

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

Stillwater Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0193604

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the Hardship Civil Money Penalty (HCMP) in the amount of \$1272.00 imposed upon Stillwater Market (hereinafter “Appellant”) by the ROD Office (hereinafter “SNAP Office”) is hereby sustained.

ISSUE

The issue accepted for review is whether the SNAP Office took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a), 7 CFR § 278.6 (e), (f) and (g) in its administration of the SNAP when it assessed a HCMP for Appellant.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 C.F.R. § 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

In a letter dated February 15, 2017, the SNAP Office informed Appellant that it was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 271 – 282. The record reflects that the SNAP Office received and considered Appellant’s replies to the Charge Letter. By a letter dated March 8, 2017, Appellant was informed that it was subject to a HCMP in the amount of \$1272.00 in lieu of a six-month disqualification from

participation as a retail store in the SNAP and was instructed to pay said penalty, cease accepting SNAP benefits or, alternatively, request an administrative review of the decision. On March 18, 2017, Appellant requested an administrative review of the SNAP Office's decision. The request was granted and the disqualification action held in abeyance pending the results of the 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, 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 & Nutrition Act of 2008, as amended, at 7 U.S.C. § 2021 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6 (e) of the Regulations establish the authority upon which a disqualification, or a civil money penalty in lieu thereof, may be imposed upon a retail food store or wholesale food concern. **5 U.S.C. § 552 (b)(7)(E)**.

7 U.S.C. § 2021 states, *inter alia*:

- (1) IN GENERAL.—An approved retail food store or wholesale food concern that violates a provision of this Act or a regulation under this Act may be—
- (A) disqualified for a specified period of time from further participation in the supplemental nutrition assistance program;
 - (B) assessed a civil penalty of up to \$100,000 for each violation; or
 - (C) both.

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 & 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)(5) states:

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 and 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...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 store in the area selling as large a variety of staple food items... *FNS may disqualify a store which meets the criteria for a civil money penalty if the store had previously been assigned a sanction.* (Emphasis added.)

7 CFR §278.6(f)(2) states, *inter alia*:

In the event any retail food store...which has been disqualified is sold or the ownership thereof is otherwise transferred...the person or other legal entity who sells or otherwise transfers ownership...shall be subjected to and liable for a civil money penalty in an amount to reflect that portion of the disqualification period that has not expired, to be calculated using the method found at 278.6(g).

7 CFR §278.6(g) states, *inter alia*:

FNS shall determine the amount of the civil money penalty as follows: (1) Determine the firm's average monthly redemptions of coupons 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. The civil money penalty may not exceed an amount specified in § 3.91(b)(3)(i) of this section.

7 CFR §278.6(h)(1),(2) and (3) state, *inter alia*:

1. Disqualify the firm for the period determined to be appropriate under paragraph (e) of this section if the firm refuses to pay any of the civil money penalty.
2. Disqualify the firm for a period corresponding to the unpaid part of the civil money penalty if the firm does not pay the civil money penalty in full or in installments as specified by the regional office.
3. Disqualify the firm for the prescribed period if the firm does not present a collateral bond or irrevocable letter of credit within the required 15 days, if applicable. If the firm presents the required bond during the disqualification period, the civil money penalty may be reinstated for the duration of the disqualification period.

SUMMARY OF THE CHARGES

Among other documents, the record contains a Report of Positive Investigation, #CH46470, which indicates that investigative work was undertaken at Appellant's firm from November 16, 2016 through January 10, 2017 and reflects that four investigative visits were made to Appellant's firm during which a store clerk sold common ineligible items (those normally seen in shopping baskets) in exchange for SNAP benefits in combination with eligible food items in a substantive ratio on four separate occasions, indicative of clearly violative activity; on two occasions a clerk sold "major" ineligible items (in this case, conspicuously expensive items including two hookah pipes), in exchange for SNAP benefits, a serious violation and indicative of clearly violative activity. When the extent of violative activity was determined, the investigation was halted and a report issued and assigned to the ROD Office for consideration of administrative action.

APPELLANT'S CONTENTIONS

In its reply to the Charge Letter and in its written request for review dated March 18, 2017 Appellant provided information in which it was argued that:

1. Appellant hired a new employee that was not properly trained in SNAP rules.
2. The firm has never before committed violations.
3. Appellant requests a second chance to participate in the SNAP.
4. The civil money penalty will work a hardship upon the firm; Appellant requests that the penalty be waived.

