

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

Provision Mart,

Appellant,

v.

Case Number: C0216981

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 a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) civil money penalty in lieu of a six-month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Provision Market (Appellant) by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(1) and 7 CFR § 278.6(a) and (e)(5) in its administration of SNAP when it imposed a civil money penalty against Appellant.

AUTHORITY

7 USC § 2023 and the 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 USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of June 19, 2019, through September 20, 2019. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. As a result of evidence compiled during this investigation, by letter dated October 17, 2019, the Retailer Operations Division charged ownership with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a) and noted the violations warranted a one year disqualification period. The letter also stated that

under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

Appellant replied to the charges by e-mail dated October 22, 2019, and explained that it is a new business and the errors will not occur again. After considering the retailer's reply and the evidence, the Retailer Operations Division notified Appellant in a letter dated October 28, 2019, that the violations cited in the charge letter occurred at the firm and that a one year period of disqualification was warranted. The letter stated that eligibility for a hardship CMP was not applicable as there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

By letter dated November 17, 2019, Appellant requested an administrative review of the Retailer Operations Division's determination. Appellant provided new information to support its eligibility for a hardship civil money penalty. Based on the submitted information, the Retailer Operations Division rescinded the one year disqualification and on July 16, 2020, imposed a hardship civil money penalty against Appellant in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

On July 29, 2020, Appellant requested an administrative review of the Retailer Operations Division's determination to impose the hardship civil money penalty. The appeal was granted.

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, 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 and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a), (e)(6), and (f)(1) establish the authority upon which a one year disqualification or hardship civil money penalty may be imposed against a retail food store or wholesale food concern.

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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system . . .

7 CFR 278.6(e)(6) states, in part, that a firm is to be disqualified for one year:

[I]f it is to be the first sanction for the firm and the ownership or management personnel of the firm have committed violation such as the sale of common nonfood items in the amounts normally found in a shopping basket, and FNS had not previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating the regulations;

7 CFR § 271.2 states in part:

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) specifies in relevant part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food. ...

In addition, 7 CFR § 278.6(f)(1) provides for civil money penalty (CMP) assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP households benefit because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It reads, 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 SNAP households benefit because there is no other authorized retail food store in the area selling as large a variety of staple food items.

7 CFR § 278.6(g) outlines the steps for calculating the CMP amount:

- (1) Determine the firm’s average monthly redemptions of [SNAP benefits} for the 12-month period ending with the month immediately preceding that month during which the firms was charges with violations.
- (2) Multiply the average monthly redemptions by 10 percent.
- (3) Multiple the product arrived in paragraph (g)(2) by the number of months for which the firm would have been disqualified under paragraph € of this section. The civil money penalty may not exceed an amount specific in § 3.91(b)(3)(i) of this title for each violation.

SUMMARY OF CHARGES

Provision Mart is a convenience store originally authorized by FNS on July 24, 2017. During an investigation conducted between June 19, 2019, and September 20, 2019, a USDA investigator conducted four compliance visits at Appellant. A report of the investigation dated October 9, 2019, was provided to Appellant as an attachment to the charge letter. 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 each of the four compliance visits and involved the sale of ineligible items plastic cutlery, plastic bowls, plastic cups, plastic plates, sandwich bags. Upon review, the evidence indicates that Appellant established a record of selling non-food items, as defined by Section 271.2 of the regulations, on multiple occasions as noted in Exhibits A, B, C, and D, furnished with the charge letter.

APPELLANT'S CONTENTIONS

Appellant made the following summarized contentions in its July 29, 2020, administrative review request, in relevant part:

- Appellant just started the business two years ago and is still in the learning phase.
- Appellant is creating a better system so that it can only sell food items with SNAP.
- Appellant has upgraded its cash register system.
- Appellant's employees are reminding each other about the SNAP purchases before starting shifts.
- Appellant is suffering with COVID-19.
- The CMP and the collateral bond will create an enormous hardship.

The preceding may represent only a brief summary of the Appellant's contentions presented 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.

ANALYSIS AND FINDINGS

The investigation report documents 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 provides through a preponderance of the evidence that the violations as reported occurred at the Appellant firm.

Corrective Action

Appellant explains that it has created a better system and upgraded its cash register 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 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. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations.

Therefore, Appellant's contention that it took corrective action to prevent future violations does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant Hardship

Appellant states that CMP and collateral bond will create an enormous hardship. It is recognized that economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To excuse ownership 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, Appellant's contention that the firm will 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 imposition.

Civil Money Penalty

The Retailer Operations Division determined that Appellant is eligible for a civil money penalty in lieu of a one-year disqualification. According to FNS, the firm's disqualification would cause hardship to SNAP households because there are no other authorized stores in the area selling as large a variety of staple food items at comparable prices. This review finds that a CMP of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** was properly imposed in accordance with regulations.

Regulations at 7 CFR § 278.6(g) outline the steps for calculating the CMP amount. The CMP is based on the store's SNAP redemptions during the 12 months immediately prior to the firm being charged with program violations. Modifications to the CMP by the administrative review officer may occur only when there is an error in calculation or when the CMP exceeds the statutory limit. This review has no authority to modify a CMP amount for any other reason.

In this case, the calculated CMP of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** is less than the agency sanction limit of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The total penalty is the lesser of these two amounts. Based on the information above, it is the determination of this review that a CMP in the amount of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** was properly assessed in this matter. Accordingly, a modification to the CMP is not appropriate. The calculation of the CMP in this case is as follows:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

CONCLUSION

Based on a review of all information in this case, a preponderance of the evidence, supports that program violations of 7 CFR § 278.2(a) did occur at Provision Market during a USDA investigation. The decision to impose a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) civil money penalty in lieu of a one year disqualification against the Appellant, Provision Market, is sustained according to 7 CFR § 278.6(a), (e)(5), (f)(1) and (g).

In accordance with the Act and regulations, this penalty shall become effective 30 days after receipt of this decision. To pay the civil money penalty or to establish an installment plan, the Appellant must contact FNS's Financial Management Accounting Division at (703) 605-0483. It is important to note that if Appellant does not pay the CMP as required, the firm will be disqualified from SNAP for a period of one year.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7CFR § 279.7. 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's owners 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 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

September 2, 2020