

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

**South Park Pizza & Grocery,**

**Appellant,**

**v.**

**Case Number: C0226574**

**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 that a six-month disqualification from the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

**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, when it imposed a six-month disqualification against South Park Pizza & Grocery (hereinafter referred to as “South Park” or “Appellant.”)

**AUTHORITY**

7 U.S.C. § 2023 and its implementing regulation at 7 CFR § 279.1 provides 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 South Park with Federal SNAP law and regulations in September 2020. In a letter dated December 16, 2020, the Retailer Operations Division charged the Appellant store with accepting SNAP benefits in exchange for merchandise which included ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred during three (3) out of three (3) compliance visits. The letter further informed the Appellant that the chargeable violations warranted a six-month disqualification period as provided in 7 CFR § 278.6(e)(5). The Appellant was informed it could respond to the charges within ten (10) calendar days following delivery of the charge letter. The charge letter

was delivered to the Appellant on December 17, 2020 as documented by a UPS delivery notification in the case record.

The case record documents that, after requesting and receiving an extension, the Appellant, through counsel, replied to the charges in a letter dated January 25, 2021. The Appellant stated, among other contentions, that it did not receive a full opportunity to submit to FNS any information, explanation or evidence. The Appellant denied any violation of SNAP regulations, or in the alternative, if violations did occur, they only warranted a warning letter or a civil money penalty (CMP) in lieu of the six-month disqualification.

After considering the Appellant's contentions and the evidence in the case, the Retailer Operations Division issued a determination letter dated February 3, 2021. The determination letter informed the Appellant it was disqualified from the SNAP for a six-month period 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 CMP under 7 CFR § 278.6(f)(1). The Retailer Operations Division determined that the Appellant was not eligible for a 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. The determination letter was delivered to the Appellant on February 4, 2021 as documented by a UPS delivery notification in the case record.

In a letter postmarked February 16, 2021, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. The request for review was granted. 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, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an 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 law in this matter is covered in the Food & 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) 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, in part:

Coupons may be accepted by an authorized retail food store only from eligible households ... 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:

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....

7 CFR § 278.6(e) states, in part:

FNS **shall** take action as follows against any firm determined to have violated the Act or regulations ... (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 non-food items** due to carelessness or poor supervision by the firm’s ownership or management. [Emphasis added.]

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’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.]

7 CFR § 278.6(p) states:

Freedom of Information Act (FOIA) requests and appeals. A FOIA request or appeal for records **shall not delay or prohibit** FNS from making a determination regarding disqualification or penalty against a firm under paragraphs (c) and (d) of this section, or delay the effective date of a disqualification or penalty listed in paragraph (e) of this section. [Emphasis added.]

### SUMMARY OF THE CHARGES

During an investigation conducted in September 2020, the USDA conducted three (3) compliance visits at South Park. A report of the investigation was provided to the Appellant as

an attachment to the charge letter dated December 16, 2020. The investigation report included Exhibits A through C which provide full details on the results of each compliance visit.

The investigation report documents that SNAP violations were recorded during all three (3) compliance visits as documented by Exhibits A, B, and C. The chargeable violations in Exhibits A, B, and C involved the total sale of six (6) ineligible items over three (3) compliance visits. The violations were conducted by two (2) different clerks. One of these clerks refused to exchange cash for SNAP benefits in Exhibit C. However, this refusal does not negate or mitigate the chargeable violations documented in Exhibits A, B, and C.

### **APPELLANT'S CONTENTIONS**

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

- None of the clerks described were indicated as the owners or managers of the store, indicating that the alleged transactions were conducted clandestinely by the clerks.
- The Retailer Operations Division lacked sufficient evidence upon which to base a six (6) month disqualification of the Appellants. In pertinent part, the Appellants vehemently denied that trafficking [sic] had occurred at the store.
- This case was issued after the USDA's new rules went into effect regarding FOIA. Specifically, a FOIA request from the Appellant will not lead to the abatement of this matter. This is a violation of the regulations. 7 CFR § 278.6(b)(1) states in clear terms, "Any firm considered for disqualification. . . shall have full opportunity to submit to FNS information, explanation or evidence concerning any instances of non-compliance before FNS makes a final administrative determination."
- The investigators utilized sex appeal and the allure of a romantic relationship to coerce the clerks into SNAP violations – essentially luring the clerk into a violation that Management and Ownership had trained the staff to avoid. But for the investigator's inappropriate conduct, there would not have been a violation. Even with the conduct, it's doubtful that the management or ownership could have done anything further to prevent an employee from selling ineligible items in this honeypot scheme.
- FNS bears the burden of proof at this stage of the case.
- The Investigator's affidavit is "hearsay" by definition – an out of court statement offered to prove the truth of the matter asserted.
- Even if the allegations were accurate, the store's violations warrant a warning letter rather than a six-month disqualification as it is clear that only one clerk was involved, that he was trained, and that he was aware he was not supposed to be conducting the transactions but was doing so in such a way that he was concealing the alleged violation from the store's ownership/management.
- The Retailer Operations Division did not appropriately follow 7 CFR § 278.6(d) in making its determination. The Retailer Operations Division has failed to establish intent.
- Pursuant to 7 CFR. § 278.6(e)(7), where the violations are "too limited to warrant a disqualification," a warning letter should be issued.
- In the alternative, the Appellant should qualify for a hardship CMP in lieu of a six-month disqualification.

