

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

Los Santanita Market,

Appellant,

v.

Case Number: C0204995

Retailer Operations Division,

Respondent.

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 Los Santanita 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 Los Santanita 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, Los Santanita Market, was initially authorized for SNAP participation as a medium grocery store on February 1, 2016. Between April 17, 2018, and May 1, 2018, FNS conducted an undercover investigation at the firm to ascertain its compliance with Federal SNAP laws and regulations. The investigative report documented that personnel at Los Santanita Market accepted SNAP benefits in exchange for ineligible merchandise on three separate occasions. According to the report, the Appellant firm sold plastic

cups and aluminum foil in exchange for SNAP benefits, which benefits may only be used to purchase eligible foods.

In a letter dated May 17, 2018, the Retailer Operations Division charged the Appellant with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). The charge letter states that the violation of accepting SNAP benefits in exchange for ineligible nonfood items warrants a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further states 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 a letter dated May 23, 2018, the Appellant replied to the charges, acknowledging that the violations occurred, but blaming them on an employee who had not been properly trained and who had a language barrier that made it hard to explain to customers what could and could not be purchased with SNAP benefits. The Appellant stated that it has retrained the employee to make sure she understood SNAP rules. The Appellant further stated that by the time the investigation ended, the employee was already in compliance, as she did not commit any violations on the investigator's last visit to the store. The Appellant further stated that many SNAP recipients will experience hardship if the firm is disqualified. Accordingly, the Appellant requests a warning or perhaps a civil money penalty rather than a disqualification.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated June 4, 2018. This letter informed the Appellant that it was the determination of the Retailer Operations Division that violations did occur as outlined in the letter of charges 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 14, 2018, 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. It should also be noted that on August 15, 2018, the Appellant voluntarily withdrew itself from SNAP participation because it had sold the store to another owner. However, the Appellant did not notify the review officer that it wished to discontinue this review. As such, a final decision regarding the alleged violations is being made in this case.

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 17, 2018, and May 1, 2018, the Food and Nutrition Service completed four compliance visits at Los Santanita Market. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the May 17, 2018, 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 three 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 16-count package of 16-ounce plastic party cups (*Dart* brand), Exhibit A
- One 16-count package of 16-ounce plastic party cups (*Dart* brand), Exhibit B
- One 16-count package of 16-ounce plastic party cups (*Dart* brand), Exhibit C
- One box of aluminum foil, 20 square feet (*Jiffy-Foil* brand), Exhibit C

The report indicates that in Exhibit D, the clerk on duty refused to sell the investigator a package of trash bags and a box of aluminum foil. In Exhibit D, the investigator also attempted to obtain cash in exchange for SNAP benefits, but the request was refused. According to the report, the same cashier conducted all three violative transactions.

The charge letter states that the violations that occurred in Exhibits A, B, and C 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 is extremely sorry for the mistakes that were made and has already made the necessary changes to avoid any violations in the future.
- This business is the Appellant's only form of income and the disqualification decision will affect not only the store and the owner's family, but also the recipients.

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

The Appellant has not provided any evidence or documentation to counter FNS's investigation report. In fact, the Appellant appears to acknowledge that violations occurred by offering an apology and by blaming the violations on an employee who had not been properly trained. Because the violations themselves do not appear to be in dispute, 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 remaining contentions.

Remedial Actions Taken

The Appellant contends that it has already taken necessary steps so that violations will not occur in the future.

With regard to this contention, it should be noted 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 the violations were committed. It is not the authority of this review to consider any subsequent remedial actions that may have been taken or that 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.

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 modifying the penalty imposed.

Hardship to Appellant

The Appellant has argued that the business is the Appellant's only form of income and a disqualification would negatively affect not only the store, but the owner's family.

With regard to this contention, it is recognized that some degree of financial or economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, 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 resulting from the imposition of such a penalty.

To allow store ownership to be excused from administrative penalties based on a purported economic hardship to the store's ownership or to the firm itself would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 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 requirements, but also to those retailers who have been disqualified from the program in the past for similar violations.

Therefore, the Appellant's contention that the firm may incur financial hardship as a result of a six-month disqualification from SNAP does not provide a valid basis for dismissing the charges or for modifying the penalty imposed.

Warning Letter / Civil Money Penalty

The Appellant contends that its customers will experience hardship if the store is disqualified. As such, it requests either a warning or perhaps a civil money penalty instead of disqualification.

It should be noted that both this review and the Retailer Operations Division evaluated the Appellant's eligibility for a lesser penalty, including a warning letter and a civil money penalty. As for a warning letter, such a penalty is not appropriate in this case. The firm committed program violations on three consecutive visits made by the investigator. Further, the Appellant freely acknowledged that the clerk on duty had not been properly trained. Regulations at 7 CFR § 278.6(e)(7) state that a warning letter should only be sent if the violations are too limited to warrant a disqualification. In this case, the violations quite clearly meet the criteria for a six-month disqualification as noted in 7 CFR § 278.6(e)(5).

As for a civil money penalty, SNAP regulations at 7 CFR § 278.6(f)(1) permit a CMP in lieu of a temporary disqualification when the firm's disqualification would cause hardship to SNAP households. 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 Los Santanita Market, a medium grocery store, would not cause hardship to SNAP households because there are other shopping options in the area. According to agency records, there are about a dozen comparable or larger SNAP-authorized retail stores located within a one-mile radius of Los Santanita Market, including a superstore and three supermarkets, all of which very likely have significantly larger staple food inventory at comparable prices.

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. Because such conditions do not exist in this case, the request for a hardship civil money penalty in lieu of disqualification cannot be granted.

CONCLUSION

Based on an analysis of all information in this case, this review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at Los Santanita 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. Pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, Los Santanita 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 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

November 21, 2018