

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

CHPC LLC dba Cavazos Drive Thru,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0230175

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a six-month disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against CHPC LLC dba Cavazos Drive Thru (hereinafter “Cavazos Drive Thru” or “Appellant”) by FNS’s Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it imposed a six-month disqualification against Cavazos Drive Thru.

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

FNS records show that the Appellant firm, Cavazos Drive Thru, was initially authorized for SNAP participation under the present ownership on June 30, 2015. Between July 2, 2020 and July 13, 2020, an FNS contractor conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigation report documented that personnel at Cavazos Drive Thru accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. According to the report, the Appellant firm sold plastic cutlery, plastic sandwich bags, and aluminum foil in exchange for SNAP benefits, which benefits may only be used for the purchase of eligible food.

In a letter dated December 9, 2020, the Retailer Operations Division charged the Appellant with violating SNAP regulations at 7 CFR § 278.2(a). The charge letter stated that the acceptance of SNAP benefits in exchange for ineligible merchandise warranted a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further stated that under certain conditions and in accordance with § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

On December 11 and December 13, 2020, the Appellant responded to the allegations, stating that the firm had been in business for 15 years and this was the first time something like this had happened. The Appellant argued that since the beginning of the COVID-19 pandemic, the firm has had a difficult time retaining employees. For a time, employees were constantly in training. The Appellant stated that the employees who committed the violations were fairly new and were still going through training. According to the Appellant, those employees are no longer employed at the store. The Appellant stated that it has taken steps to prevent incidents like this from happening in the future. For instance, it called an emergency meeting with all employees and reiterated SNAP rules, and explained that any employee knowingly committing violations would have their employment terminated. The Appellant expressed its confidence that further training would minimize future violations.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated January 5, 2021. This letter informed the Appellant that it was the determination of the Retailer Operations Division that violations did occur as outlined in the charge letter and that a six-month disqualification penalty would be imposed in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that consideration for a hardship civil money penalty was given, but the Appellant was not eligible for a CMP because there were other authorized stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked January 8, 2021, the Appellant appealed the agency's determination by requesting an administrative review. The request was granted and the case was assigned to an administrative review officer. Implementation of the disqualification has been held in abeyance pending completion of this review. On July 12, 2021, the case was reassigned to administrative review officer Jon Yorgason.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular,

7 CFR § 278.6(a) and (e)(5) establish the authority upon which a six-month disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food.

7 CFR § 271.2 states, in part:

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....

Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section. [Emphasis added.]

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination...

7 CFR § 278.6(e) states, in part:

FNS shall take action as follows against any firm determined to have violated the Act or regulations...The FNS regional office shall:

(5) 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 [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.

INVESTIGATION DETAILS

During an undercover investigation conducted between July 2, 2020 and July 13, 2020, an FNS contractor completed five compliance visits at Cavazos Drive Thru. The agency's record indicates that a report of the investigation was provided to the Appellant as an attachment to the December 9, 2020 charge letter. The investigation report includes Exhibits A through E, and provides full details on the results of each compliance visit. SNAP violations were documented during four of the five visits; specifically, the exchange of ineligible nonfood merchandise for SNAP benefits. The report states that the store personnel allowed the investigator to purchase the following nonfood items:

- One 25-square-foot roll of aluminum foil (*HEB* brand), Exhibit A
- One 24-count box of plastic spoons (*HEB* brand), Exhibit A
- One 25-square-foot roll of aluminum foil (*HEB* brand), Exhibit C
- One 24-count box of plastic forks (*HEB* brand), Exhibit C
- One 25-square-foot roll of aluminum foil (*HEB* brand), Exhibit D
- One 24-count box of plastic forks (*HEB* brand), Exhibit D
- One 24-count box of plastic spoons (*HEB* brand), Exhibit E
- One 24-count box of plastic forks (*HEB* brand), Exhibit E
- One 150-count box of plastic sandwich bags (*Hill Country Fare* brand), Exhibit E

The report states that in Exhibit B, the clerk on duty refused to sell three SNAP-ineligible items to the investigator. In Exhibit E, the clerk refused to allow an exchange of SNAP benefits for cash (i.e. trafficking). The report indicates that three different clerks were involved in the SNAP violations. The charge letter states that the violations that occurred in Exhibits A, C, D, and E warrant a disqualification from SNAP for six months pursuant to 7 CFR § 278.6(e)(5).

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- Although the violations are regretful, it is an isolated situation.
- 2020 was very hard on the store. Some of the older employees did not want to work because they were scared, and the firm had to hire new employees almost every week, including clerks with no experience. Some would stay for only a short time and then quit. Two of the firm's employees even got COVID-19, requiring the firm to hire new people all over again. It was so hard to keep up with customer demand and sick employees that the firm just failed.
- Appellant requests one more chance and swears that violations will never happen again.

- The employees who committed the violations are no longer working at the store, and the Appellant has taken steps to ensure that incidents like this do not happen again. Such steps include an emergency meeting with all employees in which the Appellant explained that customers are not allowed to buy ineligible items with SNAP benefits. Any employee doing so will have their employment terminated.

