

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

Colombian Products & Services Corp,

Appellant,

v.

Case Number: C0188022

Retailer Operations Division,

Respondent.

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 Colombian Products & Services Corp. (hereinafter “Appellant”) by the 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 Colombian Products & Services Corp.

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, Colombian Products & Services Corp., was initially authorized for SNAP participation as a convenience store on May 21,

2014. Between April 20, 2016, and June 16, 2016, FNS conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigative report documented that personnel at Colombian Products & Services Corp. accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. According to the report, the Appellant firm sold bathroom tissue, aluminum foil, plastic forks, and bars of soap in exchange for SNAP benefits, which benefits may only be used in exchange for eligible foods.

In a letter dated July 16, 2017, the Retailer Operations Division charged the Appellant with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). The charge letter stated that the violation of accepting SNAP benefits in exchange for ineligible nonfood items warrants a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further stated that under certain conditions and in accordance with 7 CFR § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

The agency's record shows that the Appellant did not reply to the charge letter.

After further consideration of the evidence in the case, the Retailer Operations Division issued a determination letter dated August 7, 2017. This letter informed the Appellant that it was the determination of the Retailer Operations Division that the violations did occur as outlined in the letter of charges 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 that the Appellant was not eligible for a CMP because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked August 21, 2017, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and implementation of the sanction has been held in abeyance pending completion of this review.

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 April 20, 2016, and June 16, 2016, the USDA completed five compliance visits at Colombian Products & Services Corp. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the July 6, 2017, charge letter. The investigation report includes Exhibits A through E, and provides full details on the results of each compliance visit. SNAP violations were documented during four of the five visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report notes that the following nonfood items were purchased by a confidential informant using SNAP benefits:

- One 3.5-ounce bar of Grisi Oat soap (*Avena* brand), Exhibit B
- One 525-sheet roll of bathroom tissue (*Soft & Plenty* brand), Exhibit B
- One 25-square foot roll of aluminum foil (*Rex* brand), Exhibit C
- One 51-count package of plastic forks (*Quality Home* brand), Exhibit C
- One 25-square foot roll of aluminum foil (*Rex* brand), Exhibit D
- One 3.5-ounce bar of soap (*Arrurr'u* brand), Exhibit D
- One 25-square foot roll of aluminum foil (*Rex* brand), Exhibit E
- One 2.25-ounce bar of Sandalo soap (*Murray & Lanman* brand), Exhibit E

The report notes that in Exhibit E, the confidential informant attempted to exchange SNAP benefits for cash (i.e. trafficking), but the clerk did not speak fluent English and did not appear to understand what the confidential informant was asking. As a result, no cash was exchanged. The report also indicates that no violations were attempted in Exhibit A. According to the report, the same clerk conducted all four violative transactions.

The charge letter states that the violations that occurred in Exhibits B, C, D, and E warrant a disqualification period of 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:

- The only defense the Appellant owner has is that he has had many employees in training, and unfortunately, not all employees in training do as they are told.
- The store has always been known for following the rules, but disgruntled employees take it upon themselves to discredit the store.
- The firm now has new employees that are informed about all of its products and regulations. The firm parted ways with the employees that it had in 2016 and has a new team with broad knowledge of everything that the store represents.
- The Appellant is very sorry for the inconvenience that this has caused and wants to assure FNS that with its new team, every detail is covered and these types of transactions will not happen again.

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 herein.

ANALYSIS AND FINDINGS

The Appellant has not provided any information or documentation to counter FNS's investigation report. Rather, the Appellant appears to acknowledge that the violations took place, implying that the violations were caused by disgruntled employees who did not do as they were told. Because the violations themselves do not appear to be in dispute, it is the determination of this review that program violations did occur as charged by the Retailer Operations Division. The balance of this review will address the Appellant's remaining contentions.

Appellant Owner Not Involved in Violations

The Appellant appears to imply that the violations were not the fault of the store owner, but rather were caused by disgruntled employees in training who did not do as they were told and who took it upon themselves to discredit the store.

With regard to this contention, the record shows that on March 12, 2014, the Appellant owner signed an application to participate as a retailer in SNAP. By signing this 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 Appellant 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. An owner is not free of responsibility simply because he or she was not in the vicinity at the time the violations occurred or because he or she was uninvolved in the violations. Regardless of which clerks are operating the cash register at a given time or whom firm ownership authorizes to handle store business, the ownership of the firm is ultimately responsible for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of its employees would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA.

Therefore, the Appellant's suggestion that the violations were not the fault of the owner does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Remedial Actions Taken

The Appellant contends that the employees who were at the firm in 2016 are no longer employed there. According to the Appellant, the firm now has a new team of employees who are informed about all of the firm's products and regulations and have broad knowledge of everything that the store represents. The Appellant further states that it is very sorry for the inconvenience the violations have caused and provides its assurance that with its new team in place, such violative transactions will not happen again.

With regard to these contentions, it is important to reiterate that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. This review is limited to the circumstances that existed at the time the violations were committed. It is not the authority of this review to consider any subsequent remedial actions, such as the firing or hiring of employees, that may have been taken or will take place so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations.

Therefore, the Appellant's contention that corrective action has taken place or that further remedial actions are planned does not provide a valid basis for dismissing the charges or for reducing the penalty imposed.

Civil Money Penalty

Although not requested by the Appellant, this review evaluated the Appellant's eligibility for a civil money penalty (CMP) in lieu of a six-month disqualification. SNAP regulations at 7 CFR § 278.6(f)(1) state that a CMP in lieu of a temporary disqualification is allowable 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."

It is the determination of this review that a disqualification of Colombian Products & Services Corp., 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 at least 13 comparable or larger SNAP-authorized retail stores located within a one-mile radius of Colombian Products & Services Corp., including a superstore and a supermarket.

It is recognized that some degree of inconvenience for SNAP households is likely whenever a SNAP-authorized store is disqualified and the households are forced to use their SNAP benefits elsewhere. However, in accordance with regulation cited above, hardship exists only when there are no other authorized stores in the area selling as large a variety of staple foods at comparable prices. Therefore, pursuant to 7 CFR § 278.6(f)(1), a hardship civil money penalty in lieu of disqualification cannot be assessed in this case.

CONCLUSION

Based on a review of the evidence in this case, there is no question that program violations of 7 CFR § 278.2(a) did occur during a USDA 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 is specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for ineligible, nonfood items, and in all other critically pertinent details. Pursuant to 7 CFR § 278.6(a) and (e)(5) the decision to impose a six-month disqualification against the Appellant, Colombian Products & Services Corp., 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 participation 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.

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

February 28, 2018