

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

**Jason’s Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0191223**

**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 a finding that a six month disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Jason’s Market by the Retailer Operations Division of FNS.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a six month period of disqualification against Jason’s Market on May 24, 2017.

**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 Jason’s Market with Federal SNAP law and regulations during the period July 19, 2016 through September 13, 2016. In a letter dated April 26, 2017, the Retailer Operations Division charged the Appellants

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 five out of seven compliance visits. The letter further informed the Appellants that the violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5).

In a telephone conversation with Retailer Operations Division staff on May 5, 2017 and in written correspondences dated May 5, 2017 and May 8, 2017, the Appellants replied to the charges therein indicating that the violative SNAP transactions were committed by a store employee who inadvertently allowed ineligible items to be purchased with SNAP benefits without the firm's knowledge, consent, or approval.

After considering the Appellants' replies and the evidence of this case, the Retailer Operations Division issued a Determination Letter dated May 24, 2017. The Determination Letter informed the Appellants that they were disqualified from the SNAP for a period of six months in accordance with 7 CFR § 278.6(a) and (e). The Determination Letter also stated that the Retailer Operations Division considered the Appellants' eligibility for a hardship civil money penalty (CMP) under 7 CFR § 278.6(f)(1). The Retailer Operations Division determined that the Appellants were not eligible for the hardship CMP in lieu of the six month disqualification because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked June 9, 2017, the Appellants, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. FNS granted the Appellants' request for administrative review by letter dated June 14, 2017. Upon acceptance of the administrative review request, implementation of the six month disqualification was held in abeyance pending completion of this review.

The records reflects that in a letter dated July 10, 2017, the Appellants' counsel requested information and documents from FNS with regard to the Agency's case against Jason's Market pursuant to the Freedom of Information Act (FOIA). FNS provided a response to counsel's FOIA request, dated July 17, 2017, and received no further communication from the Appellants or counsel with regard to the Agency's response.

## **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 promulgated through regulations under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e) establish the authority upon which a disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, inter alia:

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, inter alia:

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, inter alia:

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) states, inter alia:

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, inter alia:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when . . . the firm's disqualification would cause hardship to Food Stamp [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.

## **SUMMARY OF THE CHARGES**

**5 U.S.C. § 552 (b)(7)(E)**

## APPELLANTS' CONTENTIONS

The following represents a brief summary of the Appellants' contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the Appellants' replies to the Charge Letter and in the review request postmarked June 9, 2017 and in a subsequent correspondence provided via an e:mail message dated August 22, 2017, the Appellants, through counsel, stated the following summarized contentions, in relevant part:

- The violative SNAP transactions were committed by a store employee who inadvertently allowed ineligible items to be purchased with SNAP benefits without the Appellants' knowledge, consent, or approval. Upon being questioned about the SNAP violations, the employee told the Appellants that she believed that because some of the ineligible items that she allowed the investigator to purchase with SNAP benefits were food related, including plastic forks, paper plates, and plastic sandwich bags, that they could be purchased with SNAP benefits.
- To ensure that SNAP violations do not occur in the future, the Appellants have retrained the responsible store employee on the SNAP rules including the fact that only items that have a food label may be purchased with SNAP benefits.
- The Appellants adamantly maintain that the violative SNAP transactions described in the investigation report did not occur at Jason's Market.
- The investigation report and charges lack significant evidence such as the lack of disclosure of the name of the investigator and the ability to depose him/her about the investigation findings, missing information regarding the time at which the transactions occurred, missing images of some of the ineligible items purchased, missing receipt prices of the items purchased with SNAP benefits, etc. Therefore, the investigation report is unsubstantiated and there is no credible evidence that SNAP violations occurred at Jason's Market.
- The Appellants are requesting that FNS overturn its decision to disqualify Jason's Market from participation in the SNAP for six months and in the alternative, issue them a warning letter.
- A six month SNAP disqualification will impose a severe financial hardship on Jason's Market as over 25 percent of the firm's monthly sales are from SNAP purchases.
- A six month SNAP disqualification will impose a hardship on area SNAP customers as Jason's Market is the only retail food store in the surrounding neighborhood that carries imported foods from Latin America. As such, the Appellants are requesting that FNS impose a civil money penalty in lieu of a six month SNAP disqualification of Jason's Market.

In support of the Appellants' contentions, the following documents were submitted to FNS:

- A hand-written list of the imported Latin American foods which the Appellants claim are carried/stocked by Jason's Market.

## ANALYSIS AND FINDINGS

### **Violations Made Without Appellants' Knowledge or Approval**

The Appellants contend that the violative SNAP transactions were committed by a store employee who inadvertently allowed ineligible items to be purchased with SNAP benefits without the Appellants' knowledge, consent, or approval. Upon being questioned about the SNAP violations, the employee told the Appellants that she believed that because some of the ineligible items that she allowed the investigator to purchase with SNAP benefits were food related, including plastic forks, paper plates, and plastic sandwich bags, that they could be purchased with SNAP benefits.

These contentions cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. As owners of the store, the Appellants are liable for all violative transactions that occur at Jason's Market. Regardless of whom the ownership of a store may utilize to handle store business (i.e., regardless of whether a store owner, store manager, store clerk, friend, family member, etc. was involved in the violative transactions), ownership is accountable for the proper handling of SNAP benefit transactions. Prior to becoming authorized to participate in the SNAP on August 20, 2014, the Appellants 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---paid, unpaid, new, temporary, full-time, part-time, etc. 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 Appellants were 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". The Appellants' implied contention that the SNAP violations were inadvertently committed by a store employee without the firm's knowledge, consent, or approval cannot be accepted as a valid basis for diminishing the penalty. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store

business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA.

