



Food and
Nutrition
Service

Retailer Policy and Management Division, SNAP
Policy Memorandum 2020-01

1320
Braddock
Place
Alexandria
VA 22314

Subject: **Administrative and Judicial Review**

Legislation: Food and Nutrition Act, Section 14 [7 U.S.C. 2023] Administrative and Judicial Review

Regulations: 7 CFR 279

Supersedes: RPMD Policy Memo 2014-01, “Administrative and Judicial Review”

Implementation: Upon Publication

Any firm may request administrative and judicial review, if it is aggrieved by any of the actions described in section 279.1(a) of the Supplemental Nutrition Assistance Program (SNAP) regulations. The Administrative Review Branch (ARB) ensures that the Food and Nutrition Service (FNS) follows the provisions of the Food and Nutrition Act (the Act), SNAP regulations, and agency retailer policy, and that the agency's administrative actions are equitable and consistent.

Administrative reviews are conducted by designated Administrative Review Officers who make independent rulings that are not subject to amendment or reversal except through judicial review proceedings. The decision of the review officer shall take effect 30 days after the date of delivery of the Final Agency Decision to the firm.

Pursuant to the Act, requests for judicial review may be filed either in Federal district court or in a state court of competent jurisdiction.

Non-appealable Actions

- Denial of request that a period of disqualification already imposed be converted to a Civil Money Penalty (CMP);
- Imposition of (the remaining balance of) a period of disqualification as a result of failure to make payments on a previously imposed CMP, or for failure to acquire or maintain a required bond or letter of credit (LOC) following imposition of a CMP;
- Withdrawal for failure to maintain a required bond or LOC;

The contents of this document do not have the force and effect of law and are not meant to bind the public or FNS in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

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- Disqualification from SNAP as a reciprocal action resulting from a disqualification from the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC). However, the denial of a hardship CMP (HCMP), or the amount of an HCMP involving such a reciprocal action is appealable; and,
- Voluntary withdrawal of an authorized firm.

ADMINISTRATIVE REVIEW

Requesting Review

Firms that are subject to an adverse administrative action are informed of their review rights, and the procedures for exercising those rights, in the notices of adverse action and in accordance with sections 279.2 and 279.3 of the regulations. Such adverse actions include denial, withdrawal, disqualification, imposition of a CMP or fine, assertion of a fiscal claim established by FNS, denial of a claim submitted by a firm, and forfeiture of a collateral bond or drawdown of a letter of credit. The firm should be advised on how to request administrative review and the information the firm is required to provide, such as:

- Who has the authority to request review on behalf of the firm;
- What must be included in the request;
- When the deadline is for submitting the request; and,
- Where the request should be sent.

Timeliness of Requests

A request for review shall be determined to be timely if either the delivery date to FNS, postmark, or the date of fax or hand-delivery is no later than midnight of the 10th calendar day after the notice of adverse action is received by the firm. If the 10th day falls on a Saturday, Sunday, or Federal (legal) holiday, the time period within which a request will be considered timely will be extended to the next day which is not a Saturday, Sunday, or Federal (legal) holiday. Other than a request for review being misdirected through the mail system or internally through FNS, untimely requests shall not be accepted for review. In such circumstances, the effective date of the adverse action will remain at no earlier than 10 days from receipt of the determining office's original notice (except for permanent disqualifications and denials of applications, which become effective immediately upon receipt of the determining office's original notice).

Adverse Actions Held in Abeyance Pending Review Completion

If the appeal involves a term disqualification, permanent disqualification for falsification, imposition of a CMP, or withdrawal of authorization (even permanent withdrawal), the action shall be held in abeyance and the firm may continue to accept SNAP benefits while the appeal is under review. The only exception to holding an action in abeyance pending the outcome of the administrative appeal is permanent disqualification for trafficking. In accordance with 7 CFR 279.4, a permanent disqualification for trafficking shall not be held in abeyance, and shall be effective immediately upon the firm's receipt of the determination letter. Similarly, a

denial of a firm's application to participate in SNAP shall remain in effect until a final decision is rendered by the review officer. All actions involving the denial of a claim brought by a firm against FNS, or the forfeiture of a collateral bond, or the draw down on an irrevocable letter of credit, including approval of the firm for SNAP participation, paying any part of the disputed claim, or reimbursing the firm for any bond forfeiture or irrevocable letter of credit withdrawal, shall be held in abeyance pending the reviewer's decision in the matter.

Information in Support of the Request

A firm's request for an administrative review, with no accompanying information in support of its position in the matter, is not sufficient to start the administrative review process. Virtually any contention may meet the requirement to provide information in support of the request for review. Firms shall be given three weeks following the firm's receipt of FNS's letter acknowledging that the review request was timely to submit supporting information. Extensions of time may be granted if, in the reviewer's judgment, additional time is required for the firm to fully present information in support of its position. However, no extension of the 10-day time frame for filing a request for review may be made. If no information in support of the firm's position is submitted, no administrative review can be conducted, and the action of the determining office shall be the agency's final decision.

