

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

**International Foods,**

**Appellant,**

**v.**

**Office of Retailer Operations and  
Compliance,**

**Respondent.**

**Case Number: C0197917**

**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 Office of Retailer Operations and Compliance to assess a hardship civil money penalty (CMP) against International Foods (hereinafter Appellant) in lieu of a six month disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), § 278.6(e)(5), and § 278.6(f)(1) in its administration of the SNAP when it assessed a hardship CMP in lieu of a six month period of disqualification against Appellant.

**AUTHORITY**

According to 7 U.S.C. § 2023 and the 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**

A USDA investigator conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period April 26, 2017, through October 2, 2017. The investigation determined that personnel at the Appellant firm 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 such as wooden skewers, dishwashing detergent, bar soap, liquid soap, and a kitchen strainer. The investigative report indicates that these violative transactions were handled by two clerks. The report notes that one clerk refused to exchange SNAP benefits for cash on one occasion (Exhibit D), but allowed the exchange of SNAP benefits for ineligible items in Exhibit D as well as in Exhibits A and B. The report also noted that the business overcharged the USDA investigator during each of the four transactions which constitutes a further violation of SNAP regulations.

As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant, in a letter dated December 21, 2017, 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 month. The letter also states that under certain conditions, FNS may impose a CMP in lieu of a disqualification (Section 278.6(f)(1)).”

Appellant, through counsel, submitted a Freedom of Information Act (FOIA) request dated January 8, 2018. This request did not include a request for a CMP or any evidence in support of one. The agency responded to the FOIA request on February 28, 2018. On May 22, 2018, Appellant, through counsel, appealed the FOIA response and the Office of Retailer Operations and Compliance suspended all work on this case pending the outcome of the appeal. The FOIA appeal decision was subsequently issued on September 25, 2020. The Office of Retailer Operations and Compliance sent a 10 day reminder of the opportunity to submit an additional response to the charges to counsel in a letter dated September 30, 2020.

Appellant, through counsel, responded to the charges in an email dated October 15, 2020, that did not request a CMP. After giving consideration to the evidence, the Office of Retailer Operations and Compliance notified Appellant in a letter dated November 24, 2020, that it determined that violations had occurred at the firm, and that an assessment of a hardship CMP in the amount of \$8,538.00 in lieu of a six month SNAP disqualification was an appropriate penalty for the violations committed and in accordance with Section 278.6(f)(1). This determination was based on Appellant’s disqualification causing hardship to SNAP households as there were no other authorized retail stores in the area selling a similar variety of staple foods at comparable prices.

By letter postmarked December 7, 2020, Appellant, without counsel, appealed the Office of Retailer Operations and Compliance’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. On January 12, 2021, Appellant requested and was approved for an extension of time to respond until February 3, 2021. Subsequent correspondence was received.

## **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 Section 278. In particular, Sections 278.6(a) and (e)(5) establish the authority upon which a hardship CMP may be assessed against a retail food store or wholesale food concern in lieu of a six month disqualification.

7 CFR § 271.2 states that: 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 § 278.2(a) states that: Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food. Further, the citation specifies that coupons may not be accepted in exchange for cash, in payment of interest on loans, or for any other nonfood use.

7 CFR § 278.6(a) states that: 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)(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(f)(1) states that, FNS may impose a CMP 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. FNS may disqualify a store which meets the criteria for a CMP if the store had previously been assigned a sanction. A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

### **APPELLANT'S CONTENTIONS**

The following may represent a 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:

