

**U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review  
Alexandria, VA 22302**

Commerce Road Shell,	)	
	)	
Appellant,	)	
	)	
v.	)	<b>Case Number: C0183661</b>
	)	
Retailer Operations Division,	)	
	)	
Respondent.	)	
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**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the decision by the Retailer Operations Division to impose a six month disqualification against Commerce Road Shell (hereinafter Appellant) from participating as an authorized retailer in 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) in its administration of the SNAP when it imposed a six month period of disqualification against Appellant on August 16, 2016.

**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**

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period October 14, 2015, through February 16, 2016. The investigation determined that personnel at Appellant’s store accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. All four transactions were deemed clearly

violative and warrant a six month disqualification period. The items sold are best described in regulatory terms as common nonfood items and included items such as coffee filters, plastic sandwich bags, and hot food. The investigative report indicates that these violative transactions were handled by different clerks. The investigative report also noted that the business refused to exchange SNAP benefits for an ineligible item on one occasion (Exhibit C) and also refused to exchange SNAP benefits for cash on another occasion (Exhibit E).

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated July 1, 2016, 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)). The letter also states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).”

Appellant requested and was approved for two separate extensions to respond to the charge letter and subsequently responded by letter dated August 8, 2016, but faxed on August 9, 2016. This response contained no evidence to be considered in support of the CMP. After giving consideration to the evidence, the Retailer Operations Division notified Appellant in a letter dated August 29, 2016, that it determined that violations had occurred at the establishment, and that a six month period of disqualification from participating as an authorized firm in SNAP was warranted. This determination letter also states that Appellant’s eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated “. . . 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.”

By letter dated August 29, 2016, Appellant appealed the Retailer Operations Division’s decision and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review. No subsequent correspondence was received from Appellant.

#### **STANDARD OF REVIEW**

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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 and Nutrition Act of 2008, as amended (the Act), 7 U.S.C. § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e)(5) establish the authority upon which a six month disqualification may be imposed against a retail food store or wholesale food concern.

Section 278.6(e)(5) of the SNAP regulations states, in part, that a firm is to be disqualified 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 common nonfood items due to carelessness or poor supervision by the firm's ownership or management.”

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 . . . .” (Emphasis added.)

7 CFR § 278.6(f)(1) 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.”

7 USC 2018 (b)(7)(e)

### APPELLANT’S CONTENTIONS

In response to the letter of charges and in the request for administrative review, Appellant has stated as its position in the matter the following:

- The store owner is very remorseful about the allegations made against his former employees and in particular against Commerce Shell and has taken more aggressive steps to ensure that his store employees do not make any more mistakes regarding the use of SNAP benefits;
- The owner recognized three of the clerks from the descriptions contained in the report. A female, [7 USC 2018 (b)(6) & (b)(7)(c)], responsible for the violation on 10/14/2015 was terminated in January for negligence. A male, [7 USC 2018 (b)(6) & (b)(7)(c)], who was responsible for the violation on 11/3/2015, was a new trainee who did not like the job and left after one week. Another male, [7 USC 2018 (b)(6) & (b)(7)(c)], was

involved in the transaction on 2/16/2016 and refused to exchange SNAP for cash. The other two descriptions do not match any current or previous employees;

- When the owner hires new employees, he trains them about the proper rules and regulations regarding the SNAP program and also to properly check ID's for alcohol and tobacco. These are very important to the business and to the industry. Sometimes, the employees make mistakes and this is when they are terminated. Sometimes employees [7 USC 2018 (b)(7)(e)] The owner admits that store employees violated some very minor items with a very minor amount of money and takes full responsibility for these violations. He also requests an opportunity to learn from this investigation and requests the business be forgiven from any fine or suspension as the community around the store needs a responsible convenience store to fulfill their everyday SNAP purchases. The business has been responsible since day one; however, mistakes do happen with the best of us in this business and the owner promises there will be no more ineligible transactions going forward;
- Appellant disagrees with the determination that this location is not qualified to receive a CMP in lieu of disqualification. SNAP regulations at 278.6(f)(1) state that if a firm 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 store in the area selling as large a variety of staple food items at comparable prices. Although there is at least one nearby SNAP retailer in the area, Commerce Shell does sell a variety of staple food items such as breads, dairy, fruits/vegetables, and meat/poultry/fish. Commerce Shell does sell other items that are different from the nearby stores such as frozen pizza and wings. The business actually sells six different kinds of wings as well as several different flavors of pizza. The [7 USC 2018 (b)(6) & (b)(7)(c)] does not sell frozen pizza or wings, let alone have a variety of such items; and,
  - Additionally, the business is open for substantially more hours than the neighboring retail stores being open for 20 hours per day while the closest retail store is only open 16 hours per day during the week and 18 per day on the weekends. A large number of SNAP households are single-parent households with schedules that often have limited flexibility. As such, the extra hours provides these families with the ability to purchase food items at almost all hours of the day. With the business being roughly twice the size of the nearest SNAP retailer and creating twice the volume of customer traffic, the disqualification would create a hardship to SNAP households.

No documentation or other evidence was submitted in support of these contentions.

The preceding may represent only a brief summary of Appellant's contentions in this matter. However, 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

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not within the authority of this review to consider what subsequent remedial actions may have been taken or will be taken in the future so that a store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, while having taken more aggressive steps to ensure that his employees do not make any more mistakes regarding the use of SNAP benefits is a positive step, it does not provide any valid basis for dismissing the charges, or for mitigating the penalty imposed. Additionally, a record of participation in 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. Regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, the ownership is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time. Ownership is responsible for all SNAP transactions at the firm regardless of the amount of time the owner is present at the subject firm.

Regarding Appellant's contentions, the FNS electronic retailer application contains a certification page whereby applicants must confirm their understanding of an agreement with SNAP retailer requirements in order to complete the application or reauthorization process. Store ownership did certify its understanding and agreement when it applied for authorization as a SNAP retailer in May 2013 through the FNS retailer web site. The "SNAP Training Guide for Retailers" is provided to all retail store owners upon their authorization/reauthorization and clearly states that store owners or operators are legally responsible for the own actions as well as the actions of everyone working in their store and that violations may include being disqualified from SNAP. This guide and the video accompanying it are both available online through the FNS retailer web

site and provide detailed information for SNAP retailers regarding compliance with SNAP rules and regulations. This web site cautions applicants about their responsibilities for training and overseeing store employees.

7 USC 2018 (b)(7)(e)

7 USC 2018 (b)(7)(e)

Based on the discussion above, there is not any valid basis for dismissing the charges or for mitigating the penalty imposed.

#### **CIVIL MONEY PENALTY**

7 USC 2018 (b)(7)(e) offered by Appellant. Appellant does not carry any unique items or foods that cannot be found at these or other nearby stores. It is recognized that some degree of inconvenience to SNAP benefit users is inherent in the disqualification from SNAP of any participating food store as the normal shopping pattern of such SNAP benefit holders may be altered. Inconvenience; however, does not rise to the level of hardship required by the regulations.

#### **CONCLUSION**

A review of the evidence in this case supports that the program violations at issue did 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 by a USDA special agent and signed under penalty of perjury. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, 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. Accordingly, the determination by the Retailer Operations Division to impose a disqualification of six months against Commerce Road Shell from participating as an authorized retailer in SNAP is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations as there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

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 six month 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 a judicial review is desired, 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.

/s/

October 7, 2016

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ROBERT T. DEEGAN  
ADMINISTRATIVE REVIEW OFFICER

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DATE