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

## **ANALYSIS AND FINDINGS**

### **Investigation Report**

The Appellant contends that FNS bears the burden of proof at this stage of the case. However, as noted above, in appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action 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 claims that the clerks were entrapped by the investigators and provided an alleged statement of a former clerk as support for this contention. This alleged statement was not written or signed by the clerk but was merely incorporated in the Appellant's written brief. As such, the statement is not sufficiently authenticated to be relied upon for this administrative review.

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 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 in the case record that confirms specific details of the transactions. The investigation report documents by a preponderance of the evidence that personnel at the store exchanged ineligible items for SNAP benefits.

### **Owner Accountability**

The Appellant states that the ineligible SNAP transactions were committed clandestinely by clerks without the knowledge or involvement of the store owner. Regarding this contention, store owners are at all times accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store owners to disclaim accountability for the acts of persons chosen to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

In addition, the store owner signed the SNAP application for South Park on February 13, 2013 and a reauthorization application on March 13, 2018. Those applications included a signed certification that the owner(s) would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or

unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations including accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible non-food items.

### **Violations Warrant a Six-Month Disqualification**

The Appellant requests a warning letter in lieu of a six-month disqualification as the SNAP regulation at 7 CFR § 278.6(e)(7) states that FNS should “send the firm a warning letter if violations are too limited to warrant a disqualification.” It is true that the Retailer Operations Division will send a warning letter when investigation findings consist of only one (1) or two (2) sales of inexpensive non-food items. However, the investigation report documents that the chargeable violations in this case consisted of six (6) inexpensive non-food items purchased over three (3) transactions; therefore, the Retailer Operations Division correctly determined that a warning letter was not appropriate in this case.

The SNAP regulations at 7 CFR § 278.6(e)(5) states, in part, that “FNS shall take action as follows against any firm determined to have violated the Act or regulations ... **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 non-food items** due to **carelessness or poor supervision** by the firm’s ownership or management.” [Emphasis added.]

The investigation report documents that the number of chargeable violations over multiple transactions in this case equate to carelessness or poor supervision by ownership. Therefore, the Retailer Operations Division correctly determined that the violations warranted a six-month disqualification, the least severe penalty allowed by regulation under these circumstances. This review does not have the authority to waive or reduce the regulatory six-month disqualification in this case.

### **Basis of Determination under 7 CFR § 278.6(d)**

The Appellant contends that the Retailer Operations Division did not properly apply the three factors under 7 CFR §278.6(d) before imposing a sanction on the firm. The SNAP regulations at 7 CFR § 278.6(d) states, in part, that in making a disqualification determination FNS shall consider:

- (1) The nature and scope of the violations committed by personnel of the firm,
- (2) Any prior action taken by FNS to warn the firm about the possibility that violations are occurring, and
- (3) Any other evidence that shows the firm's intent to violate the regulations.

This review finds that the Retailer Operations Division properly followed 7 CFR § 278.6(d) as required. With regard to the nature and scope of the violations, exchanging SNAP benefits for

common non-food items over multiple transactions indicates carelessness or poor supervision under 7 CFR § 278.6(e)(5). Under these circumstances a first time violation, without any prior warning letters, warrants a six-month disqualification. Lastly, the firm's intent is not relevant here as the violation described under 7 CFR § 278.6(e)(5) does not require an element of intent.

