

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

El Coqui Grocery & Deli,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0210601

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA) that the record supports that El Coqui Grocery & Deli (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP) regulations. There is sufficient evidence to sustain a six month disqualification of Appellant from the SNAP as imposed by the Retailer Operations Division (Retailer Operations).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action in its administration of the SNAP, consistent with 7 CFR § 278.6(f)(1), 7 CFR § 278.6(a), and 7 CFR § 278.6(e), when it imposed a six month period of disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7, may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

CASE CHRONOLOGY

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of February 4, 2019 through March 12, 2019. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on multiple separate occasions that warrant a six month disqualification period. The items sold on multiple dates are best described as common nonfood items.

As a result of evidence compiled during the investigation, by letter dated April 29, 2019, Retailer Operations charged the owners with violating the terms and conditions of the SNAP regulations. Misuse of SNAP benefits was noted in Exhibits A, B, and D, that warrants a disqualification as a SNAP retail food store for a period of six months. The letter also states that under certain conditions FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

The record includes a reply to the Charge letter dated May 15, 2019. Retailer Operations informed the owner by Determination letter dated June 3, 2019, that the violations cited in the Charge letter occurred at the firm and that a six month period of disqualification was warranted. The letter also stated that eligibility for a hardship CMP was not applicable as there are other authorized retail food stores in the area selling as large a variety of staple foods at comparable prices.

The determination was appealed by an undated letter postmarked June 13, 2019. The administrative review was granted by letter dated July 5, 2019. Additional information was provided and postmarked July 26, 2019.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing relevant, credible 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 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 § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e)(5) establish the authority upon which a six month disqualification may be imposed against a retail food store.

7 CFR § 278.2(a) states: “Coupons may be accepted by an authorized retail food store only from eligible households or the households’ authorized representative, and only in exchange for eligible food.”

7 CFR § 278.6(e)(5) of the SNAP regulations states that a firm is to be disqualified for six 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(a) states: “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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system.”

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 benefit households because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It states: “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to SNAP benefit 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

A report of the investigation was provided to the Appellant as Exhibits with the Charge letter. The investigative report provides details on the results of the five compliance visits. The investigative report documents that SNAP violations were recorded during three store visits, conducted by two different clerks, that warrant a six month disqualification. The SNAP violations of 7 CFR § 278.2(a) involved the sale of nonfood items for benefits including toilet tissue.

APPELLANT’S CONTENTIONS

Consideration of all contentions was made whether recapitulated here or not.

- I have not been able to work steadily at the store.
- I was not there on the three occasions that the person temporarily helping did not split the item adequately.
- I have since trained everyone working or helping at the cash register the do’s and don’ts of EBT.
- We cannot afford to keep our business afloat without this form of payment.
- The suggested 6 month suspension would be detrimental to good people that depend on SNAP and to my firm.
- I suggest a 3 month suspension with a fine.

A named individual provided a customer petition of several pages that showed name, address and signature of the signers. It stated Appellant faithfully served the community for 10 years, many in the community are beneficiaries and use SNAP at the firm regularly, disrupting service would affect individuals and families, and unduly harm the owner. A handwritten note at the bottom of the last page stated “Didn’t get any more signitures [sic] because a lot of people stop coming into business, because of no food stamps.”

ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the determination made by Retailer Operations; it is limited to the facts at the basis of Retailer Operations’ determination at the time it was made. Upon review, the evidence supports that Appellant established a record of selling a nonfood item as defined by Section 271.2 of the regulations, on multiple occasions. The Exhibits furnished with the Charge letter warrant a disqualification period of six months. The regulations at 7 CFR

§ 278.6(e)(5) specify that FNS shall “disqualify the firm for six 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 nonfood items due to carelessness or poor supervision by the firm’s ownership or management.” Three violations are considered evidence of carelessness. Therefore, the violations in this case are not too limited to warrant a disqualification. The six month duration is by regulation, and is not negotiable.

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 SNAP 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 regulations stipulate that FNS disqualify the firm for six 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 as the sale of common nonfood items due to carelessness and poor supervision by the firm’s ownership or management.

The owner contends that SNAP training has been given to employees and helpers. This review is limited to what circumstances were at the basis of Retailer Operations’ action at the time such action occurred. It is not the authority of this review to consider what subsequent remedial actions may be undertaken so that an authorized store might begin to comply with program regulations. There are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective actions implemented subsequent to findings of program violations. Therefore, Appellant’s contentions that corrective actions have been taken, do not provide a valid basis for dismissing the charges or the penalty imposed.

FNS recognizes some degree of economic hardship is a likely consequence whenever a firm is disqualified from SNAP participation, however, there is no provision in the SNAP regulations for the waiver or suspension of an administrative penalty on the basis of possible economic hardship to a store based on the imposition of such penalty. To allow the owner to be excused from an assessed sanction based on economic hardship to Appellant would forsake fairness and equity to authorized stores that abide by the SNAP regulations, and to authorized store owners who have been disqualified for a similar regulatory violation.

The charges of violations are based on the findings of a formal USDA investigation. The transactions are fully documented, and a review of this documentation has yielded no indication of error or discrepancy in the reported findings. The investigative record is specific and thorough with regard to the dates of the violations, the specific facts related to the sales of a nonfood item, and in all other critically pertinent detail. The preponderance of the evidence supports that Appellant sold a nonfood item on multiple store visits in exchange for SNAP benefits, a regulatory violation.

CIVIL MONEY PENALTY

Retailer Operations rendered a finding that it was not appropriate to impose a CMP in lieu of a six month period of disqualification from SNAP. The record documents that there are other

authorized stores within a nearby radius of Appellant that stock a variety of comparable staple foods at comparable prices. The evidence does not support that it will cause hardship for SNAP recipients if Appellant is disqualified. Therefore, Appellant is not eligible for a hardship CMP.

CONCLUSION

The preponderance of the evidence in the record supports that the program violations charged did occur at Appellant. It is determined that three violations outlined in the investigative report Exhibits A, B and D were committed by two unidentified clerks at Appellant. These violations are evidence of carelessness and/or poor supervision by the owner.

The record documents that Retailer Operations considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the regulations, and properly denied it. There are other authorized firms nearby that carry as large a variety of staple foods at comparable prices. Therefore, the six month disqualification of Appellant from participation as an authorized retail food store in the SNAP is sustained.

RIGHTS AND REMEDIES

This penalty shall become effective thirty (30) days after receipt of this decision. A new application for participation in the SNAP may be submitted ten (10) days prior to the expiration of the six month period of disqualification. Please contact the Retailer Center at 877-823-4369 with general questions regarding the SNAP application process. Please contact Paul Arce at (503) 820-4834 if you have operations questions.

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023), and to the regulations at 7 CFR § 279.7 with respect to your right to judicial review of this decision. 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 owner resides or is 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, 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.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

July 30, 2019