

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

National Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0197401

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the hardship civil money penalty (HCMP) in the amount of \$2772.00 imposed upon National Market (hereinafter “Appellant”) by the ROD Office (hereinafter “ROD Office”) is hereby sustained.

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a), 7 CFR § 278.6 (e), (f) and (g) in its administration of the SNAP when it assessed a HCMP for Appellant.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 C.F.R. § 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

In a letter dated December 20, 2017, the ROD Office informed Appellant that it was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 271 – 282. The record reflects that the ROD Office received and considered Appellant’s reply to the Charge Letter. By a letter dated January 10, 2018, Appellant was informed that it was subject to a HCMP in the amount of \$2772.00 in lieu of a six-month disqualification from participation as a retail store in the SNAP and was instructed to pay said penalty, cease accepting SNAP benefits or, alternatively, request an administrative review of the decision. On January 13, 2018, Appellant

requested an administrative review of the ROD Office's decision. The request was granted and the imposition of the HCMP held in abeyance pending the results of the review.

STANDARD OF REVIEW

In appeals of adverse actions an appellant bears the burden of proving by a preponderance of the evidence that the administrative actions should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the **Food & Nutrition Act of 2008**, as amended, at 7 U.S.C. § 2021 and in Part 278 of Title 7 of the Code of Federal Regulations (C.F.R.). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6 (e) of the Regulations establish the authority upon which a disqualification, or a civil money penalty in lieu thereof, may be imposed upon a retail food store or wholesale food concern. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to disqualify a retail store from the SNAP or impose a civil money penalty in lieu thereof.

7 U.S.C. § 2021 states, inter alia:

- (1) IN GENERAL.—An approved retail food store or wholesale food concern that violates a provision of this Act or a regulation under this Act may be—
- (A) disqualified for a specified period of time from further participation in the supplemental nutrition assistance program;
 - (B) assessed a civil penalty of up to \$100,000 for each violation; or
 - (C) both.

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 & 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.

7 CFR § 278.6(e)(5) states:

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 and poor supervision by the firm's ownership or management.

7 CFR § 278.6(f)(1) states, in part:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when the 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... FNS may disqualify a store which meets the criteria for a civil money penalty if the store had previously been assigned a sanction.

7 CFR §278.6(f)(2) states, in part:

In the event any retail food store...which has been disqualified is sold or the ownership thereof is otherwise transferred...the person or other legal entity who sells or otherwise transfers ownership...shall be subjected to and liable for a civil money penalty in an amount to reflect that portion of the disqualification period that has not expired, to be calculated using the method found at 278.6(g).

7 CFR §278.6(g) states, in part:

FNS shall determine the amount of the civil money penalty as follows: (1) Determine the firm's average monthly redemptions of coupons for the 12-month period ending with the month immediately preceding that month during which the firm was charged with violations. (2) Multiply the average monthly redemption figure by 10 percent. (3) Multiply the product arrived at in paragraph (g)(2) by the number of months for which the firm would have been disqualified under paragraph (e) of this section. The civil money penalty may not exceed an amount specified in § 3.91(b)(3)(i) of this section.

7 CFR §278.6(h)(1),(2) and (3) state, in part:

1. Disqualify the firm for the period determined to be appropriate under paragraph (e) of this section if the firm refuses to pay any of the civil money penalty.
2. Disqualify the firm for a period corresponding to the unpaid part of the civil money penalty if the firm does not pay the civil money penalty in full or in installments as specified by the regional office.
3. Disqualify the firm for the prescribed period if the firm does not present a collateral bond or irrevocable letter of credit within the required 15 days, if applicable. If the firm presents the required bond during the disqualification period, the civil money penalty may be reinstated for the duration of the disqualification period.

SUMMARY OF THE CHARGES

Among other documents, the record contains a Report of Positive Investigation, #LA09720, which indicates that investigative work was undertaken at Appellant's firm from April 26 through October 2, 2017 and reflects that four investigative visits were made to Appellant's firm during which store clerks sold common ineligible items (those normally seen in shopping baskets) in exchange for SNAP benefits in combination with eligible food items in a substantive ratio on four separate occasions, indicative of clearly violative activity. When the

extent of violative activity was determined, the investigation was halted and a report issued and assigned to the ROD Office for consideration of administrative action.

APPELLANT'S CONTENTIONS

In its written request for review dated January 13, 2018, Appellant provided information in which it was argued that:

1. The violations were mistakes only.
2. Appellant has met with employees and discussed the incident. Appellant does not want to terminate any employees knowing that the violations were mistakes only.
3. Appellant apologizes for the violations and assures future compliance.
4. A civil money penalty or a disqualification will work a hardship upon the firm.

ANALYSIS AND FINDINGS

In regard to contention 1 above, Appellant implies that mistakes made in handling transactions, as opposed to violations intentionally committed, may provide a compelling rationale to reduce or reverse the sanction imposed in the present case. Lack of intent to violate is contemplated by the regulations and reprinted above on page 2; as noted above, violations due to carelessness or poor supervision warrant a six-month disqualification or a hardship civil money penalty in lieu thereof, provided the firm is qualified for such alternate sanction. Moreover, it is acknowledged that the agency issues warning letters for some cases involving violations; however, this is done in accordance with 7 CFR 278.6(e)(7), which states, "Send the firm a warning letter if violations are too limited to warrant a disqualification." As the violations in the present case (four clearly violative sales of ineligible items) exceeded the standard for warranting a warning letter only, the ROD Office was afforded no latitude to issue a warning letter and, therefore, properly assigned a six-month disqualification (or a HCMP in lieu thereof).

