

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

Ponce Sandwich Shop & Grocery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0190528

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 finding that a **six-month disqualification** from participation as an authorized retailer in the Supplemental Nutrition Assistance Program¹ was properly imposed against Ponce Sandwich Shop & Grocery (hereinafter “Ponce Sandwich Shop & Grocery” and/or “Appellant”) and its owner of record, by the Retailer Operations Division of the FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a) and (e) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a six-month disqualification against Ponce Sandwich Shop & Grocery in a letter dated April 12, 2018.

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.

¹ Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

CASE CHRONOLOGY

The USDA conducted an investigation of the compliance of Ponce Sandwich Shop & Grocery with Federal SNAP law and regulations which consisted of five (5) visits completed between December 19, 2016, and February 22, 2017. The USDA-FNS Report of Positive Investigation (hereinafter, “Investigative Report”) number TR37965 dated March 10, 2017 disclosed that on four (4) separate occasions Ponce Sandwich Shop & Grocery personnel accepted SNAP benefits for merchandise that was ineligible for purchase with such benefits from a USDA Investigator. Identification information ascertained from the Investigative Report indicates that these SNAP violations were handled at Appellant firm by one (1) unidentified male clerk.

As a result of the evidence compiled during the USDA investigation, in a letter dated March 27, 2018, the Retailer Operations Division, charged Appellant with violating 7 CFR § 278.2(a) of the SNAP regulations.

The Retailer Operations Division record indicates a telephone call was received from Appellant’s owner on April 3, 2018 wherein it was indicated that Appellant was in the process of being sold. Explanation of next steps is documented to have been provided to Appellant’s owner. The record documents that no further response was received, therefore the Retailer Operations Division issued a final determination letter, dated April 12, 2018, assessing a six-month disqualification from participation as an authorized retailer in the SNAP against Ponce Sandwich Shop & Grocery.

In a letter dated April 19, 2018, received in the offices of the Administrative Review Branch on April 23, 2018, Appellant, through its owner, submitted an appeal of the Retailer Operations Division’s assessment, requesting an administrative review of the action. The appeal was granted and implementation of the sanction has been held in abeyance, in accordance with 7 CFR § 279.4(a).

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 AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)², 7 USC 2023 and 278 of Title 7 of the Code of Federal Regulations (CFR).³

² Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment through P.L. 113-79, enacted February 7, 2014.

³ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

7 CFR § 278.2(a) “Use of Coupons”, states, in relevant part, “Coupons may be accepted by an authorized retail food store only from eligible households... only in exchange for eligible food.”

7 CFR § 271.2 defines **Eligible foods**” in relative part as “**Any food and food product** intended for human consumption **except** alcoholic beverages, tobacco and hot foods and hot food products prepared for immediate consumption...” (Emphasis Added)

7 CFR § 278.6 establishes the authority upon which a period of disqualification may be imposed against an authorized food store or wholesale food concern in the event that it has failed to comply with the Act.

7 CFR § 278.6(e) provides the following, in relevant part, with respect to penalties that may be assessed against firms determined to have violated the Act or regulations:

“...For the purposes of assigning a period of disqualification, a warning letter shall not be considered to be a sanction. A civil money penalty and a disqualification shall be considered sanctions for such purposes...”

7 CFR § 278.6(e)(5) applies to the period of disqualification under review, and specifies that FNS **shall**: [Emphasis added]

“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(e)(7), states, that FNS shall,

“Send the firm a warning letter if violations are too limited to warrant a disqualification.”

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 households because of the unavailability of a comparable participating food store in the area to meet their shopping needs.

7 CFR §278.6(f)(1) reads, in part,

“FNS may impose a civil money penalty as a sanction in lieu of disqualification 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.”

SUMMARY OF THE CHARGES

USDA conducts investigations of the compliance of retail food stores, in part, to ascertain the nature and extent of SNAP violations that may be occurring. In the instant case the Investigative

Report dated March 10, 2017, reveals that a USDA Investigator completed five (5) total investigative visits at Ponce Sandwich Shop & Grocery between December 19, 2016 and February 22, 2017.

The report materials were provided to Appellant as attachments to the charge letter dated March 27, 2018, and included exhibits A through E that provide detail of the investigative results. The Investigative Report reveals SNAP violations were recorded during four (4) of the five (5) reported visits, included as exhibits B, C, D, and E of the Investigative Report with the exchange of SNAP benefits for non-food items considered common ineligible items including bleach, paper plates, body wash, storage bags, and dishwashing liquid.