ANALYSIS AND FINDINGS

In regard to contention 1 above, Appellant implies that the Owner did not personally commit violations of the SNAP Regulations and notes that an employee committed the violations. This contention cannot be accepted as a valid basis for dismissing any of the charges or for mitigating the impact of the violations upon which they are based. Appellant is liable for all violative transactions handled by full or part-time, paid or unpaid store personnel, whether or not ownership is aware of such transactions. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. Additionally, ownership of the Appellant firm signed an FNS-252, SNAP Application for Stores, on November 5, 2007, by means of which Appellant acknowledged and agreed to accept responsibility to prevent violations of the program by any and all employees of the firm. Again, to allow store ownership to disclaim accountability for the acts of persons to whom the responsibility to handle store business has been assigned would render inert the enforcement provisions of the Food and Nutrition Act of 2008 and corresponding provisions of the regulations.

Appellant may imply that mistakes made in handling transactions, as opposed to violations intentionally committed, may provide a compelling rationale to reduce or reverse the sanction imposed in the present case. Lack of intent to violate is contemplated by the regulations and reprinted above on page 2; as noted above, violations due to carelessness or poor supervision

warrant a six-month disqualification or a hardship civil money penalty in lieu thereof, provided the firm is qualified for such alternate sanction. Moreover, it is acknowledged that the agency issues warning letters for some cases involving violations; however, this is done in accordance with 7 CFR 278.6(e)(7), which states, “Send the firm a warning letter if violations are too limited to warrant a disqualification.” As the violations in the present case (four clearly violative sales of ineligible items) exceeded the standard for warranting a warning letter only, the SNAP Office was afforded no latitude to issue a warning letter and, therefore, properly assigned a six-month disqualification (or a HCMP in lieu thereof).

Regarding contention 2 above, Appellant may imply that a record of no prior SNAP violations at the store at issue, or at other firms now or previously owned, should be taken into consideration. However, such a record does not constitute valid grounds for dismissing the present serious charges or for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that precludes, reverses or reduces a sanction based upon a lack of prior SNAP violations by a firm and its owners, managers and/or employees. While the regulations provide for increased sanctions upon firms with prior violations, no provision exists for reducing a sanction in the absence of same. It should be added that a six-month disqualification is the least severe disqualification period allowed by regulation.

With regard to contention 3 noted above, Appellant’s apology for committing violations and assurances of future compliance do not constitute valid grounds for dismissal of the current charges or for mitigating the impact of the violations upon which they are based.

5 U.S.C. § 552 (b)(7)(E). Likewise, no provision exists for providing additional opportunities to participate in the SNAP due to assurances of future compliance. As noted, 7 CFR § 278.6(e)(5) states that FNS shall (emphasis added) disqualify a firm for six months with the exception of a hardship civil money penalty (which will be discussed below) 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 and poor supervision by the firm’s ownership or management. Such accurately describes the nature and extent of violations in the present case.

In regard to contention 4 above, hardship worked upon retailers is not a consideration in decisions to impose a HCMP in lieu of a disqualification; **5 U.S.C. § 552 (b)(7)(E).**

CIVIL MONEY PENALTY

Lastly, the record reflects that the SNAP Office duly considered the firm’s eligibility for a hardship civil money penalty and found the firm eligible. The regulations at 7 C.F.R § 278.6(f), (g) and (h) provide for the imposition of such penalties and for the amount of same; this review affirms that the penalty was correctly imposed and the amount correctly calculated at \$1272.00.

CONCLUSION

In view of the above, the decision of the ROD Office to impose a hardship civil money penalty in the amount of \$1272.00 upon Stillwater Market, in lieu of a six-month disqualification from participation in the SNAP, is hereby sustained and will become effective upon the 30th day following your firm's receipt of this document. If the civil money penalty is not paid, the disqualification shall be imposed. In such case, Appellant may reapply for authorization to participate in the SNAP up to 10 days prior to the end of the six-month disqualification period. Please contact the Centralized Receivables Service at 1-855-549-4285 to discuss payment options, or follow the instructions in the Retailer Operations Division's letter dated March 8, 2017 regarding online or check payment options. This decision will become effective upon the 30th day following Appellant's receipt of this document.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the provisions of the Freedom of Information Act (FOIA), 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.

DANIEL S. LAY
Administrative Review Officer

November 9, 2017