

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

La Consolarena Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0213352

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 Consolarena Market (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 La Consolarena Market.

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 Consolarena Market, was initially authorized for SNAP participation as a small grocery store on April 29, 1987. Between April 10, 2019, and April 29, 2019, FNS 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 Consolarena Market accepted SNAP benefits in exchange for ineligible items on four separate occasions. According to the report, the Appellant firm sold toilet tissue, plastic sandwich bags, and aluminum foil in exchange for SNAP benefits, which benefits may only be used for the purchase of eligible foods.

In a letter dated June 3, 2019, 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 nonfood 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 correspondence between June 5, 2019, and June 11, 2019, the Appellant responded to the charges. The Appellant owner stated that he checked his cash register report and could not find the transaction noted in Exhibit A of the investigation report. The Appellant also disputed the investigator's physical description of the cashier. The Appellant argued that the store has been in operation since 1986 and has always prevented customers from purchasing ineligible items with SNAP benefits. The Appellant further stated that the violations were not intentional and would not happen again.

After considering the Appellant's responses and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated June 17, 2019. 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 that 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 June 24, 2019, the Appellant appealed the agency's determination by requesting an administrative review. The request was granted and implementation of the disqualification 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 10, 2019, and April 29, 2019, the Food and Nutrition Service completed four compliance visits at La Consolarena Market. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the June 3, 2019, 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 following nonfood items were purchased by an investigator using SNAP benefits:

- One roll of toilet tissue (*Scott* brand), Exhibit A
- One 180-count package of sandwich bags (*Glad* brand), Exhibit B

- One roll of toilet tissue (Scott brand), Exhibit C
- One 180-count box of sandwich bags (*Glad* brand), Exhibit C
- One roll of toilet tissue (*Scott* brand), Exhibit D
- One 30-square-foot package of aluminum foil (*Reynolds Wrap* 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). The report states that the same clerk conducted all four violative transactions.

The charge letter states that the violations that occurred in Exhibits A, B, C, and D 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:

- Appellant has been authorized to accept SNAP for 33 years, has always followed the rules, and has never had any problems with transactions in the store.
- The investigator stated that he/she asked for cash back in four different instances, but stated that the firm refused to accommodate these requests all four times. Appellant does not recall having any type of conversation with regard to cash back, let alone four times.
- Appellant is certain that moving forward, it will pay more attention to this matter.
- Appellant assures FNS that this will never happen again and begs for FNS’s understanding.
- Appellant values its store as well as Federal and State rules.

In a second letter dated August 2, 2019, the Appellant provided the following additional contentions:

- When the Appellant originally received the charge letter, it took the position that it could not argue with the government, even if it felt that it was wrongly accused. So it responded in a mild manner that could have been interpreted as an admission. What the Appellant really meant was that it did not commit the violations at all.
- The store has been in operation since 1986 and has been committed to doing business the right way. The firm is known as being highly ethical with the well-being of the community its main concern.
- The firm has established a partnership with Massachusetts General Hospital to provide healthier food alternatives in the store. This relationship is longstanding and successful and while it has not provided extra income for the store, it has provided the community with incentives to eat healthier food.
- Appellant found the following discrepancies in the investigation report:
 - Only two people work in the store, and neither has a “thin moustache,” as stated in the report. The owner has a full goatee and the other is clean shaven. The height of the clerk was listed in the report as 5’6” to 5’9”, but the owner is 5’11”.
 - The used value of the products sold in Exhibits B, C, and D do not match up with the firm’s pricing.

- Three of the exhibits list the sale of Scott brand toilet tissue, but the Appellant has never included toilet tissue as a SNAP purchase. The Appellant would only put such a product on the card as a cash transaction. The same goes for other ineligible items. In 33 years, the firm has never had an infraction.
- In Exhibit D, the investigator claimed that the clerk said, “I’ll let you know,” in reply to the investigator’s question of whether he/she could “go get him merchandise with my stamps for cash.” Appellant completely denies giving anybody an indication that such a transaction was ever a possibility.
- Appellant requests that FNS not subject the store and its customers to the pain that would occur if the firm’s SNAP authorization was revoked.

In support of its contentions, the Appellant submitted a one-page letter dated June 25, 2019, from 5 U.S.C. § 552 (b)(6) & (b)(7)(C), Community Coordinator at Healthy Chelsea, part of Massachusetts General Hospital. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) describes the important partnership between La Consolarena Market and the Hospital and states that the fraudulent activities described in the charge letter are “not at all possible, as (the store owner) is above reproach and highly ethical.” The letter also claims that the person who reported the infractions to USDA was likely an older man named 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (last name unknown), who hangs around the store and complains about “freeloaders” who use public benefits like SNAP and WIC. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) requests that FNS check into this claim to see if the informant was this 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

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 evidence to counter FNS’s investigation report. While the Appellant has denied committing the violations and claims that the investigation report has a number of discrepancies, no actual evidence has been offered to support these claims. Because the Appellant has not submitted any evidence to refute the allegations, it is the determination of this review that program violations did occur as charged by the Retailer Operations Division and a six-month disqualification is warranted. The balance of this review will address the Appellant’s key contentions in further detail.

