

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

**Nancy Foods, Inc.,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0201064**

**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 six month disqualification against Nancy Foods, Inc. (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 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 imposed a six month period of disqualification against Appellant on October 5, 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 July 18, 2017, through July 28, 2017. The investigation determined that personnel at the Appellant business 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 bathroom tissue, bleach, laundry detergent, dishwashing liquid, and dryer sheets. The investigative report indicates that these violative transactions were handled by two different clerks. The investigative report also noted that the business refused to exchange SNAP benefits for cash on two occasions (Exhibits C and D). Additionally, on Exhibits A, B, and D, the cashier overcharged the undercover investigator for the items purchased using SNAP benefits.

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated September 5, 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)).” Records show that the letter was delivered on September 8, 2017, and signed for by “5 U.S.C. § 552 (b)(6) & (b)(7)(C)”.

Ownership did not respond to the charge letter and no evidence was submitted to be considered in support of the CMP. After giving consideration to the evidence, the Retailer Operations Division notified Appellant in a letter dated October 5, 2017, 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 October 11, 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 2, 2017, was also 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 six month disqualification may be imposed against a retail food store or wholesale food concern.

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) states, in 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. . . .”

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) 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.”

### **APPELLANT’S CONTENTIONS**

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

- The violations were caused by a new employee that made an innocent mistake;
- As a small business in a neighborhood, ownership conducts business with a high level of integrity and tries to best serve the community;
- The business is located in a neighborhood with a high percentage of senior citizens; and,
- The owner will make sure no other violations will occur again and requests the penalty be waived.

Appellant submitted no evidence or documentation 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. 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. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time. Ownership is also responsible for all SNAP transactions at the firm regardless of the amount of time the owner is present at the subject firm.

The Report of Investigation shows that two clerks working at the Appellant business during the period under review transacted SNAP benefits for ineligible items on four 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. The regulations 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. There was no indication of involvement by the firm's ownership or management.

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. Additionally, a review of the Report shows no errors or discrepancies. 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 Retailer Operations Division to disqualify the firm for a six month period was the appropriate penalty.

Appellant has admitted that the violative transactions did, in fact, occur at the business and were due to innocent mistakes by a new employee. However, the Report of Positive Investigation contradicts this claim showing that the violative transactions were actually handled by two different cashiers and, that in Exhibit B, an older third employee told the cashier to allow the purchase of ineligible non-food items using SNAP benefits.

It is highly improbable, based on the readiness of the three 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.

Based on the discussion above, there is not 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 therefore any contentions related to Section 278.6(i) are of no consequence.

A hardship CMP as an optional penalty in lieu of a six month disqualification was considered in this case. Such a finding is appropriate only if a store sells a substantial variety of staple food items and 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. FNS records show there are 11 other SNAP retail stores located within a one mile radius of the Appellant business that includes one supermarket, two medium grocery stores, and three small groceries stores in addition to many smaller stores. All of these stores stock adequate varieties of food in all four food categories and in perishables as required by FNS. Additionally, there is scheduled bus service one block east on South Michigan Avenue and a Metro Station two to three blocks away at West 121<sup>st</sup> Street to facilitate SNAP households shopping at other stores.

A review of the 368 SNAP transactions at the Appellant business during the month of July 2017 shows that the vast majority of transactions (326) were less than 5 U.S.C. § 552 (b)(6) & (b)(7)(C) with most (279) being less than 5 U.S.C. § 552 (b)(6) & (b)(7)(C) indicating that SNAP households in the area of the Appellant business do not consider the Appellant business to be a primary source for groceries. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The many nearby stores appear readily accessible to SNAP recipients and they offer a variety 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 these stores. Based on the close proximity of the larger stores, it is unlikely that any SNAP households would consider the Appellant business as their primary source of food, beverages, and essential supplies. 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 the Appellant business 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, including ethnic 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. 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](http://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

January 24, 2018