combination grocery stores and four (4) superstores. Two convenience stores were located only 0.28 and 0.29 miles away; in addition, one superstore was located only 0.32 miles away. The superstores in particular would all have a greater depth and breadth of staple food at likely comparable or better prices. In addition, there is no evidence that Friendly Food Store carries any specialty or international foods that cannot be obtained at these other stores.

Based on the analysis above, a six-month disqualification of Friendly Food Store would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division decision not to assess a hardship CMP in lieu of a six-month disqualification is **sustained** as appropriate under 7 CFR § 278.6(f)(1).

## CONCLUSION

It is established that the violations as described in the letter of charges did in fact occur at Friendly Food Store warranting a disqualification of six (6) months in accordance with 7 CFR § 278.6(e)(5). That regulation states 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 non-food items due to carelessness or poor supervision by the firm’s ownership or management.” Therefore, the decision to impose a six-month disqualification, **the least severe penalty** allowed by regulation, against Friendly Food Store, Appellant, 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 authorization ten (10) days prior to the expiration of the six-month disqualification period.

## **RIGHTS AND REMEDIES**

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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. Please note that the judicial filing timeframe is specified in the Act, and this office cannot grant an extension.

Under the Freedom of Information Act, FNS is 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.

RONALD C. GWINN  
Administrative Review Officer

April 29, 2020