

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

**Whitney Food,**

**Appellant,**

**v.**

**Case Number: C0205297**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), that the record supports that Whitney Food (Appellant), committed violations of the Supplemental Nutrition Assistance Program (SNAP) regulations. There is sufficient evidence to sustain a six month disqualification of Appellant from the SNAP as imposed by the Retailer Operations Division (Retailer Operations).

**ISSUE**

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

**AUTHORITY**

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7, may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

**CASE CHRONOLOGY**

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of March 12, 2018 through September 11, 2018. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on multiple separate occasions that warrant a six month disqualification period. The items sold on multiple dates are best described as common nonfood items.

As a result of evidence compiled during the investigation, by letter dated December 6, 2018, Retailer Operations charged the owner with violating the terms and conditions of the SNAP regulations. Misuse of SNAP benefits was noted in Exhibits B, C, and E, that warrants a disqualification as a SNAP retail food store for a period of six months. The letter also states that under certain conditions FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

Retailer Operations notes that Appellant replied to the Charge letter by telephone on December 14, 2018. According to the record the owner provided no written reply. Retailer Operations informed the owner by Determination letter dated February 6, 2019, that the violations cited in the Charge letter occurred at the firm and that a six month period of disqualification was warranted. The letter also stated that eligibility for a hardship CMP was not applicable as there are other authorized retail food stores in the area selling as large a variety of staple foods at comparable prices.

The owner appealed the determination by letter dated February 15, 2019. The administrative review was granted by letter dated February 26, 2019.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, 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 that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument 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 § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e)(5) establish the authority upon which a six month disqualification may be imposed against a retail food store.

7 CFR § 278.2(a) states: “Coupons may be accepted by an authorized retail food store only from eligible households or the households’ authorized representative, and only in exchange for eligible food.”

7 CFR § 278.6(e)(5) of the SNAP regulations states that a firm is to be disqualified for six 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(a) states: “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(f)(1) provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause hardship to SNAP benefit households because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It states: “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to SNAP benefit 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**

A report of the investigation that provides details on the results of each compliance visit was provided to the owner as Exhibits with the Charge letter. The investigative report documents that SNAP violations were recorded during three store visits that warrant a six month disqualification. The violations involved the sale of nonfood items for SNAP benefits in violation of 7 CFR § 278.2(a) including: paper towels, toothpicks, foam plates, plastic cutlery, and plastic forks.

### **APPELLANT’S CONTENTIONS**

Consideration of all contentions was made whether recapitulated here or not.

- I take full responsibility for the misconduct of selling nonfood items of EBT.
- I was unaware of the fact that our employees were making such sales.
- All of the employees have been trained equally and given clear instructions since day 1 on what they can and cannot sell on EBT.
- A document stating the items allowed and prohibited has always been posted.
- It is perhaps due to our employees’ carelessness, but nonetheless I take full pardon and apologize for this misconduct.
- Such misconduct and sales are never to be repeated again.
- I request to be fully pardoned or reduces as it will be difficult for the community.
- More than half of our customers travel by foot and use EBT as their primary source of providing food to their family. Their families would be in great hardship.
- The business would greatly suffer.
- I heartedly apologize for all the misconduct.

### **ANALYSIS AND FINDINGS**

This review is to either validate or to invalidate the determination made by Retailer Operations; it is limited to the facts at the basis of Retailer Operations’ determination at the time it was made. Upon review, the evidence supports that Appellant established a record of selling a nonfood item as defined by Section 271.2 of the regulations, on multiple occasions. The Exhibits furnished with the Charge letter warrant a disqualification period of six months.

The regulations at 7 CFR § 278.6(e)(5) specify that FNS shall “disqualify the firm for six 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 nonfood items due to carelessness or poor supervision by the firm’s ownership or management.” Three violations are considered evidence of carelessness. Therefore, the violations in this case are not too limited to warrant a disqualification. Regardless of who the store owner utilizes to handle store business, the owner is accountable for the proper handling of SNAP benefit transactions. The regulations establish that an authorized food store may be disqualified from participating in SNAP 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.

The owner contends that a SNAP disqualification will have a negative financial impact on Appellant’s business. It is recognized that some degree of 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 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 the owner to be excused from an assessed administrative penalty 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. Furthermore, 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 contention that Appellant may incur economic hardship does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

There are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective actions implemented subsequent to findings of program violations. Therefore, the owner’s contentions that corrective actions such as training and posting a list of allowed and prohibited items as he furnished, do not provide any valid basis for dismissal of the charges or mitigate the penalty imposed.

The preponderance of the evidence supports that Appellant sold nonfood items on multiple store visits in exchange for SNAP benefits, a program violation. The regulations stipulate FNS shall disqualify a firm for six 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 the sale of common nonfood items due to carelessness and poor supervision by the firm’s ownership or management.

### **CIVIL MONEY PENALTY**

Retailer Operations rendered a finding that it was not appropriate to impose a CMP in lieu of a six month period of disqualification. The record documents that there are other authorized stores within a nearby radius of Appellant that stock a variety of comparable staple foods at comparable prices. The evidence does not support that it will cause hardship for SNAP recipients if Appellant is disqualified. Therefore, Appellant is not eligible for a hardship CMP.

## **CONCLUSION**

The preponderance of the evidence in the record supports that the program violations charged did occur at Appellant. The USDA investigative record is specific, thorough, and fully documented with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail. The record documents that Retailer Operations considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the regulations, and properly denied it. Therefore, the six month disqualification of Appellant from participation as an authorized retail food store in the SNAP is sustained.

## **RIGHTS AND REMEDIES**

This penalty shall become effective thirty (30) days after receipt of this decision. A new application for participation in the SNAP may be submitted ten (10) days prior to the expiration of the six month period of disqualification. Please contact the Retailer Center at 877-823-4369 with any questions regarding the SNAP application process.

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and to the regulations at 7 CFR § 279.7 with respect to your right to judicial review of this decision. 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 owner resides or is 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, 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.

M. Viens  
Administrative Review Officer

March 27, 2019