- The firm is approximately 3,000 SF and been in operation since 2000 with no alleged violations. All personnel who operate the register are required to read the SNAP training guidebook, watch the YouTube video, and sign a letter acknowledging that they have been trained. Retraining occurs as needed, when new inventory arrives, or when rules change. All clerks must also demonstrate practical knowledge of how to operate SNAP transactions before being permitted to operate SNAP transactions on their own. Appellant cited demographic information from the USDA Profile of Households for the 11<sup>th</sup> Congressional District of California;
- Appellant states that FNS shall consider SNAP regulations at 7 CFR § 278.6 when making a disqualification or penalty determination. Section 278.6(e)(5) states that a firm shall be disqualified for six months if it is the first violation and personnel, of the firm 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. Additionally, FNS is to send the firm a warning letter if violations are too limited to warrant a disqualification;
- Store ownership denies any intentional violation of SNAP regulations on the part of the store. The violations were honest mistakes, made without malice, by the clerk who was confused as to which items were eligible versus ineligible. Store employees were trained in EBT transactions, but apparently did not fully understand the transaction process. Upon becoming aware of the violations, all personnel were re-trained;
- In order to qualify for a six-month disqualification, the regulation indicates that the evidence must show that carelessness or poor supervision by ownership or management sold ineligible items. Furthermore, the regulations require the Department to conduct a three part analysis in addition to determining whether or not FNS can issue a six month disqualification. There is no evidence whatsoever in the record that the alleged sales of common nonfood items was due to carelessness or poor supervision by the store's ownership or management. The mere presence of the alleged violation – even in a certain volume – is not a prima facie case for “carelessness or poor supervision.” Store owners and management are not expected to sit over their employee's shoulder for every transaction to verify their accuracy. Furthermore, a concealed problem (such as this where there's no way for the store owner/manager to have known about these specific alleged problems) is not the same as acting careless or neglectful. Careless/neglectful qualifies for store owners who never trained their staff, or who govern their store on an absentee basis without any ongoing concern for how the store is operating. A determination that a certain number of ineligible sales over a certain number of visits is the very definition of arbitrary: a determination based upon individual preference or convenience rather than by the intrinsic nature of the transactions;
- The store asks that a warning letter be issued in lieu of a six month disqualification. There were minimal ineligible items purchased by the investigator, all of which were reasonably related to food preparation and/or common household products. There was a clear misunderstanding on the part of the clerks regarding the difference between eligible verse ineligible items, and nothing in the record to indicate that the sales were

intentionally violative. Furthermore, the clerk during the October 2, 2017 investigation outright refused to engage in trafficking in SNAP benefits by refusing cash in exchange for SNAP benefits, clearly evidencing the training effectuated by the store.

Accordingly, the violations were minor in nature, and while the Department is tasked with maintaining compliance with the regulations, it should be reluctant to resort to draconian sanctions where a lesser sanction would be more appropriate and equally effective. Appellant cited court cases pertaining to the issuance of a warning letter;

- In this instance, the ownership had taken reasonable and fiscally practical steps to prevent SNAP violations. Their efforts cannot be reasonably described as careless or as poor supervision, as would be required to support a six month disqualification under the regulation. Rather, it would seem as though the violations are exceptionally minor in nature, and while certainly in need of correction, proper corrective action can be achieved by the issuance of a warning letter. The six-month disqualification as set forth in the charging letter would be overkill for the violations that have allegedly occurred, and under the circumstances set forth in the charging letter. While obviously violations should be strongly discouraged, the ownership of the store has not been careless or failed to oversee its employees;
- The owner has thoroughly trained, discussed, and reviewed the EBT rules with all the cashiers since receiving the citation. The cashiers are continuously reminded in meetings and each has signed an employee training and certification letter;
- The owner cannot afford the attorney who was handling the case for him. He is grateful that the firm's license was not suspended, but the monetary penalty is weighing heavy. For the survival of his business, the owner requests that the penalty be waived and a warning be issued instead;
- FNS should consider that the firm does not sell alcohol or tobacco, that the owner understands that violating SNAP rules is against the law, that any violations that occurred were never at the owner's direction, that the cashiers are not relate to the owners and did not benefit from violating the rules, and that the owner reminds the cashiers daily about SNAP rules; and,
- The business has been serving the community for 31 years with no issues over EBT rules and guidelines.

Appellant submitted photos of SNAP signage and a cashier training certificate in support of these contentions.

## **ANALYSIS AND FINDINGS**

Regarding Appellant's denial, 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 Office of Retailer Operations and Compliance and is limited to what circumstances were at the basis of the action at the time such action was made. In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the 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. Assertions that the

firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. There is no provision in the SNAP regulations 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 the owner has thoroughly trained, discussed, and reviewed the EBT rules with all the cashiers since receiving the citation and they are continuously reminded in meetings and each has signed an employee training and certification letter are positive steps, they do not provide any valid basis for dismissing the charges, or for mitigating the penalty imposed. While store ownership may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, that ownership is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. When store ownership signed the certification page of the SNAP retailer authorization and reauthorization applications to become and remain a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP.

