

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

**Hong Long Ginseng, LLC,**

**Appellant,**

**v.**

**Case Number: C0199067**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a one-year disqualification against Hong Long Ginseng, LLC (“Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of Code of Federal Regulations (CFR) § 278.6(e)(5) in its administration of SNAP when it imposed a one-year period of disqualification against Appellant on April 5, 2018.

**AUTHORITY**

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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**

USDA conducted an investigation of Appellant’s compliance with federal SNAP law and regulations during the period of December 6, 2017 through January 2, 2018. The investigation reported that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. These items sold during the impermissible transactions are best described in regulatory terms as “common ineligible nonfood items.” The investigation revealed that one unidentified female clerk was involved in the impermissible transactions. As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated March 15, 2018, that the firm was charged with violating the terms

and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter states, in part, that the violations “. . . warrant a disqualification period of six months (Section 278.6(e)(5)). Under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).”

Although afforded the opportunity to do so, Appellant did not reply to the Retailer Operations Division’s charges. Appellant stated it was unable to respond to the change letter due to a language barrier.

The Retailer Operations Division notified Appellant in a letter dated April 5, 2018 that the firm was being disqualified for one year from participation as an authorized retailer in SNAP. This determination letter also stated that Appellant’s eligibility for a hardship civil money penalty (CMP) according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated to Appellant that “. . . you are not eligible for the CMP because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.”

On April 16, 2018, Appellant appealed the Retailer Operations Division’s decision to impose a one-year disqualification, and requested an administrative review of the action. The appeal was granted and implementation of the sanction has been on hold pending completion of this review.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that 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 untrue.

### **CONTROLLING LAW**

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(5 and 6) establish the authority upon which a one-year disqualification may be imposed against a retail food store or wholesale food concern.

Section 278.6(e)(5 and 6) of the SNAP regulations states, in part, when a firm is to be disqualified for one year:

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.(6) Double the appropriate period of disqualification prescribed in paragraphs (e)(2) through (5) of this section as warranted by the evidence of violations if the same firm has once before been assigned a sanction.

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 . . . .

### **APPELLANT'S CONTENTIONS**

Appellant's responses regarding this matter are essentially as follows:

- On one occasion the clerk refused the sale of nonfood items with SNAP benefits;
- The sale of nonfood items with SNAP benefits were unintentional;
- The owner was working at the store due to a family health crisis. Appellant provided ~11 pages of documents regarding the names of the owner and her family members and ~three pages of documents regarding the health crisis;
- Appellant apologizes for the violations;
- The store did not have any prior violation of SNAP regulations;
- Appellant is willing to pay a CMP; and,
- The three alleged violations were isolated and minimal in scope.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

### **ANALYSIS AND FINDINGS**

Appellant apologizes for the violations and contends that the sale of nonfood items with SNAP benefits were unintentional, resulting from the absence of the owner's mother due to a severe health situation involving the owner's grandmother. When ownership signed the FNS application to become a SNAP authorized retailer, this included a certification and confirmation that Appellant would "accept responsibility on behalf of the firm for violations of the SNAP regulations." The violations listed on this certification document include selling ineligible non-food items. Regardless of whom the ownership of a store may use to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions.

#### **First SNAP Violation**

Appellant's maintains that this is the first time there has been an issue related to SNAP. Appellant was previously sanctioned for the sale of nonfood items on December 9, 2014. In that instance, Appellant was offered, and accepted, the opportunity to pay a civil money penalty in lieu of a six-month disqualification.

Appellant argues that the three alleged violations were isolated and minimal in scope and on one occasion the clerk refused the sale of nonfood items with SNAP benefits. The investigation

report shows that of the four times that nonfood violations were attempted, store personnel permitted them three times. It is unclear how sales of nonfoods three times in succession could be considered isolated incidents. Appellant stated the owner was responsible for the violations which results in a more severe penalty. However, the Retailer Operations Division attributed violations to “carelessness, or poor supervision by the firm’s ownership or management,” pursuant to 7 CFR § 278.6(e)(5) of the SNAP regulations which provides for a disqualification of six months. This is consistent with Appellant’s contention that violations were committed in error. As the firm had been previously subjected to a six-month disqualification, pursuant to 7 CFR § 278.6(e)(6) of the SNAP regulations this time period is doubled. Therefore, a one-year disqualification for the violations committed, the minimum, is the appropriate sanction in this case.

### **Investigative Record**

Based on a review of the evidence, it appears that the program violations at issue did, in fact, occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted under the supervision of a USDA investigator and all are fully documented. The investigative record is specific and accurate 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.

### **CIVIL MONEY PENALTY**

Appellant requested a fine in lieu of the one-year disqualification. A CMP as an optional penalty in lieu of a one-year disqualification was considered in this case. Such a finding is appropriate only if: 1) a store sells a substantial variety of staple food items, and; 2) its disqualification would create a 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.

In this regard, some degree of inconvenience to SNAP benefit users is inherent in the disqualification from the SNAP of any participating food store, since the normal shopping pattern of such SNAP benefit holders may temporarily be altered during that period. In this case, however, the Retailer Operations Division has rendered a finding pursuant to 7 CFR § 278.6(f) that it would not be appropriate to impose a CMP in lieu of a period of disqualification. The Retailer Operations Division has determined that Appellant is not the only authorized retail food store in the area "selling as large a variety of staple food items at comparable prices." In addition, the Retailer Operations Division notes that the subject store is classified in the FNS SNAP retailer database as a combination/grocery store that carries Asian specialty foods. That database also shows one medium grocery store and one superstore located within a one-mile radius which also carry Asian specialty foods. All of these stores are easily accessible to customers and offer a variety and quality of staple foods comparable to, or better than, those offered by Appellant. Appellant does not carry any unique items or foods that cannot be found at other stores. Therefore, the earlier determination that Appellant’s disqualification would not create a hardship to customers, as differentiated from potential inconvenience, is sustained, and a CMP in lieu of disqualification is not appropriate in this case.

## **CONCLUSION**

Based on the discussion above, the determination by the Retailer Operations Division to impose a disqualification of one year against Hong Long Ginseng, LLC from participating as an authorized retailer in SNAP is sustained.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. A new application for participation in SNAP may be submitted ten (10) days prior to the expiration of the one-year disqualification period.

## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the Freedom of Information Act (FOIA), it may be necessary to release this document and related correspondence and records upon request. If such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released could constitute an unwarranted invasion of privacy.

RICH PROULX  
Administrative Review Officer

June 11, 2018