

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

**Spice Bazzar,**

**Appellant,**

**v.**

**Case Number: C0196134**

**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 the assessment of a \$3,156.00 hardship civil money penalty (CMP) against Spice Bazzar (aka Spice Bazaar) in lieu of a six-month disqualification from the Supplemental Nutrition Assistance Program (SNAP).

**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(g), when it assessed a hardship CMP in the amount of \$3,156.00 against the Appellant.

**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 USDA conducted an investigation of the compliance of Spice Bazzar with Federal SNAP law and regulations from March 2017 through November 2018. In a letter dated January 29, 2019, the Retailer Operations Division charged the Appellant store 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 (4) out of four (4) compliance visits. The letter further informed the Appellant that the chargeable violations warranted a

disqualification period of six months 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 store via UPS on January 31, 2019.

The Appellant responded to the charges on January 31, 2019 and February 8, 2019. The Appellant apologized for the violations and stated in general that it appeared the violations were conducted by friends who were helping out in the store. The Appellant stated that posters would be put up in the store regarding what can be bought with SNAP benefits. In addition, SNAP training would be provided to friends and family that work in the store and the training would be documented.

After reviewing the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated March 20, 2019. The Retailer Operations Division concluded that the violations did occur at the store. However, the Retailer Operations Division determined that the Appellant was eligible for a hardship CMP in lieu of a six-month disqualification because the store was selling a substantial variety of staple food items and the firm's disqualification would cause a hardship to SNAP households. As a result, the determination letter informed the Appellant it was assessed with a \$3,156.00 hardship CMP in lieu of a six-month disqualification in accordance with 7 CFR § 278.6(f)(1). The store was informed that failure to pay the hardship CMP would result in a six-month disqualification.

In a letter dated March 29, 2019, the Appellant requested an administrative review of the Retailer Operations Division's determination. The request for review was granted and the assessment of the hardship CMP 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 action 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and Section 278 of Title 7 of the Code of Federal Regulations (CFR).

7 CFR § 278.2(a) states, in part:

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 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: (1) 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)(5) states, in part:

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, in part:

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.

7 CFR § 278.6(g) states, in part:

Amount of civil money penalties for hardship and transfer of ownership. FNS shall determine the amount of the civil money penalty as follows:

- (1) Determine the firm's average monthly redemptions ... for the 12-month period ending with the month immediately preceding that month during which the firm was charged with violations.
- (2) Multiply the average monthly redemption figure by 10 percent.
- (3) Multiply the product arrived at in paragraph (g)(2) by the number of months for which the firm would have been disqualified under paragraph (e) of this section ....

Notwithstanding the above, there is an agency limit of \$11,000 per violation as the maximum TOCMP amount.

## **SUMMARY OF CHARGES**

During an investigation conducted from March 2017 through November 2018, the USDA conducted four (4) compliance visits at Spice Bazaar. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated January 29, 2019. 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 all four (4) compliance visits. The chargeable violations involved the sale of eight (8) ineligible non-food items in exchange for SNAP benefits in violation of 7 CFR § 278.2(a). These ineligible items consisted of two (2) packages of foam plates; paper towels; laundry detergent; dishwashing liquid; bathroom tissue; soap; and toothpaste as documented by Exhibits A, B, C and D and pictures in the case record. These violations were conducted by four (4) different clerks. One of these clerks refused to exchange SNAP benefits for cash in Exhibit D.

## **APPELLANT'S CONTENTIONS**

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

- The Appellant requests an abatement of the penalties as the store is a small family business that doesn't make a lot of money.
- The store has a huge range of customers spanning all Asian and African countries. If the store cannot settle the penalty in time, it will have a negative impact on these customers.
- The owner has trained all the persons who will take care of the shop in his absence and has placed SNAP posters inside the shop and on the door to make customers aware of what can and cannot be purchased with SNAP benefits.
- These mistakes will never happen again in the store.

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 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 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. The investigation report documents by a preponderance of the evidence that personnel at the store exchanged ineligible items for SNAP benefits.

### **Owner Responsibility**

The Appellant states that the violations in Exhibits A, B, C and D were due untrained family friends helping in the store. Regarding this contention, SNAP authorized firms are responsible for reviewing the SNAP training materials, providing training for its employees, and generally familiarizing themselves with all SNAP rules and regulations pertaining to retailers. Also, please note that the violation of exchanging ineligible non-food items for SNAP benefits does not require an element of intent by the violator. Even if the clerks did not know this was a violation, the store is liable.

In addition, a store owner signed the SNAP reauthorization application for Spice Bazaar during its last reauthorization on March 30, 2015 and acknowledged that the owners were aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owners 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 in exchange for ineligible non-food items.

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

The SNAP regulation 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 large number of chargeable violations over multiple transactions equate to carelessness or poor supervision by ownership.

Whether or not the clerks intended to violate SNAP regulations is not relevant in this case. Although a clerk refused to exchange cash for SNAP benefits in Exhibit D, this does not ameliorate or mitigate the penalty for exchanging SNAP benefits for non-food items as documented by Exhibits A, B, C, and D. Therefore, the Retailer Operations Division correctly determined that the violations normally warrant a six-month disqualification.

## **Hardship Civil Money Penalty in Lieu of Six-Month Disqualification**

The violations as cited in the charge letter would normally warrant a six-month disqualification. However, the Retailer Operations Division determined that the assessment of a hardship CMP of \$3,156.00 in lieu of a six-month disqualification was appropriate. A preponderance of the evidence supports the decision of the Retailer Operations Division.

The Appellant asks for a reduced hardship CMP as the firm is a small family owned business and the amount of \$3,156.00 is excessive. Regarding this contention, the SNAP regulations at 7 CFR § 278.6(g) prescribes how to calculate the amount of the hardship CMP utilizing a mandated formula. As such, there is no discretion granted to the Retailer Operations Division, or to the Administrative Review Officer, in the calculation of the hardship CMP. Therefore, a reduced hardship CMP cannot be granted.

7 CFR § 278.6(g) states that the hardship CMP is to be calculated on a formula which includes the SNAP redemption volume of the store during the twelve (12) months prior to the firm being charged with violations. Modifications to the hardship CMP may occur only when there is an error in calculation or the amount exceeds the agency limit of \$11,000 per violation. Using the methodology described in 7 CFR § 278.6(g), Retailer Operations Division correctly calculated the amount of the hardship CMP under 7 CFR § 278.6(g) as \$3,156.00. That calculation is shown below:

**5 U.S.C. § 552 (b)(7)(E)**

### **Corrective Action**

The Appellant stated that all the store employee had been retrained on SNAP rules and regulations so that there will be no violations in the future. With regard to this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is limited to what circumstances existed at the time of the Retailer Operations Division's action. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that a store may begin to comply with program requirements.

In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of alleged corrective actions implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that corrective action has taken place does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

## **CONCLUSION**

A review of the evidence in this case documents that personnel at Spice Bazaar exchanged SNAP benefits for ineligible nonfood items during four (4) compliance visits and that the chargeable violations occurred as documented in Exhibits A, B, C and D of the investigation report. However, the Retailer Operations Division determined that a six-month disqualification of Spice Bazaar would create a hardship for SNAP households as there is no other authorized retail food store in the area selling a comparable or larger variety of staple food. Therefore, in lieu of a six-month disqualification, the Retailer Operations Division assessed a hardship CMP against the Appellant of \$3,156.00. The decision in this case is hereby sustained.

## **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.

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 14, 2019