

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

**Cafe & Bakery Mucho Mexico,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0242917**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS) finds there is sufficient evidence to support the determination by the Retailer Operations Division to impose a one-year disqualification of Cafe & Bakery Mucho Mexico (“Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**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, when it imposed a one-year disqualification against Cafe & Bakery Mucho Mexico.

**AUTHORITY**

7 U.S.C. § 2023 and 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**

Cafe & Bakery Mucho Mexico was initially authorized to participate in SNAP on November 21, 2014. Agency records show that Appellant was previously sanctioned with a hardship civil money penalty in lieu of a six-month disqualification on December 26, 2017, for accepting SNAP benefits in exchange for ineligible non-food items on four occasions. Between February 2, 2021, and March 2, 2021, the USDA conducted an undercover investigation of Cafe & Bakery Mucho Mexico to ascertain the firm’s compliance with Federal SNAP law. Agency records show that during the investigation Appellant again violated SNAP regulations by accepting SNAP benefits in exchange for ineligible non-food items on three separate occasions.

In a letter dated March 15, 2021, the Retailer Operations Division charged Appellant with accepting SNAP benefits in exchange for ineligible non-food merchandise, in violation of 7 CFR § 278.2(a). The charge letter informed Appellant that the violations warranted a one-year disqualification period from SNAP, as provided in 7 CFR § 278.6(e). 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.

Appellant, through counsel, responded to the charge letter on March 22, 2021, April 12, 2021, July 2, 2021, and August 10, 2021. In the response, Appellant did not deny that the violations occurred as reported, but rather attempted to establish eligibility for a hardship CMP. Appellant claimed the business was unique from other businesses in the area, by describing the longer store hours, the availability of the store during natural disasters or inclement weather, and the homemade bread and bakery goods that were not carried by other businesses in the immediate area.

After considering the Appellant's response and further evaluating the evidence, the Retailer Operations Division issued a determination letter, dated November 10, 2021. This letter informed the Appellant that the Retailer Operations Division found that the violations did occur as outlined in the charge letter and that a one-year disqualification would be imposed in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that Appellant was considered for a hardship CMP but was ineligible because there were other authorized stores in the area selling as large a variety of staple foods at comparable prices.

On November 18, 2021, Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and implementation of the one-year disqualification has been held in abeyance pending completion of this review. In supplemental correspondence emailed on December 30, 2021, Appellant, through counsel, submitted additional information in support of the request for administrative review.

## **STANDARD OF REVIEW**

In an appeal of an adverse action, the appellant bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. This means the 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**

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

[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(e) states, in part:

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

(4) Disqualify the firm for 1 year if:

(i) It is to be the first sanction for the firm and the ownership or management personnel of the firm have committed violations such as the sale of common nonfood items in amounts normally found in a shopping basket, and FNS had not previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating the regulations; or

(ii) The firm has accepted SNAP benefits in payment for items sold to a household on credit.

(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.

**(6) Double the appropriate period of disqualification prescribed in paragraphs (e) (2) through (5) of this section as warranted by**

**the evidence of violations if the same firm has once before been assigned a sanction.** [Emphasis Added.]

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. **FNS may disqualify a store which meets the criteria for a civil money penalty if the store had previously been assigned a sanction.** [Emphasis Added.]

### SUMMARY OF INVESTIGATION

During an undercover investigation conducted between February 2, 2021, and March 2, 2021, FNS completed five compliance visits at Cafe & Bakery Mucho Mexico. A report of the investigation was provided to Appellant as an attachment to the charge letter, dated March 15, 2021. The report included Exhibits A through E and provided full details on the results of each compliance visit. SNAP violations documented during three of the five visits included the exchange of ineligible non-food merchandise for SNAP benefits. One clerk committed the violations. The report noted that the following ineligible non-food items were sold in exchange for SNAP benefits: bathroom tissue, face cream, deodorant, hair gel, and bars of soap.

The report noted that an investigator attempted to exchange SNAP benefits for ineligible non-food merchandise on one other occasion but the attempt was refused by the clerk on duty, as documented in Exhibit E. Likewise, the investigator attempted to exchange SNAP benefits for cash on two occasions but was also refused, as documented in Exhibits D and E. The charge letter stated that the violations that occurred in Exhibits B, C, and D warranted a disqualification period of one-year pursuant to 7 CFR § 278.6(e)(4).

### APPELLANT'S CONTENTIONS

Appellant's contentions regarding this matter are summarized as follows:

- The store does in fact sell staple foods and not just bread and dessert products.
- The store is open 24-hours a day which allows for the average worker, who does shift work, to go in and purchase an assortment of products including food staples.
- The café and bakery is set up in such a way that allows the store to work during natural disasters and inclement weather. The café serves as a mini grocery store, restaurant, and bakery and offers staple products.
- The store carries many homemade food products by way of bread and bakery goods and staple products.