The FNS investigative report shows that two employees working at the Appellant firm accepted SNAP benefits for ineligible items on four separate occasions during the investigative period indicating an ongoing pattern and practice of SNAP violations as defined by Section 271.2 of the SNAP regulations. The firm also overcharged during each SNAP transaction further supporting the pattern and practice of SNAP violations. The report shows that the nature and scope of the violations under review do violate SNAP regulations, and the transaction amounts cited in the report also match FNS transaction records for the dates in question. Additionally, a review of the report shows no errors or discrepancies. There is no regulatory threshold for the dollar value of the ineligible items purchased or for the timeframe in which they were purchased. The acceptance of SNAP benefits for ineligible items is a violation of SNAP rules and regulations. The ineligible items sold were obvious nonfood items and would not readily be confused with eligible edible food items. SNAP regulations explicitly state that FNS shall disqualify a store for a six month period 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 the sale of common nonfood items in exchange for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management. The applicable regulations do not specify intent as being a required element for a six month disqualification.

SNAP benefits, in general, are only authorized to be used for the purchase of foods for the household to eat as well as seeds and plants which produce food for the household to eat. The many nonfood items purchased are clearly not edible foods and are not plants or seeds, so one has to question the level of training these employees received by store ownership and/or management. The basic concept of "if you can't eat it, you can't buy it using SNAP" is not a difficult one for employees to grasp, yet these employees allowed the purchase of ineligible items using SNAP benefits on multiple occasions. Had an effective compliance policy and

program been in effect at the firm, it is unlikely that these employees would have made such obvious mistakes. The more likely explanation is that store ownership and/or management failed to properly train and subsequently supervise these employees. Additionally, had store ownership and/or management been supervising these employees through occasionally monitoring them using videotape, if available, or in person, it would have readily noticed that they were allowing the sale of ineligible nonfood items in exchange for SNAP benefits. It also would have been immediately evident to store ownership and/or management that these employees were deficient in their knowledge of SNAP rules and regulations had it periodically spot checked their knowledge and abilities by asking questions about SNAP eligible/ineligible items. Either of these basic supervisory techniques would have provided a no cost method for store ownership and/or management to ensure that store employees were not putting the firm's SNAP license at risk. These are clear signs of poor or no supervision by store ownership and/or management.

It is highly improbable, based on the willingness of these employees to exchange SNAP benefits for ineligible nonfood items, that the only instances of SNAP violations were those transactions identified as part of the FNS undercover investigation. Common sense dictates that these actions more likely than not represented an ongoing pattern and practice of SNAP violations at the Appellant firm. As previously stated, store ownership is responsible for all SNAP transactions at the firm and therefore a certain minimal level of oversight and training on the part of ownership to ensure employees, especially new employees, are not violating SNAP laws or regulations is expected. It would be unusual and irresponsible for store ownership to not have a program of ongoing supervision of employee performance and conduct by periodically monitoring store transactions, including those involving SNAP, and reviewing daily balance sheets to ensure store employees were not stealing from the firm or conducting other activities that would jeopardize the licenses and income that the firm is dependent upon. Under SNAP regulations, a practice of allowing the purchase of ineligible nonfood items using SNAP benefits on multiple occasions will result in a six month disqualification. The regulations do allow SNAP retailers to pay a hardship CMP, if eligible, as explained in the next section.

Contrary to Appellant's contention, the three criteria from SNAP regulations at section 278.6(d) listed below are not bases to be met in order for a firm to be disqualified, but are those areas that FNS considers in determining the appropriate level of sanction for firms that have violated SNAP regulations. The level of sanction could include temporary or permanent disqualification.

- 1) The nature and scope of the violations committed by personnel of the firm,
- 2) Any prior action taken by FNS to warn the firm about the possibility that violations are occurring, and
- 3) Any other evidence that shows the firm's intent to violate the regulations.

The Report of Positive Investigation shows that the nature and scope of the violations under review do violate SNAP regulations, and the transaction amounts cited in the report also match FNS transaction records for the dates in question. A review of the investigative report shows no errors or discrepancies and a comparison of the dates/times/amounts on the POS receipts issued by the Appellant firm to the USDA investigator correspond to the dates/times/amounts provided to USDA FNS by the firm's EBT processor when it submitted the transactions to USDA FNS for reimbursement. Other evidence provided (photos of the items purchased and detailed donation

records signed by a local charitable organization) also support the details provided in the investigative report. While a firm that has previously received warnings of possible violations or that has been sanctioned before could receive a more severe penalty, SNAP regulations do not provide any grounds for dismissing or reducing penalties for those firms that have not received warnings or previously been sanctioned. The record shows no evidence that the Appellant firm received any prior warnings or has been sanctioned and there is no evidence that the firm's ownership or management intentionally violated SNAP regulations. Based on this discussion, the decision by the Office of Retailer Operations and Compliance to disqualify the firm for a six month period was the appropriate penalty.

