

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review
Alexandria, VA 22302**

Corner Stop,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0202143

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a three-year disqualification against Brito Supermarket (“Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of Code of Federal Regulations (CFR) § 278.6(e)(3) in its administration of SNAP when it imposed a three-year period of disqualification against Appellant on November 20, 2017.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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

USDA conducted an investigation of the Appellant’s compliance with federal SNAP law and regulations during the period of June 6, 2017 through July 19, 2017.

The investigation reported that personnel at Appellant accepted SNAP benefits from an unauthorized firm on five separate occasions. These transactions were conducted by two unidentified female clerks.

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated October 17, 2017, that its firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.2(a). The letter stated, in relevant part, that “. . . the violations warrant a disqualification period of 3 years (Section 278.6(e)(3)). Under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification (Section 278.6(f)(1)).”

Appellant replied to the Retailer Operations Division’s charges in writing. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

The Retailer Operations Division notified Appellant in a letter dated November 20, 2017 that the firm was being disqualified for three years from participation as an authorized retailer in SNAP. This determination letter also stated that Appellant’s eligibility for a hardship civil money penalty (CMP) according to the terms of Section 278.6(f)(1) of the SNAP regulations was considered. However, the letter stated to Appellant that “. . . you are not eligible for the CMP because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.”

In a letter dated November 26, 2017, Appellant appealed the Retailer Operations Division’s assessment and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been on hold pending completion of this review.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(3) establish the authority upon which a three-year disqualification may be imposed against a retail food store or wholesale food concern.

Section 278.6(e)(3) of the SNAP regulations states, in part, when a firm is to be disqualified for three years if:

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; or . . . any of the situations described in paragraph (e)(2) of this section occurred and FNS had not previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating the regulations.

Section 278.6(e)(2) of the SNAP regulations states, in part, that a firm is to be disqualified for five years if:

Personnel of the firm knowingly accepted coupons from an unauthorized firm or an individual known not to be legally entitled to possess coupons.

In addition, 7 CFR § 278.6(f)(1) provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP households because of the unavailability of a comparable participating food store in the area to meet their shopping needs. 7 CFR § 278.6(f)(1) 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.

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*** (Emphasis added.)

APPELLANT’S CONTENTIONS

Appellant’s responses regarding this matter are essentially as follows:

- Appellant has not had a previous issue with SNAP;
- The violations occurred when the owner was away from the firm. Appellant provided 16 pages of travel documents and a one-page overdue rent notice;
- The employees made a mistake; and,
- Appellant has taken the appropriate action against the responsible employees.

These explanations may represent only a brief summary of Appellant’s contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

Appellant contends that the violations occurred when the owner was away from the firm and were due to employee mistakes. While the reason for the owner's absence may be deserving of sympathy, when ownership signed the FNS application to become a SNAP authorized retailer, this included a certification and confirmation that Appellant would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time." The violations listed on this certification document include accepting benefits on behalf of an unauthorized firm. Regardless of whom the ownership of a store may use to handle store business, or the circumstances causing the absence of the owner from the firm, ownership is accountable for the proper handling of SNAP benefit transactions.

This review is limited to considering the circumstances at the time the Retailer Operations Division's decision was made. It is not within this review's scope to consider actions that Appellant may have taken subsequent to this decision to begin to comply with program requirements. There is no provision in SNAP regulations for reducing an administrative penalty on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, Appellant's actions against the offending employees do not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

First SNAP Violation

Appellant's maintains that this is the first time there has been an issue related to SNAP. A record of program participation with no documented previous violations, however, does not constitute valid grounds for mitigating the impact of the present charges of sale of nonfood items. In addition, the investigation report shows that on five occasions store personnel accepting benefits on behalf of an unauthorized firm. For these types of violations 7 CFR § 278.6(e)(3) of the SNAP regulations provides that the minimum period for a disqualification is three years. This penalty is only permitted if the firm has not been sanctioned previously. Therefore, a three-year disqualification for the violations committed, the minimum, is the appropriate sanction in this case.

Investigative Record

Based on a review of the evidence, it appears that the program violations at issue did, in fact, occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted under the supervision of a USDA investigator and all are fully documented. The investigative record is specific and accurate with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to impose a disqualification of three years against Brito Supermarket from participating as an authorized retailer in SNAP is sustained.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. A new application for participation in SNAP may be submitted ten (10) days prior to the expiration of the three-year disqualification period. In addition, Appellant had previously been advised by the Retailer Operations Division of the further requirement, pursuant to 7 CFR § 278.1(b)(4), to post a collateral bond or irrevocable letter of credit as a further condition for continued participation in the SNAP.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (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.

RICH PROULX
Administrative Review Officer

January 16, 2018