

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

**Y & F Mini Mart,**

**Appellant,**

**v.**

**Case Number: C0198224**

**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 a finding that a six month disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Y & F Mini Mart (hereinafter “Y & F Mini Mart” or “Appellant”) by the Retailer Operations Division of FNS.

**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 in its administration of the SNAP, when it imposed a six month period of disqualification against Y & F Mini Mart.

**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 Y & F Mini Mart with Federal SNAP law and regulations during the period April 6, 2017 through May 12, 2017. In a letter dated July 26, 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 (4) out of six (6) 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 letter also stated

that under certain conditions, FNS may impose a hardship civil money penalty (CMP) in lieu of a disqualification as provided in 7 CFR § 278.6(f)(1).

The charge letter noted that per SNAP regulations Section 278.6(b), the Appellant has the right to present any information, explanation or evidence regarding the charges and must reply within 10 calendar days of the date of receipt of the charge letter. Per UPS confirmation, the charge letter was delivered to the Appellant at the store address of record on July 27, 2017.

In responses to the Retailer Operations Division of August 4, 2017, August 21, 2017, August 24, 2017, September 11, 2020, and October 2, 2020, the Appellant, through counsel, replied to the charges therein submitting various arguments and supporting documents in support thereof and requesting the imposition of a civil money penalty in lieu of a six month SNAP disqualification due to customer hardship. The record indicates that Appellant's counsel requested and was granted an extension in time to September 1, 2017 for providing a response to the letter of charges.

The record also indicates that in the response of August 24, 2017, Appellant's counsel requested information and documents from FNS with regard to the agency's case against Y & F Mini Mart pursuant to the Freedom of Information Act (FOIA). In a response of September 19, 2017, FNS provided Appellant's counsel with a response to the initial FOIA request. Appellant's counsel appealed the FOIA request in a letter received on December 18, 2017. In a response of August 27, 2020, FNS provided Appellant's counsel with a response to the FOIA appeal. On September 2, 2020, the Retailer Operations Division sent a 10 day letter to Appellant's counsel providing the opportunity to respond to the letter of charges. On September 11, 2020, Appellant's counsel requested and was granted an extension in time to October 2, 2020 for providing a response to the letter of charges. Appellant's counsel provided an additional response to the letter of charges on October 2, 2020.

After giving consideration to the Appellant's responses and the evidence of this case, the Retailer Operations Division issued a determination letter dated January 15, 2021. The determination letter informed the Appellant that the firm was disqualified from the SNAP for a period of six months 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 civil money penalty under 7 CFR § 278.6(f)(1). The Retailer Operations Division determined that the Appellant was not eligible for the 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.

In a letter postmarked January 28, 2021, the Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. FNS granted the Appellant's request for administrative review by letter dated February 8, 2021. Upon acceptance of the administrative review request, implementation of the six month disqualification was held in abeyance pending completion of this review. In an email response of March 1, 2021, the Appellant, through counsel, submitted additional information in support of the request for administrative 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 promulgated through regulations 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, inter alia:

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, inter alia:

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, inter alia:

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, inter alia:

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, inter alia:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when . . . the firm's disqualification would cause hardship to Food Stamp [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.

## **SUMMARY OF THE CHARGES**

During an investigation conducted from April 6, 2017 through May 12, 2017, USDA conducted six (6) compliance visits at Y & F Mini Mart. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated July 26, 2017. The investigation report included Exhibits A through F which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during four (4) of the six (6) compliance visits and involved the sale of a variety of items best described in regulatory terms as “common nonfood items”. The misuse of SNAP benefits noted in Exhibits B, C, D, and E warrant a disqualification as a SNAP retail food store for a period of six months. The exchange of these ineligible items for SNAP benefits is in violation of 7 CFR § 278.2(a).