There are no requirements in existing FNS regulations that require stores suspected of trafficking or misusing SNAP benefits be provided with a written or verbal notification that violations of SNAP regulations may be occurring and the potential penalties.

In regard to case law cited by Appellant, considerations of relevant legal precedent through case law, or the lack thereof in relation to the present case, are beyond the scope of this review. This review relies upon the statute and regulations governing the SNAP and evaluates whether the decision to impose a disqualification upon the Appellant was in accordance with same and sustainable by a preponderance of the evidence. Appellant's case law references are acknowledged in this context only.

Appellant is correct that the firm has no previous history of SNAP program violations although the firm did receive a FNS letter in 2013 reminding it of the need to adhere to SNAP rules and regulations. However, this does not necessarily mean that the firm has not been conducting violative transactions. Neither FNS nor Appellant has sufficient data to conclusively prove that the firm was or was not conducting violative transactions prior to the start of the undercover investigation. However, the matter under review is the first time that the firm has been investigated by FNS and the results of the investigation showed SNAP violations conducted by two different employees in four of the four visits to the firm. While it is not definitive, it can be readily inferred that violative transactions were more likely than not occurring in previous months based on these investigatory visits.

Appellant's claims are particularly without merit when you consider that the outcome of the USDA investigation was that two separate employees of the Appellant firm were found to have allowed the purchase of numerous nonfood items in exchange for SNAP benefits on multiple occasions over more than a five month period. This pattern of multiple violations by multiple employees is a strong indication of the firm's business practice. That the USDA investigator was overcharged in all four transactions is further evidence of the firm's business practice and of the lack of required SNAP training and oversight on the part of store ownership.

Based on this discussion, the decision by the Office of Retailer Operations and Compliance to disqualify the firm for a six month period was the appropriate penalty and there is no valid basis for dismissing the charges or for mitigating the penalty imposed. The assessment of a hardship CMP is discussed in the next section.



## **CIVIL MONEY PENALTY**

Appellant is not eligible for a trafficking CMP as these only apply in cases of permanent disqualifications. The matter under review is a term disqualification of six months and does not involve trafficking therefore a trafficking CMP cannot be considered under 7 CFR § 278.6.

The Office of Retailer Operations and Compliance determined that the Appellant 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 store in the area selling as large a variety of staple food items. Thus, pursuant to 7 CFR § 278.6(f), it is the decision of USDA that a six month disqualification would create a hardship to SNAP recipients, and that a CMP in lieu of disqualification is appropriate in this case. The case record documents that, under 7 CFR § 278.6(g), the Office of Retailer Operations and Compliance correctly calculated the amount of the hardship CMP. 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 12 months prior to the firm being notified of the violations that led to the store's disqualification. Modifications to the hardship CMP may occur only when there is an error in calculation or the amount exceeds the statutory limit.

It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP or a CMP is imposed in lieu of a period of disqualification. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm or to ownership resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. Furthermore, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, ownership's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

## **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 investigator 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 Office of Retailer Operations and Compliance to assess a

hardship CMP in the amount of \$8,538.00 in lieu of a six month disqualification from participating as an authorized retailer in SNAP is sustained. Based on the discussion above, the amount of the hardship CMP was properly computed by the Office of Retailer Operations and Compliance. Please note that if the penalty is not paid, the six month SNAP disqualification will be imposed. Appellant may contact the USDA-FNS Financial Management Accounting Division at (703) 605-0483 to discuss a monthly payment plan, or follow the instructions in the Office of Retailer Operations and Compliance's letter dated November 24, 2020, regarding online or check payment options.

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. In the event a six month disqualification is imposed for failure to pay the CMP, or some lesser disqualification period reflecting the unpaid portion of the CMP, Appellant may reapply for authorization to participate in the SNAP up to 10 days prior to the end of the disqualification period. When eligible, Appellant may reapply for SNAP authorization using the application instructions contained on the FNS web site. Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

### **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, we are 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.

ROBERT T. DEEGAN  
ADMINISTRATIVE REVIEW OFFICER

March 3, 2021