

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

La Vaquita Mini Market,,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0192136

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a one-year disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against La Vaquita Mini Market 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 one-year disqualification against La Vaquita Mini 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 Vaquita Mini Market, was initially authorized for SNAP participation as a small grocery store on June 25, 2013. Between October 3, 2016 and November 14, 2016, 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 Vaquita Mini Market accepted SNAP benefits in exchange for ineligible

merchandise on three separate occasions. According to the report, the Appellant firm sold air freshener, soap, shampoo, plastic sandwich bags, fabric softener, and dishwashing liquid in exchange for SNAP benefits, which benefits are only permitted to be used in exchange for eligible foods.

In a letter dated March 14, 2017, the Retailer Operations Division charged the Appellant with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). The letter stated that the violation of accepting SNAP benefits in exchange for ineligible nonfood items warranted a disqualification period of six months pursuant to 7 CFR § 278.6(e)(5) and (6). The letter further stated that under certain conditions and in accordance with 7 CFR § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

In response to the charge letter, the Appellant submitted a letter dated March 15, 2017, in which it admitted that one of the cashiers who committed violations was an owner of the store. The Appellant acknowledged the infractions, but indicated that at least two of the violations, including the one committed by the owner, were due to inexperience with the cash register. The Appellant claimed that after the first three violations, the cashiers were properly trained and monitored, which is reflected in the final two visits to the store by the investigator. In those two visits, ineligible items were not permitted to be purchased with SNAP benefits.

Because the Appellant admitted that an owner of the firm had committed one of the violations, the Retailer Operations Division rescinded the original charge letter and issued a new charge letter dated April 13, 2017, this time with a disqualification period of one year instead of six months since an owner was directly involved in the violations. The letter stated that the harsher penalty was warranted in accordance with 7 CFR § 278.6(e)(4).

After receiving the second charge letter, the Appellant submitted another response letter, this one dated April 14, 2017. In this second letter, the Appellant repeated many of the same arguments it had presented earlier, but provided additional details regarding the owner's inexperience with the cash register. The Appellant repeated that proper training has now occurred for all employees. The Appellant further stated that if the firm were to be disqualified, both the firm and the surrounding community would suffer.

After considering the Appellant's reply to the charges as well as the evidence in the case, the Retailer Operations Division issued a letter dated April 26, 2017. This letter informed the Appellant that it was the determination of the Retailer Operations Division that the violations did occur as outlined in the letter of charges and that a one-year 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 civil money penalty was given, but that the Appellant was not eligible for a CMP because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

In a letter postmarked April 30, 2017, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and implementation of the sanction 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 & 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 one-year disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, *inter alia*:

[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, *inter alia*:

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, *inter alia*:

*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, *inter alia*:

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, *inter alia*:

FNS shall take action as follows against any firm determined to have violated the Act or regulations... The FNS regional office shall:

(4) Disqualify the firm for 1 year if:

(i) It is to be the first sanction for the firm and the ownership or management personnel of the firm have committed violations such as the sale of common nonfood items in amounts normally found in a shopping basket, and FNS had not previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating the regulations.

(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, *inter alia*:

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 October 3, 2016 and November 14, 2016, the USDA completed five compliance visits at La Vaquita Mini Market. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the March 14, 2017 charge letter. The investigation report included Exhibits A through E, which provided full details on the results of each compliance visit. SNAP violations were documented during three of the five visits, specifically the exchange of ineligible nonfood merchandise for SNAP benefits. The report noted that the following nonfood items were purchased by a confidential informant using SNAP benefits:

- One 8-ounce can of air freshener (*Airwick* brand), Exhibit A
- One 7-ounce bar of soap (*Zote* brand), Exhibit A
- One 15-fluid ounce bottle of shampoo (*White Rain* brand), Exhibit B
- One 80-count box of sandwich bags (*Red & White* brand), Exhibit B
- One 40-count box of fabric softener sheets (*Breezy* brand), Exhibit B
- One 15-fluid ounce bottle of shampoo (*White Rain* brand), Exhibit C
- One 40-count box of fabric softener sheets (*Breezy* brand), Exhibit C
- One 12.6-fluid ounce bottle of dish liquid (*Palmolive* brand), Exhibit C

The investigation report noted that in Exhibits D and E, the attempts by the confidential informant to purchase ineligible items were refused by the clerks on duty. The report further indicated that three separate clerks conducted the violative transactions during the investigation.