The report also indicates that Appellant exchanged a toy model valued at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for SNAP which is considered the exchange of a major ineligible item. The violations are documented to have involved one (1) unidentified male clerk. The Investigative Report further discloses that exchange of shampoo was refused in Exhibit A, and cash was refused in exhibits C and E, by the same unidentified male clerk.

The regulations establish that an authorized food store may be disqualified from participating in the program 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.

APPELLANT'S CONTENTIONS

In the letter dated April 19, 2018, Appellant's owner indicated having instructed the responsible employee to cease conducting fraudulent transactions or risk termination.

Upon receipt of the request for Administrative Review a letter of acknowledgment was sent to Appellant, dated May 1, 2018. That letter was reported as not delivered following three (3) attempts, with notification received by the Agency on May 18, 2018. On May 18, 2018 a telephone call was placed to Appellant's phone number as listed in the record. A person who identified himself as "5 U.S.C. § 552 (b)(6) & (b)(7)(C)" indicated that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was in Puerto Rico, providing a cell phone number for contact. A call was made to the cell phone number, and a message left requesting contact from Appellant's owner. As of the date of this writing no contact has been received, therefore, the materials in the administrative record are being used to process the final agency decision.

The preceding represents only a brief summary of Appellant's contentions in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

That SNAP benefits are not for the purchase of non-food items is clear in the "Act" and in the SNAP regulations, with noted exceptions, such as seeds used to grow food, and hunting equipment in remote areas of Alaska. This and other rules governing SNAP were provided to

Appellant upon initial SNAP authorization in September 2014, and have been restated in various retailer notifications routinely provided to all SNAP authorized retailers.

The SNAP regulations at 7 CFR § 278.6(e)(5) defines the period of disqualification applicable in the circumstance under review, and specifies that FNS **shall**: “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.”

Employee Violations:

Appellant’s owner has indicated in the request for review that the SNAP violations identified in the Investigative Report were committed by an employee, who has been advised to cease the practice or risk termination. SNAP regulations are specific that Appellant is liable for all violations, whether committed by ownership or personnel representing ownership. Therefore, Appellant’s contention does not serve to mitigate or reverse the current sanction.

Civil Money Penalty:

7 CFR § 278.6(f)(1) reads, in part, “FNS may impose a civil money penalty as a sanction in lieu of disqualification 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.” The record reflects that the Retailer Operations Division has rendered a finding that pursuant to 7 CFR § 278.6(f)(1), it would not be appropriate to impose a civil money penalty in lieu of a period of disqualification on Appellant firm.

The Retailer Operations Division record reflects that Ponce Sandwich Shop & Grocery is classified within FNS definitions as a convenience store; and, that there are 47 SNAP authorized firms within a one (1) mile radius of Appellant. The availability of alternative SNAP Authorized venues is verified with a review of the SNAP Retailer Locator tool located at <https://www.fns.usda.gov/snap/retailerlocator> .

Based on the availability of the alternative SNAP authorized retailers the Retailer Operations Division has determined that the temporary disqualification of Appellant would not create a hardship to customers.

It is recognized that some degree of inconvenience to SNAP customers is inherent from the temporary disqualification of any participating food store. Although the normal shopping pattern of such SNAP customers may be temporarily altered during the period of disqualification, the determination that the disqualification of Ponce Sandwich Shop & Grocery would not create a hardship to customers, as differentiated from potential inconvenience is sustained and a civil money penalty in lieu of disqualification is found not to be appropriate in this case.

CONCLUSION

The charges of violations are based on the findings of a formal USDA investigation in which all transactions cited in the letter of charges were fully documented and evidentiary materials are included in the record that validate the report as provided. A complete review of this documentation has yielded no swaying error or discrepancy. The Investigative Report is specific and thorough with regard to the dates of the violations and the specific related facts.

The documentation presented by the Retailer Operations Division clearly provides a preponderance of the evidence that the violations as reported occurred at Appellant firm and, 7 CFR §278.6(e)(5) specifies that FNS **shall** “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.”

It is established that the violations as described in the letter of charges dated March 27, 2017, did in fact occur at Appellant’s firm, warranting a disqualification of six (6) months in accordance with 7 CFR §278.6(e)(5).

Based on the discussion above, the decision to impose a six-month disqualification against Ponce Sandwich Shop & Grocery is proper and the action is sustained.

In accordance with the Act and regulations, **the six (6) month period of disqualification shall become effective thirty (30) days after receipt of this letter.** Appellant may submit a new application for SNAP participation ten (10) days prior to the expiration of the six (6) month disqualification period.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant’s owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

NANCY BACA-STEPAN
Administrative Review Officer

July 13, 2018