

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

**Esperanza Grocery Corp,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0207738**

**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 six-month disqualification of Esperanza Grocery Corp (hereinafter Appellant), from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) as initially imposed by the Retailer Operations Division.

**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 six-month disqualification against Appellant.

**AUTHORITY**

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provides 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 USDA conducted an investigation of the compliance of Esperanza Grocery Corp, with Federal SNAP law and regulations from July 18, 2018 through July 24, 2018. In a letter dated August 21, 2018, Retailer Operations Division charged the Appellant firm with accepting SNAP benefits in exchange for merchandise which included common ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on three (3) out of four (4) compliance visits. The letter further informed the Appellant that the violations warranted a disqualification period of six months as provided in 7 CFR § 278.6(e)(5).

In correspondence dated August 30, 2018, Appellant, through counsel, responded to the charge letter and submitted a Freedom of Information act (FOIA) request. Appellant stated that it respectfully denied that the business sold ineligible items for SNAP benefits and emphasized that it has been in existence for over three years and were diligent about complying with and requiring employees to comply with all laws, pertaining to operation of business, including Federal SNAP regulations and New York State and New York City laws and regulations pertaining to restricted products.

Appellant stated that the Investigative Report asserted that some improper sales took place during three out of four investigatory visits, but they are vague or ambiguous in the precise details. The report doesn't identify the seller who made the alleged sales, nor does it state the time of day when the incidents occurred. The reports states that the investigator attempted to obtain cash for SNAP benefits was rebuffed each time by the employee conducting the sale. Ownership states that it has participated in the SNAP program for many years and have never had any issues with any permits. It has an established training policy program and has trained every worker to ensure the proper procedures are understood by them, especially those working at the counter and processing EBT transactions. The official poster provided by FNS are posted in the store. Appellant, through counsel, stated that should the SNAP program decide that a violation did occur, although the employees all deny having committed the alleged violations, it respectfully requests that FNS consider that a Civil Money Penalty be imposed instead of a six month disqualification. The record reflects that Counsel's FOIA documents were received on September 14, 2018.

After reviewing the evidence and the response from the Appellant, Retailer Operations Division issued a determination letter dated March 14, 2019. The determination letter informed the Appellant it was disqualified from the SNAP for a period of six months in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that Retailer Operations Division considered Appellant's eligibility for a hardship CMP under 7 CFR § 278.6(f)(1). Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the six-month disqualification because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter dated March 27, 2019, the Appellant requested an administrative review of the Retailer Operations Division's determination. The appeal was accepted and the implementation of the six-month disqualification was held in abeyance pending completion of this review.

### **STANDARD OF REVIEW**

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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**

The controlling statute in this matter is contained in the Food & 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) establish the authority upon which a period of 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 food 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 1977, 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)(5) states, inter alia: “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, inter alia: “FNS may impose a civil money penalty as a sanction in lieu of 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.”

### **APPELLANT’S CONTENTIONS**

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

1. Respondent respectfully denies that the violations were proven of that the business sold ineligible items for SNAP benefits.
2. The Investigation Reports are vague or ambiguous in the precise details and don’t identify the seller who make the alleged sales, nor do they state the time of day when the incidents occurred. Nor do they state how much was allegedly charged for ineligible items.
3. Ownership states that she has participated in the SNAP program for many years and has never had an issue with any of her permits. She has an established training policy program and trained every worker every quarter to ensure the proper procedures are understood by them, especially those working at the counter and processing EBT transactions. The official posters provided by FNS are posted in the store.
4. The decision was in error in denying eligibility for a hardship Civil Money Penalty in lieu of a six month disqualification. However it is a densely populated area with many

older or infirm customers who would have difficulty walking to other stores and crossing the Grand Concourse, a wide boulevard.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

## **ANALYSIS AND FINDINGS**

FNS initially authorized Esperanza Grocery Corp as a convenience store on January 26, 2011. During an investigation from July 18, 2018 through July 24, 2018, the USDA conducted four (4) compliance visits at Appellant's store. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated August 21, 2018. The investigation report included Exhibits A through D, which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were committed during three (3) of the four (4) compliance visits. They involved the sale of one 30 count package of Better Valu foam plates, one 75 square foot roll of Red & White aluminum foil, one 106 count 2 ply roll of Bounty paper towels, one 30 count package of Better Valu foam bowls and one 150 count box of Hefty sandwich bags. A clerk refused the purchase of one ineligible item in Exhibit D and the exchange of an undisclosed amount of SNAP benefits for cash in Exhibit D.

