

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

Metro Auto Service,

Appellant,

v.

Case Number: C0195334

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 assess a hardship civil money penalty (CMP) against Metro Auto Service 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 Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), § 278.6(e)(5 and 6), 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 on October 13, 2017.

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 the compliance of Appellant with federal SNAP law and regulations during the period December 23, 2016, through July 20, 2017. The investigation determined that personnel at Appellant’s store accepted SNAP benefits in exchange for ineligible

merchandise on six separate occasions. All six 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 bar soap, dishwashing liquid, and scouring pads. The investigative report indicates that these violative transactions were handled by multiple unidentified clerks. The investigative report also noted that the business refused to exchange SNAP benefits for ineligible items on two occasions (Exhibits B and F) and refused to exchange SNAP benefits for cash on two occasions (Exhibits A and F).

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated September 27, 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 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 responded to the charges in a letter dated October 1, 2017, explaining that the violations were due to a technical error between the store’s main register and its separate EBT processing register that has since been corrected and requesting that no period of disqualification or fine be imposed. After giving consideration to the evidence, the Retailer Operations Division notified Appellant in a letter dated October 13, 2017, that it determined that violations had occurred at the establishment, and that an assessment of a hardship CMP in the amount of \$1,140.00 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 dated October 19, 2017, 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. Subsequent correspondence dated November 9, 2017, has been received from Appellant.

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), 278.6(e)(5), and 278.6(f)(1) 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 in part 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) specifies in relevant part, “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 . . . or for any other nonfood use.”

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(e)(5) 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) states, in part, “(1) 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 food stamp 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 civil money penalty if the store had previously been assigned a sanction. A civil money penalty for hardship to food stamp households may not be imposed in lieu of a permanent disqualification.”

APPELLANT’S CONTENTIONS

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

- The minor violations were due to a technical error caused by a miscommunication between the main register and the separate EBT processing register that allowed a few items to mistakenly ring-up as food assistance eligible. The few basic household items were quickly and manually re-categorized as ineligible following the first letter in September to avoid this mistake in the future;
- Ownership has implemented a more stringent security review by store management of all transactions via 24 hour remote access security cameras and has also informed the

customers who have attempted to purchase ineligible items of what types of items are eligible and ineligible;

- Additionally, ownership has retrained the store's small staff on SNAP eligible and ineligible items to avoid any mistakes in the future;
- Store clientele would be greatly disadvantaged if the business were disqualified from the SNAP program as ownership does its very best to take all steps possible to both serve them and abide by all applicable regulations;
- As part of the investigation, the investigators attempted to obtain cash back from store employees and in every instance were refused showing good practices on the part of the employees; and,
- The business has participated in SNAP for over five years with no violations and that, for a first offense, the imposed fine is substantial. Ownership asks that no period of disqualification be imposed and the \$1,140.00 CMP be waived as a gesture of good faith that he is a vendor that both respects and seeks to stay in compliance with all federal and state requirements.

Appellant submitted no documentation or evidence in support of these contentions.

The preceding may represent 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

Appellant admits that the sale of ineligible items using SNAP EBT benefits occurred on the dates cited in the report of investigation and contends that they were the result of a technical error that has since been corrected.

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 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 business now has corrected the technical errors by recoding the ineligible items purchased during the investigation as ineligible, retrained all employees, trained customers, and implemented a new more stringent security review are all 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, the ownership is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. When the store owner signed

the certification page of the SNAP retailer application to begin operating as a SNAP retailer, he confirmed he understood and agreed to abide by program rules and regulatory provisions. He agreed to accept responsibility on behalf of the firm for violations of the SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. A record of participation in SNAP with no previously documented instance of violations also does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

The investigative report shows that clerks working at the Appellant business during the period under review transacted SNAP benefits for ineligible items on six separate occasions indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The acceptance of SNAP benefits for ineligible items is a violation of the SNAP rules and regulations. 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.” That store employees on multiple occasions failed to deny the purchase of ineligible items using SNAP benefits is evidence that ownership failed to properly train the employees on SNAP regulations and requirements and to monitor their performance. There is no indication of involvement by the firm's management or ownership. Therefore, there is not any valid basis for dismissing the charges or for mitigating the penalty imposed. The assessment of a hardship CMP is discussed in the next section.

It is highly improbable, based on the readiness of the store employees to exchange SNAP benefits for ineligible items, that the only instances of SNAP violations were those identified as part of the FNS undercover investigation and more likely than not that this represented an ongoing pattern of SNAP violations at the Appellant business. As previously stated, store ownership is responsible for all SNAP transactions at the firm and therefore a certain minimal level of oversight on the part of ownership to ensure employees are not violating SNAP laws or regulations is expected. It would be unusual and irresponsible for store owners to not be monitoring all transactions, including those involving SNAP, and reviewing daily balance sheets to ensure store employees were not stealing from the business or conducting other activities that would jeopardize the licenses and income that the business is dependent upon.

It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. 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.

CIVIL MONEY PENALTY

Appellant is not eligible for a trafficking CMP as these only apply in cases of permanent disqualifications.

The Retailer Operations Division determined that the Appellant firm is selling a substantial variety of staple food items, and the firm's disqualification would cause hardship to SNAP household 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 the six-month disqualification would create a hardship to SNAP recipients, and that a CMP in lieu of disqualification is appropriate in this case.

Appellant contends that the hardship CMP of \$1,140.00 is excessive and requests that the CMP be waived. However, Appellant's request cannot be granted because neither the Retailer Operations Division nor this administrative review has the authority to modify the hardship CMP formula mandated by SNAP regulations at 7 CFR § 278.6(g). There is also no provision in the Act or regulations to reverse or reduce a sanction based upon a lack of prior SNAP violations.

The case record documents that, under 7 CFR § 278.6(g), the Retailer Operations Division 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.

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 assess a hardship CMP in the amount of \$1,140.00 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 Retailer Operations. 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 Retailer Operations Division's letter dated October 13, 2017, 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 at www.fns.usda.gov/snap/retailer-apply.

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

February 5, 2018