

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

La Qaxaquena Deli Grocery Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0198571

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 La Qaxaquena Deli Grocery Inc. (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 La Qaxaquena Deli Grocery Inc. with Federal SNAP law and regulations from June 29, 2017 through July 18, 2017. In a letter dated August 8, 2017, 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 four (4) 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 received August 16, 2017, Appellant replied to the charge letter and generally stated that the charges against the store in no way reflect how the store does business as a whole. The issue can be identified as an administrative error on behalf of the owners of the store. Recently there has been a need to hire temporary part-time workers to backfill some of the duties and responsibilities of the store owners. We did not properly go over the correct protocols with the workers regarding the SNAP system. Appellant stated that it takes full responsibility for the oversight and is prepared to pay a civil money penalty in lieu of a disqualification from SNAP. Appellant also stated that it will take steps to ensure that staff is trained properly in the use of the SNAP system and to ensure full compliance with the SNAP program.

In correspondence dated August 30, 2017, Retailer Operations Division granted Appellant a 10 day extension in which to submit an additional response to the charge letter. The letter stated “the time to respond to our letter of August 8, 2017 has been extended to September 6, 2017. (Note: The time to request a civil money penalty in lieu of permanent disqualification and to provide documentation to support such a request has not been extended.)”

In subsequent correspondence dated August 30, 2017, Appellant stated that it has provided documentation to support that the store sells specific grocery items essential to the Mexican community. By suspending participation in the SNAP, it would create an undue hardship for the community. The majority of the customers do not own motor vehicles and taking public transportation would add an additional financial hardship to many of its customers. Appellant listed specific Mexican products and stated that they could not be purchased in nearby supermarkets and grocery stores. Appellant named four nearby stores and indicated that these stores do not compare to its store and thereby requested a civil money penalty in lieu of disqualification.

After reviewing the evidence and the response from the Appellant, Retailer Operations Division issued a determination letter dated October 24, 2017. 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 August 11, 2017, and postmarked October 30, 2017, 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 made the following summarized contentions in its request for administrative review, in relevant part:

- Regarding the loss of our SNAP benefits in lieu of a CMP, we are appealing this decision based on the evidence we have previously submitted and ask that you rule for a Civil Money Penalty in lieu of a 6-month disqualification.
- The USDA's decision was based in part to other stores selling staple food items comparable and at the same price point as our products. We are a 100 percent Mexican grocery store and deli. We specialize in products that address the needs of the Mexican community.
- We have taken administrative steps to ensure there will be no further mishandling of the SNAP benefits protocols.

In subsequent correspondence dated November 21, 2017, Appellant provided 55 color photographs of its store stock as well as color photographs of some of the stock of three neighboring stores one of which only showed outside photographs. Appellant states that these stores do not carry a comprehensive inventory of Mexican staple food items and do not compare to its store. The closest store that sells products of its depth and scope is nearly five miles away.

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 La Qaxaquena Deli Grocery Inc. as a small grocery store on March 11, 2009. During an investigation from June 29, 2017 through July 18, 2017, 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 8, 2017. 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 four (4) of the four (4) compliance visits and involved the sale of the following:

- One box of Reynold Wrap aluminum foil;
- One roll of Bounty paper towels;
- One roll of 100 sheets Scott bathroom tissue;
- One 12.6 ounce bottle of Palmolive dishwashing liquid;
- One 22 ounce bottle of Fabuloso multi-purpose cleaner and
- One package of Dart plastic cold cups.

Store personnel refused to exchange an undisclosed amount of cash for SNAP benefits during Exhibit D. In its review request, Appellant did not refute the sale of common ineligible items during the investigation and admitted to improperly training temporary part-time employees.

Appellant contends that it has taken administrative steps to ensure there will be no further mishandling of the SNAP benefits protocols. With regard to this contention, it is important to

clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. As such, this review is limited to consideration of the relevant facts and circumstances at the time this decision was made. It is not within the scope of this review to consider actions Appellant may have taken subsequent to this decision to begin to comply with program requirements. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations.

Therefore, Appellant's contention does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed. Additionally, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that the firm may go out of business based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

The Appellant requested reconsideration of the denial of a civil money penalty under the circumstances of the investigation and contends that it is a 100 percent Mexican grocery store and deli and there are no other stores in the area that carry a comprehensive inventory of Mexican staple food items. The 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 101 other authorized retail stores, within a one-mile radius of Appellant, including 73 small grocery stores, five (5) large grocery stores, 14 supermarkets, eight (8) superstores selling as large a variety of staple foods at comparable prices and of these at least three (3) are similarly stocked carrying some or almost identical Mexican products, at comparable prices, as that of Appellant's store.

Therefore, Retailer Operations Division's determination that Appellant is not eligible for a hardship CMP in lieu of a six-month disqualification is sustained.

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 La Qaxaquena Deli Grocery Inc. 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

January 11, 2018