

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

**Pico Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0256628**

**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 three year disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Pico Market (hereinafter “Pico Market” 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 three year period of disqualification against Pico Market.

**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 Pico Market with Federal SNAP law and regulations during the period August 8, 2022 through August 29, 2022. In a letter dated October 11, 2022, 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 five out of five compliance visits. The letter further informed the Appellant that the violations noted in Exhibits A, B, D, and E warranted a disqualification period of three years as provided in 7 CFR § 278.6(e)(3). 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 of delivery, the charge letter was delivered to the Appellant at the store address of record on October 12, 2022.

In responses to the Retailer Operations Division of October 25, 2022, October 26, 2022, and October 27, 2022, the Appellant responded to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

After considering the Appellant's responses and the evidence of this case, the Retailer Operations Division issued a determination letter dated November 14, 2022. The determination letter informed the Appellant that the firm was disqualified from the SNAP for a period of three years in accordance with 7 CFR § 278.6(a) and 7 CFR § 278.6(e)(3). 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 three year disqualification because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In an email correspondence of November 21, 2022, the Appellant 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 November 25, 2022. Upon acceptance of the administrative review request, implementation of the three year disqualification was held in abeyance pending completion of this 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)(3)(i) states, inter alia:

Disqualify the firm for 3 years if it is to be the first sanction for the firm and the evidence shows that: (i) It is the firm's practice to commit violations such as the sale of common nonfood items in amounts normally found in a shopping basket and the firm was previously advised of the possibility that violations were occurring and of the possible consequences of violating the regulations.

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 August 8, 2022 through August 29, 2022, USDA conducted five compliance visits at Pico Market. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated October 11, 2022. The investigation report included Exhibits A through E which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during five of the five 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 A, B, D, and E warrant a disqualification period of three years as provided in 7 CFR § 278.6(e)(3). 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 and in the administrative review request, the Appellant stated the following summarized contentions, in relevant part:

- The owner apologizes for the SNAP violations and understands her responsibilities with regard to following the SNAP rules.
- The owner takes full responsibility for the SNAP violations.
- The SNAP violations occurred without the owner's knowledge. Neither the owner nor the store manager were present during the period of violations due to personal family emergencies.
- The owner's husband passed away two years ago. He was the main owner of the business and always ran all operations of the business.
- The store is now managed by the husband's brother who took over all of the day-to-day operations. During the investigation period, the manager had to take an emergency trip out of the country to take care of a family member's funeral.
- The manager left the business to be managed by two employees who were the ones responsible for the SNAP violations.
- The store was not properly managed for two months and the employees left to manage the store did not follow the SNAP rules. Both employees claim that they must have been tricked or deceived and that they would never violate the SNAP rules.
- The owner lost more than a SNAP disqualification. She lost approximately \$4,000.00 based on register receipts and inconsistencies in cash and later discovered store inventory had been stolen.
- The employees were immediately fired upon notice of the SNAP violations.
- The owner guarantees that these types of SNAP violations will not occur in the future.
- The November 14, 2022 determination letter states that the Appellant was previously advised that violations were occurring and of the consequences of violating. This is an untrue statement as neither the owner nor the business has ever received any type of violations notice prior to this most recent violation.
- A SNAP disqualification would impose a financial hardship on the Appellant and will force the owner to close the store.
- The Appellant requests that this case be handled in a different manner other than a SNAP disqualification.

In support of these contentions, the Appellant submitted for review a flight itinerary for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) departing on July 29, 2022 and arriving August 28, 2022.

## 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.

The Appellant contends that the SNAP violations occurred without the owner's knowledge. Neither the owner nor the store manager were present during the period of violations due to personal family emergencies. The store was not properly managed for two months while the store manager was out of the country. The employees left to manage the store did not follow the SNAP rules. Both employees claim that they must have been tricked or deceived and that they would never violate the SNAP rules. The owner lost more than a SNAP disqualification. She lost approximately \$4,000.00 based on register receipts and inconsistencies in cash and later discovered store inventory had been stolen.

However, 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.

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 FNS investigative report shows that two employees working at the Appellant firm accepted SNAP benefits for ineligible nonfood items on five separate occasions during the investigative period indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The misuse of SNAP benefits noted in Exhibits A, B, D, and E warrant a disqualification period of three years as provided in 7 CFR § 278.6(e)(3). The exchange of these ineligible items for SNAP benefits is in violation of 7 CFR § 278.2(a). The report shows that the nature and scope of the violations under review do violate SNAP regulations, and the transaction amounts cited in the report also match FNS transaction records for the dates in question. Additionally, a review of the report shows no errors or discrepancies.

There is no regulatory threshold for the dollar value of the ineligible items purchased or for the timeframe in which they were purchased. The acceptance of SNAP benefits for ineligible items is a violation of SNAP rules and regulations. The ineligible items sold were obvious nonfood items and would not readily be confused with eligible edible food items.

The Appellant requests that this case be handled in a different manner other than a SNAP disqualification. The Appellant was not previously advised that violations were occurring and of the consequences of violating the SNAP rules. However, the SNAP regulations at 7 CFR § 278.6(e)(3) explicitly state that FNS shall disqualify a store for a three year period if it is to be the first sanction for the firm and the evidence shows that...It is the firm's practice to commit violations such as the sale of common nonfood items in amounts normally found in a shopping basket and the firm was previously advised of the possibility that violations were occurring and of the possible consequences of violating the regulations. FNS's records indicate that the Appellant was issued an official warning letter dated January 28, 2020 (and delivered to the Appellant at the store address of record and signed for by "Ibrahim" on January 31, 2020, per UPS confirmation of delivery) for selling an ineligible nonfood item with SNAP benefits during an undercover compliance investigation that was conducted from July 15, 2019 through September 3, 2019. **5 U.S.C. § 552 (b)(7)(E).**

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. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current

charges of violations or for mitigating their impact. 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 three year period was the appropriate penalty and there is no valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Corrective Action**

With regard to the Appellant's contentions with respect to the implementation of corrective actions to prevent future SNAP violations from occurring, it is important to clarify for the record that 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.

### **Financial Hardship**

With regard to the Appellant's contention that a SNAP disqualification would impose a financial hardship on 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 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).

Therefore, based on the evidence, the disqualification of Pico Market 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 three year 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 Pico Market warranting a disqualification of three years in accordance with 7 CFR § 278.6(e)(3). 7 CFR § 278.6(e)(3) states that FNS shall "Disqualify a firm for 3 years if it is to be the first sanction for the firm and the evidence shows that. . .It is the firm's practice to commit violations such as the sale of common nonfood items in amounts normally found in a shopping basket and the firm was previously advised of the possibility that violations were occurring and of the possible consequences of violating the regulations." The Appellant was issued an official warning letter dated January 28, 2020 for selling an ineligible nonfood item with SNAP benefits during an undercover compliance investigation that took place in 2019. 5 U.S.C. § 552 (b)(7)(E). Therefore, the decision to impose a three year disqualification against Pico Market, 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 three year 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 three year 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 3, 2023