

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

**New DP Mart,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0196497**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a six-month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against New DP Mart by the Retailer Operations Division.

**ISSUE**

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it imposed a six-month disqualification against New DP Mart.

**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**

FNS records show that the Appellant firm, New DP Mart, was initially authorized for SNAP participation as a convenience store on June 3, 2014. Between February 6, 2017 and February 15, 2017, FNS conducted an undercover investigation at the

firm to ascertain its compliance with Federal SNAP laws and regulations. The investigative report documented that personnel at New DP Mart accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. According to the report, the Appellant firm sold toilet tissue, air freshener, dish soap, and an electronic cigarette starter kit in exchange for SNAP benefits, which benefits are only permitted to be used in exchange for eligible foods.

In a letter dated May 16, 2017, the Retailer Operations Division charged the Appellant with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). The charge letter stated that the violation of accepting SNAP benefits in exchange for ineligible nonfood items warrants a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further stated that under certain conditions and in accordance with 7 CFR § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

In response to the charge letter, the Appellant owner contacted the Retailer Operations Division by telephone on May 18, 2017. The owner did not dispute that the violations occurred, but requested that the firm not be disqualified since the store has had no prior SNAP violations.

After considering the Appellant's response as well as the evidence in the case, the Retailer Operations Division issued a letter of determination dated June 1, 2017. This letter informed the Appellant that it was the determination of the Retailer Operations Division that the violations did occur as outlined in the letter of charges and that a six-month disqualification penalty would be imposed in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that consideration for a hardship CMP was given, but that the Appellant was not eligible for a CMP 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 7, 2017, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and implementation of the sanction has been held in abeyance pending completion of this review.

## **STANDARD OF REVIEW**

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. This means that 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 AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 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 § 278.2(a) states, *inter alia*:

*[SNAP benefits] 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.... **Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section.** [Emphasis added.]*

7 CFR § 278.6(c) states, *inter alia*:

*The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination...*

7 CFR § 278.6(e) states, *inter alia*:

*FNS shall take action as follows against any firm determined to have violated the Act or regulations... The FNS regional office shall:*

*(5) 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 subject to a disqualification 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 authorized retail food store in the area selling as large a variety of staple food items at comparable prices.*

### **INVESTIGATION DETAILS**

During an undercover investigation conducted between February 6, 2017 and February 15, 2017, the USDA completed four compliance visits at New DP Mart. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the May 16, 2017 charge letter. The investigation report included Exhibits A through D, which provided full details on the results of each compliance visit. SNAP violations were documented during each of the four visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report noted that the following nonfood items were purchased by an investigator using SNAP benefits:

- One roll toilet tissue (*Scott* brand), Exhibit A
- One roll toilet tissue (*Scott* brand), Exhibit B
- One 8-ounce can air freshener (*Glade* brand), Exhibit C
- One roll toilet tissue (*Scott* brand), Exhibit C
- One Electronic Cigarette EX starter kit (*V2* brand), Exhibit D
- One 12.6-ounce bottle of "Simply Clean" dish soap (*Dawn* brand), Exhibit D
- One sponge (*Scotch Brite* brand), Exhibit D

The report noted that the store's cashiers allowed ineligible items to be exchanged for SNAP benefits every time the investigator attempted to do so. However, on one occasion, the investigator attempted to exchange SNAP benefits for cash (i.e. trafficking), but the clerk refused. This refusal is noted in Exhibit D.

The charge letter states that the violations that occurred in Exhibits A, B, C, and D warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5). According to the report, two separate clerks conducted the four violative transactions during the investigation.

### **APPELLANT'S CONTENTIONS**

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- Upon receiving the charge letter, the Appellant owner immediately called the Retailer Operations Division.
- The violations happened when the store owner was not able to work due to illness. Because he could not afford to close the store, and since the store is his only source of income, he had to ask relatives to cover his shifts. This mistake will not happen again.
- Appellant owner hopes that his business will improve to the point that he can hire and train someone in case he should fall ill like that again.
- Appellant hopes that FNS takes into consideration the fact that the store is small and has only been open for three years.
- Appellant owner is an honest, hard-working person who would never intentionally do anything to jeopardize his ability to take care of his family.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

## **ANALYSIS AND FINDINGS**

The Appellant has not provided any information or documentation to counter FNS's investigation report. Rather, the Appellant appears to acknowledge that the violations occurred, implying that the violations took place while the owner was away from the store due to illness. Because the violations do not appear to be in dispute, it is the determination of this review that program violations did occur as charged by the Retailer Operations Division. The balance of this review will address the Appellant's remaining contentions.