## **APPELLANT’S CONTENTIONS**

The following represents a brief summary of the Appellant’s contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the replies to the charge letter, in the administrative review request, and in subsequent correspondence, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The owner did not personally violate the SNAP regulations and any actions by the employee that violated the regulations were taken in direct violation of the owner’s explicit instructions on correctly implementing SNAP purchases restrictions.
- The owner has been operating free of any violations since 2007.
- The Appellant has an effective policy for combating and preventing SNAP violations. The owner has instructed employees at all times that SNAP cards may only be used to purchase eligible foods.
- Upon learning that an employee was accused of violating the SNAP rules, the owner immediately conducted an inquiry and instructed employees that the SNAP rules must be observed. The employee in question has been terminated.
- Neither the charge letter nor the FOIA responses establish that any EBT benefits were actually deducted for any ineligible non-food items. No sales receipts are actually attached, only EBT receipts. The FOIA response includes an alleged photo of the items purchased and the EBT receipt and the supposed handwritten note containing transaction details. These receipts are inconsistent. Some of the item prices are not included on the investigation report and the total loss to the government is only 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- These records are inadequate to carry FNS’s burden of proof that the violations even occurred, much less that the violations warrant a six month disqualification. Even if the SNAP violations occurred, the significance of the violations warrants at most a warning letter or a modest civil money penalty. The owner was never given any warning regarding potential or actual violations. It is unconscionable, arbitrary and capricious,

that FNS uses undercover operatives to try and create violations where none have ever existed. After the very first violation, the agency should have issued a warning and given the Appellant an opportunity to correct the problem.

- In a similar case arising in this district, the United District Court has found the retailer had a substantial likelihood of success on the merits and imposed a stay of the six month temporary disqualification (See *Shato v. United States of America*). The Court found significant failure to consider issuing a warning letter, the lack of proof of personal involvement of the owner, and the failure of the agency to consider the lack of involvement before issuing the six month disqualification.
- The intent of the owner to violate the regulations must be established by FNS (*Minhas v. Vilsack*; *Cf. Woodard v. United States*). FNS' refusal to disclose the identity of the undercover investigator, combined with the delay in responding to the FOIA request deprives the retailer the right to investigate the possibility of collusion between the investigator and employees (See *BETESFA, Inc. v. United States*). More importantly, the use of the undercover investigators, combined with the lack of meaningful administrative review of their actions, and the refusal to permit the Appellant to challenge the credibility of the investigator prior to temporary disqualification deprives the retailer of a true right to contest the credibility of the witness brought against the Appellant, which deprives it of due process. Even the employee who allegedly engaged in the SNAP violations can no longer be identified.
- Additionally, COVID restrictions in federal courts will impede meaningful and timely judicial review of any temporary disqualification. If FNS imposes the six month SNAP disqualification, an application for judicial review will not automatically delay the period of suspension (7 U.S.C. § 2023(a)(17)). Further, the law provides no remedy for any loss of revenue and customers (7 U.S.C. § 2023(a)(18); 7 CFR 279.7(d)). Currently, the Western District of Tennessee is nearly completely tied up with pending criminal matters—there is no pending schedule for when civil trials might even be available.
- In the SNAP Farm Bill of 2008, with regard to explanation of its regulations, the Department publically acknowledged that irreparable injury is almost invariably associated with even a six month disqualification. A loss of SNAP income during the six month SNAP disqualification will make it impossible to cover the owner's monthly operating expenses, including rent, which would result in eviction from the store. A SNAP disqualification will cost the store not only SNAP sales, but non-SNAP purchases by SNAP-eligible customers.
- The Appellant requests a full and in-person hearing on the charges with the right to cross-examine witnesses and bring its own witnesses to testify.
- The determination letter ignored and did not respond to the arguments and facts presented by the Appellant. The determination letter gives no consideration to any of the firm's due process or evidentiary contentions, ignores precedent in this judicial district, and fails to address the agency's failure to issue a warning letter. The decision is contrary to the agency's own internal precedent. See *Primo Meat Market* in which the agency had twice previously imposed fines on a retailer, yet determined that only a warning letter should be issued in lieu of a six month SNAP disqualification. The Appellant also noted *Abidin Oumar Shato v. United States* in support thereof. The determination letter stated that there are other authorized stores selling as large a variety of staple food items at

comparable prices, but did not provide the Appellant any meaningful opportunity to attempt to rebut this assertion. Such a finding violates due process.