Discrepancies in Investigation Report

The Appellant owner contends that there are a number of discrepancies in the investigation report. For example, the Appellant claims that the investigator asked for cash back on four separate occasions, but the Appellant does not recall having any conversations about exchanging SNAP benefits for cash, let alone four times. The Appellant further denies ever giving anyone an indication that exchanging merchandise for cash was a possibility. The Appellant also disputes the investigator’s physical description of the cashier involved in the violations and contends that the products sold during the investigation do not match up with the store’s prices. Finally, the Appellant argues that while the investigator claims to have purchased toilet tissue on three

separate occasions, the Appellant would never sell such items – or any ineligible items – to a person paying with SNAP benefits.

While the Appellant may dispute some of the facts listed in the investigator’s report, it has unfortunately offered no evidence to support its claims. Conversely, the investigator not only produced a written report of the events, he/she also provided photographs of the items purchased and point-of-sale receipts showing the name of the store, the date and time of the transactions, and the total amount spent. These receipts correspond precisely to the information listed on the report. Accordingly, the preponderance of evidence leans heavily in favor of the agency. This review finds that the transactions in the report very likely occurred as described.

It is certainly possible that an investigator may not describe a cashier’s physical characteristics with exactness. For instance, the Appellant claims that he is two inches taller than what the investigator estimated. The Appellant also claims that none of the employees have a “thin moustache.” This review finds the investigator’s descriptions to be within a reasonable margin of error and of little consequence to the report as a whole, particularly since there is other compelling evidence that the transactions occurred and because interactions between an investigator and a cashier typically last for just a few short moments.

As for the Appellant’s claim that the investigator requested cash on four separate occasions, there is no evidence of this. The report plainly states that the only time the investigator requested cash was during the final visit to the store, as noted in Exhibit D.

In short, this review finds the Appellant’s claims of discrepancies within the investigator’s report to be inconsequential and do not provide a valid basis to dismiss the allegations.

No Prior Violations

The Appellant contends that it has been in business for 33 years without any infractions and has long been known as a store that is committed to doing business the right way. This contention implies that because of the firm’s history of compliance with SNAP rules, the disqualification penalty should be reconsidered or reduced.

With regard to this contention, the law is clear that when program violations occur, specifically the exchange of ineligible nonfood items for SNAP benefits due to carelessness or poor supervision by the firm’s ownership or management, a six-month disqualification is the required penalty, even on the first occasion. In this case, the Appellant committed program violations on four consecutive visits by an investigator, suggesting carelessness at a minimum, or at worst, willful disregard of program rules. Accordingly, 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 dismissal or reduction of the six-month disqualification due to the firm’s history is not appropriate.

Partnership with Massachusetts General Hospital

The Appellant contends that it has partnered with Massachusetts General Hospital to provide healthy food options at the store and submitted a letter of support from Hospital representative 5 U.S.C. § 552 (b)(6) & (b)(7)(C). In his letter, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) describes the partnership between La Consolarena Market and the Hospital and states that the fraudulent activities described in the charge letter are “not at all possible.” The letter also claims that the person who reported the infractions to USDA was likely an older man named 5 U.S.C. § 552 (b)(6) & (b)(7)(C), who hangs around the store and complains about “freeloaders.”

Unfortunately, this letter from Massachusetts General Hospital does not constitute evidence of innocence. A positive relationship between a firm and a community organization has no bearing on the investigation in question, particularly since there is ample evidence in the investigative record that the violations did, in fact, take place at the Appellant store. As to the claim that an older man named 5 U.S.C. § 552 (b)(6) & (b)(7)(C) reported the infractions to USDA, there is no evidence whatsoever to support this assertion. As best as this review can determine, there have been no complaints about this store from 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or anyone else.

Hardship to Households / Civil Money Penalty / Hardship to Appellant

The Appellant requests a dismissal of the charges in this case, claiming that a six-month disqualification will cause pain to both the store and its customers.

With regard to the contention that the firm’s customers will be impacted by a disqualification, it is recognized that some degree of inconvenience to SNAP recipients is likely whenever a retail food store is disqualified and households are forced to use their benefits elsewhere. To address potential difficulties that SNAP households might face when a firm is disqualified, regulations at 7 CFR § 278.6(f)(1) allow for a civil money penalty to be imposed instead of disqualification when the firm’s disqualification would cause “hardship” to SNAP households. According to this regulation, hardship 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.”

It is the determination of this review that a disqualification of La Consolarena Market, a small grocery store, would not cause hardship to SNAP households because there are several other shopping options in the area. According to agency records, there are approximately 20 similarly-stocked or larger SNAP-authorized retail stores located within a one-mile radius of La Consolarena Market, including a supermarket and two superstores. There is also no evidence that La Consolarena Market sells its inventory at unusually low prices in comparison to nearby stores. Because hardship conditions do not exist in this case, a civil money penalty in lieu of disqualification is not an available option.

As to the claim that a disqualification would negatively affect the firm, there are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm itself.

CONCLUSION

Based on a review of all 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 Consolarena Market 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 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. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, La Consolarena Market, 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.

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 3, 2019