In evaluating the investigation report, the Retailer Operations Division determined that the violations that occurred in Exhibits A, B and C warranted a disqualification period of six months in accordance with 7 CFR § 278.6(e)(5). However, in its response to the charge letter, the Appellant admitted that an owner of the firm was the cashier on duty at the time that one of the violations was committed. In accordance with 7 CFR § 278.6(e)(4), when a firm's ownership or management personally commits violations involving the sale of ineligible items, a one-year disqualification is the required penalty.

APPELLANT'S CONTENTIONS

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

- The owner who committed one of the violations did not have proper experience behind the register when the violations occurred. He has a full-time job as an industrial mechanic and was mainly at the store on weekends when he did not have to work at his other job. At the time of his violation, working the cash register was not one of his duties at the store. The Appellant stated that this particular owner "barely had enough experience to work the register itself." On the day of the violation, he was the only person available to cover the store while his wife, who is the full-time owner, was away.
- The owner who committed the violation is now able to identify ineligible items more carefully. He now works at the store most days and performs his clerk duties efficiently and effectively. This is proven by his refusal to sell ineligible items in Exhibit E.
- Appellant acknowledges the errors, but insists that they were due to lack of experience. Proper training has now occurred.
- The firm relies heavily on SNAP to stay afloat. The EBT program provides the store with at least 50 percent of its sales. If the firm were to be disqualified for even one year, the business would surely suffer and quite possibly go out of business.
- The community around the firm also relies heavily on SNAP and their ability to make purchases using EBT benefits.

In support of its contentions, the Appellant provided a petition signed by members of the community. The Appellant stated that "many individuals from the community have agreed that the removal of (La Vaquita Mini Market's) SNAP benefits program would be a major inconvenience to several families as well as to many of the elderly individuals that live in close proximity to [the] business." The petition was signed by 80 individuals, but there is no indication on the petition that the signees are SNAP participants.

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 herein.

ANALYSIS AND FINDINGS

As best as can be determined, the Appellant did not, at any point, dispute that the violations took place as described in the report of investigations. In fact, the Appellant admitted that an owner of the firm committed one of the violations. Because the SNAP violations are not in dispute, it is the determination of this review that program violations did occur as charged by the Retailer Operations Division. The remainder of this review will focus on the Appellant's contentions and documentation.

Inexperienced Clerks

The Appellant argues that two of the three violations were committed by inexperienced clerks, especially the violation committed by one of the owners. This contention implies that FNS should consider a lesser penalty or perhaps a waiver of the penalty altogether.

With regard to this contention, the record shows that an Appellant owner signed the firm's application to participate as a SNAP retailer on March 20, 2013. By signing this application,

the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. The record clearly establishes that the Appellant owner agreed to abide by program rules, including taking responsibility for violations committed by any of the firm's employees, whether paid or unpaid, new, full-time or part-time. An owner is not free of responsibility simply because he or she was not in the vicinity at the time the violations occurred or because of a clerk's inexperience or lack of training. Regardless of which clerks are operating the cash register at a given time or whom firm ownership authorizes to handle store business, the ownership of the firm is ultimately responsible for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store ownership to disclaim accountability due to a lack of experience on the part of an employee or owner would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA.

Additionally, it should be noted that while the Appellant is primarily focusing on the violation committed by one of the owners, there were actually three violations committed during the investigation. Each of the three violations was committed by a different clerk, indicating a significant lack of training and oversight by the firm's ownership. Therefore, the contention that the violations were the fault of an inexperienced clerk does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Remedial Actions Taken

The Appellant has stated that after the first three violations, the firm's employees and owners received proper training with regard to SNAP transactions. The Appellant contends that this

training is evidenced in Exhibits D and E of the investigation report, in which the clerks on duty refused to allow ineligible items to be purchased with SNAP benefits.

