

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

**New Greenmount Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0176925**

**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 a finding that a six month disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against New Greenmount Market by the Retailer Operations Division of FNS.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP when it imposed a six month period of disqualification against New Greenmount Market on September 29, 2016.

**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 New Greenmount Market with Federal SNAP law and regulations during the period October 28, 2014

through November 5, 2014. In a letter dated January 26, 2015, 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 four out of five 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).

In written correspondences to the Retailer Operations Division dated January 30, 2015 and August 1, 2016, the Appellant, through counsel, replied to the charges therein by requesting additional case information from USDA under the Freedom of Information Act (FOIA) and then indicating that if violative SNAP transactions occurred at the subject store during the USDA investigation, they were committed by a store employee who inadvertently allowed ineligible items to be purchased with SNAP benefits without the firm's knowledge, consent, or approval.

After reviewing the evidence and the Appellant's replies, the Retailer Operations Division issued a Determination Letter dated September 29, 2016. The Determination Letter informed the Appellant that he was disqualified from the SNAP for a period of six months in accordance with 7 CFR § 278.6(a) and (e). The Determination Letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a hardship civil money penalty (CMP) under 7 CFR § 278.6(f)(1). The Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the six month disqualification 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 October 4, 2016, the Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. Upon acceptance of the administrative review request, implementation of the six month disqualification 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 promulgated through regulations under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e) establish the authority upon which a disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, *inter alia*:

*Coupons 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.*

7 CFR § 278.6(e)(5) states, *inter alia*:

*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's disqualification would cause hardship to Food Stamp [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.*

## **SUMMARY OF THE CHARGES**

**5 U.S.C. § 552 (b)(7)(E)**

## **APPELLANT'S CONTENTIONS**

On review, the Appellant's contentions, through counsel, are essentially the following:

- The Appellant does not believe that USDA's investigation report is reliable as no photographs were provided of the alleged merchandise purchased by the Investigator nor were photographs provided of the individuals who allegedly purchased ineligible items with SNAP benefits;
- In addition, one of the addresses provided for the Investigator was listed **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in Columbia, Maryland;
- If violative SNAP transactions occurred at the subject store during the USDA investigation, they were committed by a store employee who inadvertently allowed

ineligible items to be purchased with SNAP benefits without the firm's knowledge, consent, or approval;

- The amount of ineligible items allegedly purchased with SNAP benefits is very insignificant and small in nature; therefore, a six month SNAP disqualification is not warranted;
- To ensure that SNAP violations do not reoccur in the future, the Appellant has met with all store employees and instructed them on how to properly handle SNAP transactions;
- The Appellant is requesting an opportunity to have an in-person hearing with FNS in order to argue his case;
- A six month SNAP disqualification of New Greenmount Market will impose a severe economic hardship on the Appellant and his business;
- The Appellant is requesting that FNS issue a Warning Letter in lieu of a six month SNAP disqualification; and
- If a Warning Letter is not appropriate in this case, the Appellant is requesting that FNS impose a small civil money penalty (CMP) in lieu of a six month SNAP disqualification.

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**

A review of the case record shows that 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. The documentation presented by the Retailer Operations Division establishes by a preponderance of the evidence that the violations as reported occurred at the subject store.

### **Reliability of Investigation Report**

The Appellant stated that he does not believe that USDA's investigation report is reliable as no photographs were provided of the alleged merchandise purchased by the Investigator nor were photographs provided of the individuals who allegedly purchased ineligible items with SNAP benefits. However, the Appellant provides no evidence to support these contentions. It should be noted that the general descriptions in the investigation report are somewhat subjective in nature and may involve features that are relative with respect to the observer's point of view. In short, different observers may describe the same individual somewhat differently.

The Appellant states that one of the addresses provided for the Investigator was listed **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in Columbia, Maryland. It is important to note that the

addresses of FNS Investigators are not provided to retailers as personal identification information for these individuals is protected under the Freedom of Information Act (FOIA). As such, the address provided for the Grass Roots Crisis Center is most likely information provided regarding where the purchased food items were donated after the investigation of New Greenmount Market was concluded by FNS.

In conclusion, the charges of violations are based on 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 known 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. In comparison, the Appellant's claim is unsubstantiated and does not offer sufficient evidence to disregard the findings of the investigation report. Therefore, the Appellant's contentions do not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