### **Appellant Owner Not Involved in Violations**

The Appellant appears to contend that the violations happened at a time when the firm's owner was not able to work due to illness. The owner claims that because he could not afford to close the store, as it is his only source of income, he had to ask relatives to cover his shifts. The Appellant insists that this mistake will not happen again. The Appellant owner further hopes that his business will improve to the point that he can hire and train someone in case he should fall ill like that again. This contention implies that since the owner was not involved in the violations, FNS should consider a lesser penalty or perhaps a waiver of the penalty altogether.

With regard to this contention, the record shows that the Appellant owner signed an application to participate as a SNAP retailer on April 22, 2014. By signing this application, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. The record clearly establishes that the Appellant owner agreed to abide by program rules, including taking responsibility for violations committed by any of the firm's employees, whether paid or unpaid, new, full-time or part-time. An owner is not free of responsibility simply because he or she was not in the vicinity at the time the violations occurred or because he or she was uninvolved in the violations. Regardless of which clerks are operating the cash register at a given time or whom firm ownership authorizes to handle store business, the ownership of the firm is ultimately responsible for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of its employees would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA.

Therefore, the insinuation that the violations were not the fault of the owner does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

### **No Prior Violations**

The Appellant has argued that FNS should take into consideration the fact that the firm has had no previous SNAP violations. The owner claims to be an honest, hard-working person who would never intentionally do anything to jeopardize his ability to provide for his family. The Appellant wants FNS to take into consideration the fact that the store is small and has only been open for three years.

With regard to these contentions, SNAP regulations at 7 CFR § 278.6(e)(5) require that when serious violations occur, such as the exchange of nonfood items for SNAP benefits, a six-month disqualification is the necessary penalty, even on the first occasion, regardless of a firm's prior compliance with program rules. As noted earlier, the purpose of this review is to determine whether or not the Retailer Operations Division took appropriate action, consistent with SNAP regulations, in its imposition of a six-month disqualification against New DP Mart. As long as the administrative action taken by the agency fully conforms to SNAP regulations, this review has no authority to dismiss or reduce a period of disqualification.

In this case, the sanction imposed by the Retailer Operations Division is in line with SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed

similar violations. Therefore, the firm's prior compliance with program rules does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

### **CIVIL MONEY PENALTY**

Although not requested by the Appellant, this review evaluated the Appellant's eligibility for a civil money penalty (CMP) in lieu of a six-month disqualification. SNAP regulations at

7 CFR § 278.6(f)(1) state that a CMP in lieu of a temporary disqualification is allowable when the firm's disqualification would cause hardship to SNAP households. According to this regulation, hardship is defined as "no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices."

It is the determination of this review that a disqualification of New DP Mart, a convenience store, would not cause hardship to SNAP households because there are other shopping options in the area. According to agency records, there are two of similar or larger SNAP- authorized retail stores located within a one-mile radius of New DP Mart, including a superstore located less than a quarter-mile away.

It is recognized that some degree of inconvenience for SNAP households is likely whenever a SNAP-authorized store is disqualified and the households are forced to use their SNAP benefits elsewhere. However, in accordance with regulation cited above, hardship exists only when there are no other authorized stores in the area selling as large a variety of staple foods at comparable prices. Therefore, pursuant to 7 CFR § 278.6(f)(1), a hardship civil money penalty in lieu of disqualification cannot be granted in this case.

### **CONCLUSION**

Based on a review of the evidence in this case, there is no question that program violations of 7 CFR § 278.2(a) did occur during a USDA investigation. All transactions cited in the letter of charges were either conducted or supervised by a USDA investigator and all are thoroughly documented. 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, including the exchange of SNAP benefits for ineligible, nonfood items, and in all other critically pertinent details. Pursuant to 7 CFR § 278.6(a) and (e)(5) the decision to impose a six-month disqualification against the Appellant, New DP Mart, is sustained.

In accordance with the Act and regulations, the disqualification penalty shall become effective 30 days after receipt of this decision. A new application for SNAP participation may be submitted 10 days prior to the expiration of the six-month disqualification period.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON  
Administrative Review Officer

November 17 2017