

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

**Pico Liquor And Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0257433**

**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 six-month disqualification of Pico Liquor And Market (“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 six-month disqualification against Pico Liquor And Market.

**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**

Pico Liquor And Market was initially authorized to participate in SNAP on August 27, 2021. Between September 24, 2022, and October 6, 2022, the USDA conducted an undercover investigation of Pico Liquor And Market to ascertain the firm’s compliance with Federal SNAP law. Agency records show that during the investigation Appellant appeared to have violated SNAP regulations by accepting SNAP benefits in exchange for ineligible non-food items on four separate occasions.

In a letter dated November 8, 2022, 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 six-month disqualification period from SNAP, as provided in 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.

Appellant replied to the Retailer Operations Division's charges by telephone on November 17, 2022. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

The Retailer Operations Division issued a determination letter, dated December 22, 2022. This letter informed Appellant that the Retailer Operations Division found that the violations did occur as outlined in the charge letter and that a six-month 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 January 2, 2023, Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and implementation of the six-month disqualification has been held in abeyance pending completion of this review. In supplemental correspondence emailed on February 1, 2023, Appellant submitted additional information in support of the request for administrative review.

### **STANDARD OF REVIEW**

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

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 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...

(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.

### SUMMARY OF INVESTIGATION

During an undercover investigation conducted between September 24, 2022, and October 6, 2022, FNS completed four compliance visits at Pico Liquor And Market. A report of the investigation was provided to Appellant as an attachment to the charge letter, dated November 8, 2022. The report included Exhibits A through D and provided full details on the results of each compliance visit. SNAP violations documented during each of the four visits included the exchange of ineligible non-food merchandise for SNAP benefits. The report noted that the following ineligible non-food items were sold in exchange for SNAP benefits: foam plates, plastic forks, paper towels, storage bags, soap, charcoal, plastic cups, mini cups, lighter fluid, shampoo, body and face wash, razors, shave gel, light bulbs, and a corkscrew.

The report noted that an investigator attempted to exchange SNAP benefits for cash in Exhibit D but was refused. The charge letter states that the violations that occurred in Exhibits A, B, C, and D warrant a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5).

### **APPELLANT'S CONTENTIONS**

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

- Appellant requests reconsideration of the disqualification determination.
- Appellant apologizes for the violations.
- Appellant asks for a warning in lieu of disqualification.
- A part-time employee of the store was responsible for the violations.
- Appellant does not think it is appropriate that the investigator spoke to the clerk in Hindi rather than English.
- Appellant questions why the investigator visited the store at night rather than during the morning.
- Appellant also questioned why the investigator only visited the store while that clerk was working.
- Appellant stated there is no video or audio footage of the visits because the store's footage erases after 30 days.

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.

This review examines the relevant information regarding the Retailer Operations 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 material error or discrepancy. The investigation report appears to be specific and thorough regarding the dates of the violations, the critical facts related thereto, and is supported by documentation that confirms the details of the transactions. The record further indicates that the Retailer Operations Division has documented the transactions in which personnel at the store allegedly 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 concedes that the violations occurred, claiming they were completed by a part-time employee of the store. 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 and a six-month disqualification is warranted. The balance of this review will address Appellant's remaining contentions.

### **SNAP Violations**

Appellant stated that a part-time employee of the store completed the violations. Appellant also expressed concerns about the investigator speaking Hindi to the clerk on duty and visiting the store in the evening when the part-time clerk was working.

Regarding these contentions, the investigative report does not address the language used when the clerk and the investigator spoke. It is possible this information was provided to Appellant by the clerk who conducted the violations. However, even if the investigator spoke to the store clerk in Hindi, this would not provide a valid basis for dismissing the charges or for modifying the sanction imposed.

The record shows that the Appellant owner signed an application to participate as a retailer in SNAP on August 17, 2021. By signing the 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.

The investigative report documents that Appellant's store sold ineligible items, for SNAP benefits on all four investigative visits. This review finds the investigative report is signed by the investigator under penalty of perjury and appears to be credible and fully documented. Available evidence shows that the transactions identified in the investigative report occurred at Appellant's store. The record includes photographs of the items purchased at the store by the investigator, photographs of any EBT receipts provided by the store to the investigator, and a donation certification listing the specific items purchased during the investigation and showing the charitable organization to which, the items were donated.

Every SNAP transaction that occurred at Appellant's firm appears on agency records along with the store's SNAP authorization number, the transaction date and time, the transaction amount, and the transaction method.

Appellant has offered no compelling evidence showing that these violative transactions did not take place. Accordingly, the violations in Exhibits A, B, C, and D were sanctionable and warrant the six-month disqualification imposed by the Retailer Operations Division.

### **Applicable Penalty**

Appellant requests a warning in lieu of disqualification.

The investigation report shows that in each of the four compliance visits made to the firm, ineligible products were sold in exchange for SNAP benefits. The Retailer Operations Division attributed the violations to the carelessness, or poor supervision by the firm's ownership or management," pursuant to 7 CFR § 278.6(e)(5) of the SNAP regulations, for which the regulatory penalty is a disqualification of six months. This is the minimum penalty for a firm that has not previously been sanctioned for violations such as the ones committed in this case. Accordingly, the sanction imposed by the Retailer Operations Division in this case fully conforms to SNAP regulations and is consistent with sanctions imposed upon other retail stores that have committed similar first-time violations.

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

Appellant requests a CMP in lieu of disqualification.

Regarding this request, 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." The Retailer Operations Division had determined that a six-month disqualification of Pico Liquor And Market would not cause a hardship to SNAP households as there were comparable or larger SNAP authorized stores in the area.

SNAP customers are likely to suffer some degree of inconvenience whenever any SNAP authorized retailer is disqualified, as the normal shopping pattern of SNAP customers may be altered. However, potential inconvenience is not the same as hardship, as defined in SNAP regulations.

It is the determination of this review that disqualification of Pico Liquor And Market, a convenience store, would not cause hardship to SNAP households because there are other shopping options in the area. According to agency records, there are a number of similarly stocked or larger SNAP authorized retail stores located within a one-mile radius of Pico Liquor And Market, including two superstores. There is also no evidence that Appellant sells its inventory at unusually low prices in comparison to nearby stores. Given that hardship conditions have not been established, this review agrees with the Retailer Operations Division's determination that a hardship CMP may not be assessed in lieu of disqualification.

### **CONCLUSION**

This review finds, by a preponderance of the evidence, that program violations of 7 CFR § 278.2(a) did occur at Pico Liquor And Market during a USDA investigation. Accordingly, the Retailer Operations Division's determination to impose a six-month disqualification period is sustained.

In accordance with the Food and Nutrition Act and SNAP regulations, the six-month 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 six-month 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. 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.

AMIE CHURCHILL  
Administrative Review Officer

April 24, 2023