Note: The information in support of the firm's request must include a reference to information previously submitted, or new evidence/rationale in support of the firm's request for appeal. Information or documentation previously submitted to the determining office as part of a response to the charge letter will not be considered "Information in Support of the Request" as referenced above. Once the requirements to start an administrative review have been met, previously submitted information will be considered.

FOIA Requests

When the firm requests case file information under the Freedom of Information Act (FOIA), the administrative review will be held in abeyance pending the outcome of the FOIA request. However, no review will be held in abeyance if the firm appeals the agency's FOIA response withholding any information requested in the initial FOIA request. A review will also not be held in abeyance if the information requested has no bearing or relevance to the action under review, or the FOIA request is a duplicate of a previous request for which an official response has already been made. A firm will be given ample time, normally three weeks following the firm's receipt of the agency's response to the FOIA request to submit additional information in support of its position. This will also be the case if the FOIA request is part of the firm's request for an administrative review and no supporting information had been submitted with the request. As with other no information cases, extensions of time may be granted if, in the reviewer's judgment, additional time is required for the firm to fully present information in support of its position.

Moot Reviews

An administrative review is terminated as moot under the following circumstances:

- The firm withdraws its request for review. In such a case, the decision rendered by the determining office shall be final;
- There is no information in support of the review request; or,
- The determining office rescinds its original adverse action decision.

Making Determinations

Administrative review decisions are based on the following:

- Case file containing information submitted by the determining office;
- Information submitted by the firm in support of its position; and,
- Any additional information obtained by the Administrative Review Officer from any other person or source having relevant information.

While not responsible for developing the case to support either the firm or the agency, the review officer is free to make any inquiries or seek any information to help clarify any uncertain points or to develop additional facts. This may include information obtained from authored websites, books, news articles, and statistical reports. Even the review officer's personal knowledge and experience, as well as hearsay testimony, may be admitted for consideration of their potential probative value. Only after all the evidence is considered, accorded relative weight, and the facts determined, can a final administrative review decision, by a preponderance of the evidence, be properly rendered.

Note: The burden of proof in cases coming before a review officer rests first with the determining office which initiated the adverse action under review. The information furnished by that office must establish a prima facie case, which standing on its own sufficiently justifies the adverse action taken. The firm then assumes the burden of presenting substantial evidence to refute the findings or conclusions of the determining office. The review officer must provide the determining office for their consideration any information not previously available to that office which, in the review officer's judgment, might have resulted in a different adverse action from the one imposed, or no adverse action at all, had that information been previously available. For example, new information might alter the determining office's previous judgment that a CMP was not warranted.

Scope of Determination

Administrative review decisions are rendered within the alternatives authorized by law, regulations, and agency retailer policy. Under no circumstances are penalties or other adverse actions to be made more severe by an administrative review decision. Furthermore, the alternatives available to the review officer in rendering decisions does not mean that the review officer has any discretion to pick and choose by whim whatever alternative he or she so wishes. Rather, the alternatives are merely a list of all the possible determinations that can be rendered for the actions under review. The basis for sustaining, modifying, or reversing the determining office's initial decision is not a matter of reviewer discretion but of whether the

evidence is in accord with the law, regulations and agency policy, and warrants the action under review.

Possible Determinations

Denial or Withdrawal of Authorization

Possible determinations for denial or withdrawal decisions include:

- Sustaining the action under review;
- Modifying the action under review by specifying a shorter period of time the action will remain effect; or,
- Directing that the action under review be reversed and the firm be authorized for participation if otherwise eligible.

A special circumstance arises when the determining office fails to evaluate a firm's eligibility for SNAP participation under both Criterion A and Criterion B. For example, a firm may be deficient in several staple food categories under Criterion A and denied participation on that basis without the determining office ever assessing the firm's eligibility under Criterion B (i.e., whether staple food sales of the firm comprise more than 50 percent of its total gross retail sales). In such cases, the provision at 278.1(k)(2) and 278.1(l)(iii), requiring that a firm shall not be eligible to submit a new application for authorization in the program for a minimum period of six months, is not applicable. It is the agency's position that such a waiting period requires that a firm must fail to meet both Criterion A and Criterion B. If the determining office did not assess the firm's eligibility under Criterion B, it has not been determined that the firm is not eligible under Criterion B. Therefore, in such cases, although the denial/withdrawal would be sustained based on the firm not meeting Criterion A, the lack of evidence that the firm does not meet Criterion B makes it appropriate for the six-month waiting period to be waived and the firm be allowed to immediately reapply for SNAP participation.