### **FOIA Regulations and Due Process**

The Appellant claims that the agency's new FOIA regulation at 7 CFR § 278.6(p) is in conflict with the regulation at 7 CFR § 278.6(b)(1) which provides that an Appellant firm be given "a full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination." Specifically, the Appellant contends that the failure to hold the case in abatement pending a FOIA response is a violation of 7 CFR § 278.6(b)(1) as the Appellant was afforded no opportunity to evaluate and respond to all of the information considered by the Retailer Operations Division to be instrumental in the case, so this response cannot possibly be considered a "full opportunity" within the context of 7 CFR § 278.6(b)(1). The Appellant cites another administrative review decision from 2017 which it believes supports its interpretation.

A final rule was published at 85 Fed. Reg. 52,471 (August 26, 2020) which amended SNAP regulations to ensure that the FOIA process could no longer be used to delay administrative actions to sanction a retail food store for SNAP violations. The final rule added paragraph (p) to 7 CFR Section 278.6. Under this rule, FNS processes FOIA requests and FOIA appeals separately from administrative actions against SNAP retailers. In addition, the processing of FOIA requests and appeals during the administrative review will have no impact on when the agency can take administrative action. The effective date of this rule was October 26, 2020 and applies to any FOIA request or appeal received by the agency on or after the effective date.

The Appellant's complaint appears to be largely based on the fact that it cannot delay a final decision and, prior to a judicial review, cross-examine the agency investigators or obtain agency work papers and other internal documents that are not provided to stores with the charge letter. However, a review of the charge letter and the investigation report shows that the Retailer Operations Division provided the Appellant a sufficient explanation of why the store was assessed a six-month disqualification and adequately provided the Appellant with an opportunity to respond and explain which the Appellant has done.

Regarding the 2017 arbitration decision on a separate case, it should be noted that arbitration decisions are not precedent setting as these decisions are based on specific circumstances in individual cases as documented by materials provided by both the Appellant and Respondent. Prior administrative review decisions do not establish policy or supersede Federal law, regulations or policy guidance.

In conclusion, the purpose of an administrative review is to ensure that firms aggrieved by adverse actions have the opportunity to have their position fairly considered by an impartial reviewing authority prior to the adverse action becoming final. The Appellant has been duly given, and has taken, the opportunity to present through the administrative review process whatever evidence and information it deems as pertinent in support of its position that the

Retailer Operation's adverse action should be reversed. Therefore, any evidence and information that Appellant presented to the Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review prior to rendering the final agency administrative decision in this case. Appellant has exercised its administrative review rights, and by doing so has availed itself to the full complement of the agency's statutory obligations with regard to due process.

### **Case Law Citations**

The Appellant cites case law that the investigation report is "hearsay" by definition and cannot be relied upon by the agency to support the six-month disqualification in this case. However, considerations of legal precedent through case law, or the lack thereof in relation to the present case, is beyond the scope of this review. Instead this administrative review is limited to whether the Retailer Operations Division appropriately followed the Food and Nutrition Act of 2008, as amended, and the regulations promulgated under the Act, and whether the action taken is sustainable by a preponderance of the evidence. Therefore, any application of a supposed judicial precedent would best be addressed in a judicial review in a court of law. Accordingly, no further findings or conclusions are rendered in this regard.

### **HARDSHIP CIVIL MONEY PENALTY**

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.]

The case record documents that the Retailer Operations Division determined that a six-month disqualification of South Park, a convenience store, would not cause a hardship to SNAP households as there are other comparable or larger SNAP authorized stores in the area. The Retailer Operations Division determined through agency mapping systems that there are 23 other SNAP authorized retailers within a one-mile radius of South Park. This includes two (2) supermarkets with the nearest supermarket only 0.49 miles away. These larger stores likely carry a greater selection and depth of stock at likely better prices than a convenience store like South Park. Lastly, there is also no evidence that South Park carries any specialty or international foods that cannot be obtained at these other SNAP authorized locations.

Based on the analysis above, a six-month disqualification of South Park Pizza & Grocery would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division 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 established that the violations as described in the letter of charges did in fact occur at South Park Pizza & Grocery warranting a disqualification of six (6) 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 non-food 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 South Park Pizza & Grocery, Appellant, is appropriate and the action is **sustained**.

In accordance with the Act and regulations, the six-month period of disqualification shall become effective thirty (30) days after receipt of this letter. The Appellant may submit a new application for SNAP authorization ten (10) days prior to the expiration of the six-month disqualification period.

### **RIGHTS AND REMEDIES**

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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. Please note that the judicial filing timeframe is specified in the Act, and this office cannot grant an extension.

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.

RONALD C. GWINN  
Administrative Review Officer

May 28, 2021