- The Appellant requests the imposition of a civil money penalty in lieu of a SNAP disqualification as it is the only store within a one mile radius that serves ethnic food and is open for 24 hours per day. The firm serves Muslims that live in the area and provides halal chicken and beef. The firm is in the middle of a “food desert” of about a mile in diameter, containing not a single grocery store. The Appellant is by far the nearest location to purchase a variety of eligible food products. A SNAP disqualification will impose a hardship on SNAP customers as they will to travel to a different location, especially when other stores in the area are closed. The bus system in the area is not reliable. Previous Final Agency Decisions, in finding sufficient alternative SNAP resources denying a customer hardship request, have typically found far more than ten nearby eligible retailers, only three of which are open 24 hours (See *A to Z Grocery & Deli, Inc* and *Quick and Easy Food Mart*). By contrast, Appellant’s analysis indicates that Y & F Mini Mart’s customers have nothing like this.

In support of these contentions, the Appellant, through counsel, submitted the following documents for review:

- Affidavit of store owner;
- Affidavits of numerous customers attesting support for Appellant and imposed hardship if firm is disqualified from SNAP;
- Income Statements of Appellant firm for 2017, 2018 and 2019;
- Charge letter dated July 26, 2017;
- Determination letter dated January 15, 2021;
- Redacted investigation report;
- September 19, 2017 FOIA response with records provided to Appellant;
- *Abidin Oumar Shato v. United States*, March 21, 2016, Order granting motion to stay agency decision imposing six month disqualification;
- Final Agency Decision for *Primo Meat Market* dated January 24, 2017;
- Administrative Order No. 2021-01, United States District Court for the Western District of Tennessee, Continued court operations under the exigent circumstances resulting from COVID-19 outbreak; and
- Administrative Order No. 2021-08, United States District Court for the Western District of Tennessee, Continued court operations under the exigent circumstances resulting from COVID-19 outbreak.

## ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the determination made by the Retailer Operations Division; it is limited to the facts at the basis of the Retailer Operations Division’s determination at the time it was made.

When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the

firm for SNAP violations including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP.

The transactions cited in the letter of charges were conducted by 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 FNS investigative report shows that two (2) employees working at the Appellant firm accepted SNAP benefits for ineligible nonfood items on four (4) separate occasions during the investigative period indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The investigation report documents by a preponderance of the evidence that the store employees engaged in the misuse of SNAP benefits noted in Exhibits B, C, D, and E, warranting a disqualification as a SNAP retail food store for a period of six months.

The owner contends that he did not personally violate the SNAP regulations and any actions by the employee that violated the regulations were taken in direct violation of the owner's explicit instructions on correctly implementing SNAP purchases restrictions. However, regardless of who the store owner utilizes to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. The regulations establish that an authorized food store may be disqualified from participating in the program 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 the violations included on the investigation report total a loss to the government as only 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Therefore, the violations are too limited to warrant a six month SNAP disqualification. 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 store 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 in exchange for SNAP benefits due to carelessness by store employees or poor supervision by the firm's ownership or management.

The owner contends that he was never given any warning regarding potential or actual violations. After the very first violation, the agency should have issued a warning and given the Appellant an opportunity to correct the problem. 7 CFR § 278.6(d)(2) & (3) of the SNAP regulations provides that "The FNS office making a disqualification or penalty determination . . . shall consider . . . any prior action . . . to warn the firm about the possibility that violations are occurring . . .". The citation simply requires FNS to consider any prior warnings when determining a sanction. It does not require FNS to give such warnings. FNS did not consider

prior actions to warn the Appellant about the possibility that violations were occurring because there were no prior warnings.

