

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

Wilmer Grocery,

Appellant,

v.

Case Number: C0193987

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 Retailer Operations Division’s assessment of a \$7,602.00 hardship civil money penalty (CMP) against Wilmer Grocery 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(e)(5), 7 CFR § 278.6(f)(1), and 7 CFR § 278.6(g) in its administration of the SNAP, when it imposed a hardship CMP of \$7,602.00 in lieu of a six month disqualification against Wilmer Grocery.

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 Wilmer Grocery with Federal SNAP law and regulations during the period November 14, 2016 through May 23, 2017. The investigative report documented that personnel at Wilmer Grocery accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions in Exhibits A, B, C,

and D. The investigative report identified an unidentified female clerk and two unidentified male clerks as being the violators during the investigation.

In a letter dated June 22, 2017, 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 Charge Letter states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of disqualification.

In letters to the Retailer Operations Division dated June 28, 2017 and June 30, 2017, the Appellant, through counsel, replied to the charges therein indicating that the violative SNAP transactions were the result of the store owner's inadvertent data entry mistakes made on Wilmer Grocery's POS device for several ineligible nonfood items. As such, during the FNS investigation the store clerks allowed the investigator to purchase several ineligible nonfood items with SNAP benefits. The Appellant did not intentionally make the incorrect data entries for the ineligible nonfood items that were purchased during the FNS investigation.

Based on the Appellant's replies and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated July 12, 2017 informing the Appellant that the violations cited in the June 22, 2017 Charge Letter occurred at the firm and that a six month period of disqualification was warranted. The Determination Letter also stated that the Appellant was eligible for a hardship CMP as Wilmer Grocery was selling a substantial variety of staple food items at comparable prices and the firm's disqualification would cause hardship to SNAP households. Thus, a hardship CMP in the amount of \$7,602.00 was imposed in lieu of the six month SNAP disqualification.

In a letter postmarked July 21, 2017, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's decision to impose a hardship CMP in lieu of a six month disqualification of Wilmer Grocery from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated August 4, 2017 and implementation of the hardship CMP was held in abeyance pending completion of this review.

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 § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e) establish the authority upon which a one year 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 or the households’ authorized representative, 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: (1) 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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system...”

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 food stamp 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 CMP amount.

APPELLANT'S CONTENTIONS

In the Appellant's replies to the Charge Letter and in the administrative review request postmarked July 21, 2017, the Appellant, through counsel, made the following summarized contentions, in relevant part:

- The violative SNAP transactions were the result of the store owner's inadvertent data entry mistakes made on Wilmer Grocery's POS device for several ineligible nonfood items. As such, during the FNS investigation the store clerks allowed the investigator to purchase several ineligible nonfood items with SNAP benefits. The Appellant did not intentionally make the incorrect data entries for the ineligible nonfood items that were purchased during the FNS investigation.
- A CMP in the amount of \$7,602.00 is excessive given that the Appellant's data entry mistakes resulted in 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of income for Wilmer Grocery from February 8, 2016 through July 19, 2017.
- To ensure that these types of SNAP violations do not occur in the future, the Appellant has corrected the data entry mistakes on Wilmer Grocery's POS device for approximately nine ineligible nonfood items.
- The Appellant is requesting that FNS impose a hardship CMP of 1,002.92 in lieu of the imposed hardship CMP of \$7,602.00.

In support of the Appellant's contentions, the following documents were submitted to FNS:

- Wilmer Grocery Product Sales Reports for February 8, 2016 through July 19, 2017. The Product Sales Reports document the sales information for nine different ineligible nonfood items that were purchased with SNAP benefits during the above mentioned time period.

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

ANALYSIS AND FINDINGS

During an investigation conducted from November 14, 2016 through May 23, 2017, USDA conducted five compliance visits at Wilmer Grocery. A report of the investigation was provided to the Appellant as an attachment to the Charge Letter dated June 22, 2017. 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. The chargeable violations involved the sale of ineligible nonfood items in exchange for SNAP benefits in violation of 7 CFR § 278.2(a). The Retailer Operations Division determined that the assessment of a hardship CMP of \$7,602.00 in lieu of a six month disqualification was the appropriate penalty for these violations. A preponderance of the evidence supports the decision of the Retailer Operations Division.

Owner Responsible for SNAP Violations

The Appellant contends that the violative SNAP transactions were the result of the store owner's inadvertent data entry mistakes made on Wilmer Grocery's POS device for several ineligible nonfood items. As such, during the FNS investigation the store clerks allowed the investigator to purchase several ineligible nonfood items with SNAP benefits. The Appellant did not intentionally make the incorrect data entries for the ineligible nonfood items that were purchased during the FNS investigation. However, this contention cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. Prior to becoming authorized to participate in the SNAP on December 14, 2015, the Appellant completed and submitted a SNAP Application for Retail Stores. By signing the SNAP application, the store owner acknowledged that she was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner 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 nonfood items.

In addition, an authorization packet was sent to the firm when it was first authorized and contained training materials which gave guidance on the SNAP rules and regulations. SNAP authorized firms are responsible for reviewing the training materials, providing training for its employees, and generally familiarizing themselves with all SNAP rules and regulations pertaining to retailers.

CMP Amount Excessive

The Appellant contends that a CMP in the amount of \$7,602.00 is excessive given that the Appellant's data entry mistakes which resulted in **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of income for Wilmer Grocery from February 8, 2016 through July 19, 2017. However, neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto cite any minimum dollar amount of SNAP benefits for transactions involving the sale of ineligible items to be defined as violative. No mention of minimum cost or types of ineligibles is cited in Section 278.6(e)(5) of the SNAP regulations, which states that FNS shall disqualify a 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.

Corrective Action

The Appellant contends that in order to ensure that these types of SNAP violations do not occur in the future, she has corrected the data entry mistakes on Wilmer Grocery's POS device for approximately nine ineligible nonfood items. It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. 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 after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that she has taken corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

The Appellant is requesting that FNS impose a hardship CMP of 1,002.92 in lieu of the imposed hardship CMP of \$7,602.00. The case record documents that the Retailer Operations Division correctly calculated the amount of the hardship CMP under 7 CFR § 278.6(g).

5 U.S.C. § 552 (b)(7)(E)

The Appellant asked for a reduced hardship CMP in the amount of \$1,002.92. However, 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 in the calculation of the hardship CMP amount and a reduced hardship CMP cannot be granted.

CONCLUSION

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.

A review of the evidence in this case documents that personnel at Wilmer Grocery exchanged SNAP benefits for ineligible nonfood items during four out of five compliance visits. However,

the Retailer Operations Division determined that a six month disqualification of Wilmer Grocery would create a hardship for SNAP households as there is no other authorized retail food store in the area selling a substantial variety of staple food items at comparable prices. Therefore, in lieu of a six month disqualification, the Retailer Operations Division assessed a hardship CMP against the Appellant of \$7,602.00. A review of the calculations shows that the amount of the CMP was correct and proper and the decision in this case is hereby sustained.

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

April 3, 2018