With regard to these steps taken by the Appellant, it is important to clarify that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. This review is limited to the circumstances that existed at the time of the violations. It is not the authority of this review to consider any subsequent remedial actions that may have been taken or will take place so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations or subsequent to the violations themselves.

Therefore, the Appellant's contention that corrective action has taken place or that further remedial actions are planned does not provide a valid basis for dismissing the charges or for reducing the penalty imposed.

Hardship to Appellant

The Appellant has argued that the imposition of a one-year disqualification would negatively affect the firm, perhaps to the point of forcing the business to close.

With regard to this contention, it must be noted that hardship to the firm itself or to its owners is not a factor when deciding whether or not the disqualification determination should be reversed or whether or not a lesser penalty, such as a civil money penalty, can be applied. It is recognized that some degree of economic hardship to the firm is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of possible financial hardship to either the firm or the firm's ownership resulting from the imposition of such a penalty.

To allow store ownership to be excused from administrative penalties based on a purported economic hardship would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of 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, the Appellant's contention that it may incur economic hardship as a result of the disqualification does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Hardship to SNAP Households / Civil Money Penalty

The Appellant has argued that the firm's disqualification from SNAP would result in "major inconvenience" to many members of the community, especially those who live in close

proximity to the store. In support of this contention, the Appellant has provided a petition signed by 80 individuals. The petition asks that FNS allow La Vaquita Mini Market to remain authorized for the benefit of the families in the community.

With regard to this contention and accompanying petition, this review finds that the Retailer Operations Division properly determined that SNAP recipients would not experience hardship as a result of the firm's disqualification. Under the provisions found in 7 CFR § 278.6(f)(1), FNS may impose a civil money penalty in lieu of disqualification when hardship to SNAP households exists. However, according to this regulation, hardship is defined as "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 Vaquita Mini Market, a small grocery store, would not cause hardship to SNAP households because there are many other comparable or larger SNAP-authorized stores located in the area. According to agency records, there are currently nine larger SNAP-authorized retail stores located within one a one-mile radius of La Vaquita Mini Market, including six superstores, one supermarket, and two medium grocery stores. Two of these stores cater specifically to the Hispanic population.

It is recognized that some degree of inconvenience for SNAP households is likely whenever a SNAP-authorized store is disqualified and households are forced to use their SNAP benefits elsewhere. However, in accordance with regulation cited above, hardship exists only when there are no other authorized stores in the area selling as large a variety of staple foods at comparable prices. Therefore, pursuant to 7 CFR § 278.6(f)(1), a hardship civil money penalty in lieu of disqualification cannot be granted in this case.

As for the petition signed by community members, such documentation cannot be considered grounds for dismissing the charges or for reducing the administrative penalty because it has no bearing on whether or not the violations occurred at the store. Additionally, such documentation is not evidence of hardship to SNAP households. As stated above, when determining whether or not SNAP customers will experience hardship, the only consideration allowed by regulation is whether or not there are other comparable SNAP-authorized stores in the area. In this case, there are many shopping options for SNAP households in the vicinity of the Appellant firm. Therefore, the petition does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

CONCLUSION

Based on a review of the evidence in this case, there is no question that program violations of 7 CFR § 278.2(a) did occur at the Appellant firm 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 is 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. Pursuant to 7 CFR §

278.6(a) and (e)(4) the decision to impose a one-year disqualification against the Appellant, La Vaquita Mini 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 participation may be submitted 10 days prior to the expiration of the one-year disqualification period. In accordance with 7 CFR § 278.1(b)(4), at the time of any new application for participation in SNAP, the firm will be required to submit a collateral bond or irrevocable letter of credit as a condition for again being authorized to participate in the program. This bond requirement is due to the firm's sanction of a period of longer than six months.

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

November 8, 2017