

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

Ghezzi's Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0216628

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 the Retailer Operations Division's assessment of a **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** hardship civil money penalty (CMP) against Ghezzi's Market in lieu of a six month disqualification from the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(5), 7 CFR § 278.6(f)(1), and 7 CFR § 278.6(g) in its administration of the SNAP, when it imposed a hardship CMP of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in lieu of a six month disqualification against Ghezzi's Market.

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".

CASE CHRONOLOGY

The Department of Agriculture conducted an investigation of the compliance of Ghezzi's Market with Federal SNAP law and regulations during the period May 8, 2019 through June 3, 2019. In a letter dated July 17, 2019, the Retailer Operations Division charged the Appellant with accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on four out of four 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). The Charge Letter

states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of disqualification.

In a response to the Retailer Operations Division of July 25, 2019, the Appellant replied to the charges therein indicating that the SNAP violations were honest mistakes. When the items were rung up, the Appellant was unaware that they were EBT sales until the end when the SNAP card was handed to the Appellant. The Appellant did not remember all of the items included on the eligible items SNAP list and did not think anything was wrong. The Appellant received very little updated information regarding eligible and ineligible items under the SNAP. The Appellant has been a mom and pop business for 35 years and has a clean record.

Based on the Appellant's reply and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated August 5, 2019 informing the Appellant that the violations cited in the July 17, 2019 Charge Letter occurred at the firm and that a six month period of disqualification was warranted. The Determination Letter also stated that the Appellant was eligible for a hardship CMP as there is no other authorized retail food store in the area selling as large a variety of staple foods at comparable prices. As such, the firm's disqualification would cause hardship to SNAP households. Thus, a hardship CMP in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was imposed in lieu of the six month SNAP disqualification.

In a letter postmarked August 12, 2019, the Appellant requested an administrative review of the Retailer Operations Division's decision to impose a hardship CMP in lieu of a six month disqualification of Ghezzi's Market from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated August 29, 2019 and implementation of the hardship CMP was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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 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) establish the authority upon which a one year 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 or the households' authorized representative, 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: (1) 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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system...”

7 CFR § 278.6(e)(5) states, in part: “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, in part: “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.”

7 CFR § 278.6(g) states, in part: “Amount of civil money penalties for hardship and transfer of ownership. FNS shall determine the amount of the civil money penalty as follows:

- (1) Determine the firm's average monthly redemptions ... 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”

Notwithstanding the above, there is an agency limit of \$11,000 per violation as the maximum CMP amount.

APPELLANT’S CONTENTIONS

In the reply to the Charge Letter and in the request for administrative review, the Appellant made the following summarized contentions, in relevant part:

- The SNAP violations were honest mistakes. When the items were rung up, the Appellant was unaware that they were EBT sales until the end when the SNAP card was handed to

the Appellant. The Appellant did not remember all of the items included on the eligible items SNAP list and did not think anything was wrong.

- The couple of ineligible items purchased with SNAP benefits had a profit margin of about \$1.00 each. As such, the Appellant had nothing to gain from selling these items. The imposed penalty is not fair for a first time offense of the sale of a couple of ineligible items.
- The Appellant received very little updated information regarding eligible and ineligible items under the SNAP and would appreciate updated information to refresh it on the SNAP rules so that these types of mistakes do not occur in the future.
- The Appellant has been a mom and pop business for 35 years and has a clean record.

The preceding may represent only a brief summary of the Appellant's contentions in this matter. Please be assured, however, that 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

During an investigation conducted from May 8, 2019 through June 3, 2019, USDA conducted four compliance visits at Ghezzi's Market. A report of the investigation was provided to the Appellant as an attachment to the Charge Letter dated July 17, 2019. 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 four of the four compliance visits. The chargeable violations involved the sale of ineligible nonfood items in exchange for SNAP benefits in violation of 7 CFR § 278.2(a). The Retailer Operations Division determined that the assessment of a hardship CMP of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in lieu of a six month disqualification was the appropriate penalty for these violations. A preponderance of the evidence supports the decision of the Retailer Operations Division.

SNAP Violations

The Appellant contends that the SNAP violations were honest mistakes. When the items were rung up, the Appellant was unaware that they were EBT sales until the end when the SNAP card was handed to the Appellant. The Appellant did not remember all of the items included on the eligible items SNAP list and did not think anything was wrong.

