

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

Macareno Central Inc,

Appellant,

v.

Case Number: C0205850

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA) that the record indicates that Macareno Central Inc. (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support that the hardship civil money penalty (CMP) imposed by the Retailer Operations Division (Retailer Operations), in lieu of a six month disqualification from the SNAP, was in accordance with applicable regulations.

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.6(a), 7 CFR § 278.6(e)(5), and 7 CFR § 278.6(f)(1) in its administration of the SNAP, when it imposed a hardship CMP in the amount of \$33,000.00 in lieu of a six month period of disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

CASE CHRONOLOGY

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of April 11, 2018 through April 19, 2018. The investigative report documented that personnel at Appellant accepted SNAP benefits in exchange for

ineligible merchandise on multiple separate occasions that warrant a six month disqualification period. The items sold are best described in regulatory terms as common non-food items.

By letter dated May 14, 2018, Retailer Operations charged the owner with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). Misuse of SNAP benefits was noted in Exhibits B, C, and D, that warrants a disqualification as a SNAP retail food store for a period of six months. The letter also states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of disqualification.

The record states that the owner did not reply to the Charge letter. Retailer Operations informed the owner by Determination letter dated May 30, 2018, that the violations cited in the Charge letter occurred, and that the assessment of a hardship CMP in the amount of \$33,000.00, in lieu of a six month period of disqualification, was appropriate. Retailer Operations determined that Appellant qualified for a hardship CMP since there are no other stores in the area that appear to carry the same variety and types of staple foods at comparable prices. As such, a six month disqualification of Appellant could cause hardship to SNAP recipients.

Appellant appealed Retailer Operations' determination and requested administrative review by letter dated June 5, 2018. The appeal was granted by letter dated June 15, 2018. The information provided by the owner was forwarded to Retailer Operations for assessment. No additional information was advanced.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the 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 argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 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, "Coupons may be accepted by an authorized retail food store only from eligible households or the households' authorized representative, and only in exchange for eligible food."

7 CFR § 278.6(a) states: "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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system.”

7 CFR § 278.6(e)(5) states that a firm is to be disqualified 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.” 7 CFR § 278.6(f)(1) provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP benefit households because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It reads: “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to SNAP benefit 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.”

SUMMARY OF THE CHARGES

A report of the investigation was provided to the Appellant as Exhibits A through E with the Charge letter. The investigative report provides details on the results of each compliance visit. The investigative report documents that SNAP violations were recorded during three store visits. The violations involved the sale of non-food items including, soap, body and face wash, and paper towels for SNAP benefits, in violation of 7 CFR § 278.2(a). The cited violations warrant a six month disqualification.

APPELLANT’S CONTENTIONS

Consideration was made of all contentions whether recapitulated here or not.

- This unfortunate event, related to the misuse of services of SNAP was due to lack of information from us, having made bad use when charging forbidden items on the dates of the month of April.
- The fault was on the part of my employees and it was never out of bad intention.
- Sometimes it is confusing to determine what the permitted articles are and the eagerness to attend quickly has caused unintentional mistakes.
- We will make immediate return of the values collected and we have informed and delivered our cashiers the instructions FNS-330 in order to continue working together and achieve the objective of properly training our staff.
- The amount of \$33,000.00 imposed would mean bankruptcy of my business and we will not be able to help more families.
- If possible for the annulation or reduction of the CMP. [sic]

The owner provided a one page explanation regarding Exhibit D wherein he stated the there was no charge for the paper towel that it “was on the floor for cleaning purposes not for sale.” He also provided two checks both dated 6/6/2018, payable to “USDA, FNS;” one check for \$1.50 and one for \$4.99 each noted as “Refund.”

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or to invalidate the determination made by Retailer Operations, and it is limited to the facts at the basis of Retailer Operations' determination at the time such was taken. Upon review, the evidence supports that Appellant established a record of selling non-food items as opposed to eligible foods defined at Section 271.2 of the regulations, on multiple occasions as noted in Exhibits B, C, and D furnished with the Charge letter.

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 nonfood items due to carelessness or poor supervision by the firm’s ownership or management.” Three violations are considered evidence of carelessness. Therefore, the violations in this case are not too limited to warrant a disqualification.

The owner signed the FNS retailer application to become a SNAP authorized retailer which included a certification and confirmation that the owner would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” By signing this document the owner confirmed that “I am aware that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal or disqualification from Supplemental Nutrition Assistance Program; It is my responsibility to ensure that the training materials are reviewed by all firm owners and all employees; and I accept responsibility on behalf of the firm for violations of the Supplemental Nutrition Assistance Program regulations, including those committed by any of the firm employees.”

Regardless of whom the store owner may utilize to handle store business, the owner is accountable for the proper handling of SNAP transactions. The regulations establish that an authorized food store may be disqualified from participating in SNAP when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. To allow the store owner to disclaim accountability for the acts of persons whom the owner chooses to utilize to handle Appellant’s business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA.

The record supports that the paper towels were sold to the investigator in exchange for benefits as recorded in Exhibit D. Paper towels are clearly seen in the FNS store photographs to be on sale at Appellant. Where the owner indicates “No charged [sic],” on his one page explanation, the Exhibit shows the item was sold to the USDA investigator, and was noted “NPI”; No Price Indicated or Illegible.

With regard to the owner’s contention that the \$33,000.00 CMP is severe and would mean the bankruptcy of the business, it is recognized that some degree of economic hardship is a likely

consequence whenever a store is sanctioned for SNAP violations. 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. Payment for the items sold in violation of the regulations is not an option to resolve this sanction. Therefore, the two checks advanced by the owner for a total of \$6.49 have been marked “VOID” and will be retained in the case file.

CIVIL MONEY PENALTY

Retailer Operations rendered a finding that it was appropriate to impose a hardship CMP in the amount of \$33,000.00 in lieu of a six month disqualification period. This was because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices. Retailer Operations determined that the firm’s disqualification could cause hardship to SNAP households. Review was made of the calculation of the CMP, and the amount is deemed to have been correctly computed per the applicable regulations.

CONCLUSION

Based on a review of the record, the evidence by a preponderance supports that the charged Program violations did occur at Appellant. The charges of violations were based on the findings of a formal USDA investigation. The investigative record is specific, thorough, and fully documented with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail. Furthermore, the owner does not dispute that his employees made mistakes and were confused.

The record documents that Retailer Operations properly considered Appellant’s eligibility for a hardship CMP according to the terms of Section 278.6(f)(1). Retailer Operations granted a hardship CMP in the amount of \$33,000.00 in lieu of the six month disqualification of Appellant from participation as an authorized retailer in the SNAP. This determination is sustained.

Please review the May 30, 2018 Determination letter with the enclosed Bill for Collection for payment information and take action as described. For billing inquiries, please contact the FNS Retailer Repayment Financial Management Accounting Division at (703) 605-0483, or email at RetailerRepayment@fns.usda.gov.

If the owner chooses, or is unable to pay the CMP for the total amount as specified on the Bill for Collection, Appellant will be disqualified for a period of six months. The owner should promptly contact Retailer Operations at (608) 662-4422, extension 301, if he chooses to have the six month period of disqualification imposed rather than pay the total amount of the CMP.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and to Section 279.7 of the regulations (7 CFR § 279.7) with respect to your right to 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 the owner resides or is 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, 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.

M. Viens
Administrative Review Officer

August 3, 2018