

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

Hanson Mystic,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0210103

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 assessment of a \$21,456.00 hardship civil money penalty (CMP) against Hanson Mystic in lieu of a three-year disqualification from the Supplemental Nutrition Assistance Program (SNAP). The Appellant is also required to submit a collateral bond or irrevocable letter of credit in the amount of \$1,000.00.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(1) and 7 CFR § 278.6(g), when it assessed a hardship CMP in the amount of \$21,456.00 against the Appellant.

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 USDA conducted an investigation of the compliance of Hanson Mystic with Federal SNAP law and regulations from February 2019 through May 2019. In a letter dated July 25, 2019, the Retailer Operations Division charged the Appellant store 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 (4) out of four (4) compliance visits. The letter further informed the Appellant that the chargeable violations warranted a disqualification period of three-years as provided in 7 CFR § 278.6(e)(3). 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 via UPS on July 27, 2019. The Appellant did not respond to the charge letter prior to the deadline.

After considering the evidence in the case, the Retailer Operations Division issued a determination letter dated August 6, 2019. The Retailer Operations Division concluded that the violations did occur at the store. However, the Retailer Operations Division determined that the Appellant was eligible for a hardship CMP in lieu of a three-year disqualification because the store was selling a substantial variety of staple food items and the firm's disqualification would cause a hardship to SNAP households. As a result, the determination letter informed the Appellant it was assessed with a \$21,456.00 hardship CMP in lieu of a three-year disqualification in accordance with 7 CFR § 278.6(f)(1). The store was informed that failure to pay the hardship CMP would result in a three-year disqualification.

In a letter dated August 14, 2019, the Appellant requested an administrative review of the Retailer Operations Division's determination. The request for review was granted and the assessment of the hardship CMP 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 action 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and Section 278 of Title 7 of the Code of Federal Regulations (CFR).

7 CFR § 278.2(a) states, in part:

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 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: (1) 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)(3) states, in part:

Disqualify the firm for 3 years if it is to be the first sanction for the firm and the evidence shows that: (i) It is the firm's practice to commit violations such as the sale of common nonfood items in amounts normally found in a shopping basket and the firm was previously advised of the possibility that violations were occurring and of the possible consequences of violating the regulations

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 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.

7 CFR § 278.1(b)(4)(i) states, in part:

If the applicant firm has been sanctioned for violations of this part, by withdrawal, or disqualification for a period of more than six months, or by a civil money penalty in lieu of a disqualification period of more than six months, or if the applicant firm has been previously sanctioned for violations and incurs a subsequent sanction, regardless of the disqualification period, FNS shall, as a condition of future authorization, require the applicant to present a collateral bond or irrevocable letter of credit

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 TOCMP amount.

SUMMARY OF CHARGES

During an investigation conducted from February 2019 through May 2019, the USDA conducted four (4) compliance visits at Hanson Mystic. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated July 25, 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 all four (4) compliance visits. The chargeable violations involved the sale of ten (10) ineligible non-food items in exchange for SNAP benefits in violation of 7 CFR § 278.2(a) as documented in Exhibits A, B, C and D. The clerk also refused to exchange SNAP benefits for cash as documented by Exhibit E.

APPELLANT'S CONTENTIONS

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

- Hanson Mystic is a small community convenience store catering to the needs of SNAP households in the area.
- This monetary penalty will devastate the business, and it may have to shut it down.
- Shutting down the business will most likely result in hardship for these households, as they will have to commute to other locations for their daily food items.
- The Appellant requests that the penalty be reduced to \$7,000 and that the store be given 3 years to pay in equal monthly installments so it can stay in business.

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 Appellant did not dispute the findings of the 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 Responsibility

The store owner signed the SNAP authorization application for Hanson Mystic on May 23, 2014 and acknowledged that the owner was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner 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 in exchange for ineligible non-food items.

Violations Normally Warrant a Three-year Disqualification

The Retailer Operations Division sent an official warning letter to the Appellant on June 12, 2017. The warning letter stated, in part:

This is an OFFICIAL WARNING from the U.S. Department of Agriculture that if you are again found to be in violation of the regulations, you may lose your authorization to participate in the Supplemental Nutrition Assistance Program. You should take every precaution to make sure that you and your employees know and follow the SNAP regulations.

The warning letter was delivered to the Appellant by UPS on June 13, 2017 and was signed for by “5 U.S.C. § 552 (b)(6) & (b)(7)(C).”

The store subsequently violated SNAP regulations in the investigation conducted from February 2019 through May 2019. The SNAP regulation at 7 CFR § 278.6(e)(3) states, in part, that FNS shall “disqualify the firm for 3 years if it is to be the first sanction for the firm and the evidence shows that ... it is the firm's practice to commit violations such as the sale of common nonfood items in amounts normally found in a shopping basket and the firm was previously advised of the possibility that violations were occurring and of the possible consequences of violating the regulations”

Although the clerk who conducted the violations refused to exchange cash for SNAP benefits in Exhibit D, this does not ameliorate or mitigate the penalty for exchanging SNAP benefits for non-food items as documented by Exhibits A, B, C, and D. Therefore, the Retailer Operations Division correctly determined that the violations warranted a three-year disqualification.

Hardship Civil Money Penalty in Lieu of Three-year Disqualification

The violations as cited in the charge letter would normally warrant a three-year disqualification in conjunction with the official warning letter dated June 12, 2017. However, the Retailer Operations Division determined that the assessment of a hardship CMP of \$21,456.00 in lieu of a

three-year disqualification was appropriate. A preponderance of the evidence supports the decision of the Retailer Operations Division.

The Appellant says that the hardship CMP is too high and may cause the firm to go out of business. The Appellant requests a hardship CMP of \$7,000. Regarding this contention, 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 granted to the Retailer Operations Division, or to the Administrative Review Officer, in the calculation of the hardship CMP. Therefore, a reduced hardship CMP cannot be granted.

7 CFR § 278.6(g) states that the hardship CMP is to be calculated on a formula which includes the SNAP redemption volume of the store during the twelve (12) months prior to the firm being charged with violations. Modifications to the hardship CMP may occur only when there is an error in calculation or the amount exceeds the agency limit of \$11,000 per violation. Using the methodology described in 7 CFR § 278.6(g), Retailer Operations Division correctly calculated the amount of the hardship CMP under 7 CFR § 278.6(g) as \$21,456.00. That calculation is shown below:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

CONCLUSION

A review of the evidence in this case documents that personnel at Hanson Mystic exchanged SNAP benefits for ineligible nonfood items during four (4) compliance visits and that the chargeable violations occurred as documented in Exhibits A, B, C and D of the investigation report. Although this was a first sanction, the Appellant had previously received an official warning letter on June 12, 2017. Therefore, the violations warranted a three-year disqualification under 7 CFR § 278.6(e)(3). However, the Retailer Operations Division determined that a three-year disqualification of Hanson Mystic would create a hardship for SNAP households as no other firms in the area sold a substantial variety of staple food items and the firm's disqualification would cause a hardship to SNAP households. Therefore, in lieu of a three-year disqualification, the Retailer Operations Division assessed a hardship CMP against the Appellant of \$21,456.00. The decision in this case is hereby **sustained**.

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.

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

October 29, 2019