In support of its contentions, the Appellant provided a list of 11 different employees who quit their jobs during 2020. The Appellant also submitted a copy of a notice that was apparently given to all of its employees. The notice states generally that the firm has zero tolerance for SNAP violations and automatic termination will occur for employees who put the company in jeopardy. Finally, the Appellant submitted copies of positive COVID-19 test results for two employees. Both tests occurred on July 8, 2020.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions submitted, including any not specifically summarized or explicitly referenced in this document.

ANALYSIS AND FINDINGS

The Appellant has not provided any information or evidence to counter FNS's investigation report. In fact, the Appellant appears to acknowledge that violations occurred, largely blaming them on COVID-19 pandemic conditions that were being experienced by the firm. Because the violations themselves do not appear to be in dispute, it is the finding of this review, through a preponderance of the evidence, that SNAP violations did occur as charged and a penalty is warranted. The balance of this review will examine the Appellant's remaining relevant contentions.

Extenuating Circumstances

The Appellant argues that the violations were caused by extenuating circumstances from the national COVID-19 health crisis that erupted in the months prior to the investigation. The Appellant contends that during that time, the firm was experiencing high employee turnover and was constantly training new employees and trying to keep up with high customer demand.

With regard to this contention, this review is sympathetic to the chaotic circumstances experienced by retailers during the pandemic, particularly during its early stages. However, such circumstances do not provide a valid basis for dismissing the charges or modifying the penalty in any way. The record shows that the Appellant owner signed an application to participate as a retailer in SNAP. By signing this application, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. The record clearly establishes that the owner agreed to abide by program rules, including taking responsibility for violations committed by any of the firm's employees, whether paid or unpaid, new, full-time or part-time. Regardless of which clerks are operating the cash register at a given time and regardless of whom firm ownership authorizes to handle store business, the ownership of the firm is ultimately responsible for the proper training of staff and the monitoring and handling of SNAP benefit transactions.

Based on the actions of the clerk in Exhibit B, in which she refused to sell ineligible items to the investigator, and the actions of another clerk in Exhibit D, in which he refused to allow the investigator to exchange SNAP benefits for cash, it is likely that some employee training related to SNAP had previously taken place. But with program violations being committed by three different clerks, it is apparent to this review that employee carelessness or poor supervision was occurring at this store, and pandemic conditions cannot be used as justification for violative actions. Accordingly, this review finds that a six-month disqualification penalty is proper and is entirely in line with SNAP regulations at 7 CFR § 278.6(e)(5). This penalty is also consistent with sanctions imposed upon other retailers that have committed similar violations.

Remedial Actions Taken

The Appellant contends that it has taken corrective actions to ensure that program violations do not happen again, including retraining its employees and posting new signage about employee responsibilities when handling SNAP benefits. The Appellant further states that the employees who committed the violations are no longer employed at the store.

With regard to these steps taken by the Appellant, it must be made clear that this review is limited to the facts that existed at the time the violations were committed. This review has no authority to consider any subsequent remedial actions, such as retraining employees, that may have been taken or that will take place so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of alleged or planned corrective actions implemented after the discovery of program violations. Accordingly, the Appellant's remedial actions do not provide a valid basis for dismissal or modification of the disqualification determination.

Civil Money Penalty

Although not requested by the Appellant, the Retailer Operations Division evaluated the firm's eligibility for a hardship civil money penalty in lieu of disqualification and determined that the firm was not eligible for this alternative penalty.

To address potential difficulties that SNAP households might incur when a firm is disqualified, regulations at 7 CFR § 278.6(f)(1) allow, in limited circumstances, for a civil money penalty to be imposed instead of disqualification. Specifically, the regulation states that a CMP is permitted when a firm's disqualification would cause "hardship" to SNAP households.

While it is recognized that some degree of inconvenience to SNAP recipients is likely whenever a retail food store is disqualified for a period of time and households are forced to use their benefits elsewhere, such inconvenience does not rise to the level of "hardship" unless there are no comparable SNAP-authorized stores in the area at which customers can shop. The regulation states that hardship to SNAP households occurs when 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); in such circumstances, a CMP in lieu of disqualification may be considered.

It is the determination of this review that a disqualification of Cavazos Drive Thru would not cause hardship to SNAP households because there are other shopping options in the area. According to agency records, there are at least half a dozen similarly-stocked or larger SNAP-authorized retail stores located within a one-mile radius of Cavazos Drive Thru, including a medium sized grocery store and several convenience stores. There is also no evidence that the inventory at other stores in the area is not comparably priced. Because hardship conditions do not exist in this case, a CMP in lieu of disqualification cannot be granted.

CONCLUSION

Based on a review of all available information in this case, this administrative review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at Cavazos Drive Thru during a USDA-contracted investigation. All transactions cited in the letter of charges were either conducted or supervised by a USDA investigator and all are thoroughly documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record appears to be specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for ineligible, nonfood merchandise, and in all other critically pertinent details. Furthermore, the contentions and evidence presented by the Appellant do not persuade this review to dismiss or modify the penalty in any way. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, CHPC LLC dba Cavazos Drive Thru, is sustained.

In accordance with the Act and regulations, the disqualification penalty shall become effective 30 days after receipt of this decision. A new application for SNAP authorization may be submitted 10 days prior to the expiration of the six-month disqualification period.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

JON YORGASON
Administrative Review Officer

January 10, 2022