### **SNAP Violations Made Without the Firm's Knowledge, Consent, or Approval**

The Appellant contends that if violative SNAP transactions occurred at the subject store during the USDA investigation, they were committed by a store employee who inadvertently allowed ineligible items to be purchased with SNAP benefits without the firm's knowledge, consent, or approval. This contention cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. As owner of the store, the Appellant is liable for all violative transactions that occur at New Greenmount Market. Regardless of whom the ownership of a store may utilize to handle store business (i.e., regardless of whether a store owner, store manager, store clerk, friend, family member, etc. was involved in the violative transactions), ownership is accountable for the proper handling of SNAP benefit transactions. Prior to becoming authorized to participate in the SNAP on July 12, 2011, the Appellant completed and submitted a SNAP Application for Retail Stores. The SNAP Application contained a section indicating that the person(s) signing the Application understood and agreed to ensure that store employees follow the SNAP rules and regulations and that the person(s) accepts responsibility for any SNAP violations that may occur at the store that were committed by any of the store's employees---paid, unpaid, new, temporary, full-time, part-time, etc. The SNAP Application also included a section that contained a statement which acknowledged that the person(s) signing the Application was aware that violations of Program rules could result in fines, legal sanctions, withdrawal, or disqualification of the store. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. In this case, the individual who committed the SNAP violations was not specifically identified during the investigation. A six month disqualification is the appropriate sanction for violations which result from employees not being fully aware of the SNAP rules, the carelessness of employees, or due to inadequate

supervision by the store owner. As 7 CFR § 278.6(e)(5) of the SNAP regulations states, “Disqualify the firm for six months if ... the evidence shows that personnel of the firm have committed violations ... due to the carelessness or poor supervision by the firm’s ownership or management”. The Appellant’s implied contention that the SNAP violations were committed by a store employee who inadvertently allowed ineligible items to be purchased with SNAP benefits without the firm’s knowledge, consent, or approval cannot be accepted as a valid basis for diminishing the penalty. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA.

### **SNAP Violations Too Limited to Warrant Disqualification**

The Appellant contends that the amount of ineligible items allegedly purchased with SNAP benefits is very insignificant and small in nature; therefore, a six month SNAP disqualification is not warranted. With regards to the Appellant’s contentions, neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto cite any minimum dollar amount of SNAP benefits for transactions involving the sale of ineligible items to be defined as violative. No mention of minimum cost or types of ineligibles is cited in Section 278.6(e)(5) of the SNAP regulations, which states that FNS shall disqualify a store 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 the sale of common nonfood items in exchange for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management.

### **Corrective Action Implemented**

The Appellant contends that in order to ensure that SNAP violations do not reoccur in the future, he has met with all store employees and instructed them on how to properly handle SNAP transactions. 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. **5 U.S.C. § 552 (b)(7)(E)**. Therefore, the Appellant’s contention that he has taken 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.

### **Hearing Requested**

The Appellant is requesting an opportunity to have an in-person hearing with FNS in order to argue his case. However, neither the Food and Nutrition Act nor the SNAP regulations pursuant thereto provide for evidentiary proceedings at the administrative level of review, and therefore

such proceedings are not included in the administrative review process. Rather, the Act and regulations provide that any firm aggrieved by an administrative review determination may seek judicial review of the determination in Federal court or a state court of record having competent jurisdiction. In such event, trial de novo proceedings ensure the firm of all full evidentiary hearing on the agency action at issue.

### **SNAP Disqualification Imposes Financial Hardship**

The Appellant contends that a six month SNAP disqualification of New Greenmount Market will impose a severe economic hardship on himself and his business. **5 U.S.C. § 552 (b)(7)(E)**. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, 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, the Appellant's contention that he and 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.

### **Warning Letter Requested**

The Appellant is requesting that FNS issue a Warning Letter in lieu of a six month SNAP disqualification. However, 7 CFR § 278.6(e)(5) of the SNAP regulations is specific in that 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 by employees or poor supervision by the firm's ownership or management". As such, the Retailer Operations Division's decision to impose a six month SNAP disqualification for New Greenmount Market is appropriate for the SNAP violations that occurred during the investigation period.

### **CIVIL MONEY PENALTY**

The Appellant contends that if a Warning Letter is not appropriate in this case, he is requesting that FNS impose a small civil money penalty (CMP) in lieu of a six month SNAP disqualification. The Retailer Operations Division determined that the Appellant was not eligible for a hardship CMP under 7 CFR § 278.6(f)(1). That regulation 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." [Emphasis added]. **5 U.S.C. § 552 (b)(7)(E)**

Based on the evidence, the disqualification of New Greenmount Market would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division's decision not to assess a hardship CMP in lieu of a six month disqualification is sustained as appropriate under 7 CFR § 278.6(f)(1).

### **CONCLUSION**

It is therefore established that the violations as described in the letter of charges did in fact occur at New Greenmount Market warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5). That regulation states that 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 or poor supervision by the firm's ownership or management". Therefore, the decision to impose a six month disqualification, the least severe penalty allowed by regulation, against New Greenmount Market, the Appellant, is appropriate and the action is sustained.

In accordance with the Food and Nutrition Act of 2008 and the regulations there under, the six month period of disqualification shall become effective thirty (30) days after receipt of this letter. A new application for participation may be submitted by the firm ten (10) days prior to the expiration of this six month period.

### **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, 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.

LORIE L. CONNEEN  
Administrative Review Officer

November 15, 2017