The owner contends that he has been operating free of any violations since 2007. However, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

The Appellant contends that the firm has an effective policy for combating and preventing SNAP violations. The owner has instructed employees at all times that SNAP cards may only be used to purchase eligible foods. However, had an effective compliance policy and program been in effect at the firm, it is unlikely that the employees would have made such obvious mistakes. The more likely explanation is that store ownership and/or management failed to properly train and subsequently supervise the employees. Additionally, had store ownership and/or management been supervising the employees through occasionally monitoring them using videotape, if available, or in person, it would have readily noticed that they were allowing the sale of ineligible nonfood items in exchange for SNAP benefits.

It also would have been immediately evident to store ownership and/or management that the employees were deficient in their knowledge of SNAP rules and regulations had it periodically spot checked the employees' knowledge and abilities by asking questions about SNAP eligible/ineligible items. Either of these basic supervisory techniques would have provided a no cost method for store ownership and/or management to ensure that store employees were not putting the firm's SNAP authorization at risk.

These are clear signs of poor or no supervision by store ownership and/or management. It is highly improbable, based on the willingness of the employees to exchange SNAP benefits for ineligible nonfood items, that the only instances of SNAP violations were those transactions identified as part of the FNS undercover investigation. These actions more likely than not represent an ongoing pattern of SNAP violations at the Appellant firm. Under SNAP regulations, the penalty for allowing the purchase of ineligible nonfood items using SNAP benefits as the result of poor supervision by ownership or management is a six month disqualification. The regulations do allow SNAP retailers to pay a hardship CMP, if eligible, as explained in the next section.

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. The Appellant did not provide any evidence that the violations cited in the charge letter did not occur.

Based on this discussion, the decision by the Retailer Operations Division to disqualify the firm for a six month period was the appropriate penalty and there is no valid basis for dismissing the charges or for mitigating the penalty imposed.



## **Corrective Action**

The Appellant contends that upon learning that an employee was accused of violating the SNAP rules, the owner immediately conducted an inquiry and instructed employees that the SNAP rules must be observed. The employee in question has been terminated.

As noted previously, 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 it has taken or will take 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.

## **Due Process**

The Appellant contends that the Retailer Operations Division's determination to disqualify the firm from participation in the SNAP for six months was arbitrary and capricious because of the failure of the Retailer Operations Division to acknowledge the facts and arguments presented in response to the letter of charges.

The Appellant, through counsel, replied to the charges in writing, offering various arguments and supporting documents in support thereof, for the violative SNAP transactions that occurred during the investigation period. After considering the evidence of the case and the Appellant's replies, the Retailer Operations Division determined that a six month SNAP disqualification was warranted. The action was not arbitrary or capricious as it followed the agency's due process procedures which are two-fold in nature. First, the retailer is afforded an opportunity to reply to the charges as specified by the Retailer Operations Division; the Appellant has availed itself of this first aspect of the due process procedures in the form of written replies to the Retailer Operations Division. The second level of due process involves an administrative review, of which the Appellant, through counsel, has likewise availed itself and in the process of which the Appellant was granted an additional three (3) weeks within which additional information may be provided in support of the request for review.

The purpose of the administrative review process is to ensure that firms aggrieved by FNS's adverse actions have the opportunity to have their position fairly considered by an impartial reviewing authority prior to that adverse action becoming final. The Appellant has been duly given, and has taken, the opportunity to present to USDA through the administrative review process whatever evidence and information it deems as pertinent in support of its position that the Retailer Operations Division's adverse action should be reversed. In the instant case the Appellant, through counsel, provided additional materials a full month following delivery of the letter acknowledging acceptance of the appeal, the additional materials were accepted and

included in the administrative review. Therefore, any evidence and information that the Appellant presented to the Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to the Appellant's right to a fair and thorough review. The Appellant has exercised its opportunity to reply to the charge letter and its administrative review rights, and by doing so has availed itself of the full complement of the agency's statutory obligations with regard to due process.