With regard to Appellant's contentions, through counsel, it is important to note that as owner of the store, Appellant is liable for all volatile transactions handled by either paid or unpaid store personnel. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food Stamp Act and the enforcement efforts of the USDA. Additionally, a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

Appellant, through counsel, contends that the Investigative Report is vague or ambiguous in the precise details and don't identify the seller who made the alleged sales nor does it state the time of day when the incidents occurred. With regard to these contentions, and based on a review of the evidence in this case, there is no question that program violations did occur. The record reflects that an unidentified female clerk, working at Appellant, sold common ineligible items to an FNS, USDA Investigator on three occasions. In all transactions, the clerk had the option and choice to refuse the ineligible items once she was aware that the purchase was with SNAP. These transactions are clear violations of the SNAP regulations as cited herein. The investigative record is specific and accurate with regard to the dates of the violations, the exchange of SNAP benefits for ineligible items, and in all other critically pertinent detail. A review of this official documentation has yielded no indication of error or discrepancy in any of the reported findings. As such, the contentions presented do not constitute valid grounds for dismissal of the current charges of violations, or for mitigating the impact of those charges. The

Retailer Operations Division's initial determination to impose a six-month disqualification in this matter was proper, and the determination is sustained

Appellant, through counsel, contends that ownership has participated in SNAP for many years and has never had an issue with any permits and has established a training policy program and trained every worker every quarter to ensure the proper procedures are understood, especially those working at the counter and processing EBT transactions. With regard to these contentions, it is important to note that a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges. Furthermore, In support of Appellant's contention that the firm is eligible for a CMP, it described its compliance policy and practice. However, Appellant did not submit documents or other evidence in support of its statements. In this regard, the various statements made by Appellant is not "substantial evidence" that fulfills each of the four criteria of 7 CFR § 278.6(i), demonstrating "that the firm had established and implemented an effective compliance policy and program to prevent violations."

Based on a review of the evidence in this case, there is no question that program violations did occur. A female clerk working at Appellant sold common ineligible items to an FNS investigator on three (3) separate investigative visits. The investigative record is specific and accurate with regard to the dates of the violations, the exchange of SNAP benefits for ineligible items, and in all other critically pertinent detail. As such, the contentions presented do not constitute valid grounds for dismissal of the current charges of violations, or for mitigating the impact of those charges. Based on a review of the evidence in this case, it appears that the SNAP violations at issue did, occur as charged.

### **CIVIL MONEY PENALTY**

Appellant, through counsel, contends that the decision to deny a hardship CMP in lieu of a six month disqualification was in error. It is located in a densely populated area with many older or infirm customers who would have difficulty walking to other stores and crossing the Grand Concourse, which is a wide boulevard. With regard to this contention, it must be noted that the SNAP regulations do not define hardship as inconvenience or lack of "comparable accommodations," but rather simply as the lack of an "authorized retail food store in the area selling as large a variety of staple food items at comparable prices." The Agency further clarifies the regulations by defining "in the area" to mean within a one mile radius in urban areas and within a three mile driving distance in rural areas. Bronx, New York is designated by the U.S. Census Bureau as "urban."

Retailer Operations Division considered Appellant's eligibility for a hardship CMP 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 six-month disqualification because there were at least 83 other SNAP authorized retail stores, within a half-mile radius of Appellant, including small and medium grocery stores, supermarkets, superstores and other convenience stores all selling as large a variety of staple foods at comparable prices.

## **CONCLUSION**

The documentation presented by Retailer Operations Division provides through a preponderance of the evidence that the violations as reported occurred at the Appellant firm. 7 CFR § 278.6(e)(5) specifies 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 common nonfood items due to carelessness or poor supervision by the firm’s ownership or management.

The violations were determined by Retailer Operations Division to represent the first sanction for the firm and evidence carelessness and poor supervision. Therefore, the imposition of a six-month disqualification, the least severe penalty allowed by regulation, is appropriate.

It is therefore established that the violations as described in the letter of charges did in fact occur at the Appellant firm warranting a disqualification of six months in accordance with 7 CFR § 278.6(e)(5). Based on the discussion herein, the decision to impose a six-month disqualification against Esperanza Grocery Corp is appropriate and the action is sustained.

In accordance with the Act and regulations, the six-month period of disqualification shall become effective thirty (30) days after receipt of this letter. The Appellant may submit a new application for SNAP participation ten (10) days prior to the expiration of the six-month disqualification period.

## **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (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 (FOIA), 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.

Monique Brooks  
ADMINISTRATIVE REVIEW OFFICER

August 12, 2019