

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

La Tampiquena,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0190902

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 Tampiquena (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 Tampiquena with Federal SNAP law and regulations from August 23, 2016 through November 10, 2016. In a letter dated July 18, 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).

During a telephone conversation on July 31, 2017, with Retailer Operations Division, Appellant requested a 10 day extension in which to respond to the charge letter. In a letter dated July 31, 2017, Retailer Operations Division granted the 10 day extension to August 11, 2017. Appellant was also informed that 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 correspondence dated August 11, 2017, Appellant, through counsel, responded to the charge letter and generally stated that the store caters to a large Hispanic population and it would be a hardship for the Hispanic community, and others, if the store is disqualified. The store has been opened for over three years and EBT customers account for 35 percent of the sales. There have been no other prior violations and the evidence in the investigative report indicates that there were no sales for cash. The other purchases were minor items and were not extravagant products. The employee involved in the violations is no longer employed and the employees have begun an educational program which includes the video on the website and the instructional sheet provided in Spanish, to prevent problems that have been caused by lack of instruction.

After reviewing the evidence and the response from the Appellant, Retailer Operations Division issued a determination letter dated October 10, 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 October 16, 2017, the Appellant, through counsel, 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:

- This was the participant’s first offense. They have not been given a warning regarding the handling of EBT matters.
- We hereby request a civil money penalty instead of disqualification.

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 Tampiquena as a convenience store on May 28, 2014. During an investigation from August 23, 2016, through November 10, 2016, 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 July 18, 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 one 45 sheets of 2 ply roll of Fiesta paper towels, one classic cherry Chapstick, two 100 count boxes of Goodsense sandwich bags, one 3-pack of Trojan latex condoms, one 240 sheets of 2 ply Marcal Pro bath tissue, one .15 ounce Chapstick skin protectant. 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.

With regard to Appellant's contentions, it should be noted that a warning letter is not a prerequisite to a disqualification. The presence of a prior warning may in some cases increase the sanction imposed on a firm (see §278.6(e)(2), (3)(i) & (ii), (4) and (6)), while the lack of a warning does not decrease a sanction properly imposed or prevent the imposition of such a sanction. Additionally, departmental and agency investigators routinely determine the extent/severity of violations before referring cases to Retailer Operations Division for administrative action; Retailer Operations Division then again evaluate the nature and extent of violations in determining the appropriate administrative action; these standard procedures are seen to have been likewise followed in the present case. Thus, Appellant was duly notified of the violations in accordance with all pertinent regulations.

Additionally, it is important to clarify for the record that the purpose of this review is to determine if the earlier decision of the Retailer Operations Division, to disqualify Appellant from participation in the SNAP for a period of six months, was in fact a correct one. It is not within the scope of this review to consider what subsequent actions Appellant may have taken so that its store may begin to comply with program requirements.

CIVIL MONEY PENALTY

The Appellant requested reconsideration of the denial of a civil money penalty under the circumstances of the investigation. 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 nine other authorized retail stores, within a one-mile radius of Appellant, including other convenience stores and one supermarket, selling as large a variety of staple foods at comparable prices. Additionally, the store visit documentation and photographs show that Appellant does not stock any specific ethnic or specialty foods. The record reflects that the supermarket and at least two other convenience stores carry a full line of

Hispanic foods. Therefore, Retailer Operations Division's decision not to impose a CMP in lieu of 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 Tampiquena 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 9, 2018