

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

**Nazar Market,**

**Appellant,**

**v.**

**Case Number: C0205819**

**Retailer Operations Division,**

**Respondent.**

**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 the Retailer Operations Division's assessment of a \$2,112.00 hardship civil money penalty (CMP) against Nazar Market in lieu of a six month disqualification from the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(5), 7 CFR § 278.6(f)(1), and 7 CFR § 278.6(g) in its administration of the SNAP, when it imposed a hardship CMP of \$2,112.00 in lieu of a six month disqualification against Nazar Market.

**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 Nazar Market with Federal SNAP law and regulations during the period November 6, 2018 through November 20, 2018. In a letter dated February 6, 2019, the Retailer Operations Division charged the Appellant 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 three out of

four compliance visits. The letter further informed the Appellant that the violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5). The Charge Letter states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of disqualification.

The Appellant did not reply to the charges outlined in the February 6, 2019 Charge Letter. Based on the evidence in the case, the Retailer Operations Division issued a Determination Letter dated February 22, 2019 informing the Appellant that the violations cited in the February 6, 2019 Charge Letter occurred at the firm and that a six month period of disqualification was warranted. The Determination Letter also stated that the Appellant was eligible for a hardship CMP as Nazar Market was selling a substantial variety of specialty/ethnic staple food items at comparable prices and the firm's disqualification would cause hardship to SNAP households. Thus, a hardship CMP in the amount of \$2,112.00 was imposed in lieu of the six month SNAP disqualification.

In a letter postmarked March 4, 2019, the Appellant requested an administrative review of the Retailer Operations Division's decision to impose a hardship CMP in lieu of a six month disqualification of Nazar Market from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated March 8, 2019 and implementation of the hardship CMP was held in abeyance pending completion of this review.

### **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 § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e) establish the authority upon which a one year disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2 (a) states, in part: "Coupons may be accepted by an authorized retail food store only from eligible households or the households' authorized representative, and only in exchange for eligible food."

7 CFR § 271.2 states that the definition of "coupon" includes: ... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

7 CFR § 271.2 states, in part: (1) 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, 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...”

7 CFR § 278.6(e)(5) states, in part: “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, in part: “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.”

7 CFR § 278.6(g) states, in part: “Amount of civil money penalties for hardship and transfer of ownership. FNS shall determine the amount of the civil money penalty as follows:

- (1) Determine the firm's average monthly redemptions ... 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 ....”

Notwithstanding the above, there is an agency limit of \$11,000 per violation as the maximum CMP amount.

### **APPELLANT’S CONTENTIONS**

In the administrative review request postmarked March 4, 2019, the Appellant made the following summarized contentions, in relevant part:

- The Appellant has had issues with the point of sale (POS) system which resulted in the SNAP violations. Since then, the owners have had meetings with store staff and they are working on correcting the items within the database so that the POS system does not allow ineligible items to be purchased with SNAP benefits. The Appellant has a list of inventory items that it will go through and correct on the POS system.

In support of these contentions, the Appellant provided FNS with screenshots of the store's POS system.

The preceding may represent only a brief summary of the Appellant's contentions in this matter. Please be assured, however, that 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**

During an investigation conducted from November 6, 2018 through November 20, 2018, USDA conducted four compliance visits at Nazar Market. A report of the investigation was provided to the Appellant as an attachment to the Charge Letter dated February 6, 2019. The investigation report included Exhibits A through D which provide full details on the results of each compliance visit.

The investigation report documents that SNAP violations were recorded during three of the four compliance visits. The chargeable violations involved the sale of ineligible nonfood items in exchange for SNAP benefits in violation of 7 CFR § 278.2(a). The Retailer Operations Division determined that the assessment of a hardship CMP of \$2,112.00 in lieu of a six month disqualification was the appropriate penalty for these violations. A preponderance of the evidence supports the decision of the Retailer Operations Division.

### **Corrective Action**

The Appellant contends that it has had issues with the point of sale (POS) system which resulted in the SNAP violations. Since then, the owners have had meetings with store staff and they are working on correcting the items within the database so that the POS system does not allow ineligible items to be purchased with SNAP benefits. The Appellant has a list of inventory items that it will go through and correct on the POS system. In support of these contentions, the Appellant provided FNS with screenshots of the store's POS system.

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 Appellant's contention that it has taken/will take 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.

## **CIVIL MONEY PENALTY**

The case record documents that the Retailer Operations Division correctly calculated the amount of the hardship CMP under 7 CFR § 278.6(g). 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 twelve months prior to the firm being notified of the violations. Modifications to the hardship CMP may occur only when there is an error in calculation or the amount exceeds the agency limit. The Retailer Operations Division correctly determined, using the methodology described in 7 CFR § 278.6(g), that the initial calculated amount of the hardship CMP was \$2,112.00. That calculation is shown below:

### **5 U.S.C. § 552 (b)(7)(E)**

The calculation of the hardship CMP outlined in the above table correctly indicates that the amount of the imposed hardship CMP should be \$2,112.00. The SNAP regulations at 7 CFR § 278.6(g) prescribes how to calculate the amount of the hardship CMP utilizing a mandated formula. As such, there is no discretion in the calculation of the hardship CMP amount and a reduced hardship CMP cannot be granted.

## **CONCLUSION**

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.

A review of the evidence in this case documents that personnel at Nazar Market exchanged SNAP benefits for ineligible nonfood items during three out of four compliance visits. However, the Retailer Operations Division determined that a six month disqualification of Nazar Market would create a hardship for SNAP households as there is no other authorized retail food store in the area selling a substantial variety of specialty/ethnic staple food items at comparable prices. Therefore, in lieu of a six month disqualification, the Retailer Operations Division assessed a hardship CMP against the Appellant of \$2,112.00. A review of the calculations shows that the amount of the CMP was correct and proper and the decision in this case is hereby sustained.

## **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, 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.

LORIE L. CONNEEN  
Administrative Review Officer

April 30, 2019