Regarding contention 2 above, it is important to clarify for the record that there is no provision in the statute or regulations for waiver or reduction of an administrative penalty on the basis of corrective action implemented subsequent to findings of program violations. The purpose of this review is to determine if the earlier decision of the ROD Office was proper and in compliance with pertinent laws and regulations. Accordingly, this review is limited to considerations relevant at the time such decision was made. It is beyond the scope of this review to consider what subsequent remedial actions, such as changes in store management, procedures, internal controls, employee discipline/training or facility and/or inventory changes and improvements Appellant may propose to take or may have taken in order to comply with program requirements. Therefore, to the extent Appellant implies that it will, or has, implement(ed) corrective and/or remedial actions, though this would likely have been valuable in preventing program violations at an earlier time, such cannot now apply retroactively and does not provide a valid basis for dismissing the charges or for mitigating the serious impact of the violations upon which they are based. It is further added for the record that, although Appellant claims corrective action has been taken, it offers no documentary evidence of same. As such, the claim carries little weight, and as noted above, corrective action following findings of violations is not relevant in ROD Office sanction decisions.

Additionally, Appellant implies that the Owner did not personally commit violations of the SNAP Regulations and that employees committed the violations. This contention cannot be accepted as a valid basis for dismissing any of the charges or for mitigating the impact of the violations upon which they are based. Appellant is liable for all violative transactions handled by full or part-time, paid or unpaid store personnel, whether or not ownership is aware of such transactions. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. Additionally, ownership of the Appellant firm signed an FNS-252, SNAP Application for Stores, on March 21, 2011, (as well as similar certification statements as part of periodic reauthorization activities since initial authorization) by means of which Appellant acknowledged and agreed to accept responsibility to prevent violations of the program by any and all employees of the firm. Again, to allow store ownership to disclaim accountability for the acts of persons to whom the responsibility to handle store business has been assigned would render inert the enforcement provisions of the **Food and Nutrition Act of 2008** and corresponding provisions of the regulations.

With regard to contention 3 above, Appellant's apology for committing violations and assurances of future compliance do not constitute valid grounds for dismissal of the current charges or for mitigating the impact of the violations upon which they are based. Additionally, as noted, 7 CFR § 278.6(e)(5) states that the ROD Office *shall* (emphasis added) disqualify a firm for six months if it is to be the first sanction for the firm and the evidence shows that personnel of the firm committed violations such as, but not limited to, the sale of common non-food items due to carelessness or poor supervision by the firm's ownership or management. The above accurately reflects the nature and level of noncompliance in the present case and thus the sanction imposed by the ROD Office was correct and appropriate.

In regard to contention 4 above, hardship worked upon retailers is not a consideration in decisions to disqualify firms due to SNAP benefit violations or in decisions to impose civil money penalties in the event disqualified firms are subsequently sold or the ownership thereof otherwise transferred; there are no provisions in the Act, the regulations or in agency policy allowing for hardship worked upon a firm, due to a disqualification, to warrant a civil money penalty.

The record reflects that the ROD Office duly considered the firm's eligibility for a hardship civil money penalty (for hardship worked upon SNAP customers). The ROD Office found that there was not a comparable firm located within a one-mile radius of the Appellant store and accordingly determined that a hardship civil money penalty was warranted. The record contains a preponderance of evidence that the violations occurred as charged; thus a six-month disqualification, or a HCMP in lieu thereof, is clearly correct and appropriate. The remaining issue is whether the amount of the civil money penalty was correctly calculated.

Regulations specify the method for calculating such amounts at 7 C.F.R. § 278.6(g), as noted in the foregoing; the amount is based upon the firm's SNAP redemptions for the 12-month period prior to the month of issuance of the Charge Letter. In this case, therefore, the firm's SNAP redemptions for November 2017 through December 2016 were used. This review finds that the ROD Office correctly calculated the HCMP at \$2772.00.

CONCLUSION

In view of the above, the decision of the ROD Office to impose a hardship civil money penalty in the amount of \$2772.00 upon Appellant, in lieu of a six-month disqualification from participation in the SNAP, is hereby sustained and will become effective upon the 30th day following your firm's receipt of this document. If the civil money penalty is not paid, the disqualification shall be imposed. In such case, Appellant may reapply for authorization to participate in the SNAP up to 10 days prior to the end of the six-month disqualification period. Please contact the Retailer Repayment Accounting Division at 1-703-605-0483 to discuss payment options, or follow the instructions in the Retailer Operations Division's Determination Letter dated January 10, 2018 regarding online or check payment options. As noted, this decision will become effective upon the 30th day following Appellant's receipt of this document.

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 provisions of the Freedom of Information Act (FOIA), FNS is 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.

DANIEL S. LAY
Administrative Review Officer

August 1, 2018