

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

**Richmond Emporium,**

**Appellant,**

**v.**

**Case Number: C0202589**

**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 a finding that a six month disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Richmond Emporium 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 Richmond Emporium on April 5, 2018.

**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 Richmond Emporium with Federal SNAP law and regulations during the period December 28, 2017 through January 25, 2018. In a letter dated March 15, 2018, 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).

The Appellant did not reply to the charges outlined in the March 15, 2018 Charge Letter. After considering the evidence of this case, the Retailer Operations Division issued a Determination Letter dated April 5, 2018. The Determination Letter informed the Appellant that it 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 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 April 14, 2018, the Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. FNS granted the Appellant's request for administrative review by letter dated April 27, 2018. Upon acceptance of the administrative review request, implementation of the six month disqualification was held in abeyance pending completion of this review.

The records reflects that in the request for administrative review postmarked April 14, 2018, the Appellant's counsel requested information and documents from FNS with regard to the Agency's case against Richmond Emporium pursuant to the Freedom of Information Act (FOIA). FNS provided a response to counsel's FOIA request, dated August 7, 2018, and received no further communication from the Appellant or counsel with regard to the Agency's response.

### **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**

During an investigation conducted from December 28, 2017 through January 25, 2018, USDA conducted five compliance visits at Richmond Emporium. A report of the investigation was provided to the Appellant as an attachment to the Charge Letter dated March 15, 2018. The investigation report included Exhibits A through E which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during four of the five compliance visits and involved the sale of a variety of items best described in regulatory terms as "common nonfood items". The exchange of these ineligible items for SNAP benefits is in violation of 7 CFR § 278.2(a).

### **APPELLANT'S CONTENTIONS**

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the administrative review request postmarked April 14, 2018, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant vehemently denies that it has any knowledge that itself or anyone employed at Richmond Emporium has engaged in violative SNAP transactions.
- Since being authorized to participate in the SNAP, the Appellant has continuously trained and tested its employees concerning the SNAP regulations and requirements relating to prohibitions against sales of ineligible items and exchanging SNAP benefits for cash. The Appellant has established and implemented an effective compliance policy and program, pursuant to the SNAP regulations, to prevent violations of the SNAP which was in effect at the time of the alleged charges. During the investigation period, the Appellant had left the country to attend to a sick relative. The Appellant was forced to rely upon the competency and honesty of a new employee during its absence. The Appellant denies knowledge of any violative SNAP transactions that occurred in its absence.
- This is the first time since Richmond Emporium was authorized to participate in the SNAP that it has been cited for SNAP violations.
- The investigation report reveals several inadequacies regarding the investigation by the FNS investigator. As such, the inadequacies, inaccuracies, and insufficiencies affect the reliability of the investigation report and the meager and questionable sale of ineligible items as charged.
- A six month SNAP disqualification will impose a substantial financial hardship on Richmond Emporium and will cause irreparable harm and injury to the firm forcing it out of business due to the loss of revenue.
- The Appellant requests an immediate hearing to discuss the imposition of a hardship civil money penalty (CMP) in lieu of SNAP disqualification due to the hardship a SNAP disqualification will impose on the surrounding community.
- Due to the inadequacies of the investigation report, the Appellant requests that FNS impose a CMP in lieu of a six month SNAP disqualification. A six month SNAP disqualification would impose a hardship on members of the surrounding community who rely on this retail deli/grocery to regularly purchase foods with SNAP benefits.

## **ANALYSIS AND FINDINGS**

### **Denial of Charges**

Regarding the Appellant's contention that it denies the knowledge of the violative SNAP transactions as described in the investigation report, this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is, as noted above, to determine whether the Appellant demonstrates by a preponderance of the evidence that the six month disqualification should be reversed. In this case, therefore, if the Appellant demonstrates by a preponderance of the evidence that SNAP violations did not occur in the Appellant's firm, then the SNAP violations will be considered not to have occurred and the disqualification reversed. If this is not demonstrated the case is to be sustained. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

### **SNAP Violations Occurred Without Appellant's Knowledge**

The Appellant contends that since being authorized to participate in the SNAP, it has continuously trained and tested its employees concerning the SNAP regulations and requirements relating to prohibitions against sales of ineligible items and exchanging SNAP benefits for cash. The Appellant has established and implemented an effective compliance policy and program, pursuant to the SNAP regulations, to prevent violations of the SNAP which was in effect at the time of the alleged charges. During the investigation period, the Appellant had left the country to attend to a sick relative. The Appellant was forced to rely upon the competency and honesty of a new employee during its absence. The Appellant denies knowledge of any violative SNAP transactions that occurred in its absence.

The Appellant's contentions 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 Richmond Emporium. 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 August 10, 2000, 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 individuals who committed the SNAP violations were 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 it denies knowledge of any violative SNAP transactions that occurred in its absence 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.

### **First Time Violator**

The Appellant contends that this is the first time since Richmond Emporium was authorized to participate in the SNAP that it has been cited for SNAP violations. However, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

### **Investigation Report**

The Appellant contends that the investigation report reveals several inadequacies regarding the investigation by the FNS investigator. As such, the inadequacies, inaccuracies, and insufficiencies affect the reliability of the investigation report and the meager and questionable sale of ineligible items as charged.

Regarding this contention, 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 investigator stands by his/her report that the items listed in the investigation report were, in fact, purchased at Richmond Emporium on the dates indicated and FNS has documentation on file that confirms the items listed were donated to and signed for by a charitable organization following each transaction. The penalty imposed by the Retailer Operations Division is based on the occurrence of violative SNAP transactions involving the sale of ineligible items at Richmond Emporium during the investigation period of December 28, 2017 through January 25, 2018.

As mentioned previously, 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. The Appellant did not provide FNS with any evidence or documentation that substantiates/proves that the violative SNAP transactions listed in the investigation did not occur at Richmond Emporium.

### **Financial Hardship**

The Appellant contends that a six month SNAP disqualification will impose a substantial financial hardship on Richmond Emporium and will cause irreparable harm and injury to the firm forcing it out of business due to the loss of revenue. However, 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 possible economic hardship to the firm resulting from imposition of such penalty. 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 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.

### **Requested Hearing**

The Appellant requests an immediate hearing to discuss the imposition of a hardship civil money penalty (CMP) in lieu of SNAP disqualification due to the hardship a SNAP disqualification will impose on the surrounding community. 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.

### **CIVIL MONEY PENALTY**

The Appellant contends that due to the inadequacies of the investigation report, it requests that FNS impose a CMP in lieu of a six month SNAP disqualification. A six month SNAP disqualification would impose a hardship on members of the surrounding community who rely on this retail deli/grocery to regularly purchase foods with SNAP benefits.

The Retailer Operations Division determined that the Appellant was not eligible for a hardship civil money penalty (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 Richmond Emporium 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 Richmond Emporium 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 Richmond Emporium, the Appellant firm, 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, 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

October 2, 2018