These contentions cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. As owner of the store, the Appellant is liable for all violative transactions that occur at Ghezzi's Market. 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. Prior to becoming authorized to participate in the SNAP, the Appellant completed and submitted a SNAP Application for Retail Stores. The SNAP Application contained a section indicating that the person(s) signing the Application understood and agreed to ensure that store employees follow the SNAP rules and regulations and that the person(s) accepts responsibility for any SNAP violations that may occur at the store that were

committed by any of the store's employees. The SNAP Application also included a section that contained a statement which acknowledged that the person(s) signing the Application was aware that violations of Program rules could result in fines, legal sanctions, withdrawal, or disqualification of the store. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

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. In this case, the individual who committed the SNAP violations was not specifically identified during the investigation. A six month disqualification is the appropriate sanction for violations which result from employees not being fully aware of the SNAP rules, the carelessness of employees, or due to inadequate supervision by the store owner. As 7 CFR § 278.6(e)(5) of the SNAP regulations states, "Disqualify the firm for six months if ... the evidence shows that personnel of the firm have committed violations ... due to the carelessness or poor supervision by the firm's ownership or management".

Profit Margin Minor

The Appellant contends that the couple of ineligible items purchased with SNAP benefits had a profit margin of about \$1.00 each. As such, the Appellant had nothing to gain from selling these items. The imposed penalty is not fair for a first time offense of the sale of a couple of ineligible items.

However, neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto cite any minimum dollar amount of SNAP benefits for transactions involving the sale of ineligible items to be defined as violative. No mention of minimum cost or types of ineligibles is cited in Section 278.6(e)(5) of the SNAP regulations, which states that FNS shall disqualify a 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. However, in the Determination Letter of August 5, 2019, the Retailer Operations Division assessed a hardship CMP of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** against Ghezzi's Market in lieu of a six month SNAP disqualification as it determined that Ghezzi's Market was selling a substantial variety of staple food items at comparable prices and the firm's disqualification would cause hardship to SNAP households.

Training Materials

The Appellant contends that it received very little updated information regarding eligible and ineligible items under the SNAP and would appreciate updated information to refresh it on the SNAP rules so that these types of mistakes do not occur in the future. As noted on the second page of the July 17, 2019 Charge Letter, the SNAP regulations are available online at <https://www.fns.usda.gov/snap/retailers-store-training-information>. Additional information is available to the Appellant by calling the SNAP Retailer Service Center at 1-877-823-4369.

First Time Violator

The Appellant contends that it has been a mom and pop business for 35 years and has a clean record. However, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

CIVIL MONEY PENALTY

The case record documents that the Retailer Operations Division correctly calculated the amount of the hardship CMP under 7 CFR § 278.6(g). That regulation states that the hardship CMP is to be calculated on a formula which includes the SNAP redemption volume of the store during the twelve months prior to the firm being notified of the violations. Modifications to the hardship CMP may occur only when there is an error in calculation or the amount exceeds the agency limit. The Retailer Operations Division correctly determined, using the methodology described in 7 CFR § 278.6(g), that the initial calculated amount of the hardship CMP was 5 U.S.C. § 552 (b)(6) & (b)(7)(C). That calculation is shown below:

5 U.S.C. § 552 (b)(7)(E).

The calculation of the hardship CMP outlined in the above table correctly indicates that the amount of the imposed hardship CMP should be 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The SNAP regulations at 7 CFR § 278.6(g) prescribes how to calculate the amount of the hardship CMP utilizing a mandated formula. As such, there is no discretion in the calculation of the hardship CMP amount and a reduced hardship CMP cannot be granted.

CONCLUSION

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 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.

A review of the evidence in this case documents that personnel at Ghezzi's Market exchanged SNAP benefits for ineligible nonfood items during four out of four compliance visits. However, the Retailer Operations Division determined that a six month disqualification of Ghezzi's Market would create a hardship for SNAP households as there is no other authorized retail food store in the area selling as large a variety of staple foods at comparable prices. Therefore, in lieu of a six month disqualification, the Retailer Operations Division assessed a hardship CMP against the Appellant of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 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.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (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, 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

October 21, 2019