- The store is like a diamond in the community and is multi-faceted by way of its products and provides continuous and uninterrupted service to the many citizens of different socioeconomic backgrounds in the community.
- The SNAP program is highly beneficial to the people in this low-income area and a loss of SNAP authorization would not only hurt the community but also the store business.

In support of these contentions, Appellant submitted nine photographs of store inventory, including a variety of staple food items.

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

### **ANALYSIS AND FINDINGS**

If a store has never been sanctioned and its personnel, due to carelessness or poor supervision, sells common nonfood items for SNAP benefits, then the penalty under SNAP regulations is a six-month disqualification of the store's SNAP authorization. SNAP regulations provide that the penalty is doubled to one-year if the firm has once before been assigned a sanction.

This review examines the relevant information regarding the Retailer Operation Division's determination. Once the Retailer Operations Division establishes a violation occurred, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that the disqualification should be reversed. If this is not demonstrated, the case will be sustained. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

In this case, the report of investigation, signed by the investigator under penalty of perjury, documents that the charges of violations are based on the findings of a formal USDA investigation. A complete review of this documentation has yielded no known error or discrepancy. The investigation report is specific and thorough regarding the dates of the violations, the critical facts related thereto, and is supported by documentation that confirms details of the transactions. The Retailer Operations Division has thoroughly documented the transactions in which personnel at the store exchanged ineligible items for SNAP benefits.

In response to the charge letter and on administrative review, Appellant did not offer any evidence or alternative theories to counter the agency's investigative report. In fact, Appellant, does not deny the violations. Because the violations themselves do not appear to be in dispute, this review finds, by a preponderance of the evidence, that program violations did occur as charged by the Retailer Operations Division. Given Appellant was previously sanctioned with a hardship civil money penalty for the sale of ineligible items, a one-year disqualification is warranted in this case.

The balance of this review will address the Appellant's contentions regarding imposition of a CMP in lieu of disqualification.

### **Hardship Civil Money Penalty (CMP)**

The Appellant requests a CMP in lieu of disqualification, alleging disqualification would cause hardship to customers and the store's business. Appellant describes the store as unique in the area with regard to the store's hours and because the store offers homemade bread, bakery products, and staple food items. Appellant also says the store is open during natural disasters and other inclement weather, when nearby stores are not.

Regarding these contentions, although there is no regulatory or statutory basis for a CMP due to hardship to a store, SNAP regulations, at 7 CFR § 278.6(f)(1), do allow in some circumstances, for a CMP to be imposed in lieu of disqualification when the firm's disqualification would cause hardship to SNAP households. According to this regulation, hardship is defined as "no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices." However, the regulations also provide that, "FNS may disqualify a store which meets the criteria for a civil money penalty if the store had previously been assigned a sanction."

The Retailer Operations Division had determined that a disqualification of Cafe & Bakery Mucho Mexico would not cause a hardship to SNAP households as there were comparable or larger SNAP authorized stores in the area, and also cited the regulatory discretion to disqualify a store that meets the criteria for a CMP if the store had previously been assigned a sanction.

Appellant's contentions regarding store hours and availability during nature disasters are not a factor in a hardship CMP determination, though Appellant's unique staple food offerings do. Appellant argues that it offers homemade bread, bakery, and staple food items unavailable at other stores in the area and submitted lists of these unique foods as well as photographs of its inventory, including staple food items.

Many of the food items identified by Appellant as unique were in fact accessory foods or prepared foods, and not staple food items that are considered in an hardship CMP assessment. Photographs submitted by Appellant show staple food items, though most of these appear to be offered by stores identified by the Retailer Operations Division as comparable. Noticably, however, Appellant appears to carry a variety of bread items that are not offered at stores identified by the Retailer Operations Division. Regardless, Appellant was previously sanctioned with a hardship civil money penalty for selling ineligible items and the Retailer Operations Division had the authority to disqualify the store even if it were otherwise eligible for a CMP.

It is the determination of this review that the Retailer Operations Division took appropriate action in deciding not to assess a hardship CMP in lieu of a one-year disqualification of Cafe & Bakery Mucho Mexico.

### **CONCLUSION**

This review finds, by a preponderance of the evidence, that program violations of 7 CFR § 278.2(a) did occur at Cafe & Bakery Mucho Mexico. during a USDA investigation. Accordingly,

the Retailer Operations Division's determination to impose a one-year disqualification period is sustained.

In accordance with the Food and Nutrition Act and SNAP regulations, the one-year period of disqualification shall become effective 30 days after receipt of this decision. Appellant may submit a new application for SNAP authorization 10 days prior to the expiration of the one-year disqualification period.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this determination are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in SNAP regulations, at 7 CFR § 279.7. If 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.

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.

MICHELLE WATERS  
Administrative Review Officer

June 10, 2022