Disqualification

Possible determinations for disqualification actions include:

- Sustaining the action under review;
- Modifying the action under review by specifying a shorter period of disqualification;
- Changing the original disqualification to include the option of a hardship CMP (except for permanent disqualifications) if a disqualification would cause a hardship to SNAP households;
- Modifying a permanent disqualification for trafficking to include the option of a Trafficking CMP. This is appropriate if the firm had established and implemented a compliance policy and program substantially showing it to have been in place prior to the occurrence of violations and requested consideration of a trafficking CMP within appropriate timeframes established by regulation;
- Modifying the original disqualification to an Official Warning Letter; or,
- Directing that the action under review be reversed.

Civil Money Penalty

Possible determinations for action involving a CMP include:

- Sustaining the action under review (either the CMP assessed or, in the case of a WIC/SNAP reciprocal disqualification, the denial of a CMP);
- Specifying a reduced CMP based on a finding that either the original sanction period or the calculation of the amount of the penalty, or both, was incorrect;
- Modifying the CMP to an Official Warning Letter; or,
- Directing that the action under review be reversed.

Denial of Claim Submitted by Firm

Possible determinations for the denial of a claim submitted by the firm include:

- Sustaining the action under review;
- Specifying the amount of the claim to be paid by FNS; or,
- Directing that the action under review be reversed.

Assertion of Claim by FNS

Possible determinations for the assertion of a claim by FNS include:

- Sustaining the action under review;
- Specifying a reduced amount based on a finding that the claim amount initially asserted was in error; or,
- Directing that the action under review be reversed.

Imposition of Fine by FNS

Possible determinations for the imposition of a fine by FNS include:

- Sustaining the action under review.
- Specifying a reduced amount based on a finding that the fine amount initially asserted was in error.
- Directing that the action under review be reversed.

Forfeiture of a Collateral Bond/Drawdown of a LOC

Possible determinations for actions involving forfeiture of a collateral bond or drawdown of a letter of credit include:

- Sustaining the action under review;
- Specifying a reduced amount based on a finding that the amount initially forfeited or drawn down was in error; or,
- Directing that the action under review be reversed.

Special Considerations

Change in Ownership - If a firm changes ownership while under administrative review, the review cannot be terminated unilaterally by the Administrative Review Officer for that reason alone. If the former owner wishes to continue the review, or does not specifically request to terminate the review, the review officer will pursue the matter to conclusion and issue a Final Agency Decision. Any action to close a review as moot upon request of the former owner shall first be preceded by notification to the owner of the right to pursue the review to

conclusion even though the firm was sold, and of the consequence that not pursuing the review to conclusion shall result in the determination of the determining office becoming final.

Reinstitution - The regulations do not provide for remanding cases to the determining office. If an appealed action is found to be seriously deficient, the review officer, after consulting with the determining office, may either close the case as moot upon receipt of a copy of the letter sent from the determining office to the firm rescinding the earlier adverse action, or render a decision based upon the record as presented. In the case of a moot decision, the determining office may then reinstitute adverse administrative action against the firm, taking care to avoid those objections which had undermined the previous action. The reinstated adverse action would be subject to administrative review, provided the request is made timely.

JUDICIAL REVIEW

Requesting Review

A firm aggrieved by an administrative review decision may, within 30 days of delivery of the Final Agency Decision, file for a judicial review. A complaint against the United States must be filed by the firm in the United States 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 no judicial review is filed, the decision of the Administrative Review Officer shall be final.

Stay of Administrative Action

Administrative actions held in abeyance during the administrative review take effect 30 days after the delivery of the Final Agency Decision, shall remain in force during the judicial review process unless the court grants the firm a stay of the administrative action. This normally entails the firm making a timely stay-of-action application to the court and showing in a hearing that irreparable injury will occur if there is no stay and that the firm is likely to prevail on the merits of the case. Permanent disqualifications are not subject to such stays.

Appeals

Any District Court decision is subject to appeal to a Federal Circuit Court of Appeals and ultimately to the U. S. Supreme Court, by either the Government or the firm.

Settlement Agreements

Settlement agreements of pending litigation are made between the Assistant United States Attorney (AUSA) and the firm and/or the firm's legal representative. Settlement agreements may be initiated by retailers or in certain situations by the AUSA. As the terms which are reached in a settlement agreement may set a precedent for future settlement agreements, all settlement terms must be approved by the SNAP Associate Administrator. Therefore, Retail Policy Management Division (RPMD) management are to be kept abreast of any significant developments with a settlement and are to be consulted on any settlement proposals. Any settlement that results in the complete reversal of a sanction must not be agreed to without

first consulting with RMPD, regardless of the length of the original sanction. FNS should work closely with the Office of General Counsel Attorney to avoid a settlement which is inappropriate.

Any questions regarding this policy should be directed to: RPMDHQ-WEB@fns.usda.gov.

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