

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

La Peraviana Inc.,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0226361

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 La Peraviana Inc. (hereinafter “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 La Peraviana Inc.

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, La Peraviana Inc., was initially authorized for SNAP participation on January 21, 1992. Between March 5, 2020 and March 11, 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 La Peraviana Inc. accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. According to the report, the Appellant firm sold coffee filters, plastic storage bags, plastic cutlery, scrubber sponges, and oven bags in exchange for SNAP benefits, which benefits may only be used for the purchase of eligible food.

In a letter dated June 22, 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.

In a letter dated June 25, 2020, the Appellant, through its store manager, responded to the allegations. The manager requested reconsideration of the six-month penalty, citing the firm's long tenure as a SNAP-authorized store without any prior violations. The manager further stated that with the COVID-19 pandemic, child care has been difficult and she has been unable to be in the store as frequently as usual. This has resulted in delegating responsibilities to less experienced cashiers. The manager stated that the violations were human errors and oversights due to a busy store with limited staff, and stated that the errors were not indicative of any intentional fraud or wrongdoing.

The store manager further requested a monetary fine in lieu of disqualification, claiming that a disqualification would result in a financial burden to the business that could ultimately result in closure of the store. According to the manager, such a disqualification would inconvenience many of the store's customers who rely on SNAP benefits for food and would need to travel farther to use their benefits at another store. Finally, the store manager provided assurance that the firm would be more diligent in training and supervising its employees to prevent violations from reoccurring in the future.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated October 28, 2020. 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 CMP 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 November 5, 2020, 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 9, 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 March 5, 2020 and March 11, 2020, an FNS contractor completed four compliance visits at La Peraviana Inc. The agency's record indicates that a report of the investigation was provided to the Appellant as an attachment to the June 22, 2020 charge letter. The investigation report includes Exhibits A through D, and provides full details on the results of each compliance visit. SNAP violations were documented during each of the four visits; specifically, the exchange of ineligible nonfood merchandise for SNAP benefits. The report states that the firm allowed the investigator to purchase the following nonfood items:

- One 50-count package of coffee filters (*Mr. Coffee* brand), Exhibit A
- One 25-count box of plastic storage and freezer bags (*Génere* brand), Exhibit B
- One 24-count box of plastic cutlery (*White Rose* brand), Exhibit B
- Two packages of heavy duty scrubber sponges (*S.O.S.* brand), Exhibit C
- Two 2-count packages of turkey-size oven bags (*Home Select* brand), Exhibit D
- One 24-count box of plastic spoons (*White Rose* brand), Exhibit D
- One 25-count box of plastic storage and freezer bags (*Génere* brand), Exhibit D

The report indicates that in Exhibit D, the clerk on duty refused to allow an exchange of SNAP benefits for cash (i.e. trafficking). According to the report, three different clerks conducted the four violative transactions. The charge letter states that the violations that occurred in Exhibits B, C, and D 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:

- In its previous response to the charge letter, Appellant explained how this unfortunate event occurred. Appellant hopes that FNS will understand that it was an honest mistake and in no way indicative of how the store has operated in the past 35+ years.
- Appellant would like an opportunity to pay a fine in lieu of a six-month disqualification, as a disqualification will be detrimental to the financial stability of the business and may result in closure of the store. Due to economic situations caused by the COVID-19 pandemic, a large portion of the firm's customers are reliant on food assistance programs for food and support.

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 presented, 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 and blames them, in part, on staffing limitations due to the coronavirus pandemic. The Appellant additionally states that the violations were an honest mistake and were committed without any intention of fraud. 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 remainder of this review will examine the Appellant's remaining relevant contentions.

No Prior Violations / Violations Caused by Staffing Issues

The Appellant argues that the store owner has owned the business for over 35 years and has been compliant with SNAP rules and regulations during that time. The Appellant further indicates that the violations were inadvertent human errors caused, in part, by the manager's decreased work hours as a result of child care unavailability stemming from the coronavirus pandemic. Without the manager present to help train and supervise, the store was forced to rely on less experienced store clerks.

While the Appellant may have been authorized for many years without any violations, the regulations are clear that when program violations do occur, specifically the exchange of ineligible nonfood items for SNAP benefits due to employee carelessness or poor supervision by the firm's ownership or management, a six-month disqualification is the required penalty, even on the first occasion. This review acknowledges that the violations might have been mistakes or due to inexperience, but these are not valid reasons to dismiss the charges. This review also finds that the COVID-19 pandemic likely had very little to do with the violations. As noted earlier, the investigation ran from March 5-11, 2020. The pandemic had little impact in the United States until March 13, 2020, when it was declared a national emergency.

Based on the actions of the clerk in Exhibit D, it is likely that some training or supervision relating to SNAP occurred at the store, particularly in relation to exchanging SNAP benefits for cash. However, with four consecutive program violations occurring over a period of one week by three different cashiers, it is apparent to this review that employee carelessness or poor supervision, even if unintentional, was commonplace at this store. Accordingly, this review finds that a six-month disqualification penalty is appropriate and is entirely in line with SNAP regulations. This penalty is also consistent with sanctions imposed upon other retailers that have committed similar violations. As such, a reversal or modification to the penalty is not appropriate.

Hardship to Appellant

The Appellant contends that a disqualification would be detrimental to the financial stability of the store and may force it to close because a large portion of its clientele relies on SNAP to obtain food.

With regard to this contention, SNAP regulations do not permit this review to consider dismissing or modifying the disqualification penalty on the basis of possible economic hardship to either the ownership personally or to the firm itself. To allow an exemption from penalties based on a purported financial hardship to the firm or its ownership would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA. Moreover, 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 requirements, but also to those retailers who have been disqualified from the program for similar violations.

Hardship to SNAP Households / Civil Money Penalty

The Appellant requests an opportunity to pay a fine in lieu of disqualification, arguing that a disqualification would place an inconvenience on its customers who would be forced to travel longer distances to redeem their SNAP benefits.

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 La Peraviana Inc. would not cause hardship to SNAP households because there are several other shopping options in the area. According to agency records, there are more than a dozen similarly-stocked or larger SNAP-authorized retail stores located within a one-mile radius of La Peraviana Inc., including two superstores and two supermarkets. 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 La Peraviana Inc. 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 provided 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, La Peraviana Inc., 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

October 20, 2021