### **Corrective Action Implemented**

The Appellants contend that in order to ensure that SNAP violations do not occur in the future, they have retrained the responsible store employee on the SNAP rules including the fact that only items that have a food label may be purchased with SNAP benefits. 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 the authority of this review to consider what subsequent remedial actions may have been taken so that the 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 after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellants' contention that they have taken corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Denial of SNAP Violations**

Regarding the Appellants' contention that they deny that the violative SNAP transactions described in the investigation report occurred, this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is, as noted above, to determine whether the Appellants demonstrate by a preponderance of the evidence that the six month disqualification should be reversed. In this case, therefore, if the Appellants demonstrate by a preponderance of the evidence that SNAP violations did not occur in the Appellants' firm, then the SNAP violations will be considered not to have occurred and the disqualification reversed. If this is not demonstrated the case is to be sustained. 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.

It is also important to note that while the Appellants deny that the violative SNAP transactions described in the investigation report occurred at Jason's Market, in the May 8, 2017 response to the letter of charges, the Appellants stated that upon receiving the Charge Letter from FNS, they questioned the employee who conducted the violative transactions listed in the investigation report. The employee subsequently informed the Appellants that she believed that because some of the ineligible items that she allowed the investigator to purchase with SNAP benefits were food related, including plastic forks, paper plates, and plastic sandwich bags, that they could be purchased with SNAP benefits. As such, the Appellants were aware that violative SNAP transactions had been conducted by a store employee of Jason's Market during the FNS investigation.

## **Investigation Report Lacks Evidence**

The Appellants contend that the investigation report and charges lack significant evidence such as the lack of disclosure of the name of the investigator and the ability to depose him/her about the investigation findings, missing information regarding the time at which the transactions occurred, missing images of some of the ineligible items purchased, missing receipt prices of the items purchased with SNAP benefits, etc. Therefore, the investigation report is unsubstantiated and there is no credible evidence that SNAP violations occurred at Jason's Market.

Regarding this contention, 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 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 investigator stands by his/her report that the items listed in the investigation report were, in fact, purchased at Jason's Market on the dates indicated and FNS has documentation on file that confirms the items listed were donated to and signed for by a charitable organization following each transaction. The penalty imposed by the Retailer Operations Division is based on the occurrence of violative SNAP transactions involving the sale of ineligible items regardless of whether the name of the investigator was disclosed to the Appellants or the purchase receipts included the prices of the individual items purchased with SNAP benefits.

As mentioned previously, 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. The Appellants did not provide FNS with any evidence or documentation that substantiate/prove that the violative SNAP transactions listed in the investigation did not occur at Jason's Market.

With regard to the Appellants' contention that they were not given the opportunity to depose and question the Agency's investigator, neither the Food and Nutrition Act of 2008 nor the SNAP regulations pursuant thereto provide for evidentiary proceedings at the administrative level of review, and therefore such proceedings are not included in the administrative review process. Rather, the Act and regulations provide that any firm aggrieved by an administrative review determination may seek judicial review of the determination in Federal court or a state court of record having competent jurisdiction. In such event, trial de novo proceedings ensure the firm of a full evidentiary hearing on the agency action at issue.

## **Reconsideration of Disqualification Requested**

The Appellants are requesting that FNS overturn its decision to disqualify Jason's Market from participation in the SNAP for six months and in the alternative, issue them a warning letter. However, 7 CFR § 278.6(e)(5) of the SNAP regulations is specific in that FNS shall "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 by employees or poor supervision by the firm's ownership or management". As such, the Retailer Operations Division's decision to impose a six month SNAP disqualification for Jason's Market is appropriate for the SNAP violations that occurred during the investigation period.

## **Imposed Financial Hardship**

The Appellants contend that a six month SNAP disqualification will impose a severe financial hardship on Jason's Market as over 25 percent of the firm's monthly sales are from SNAP purchases. However, 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 possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, 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, the Appellants' 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.

## **CIVIL MONEY PENALTY**

The Appellants contend that a six month SNAP disqualification will impose a hardship on area SNAP customers as Jason's Market is the only retail food store in the surrounding neighborhood that carries imported foods from Latin America. As such, the Appellants are requesting that FNS impose a civil money penalty in lieu of a six month SNAP disqualification of Jason's Market. The Retailer Operations Division determined that the Appellants were not eligible for a hardship civil money penalty (CMP) under 7 CFR § 278.6(f)(1). That regulation 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." [Emphasis added]. **5 U.S.C. § 552 (b)(7)(E)**



Based on the evidence, the disqualification of Jason's Market would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division's decision not to assess a hardship CMP in lieu of a six month disqualification is sustained as appropriate under 7 CFR § 278.6(f)(1).

### **CONCLUSION**

It is therefore established that the violations as described in the letter of charges did in fact occur at Jason's Market warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5). That regulation states that FNS shall "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". Therefore, the decision to impose a six month disqualification, the least severe penalty allowed by regulation, against Jason's Market, the Appellant firm, is appropriate and the action is sustained.

In accordance with the Food and Nutrition Act of 2008 and the regulations there under, the six month period of disqualification shall become effective thirty (30) days after receipt of this letter. A new application for participation may be submitted by the firm ten (10) days prior to the expiration of this six month period.

### **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, 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.

LORIE L. CONNEEN  
Administrative Review Officer

March 9, 2018