### **Hearing Request**

The Appellant requests a full and in-person hearing on the charges with the right to cross-examine witnesses and bring its own witnesses to testify. However, neither the Food and Nutrition Act of 2008 nor the SNAP regulations pursuant thereto provide for evidentiary proceedings at the administrative level of review, and therefore such proceedings are not included in the administrative review process. Rather, the Act and regulations provide that any firm aggrieved by an administrative review determination may seek judicial review of the determination in Federal court or a state court of record having competent jurisdiction. In such event, trial de novo proceedings ensure the firm of all full evidentiary hearing on the agency action at issue.

### **FOIA Process/COVID Restrictions**

With regard to the Appellant's contentions with regard to the FOIA process and the refusal to disclose the identity of the undercover investigator in the investigation report, the authority for redaction of certain information in investigation reports is based on the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended by P.L. 93-502, P.L. 94-409, and P.L. 99-570, 7 CFR 1.1 to 1.23, 7 CFR 295.1 to 295.10, and the Food and Nutrition Act of 2008, as amended. The Retailer Operations Division provided the Appellant with a copy of the investigation report with redacted information. Certain information contained in the investigation report are protected under FOIA and shall not be released by FNS to include: The name and any identifying particulars of the investigator conducting the investigation is protected under Exemptions 6 and 7(C) of the FOIA (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) in that the release would result in a clearly unwarranted invasion of personal privacy. The name and any identifying particulars of the person who assisted in the investigation as a private citizen and who qualifies as a confidential source under Exemptions 7(D) of the FOIA (5 U.S.C. 552(b) (7) (D)), as well as Exemptions 6 and 7(C). In addition, Exemption 7(F) "endanger life or safety" may also be relative. Consideration of the Appellant's arguments with regard to the processing times of FOIA requests and FOIA appeals and COVID restrictions in federal courts is beyond the scope of this administrative sanction determination.

### **Case Laws/Past Administrative Reviews**

With regard to the case laws and past administrative reviews cited by the Appellant, it is beyond the scope and authority of this review to determine the applicability of same. This review is limited to consideration of whether or not the Retailer Operations Division duly adhered to the

Food and Nutrition Act of 2008, as amended, and the implementing regulations, and whether or not the action taken is sustainable by a preponderance of the evidence. Therefore, the application of any judicial precedent is better addressed via judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

A review of the case record indicates that the investigation report contains sufficient evidence to support the imposition of a six month SNAP disqualification as provided in 7 CFR § 278.6(e)(5). The Appellant accepted SNAP benefits in exchange for merchandise which included ineligible nonfood items in violation of 7 CFR § 278.2(a). As with all other administrative review decisions, this administrative review decision is not precedent setting as the decision is based on the specific circumstances of this case as documented by materials provided by both the Appellant and the Retailer Operations Division. In addition, this administrative review decision, as well as all other administrative review decisions, does not establish policy or supersede Federal law, regulations or policy guidance.

### **Financial Hardship**

With regards to the Appellant's contentions that a SNAP disqualification will impose a financial hardship to the firm, 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 or to ownership resulting from imposition of such penalty. To allow ownership 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, as amended, 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, Appellant's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **CIVIL MONEY PENALTY**

The Appellant requests the imposition of a civil money penalty in lieu of a SNAP disqualification as it is the only store within a one mile radius that serves ethnic food and is open for 24 hours per day. The firm serves Muslims that live in the area and provides halal chicken and beef. A SNAP disqualification will impose a hardship on area SNAP customers.

The Retailer Operations Division determined that the Appellant was not eligible for a hardship civil money penalty (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]. 5 U.S.C. § 552 (b)(7)(E).

Based on the evidence, the disqualification of Y & F Mini Mart would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division’s 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 therefore established that the violations as described in the letter of charges did in fact occur at Y & F Mini Mart warranting a disqualification of six 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 nonfood 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 Y & F Mini Mart, the Appellant firm, is appropriate and the action is sustained.

In accordance with the Food and Nutrition Act of 2008 and the regulations there under, the six month period of disqualification shall become effective thirty (30) days after receipt of this letter. A new application for participation may be submitted by the firm ten (10) days prior to the expiration of this six month period.

## **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

March 25, 2021