

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

**Pulperia Buen Porvenir,**

**Appellant,**

**v.**

**Case Number: C0212050**

**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 Pulperia Buen Porvenir (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 Pulperia Buen Porvenir.

**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, Pulperia Buen Porvenir, was initially authorized for SNAP participation as a convenience store on December 16, 2011. Between October 3, 2018, and March 14, 2019, 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 Pulperia Buen Porvenir accepted SNAP benefits in exchange for ineligible items on five separate occasions. According to the report, the Appellant firm sold paper towels, bathroom tissue, dishwashing liquid, scouring pads, multipurpose towels, powdered cleanser, laundry detergent, dishwashing cream, liquid cleaner, cigarettes, and a mop in exchange for SNAP benefits, which benefits may only be used for the purchase of eligible foods.

In a letter dated April 16, 2019, the Retailer Operations Division charged the Appellant with violating SNAP regulations at 7 CFR § 278.2(a). The charge letter stated that the acceptance of SNAP benefits in exchange for ineligible nonfood merchandise warranted a disqualification from SNAP for a period of six months pursuant to 7 CFR § 278.6(e)(5). The letter further stated that under certain conditions and in accordance with § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification.

The record shows that the Appellant did not respond to the charge letter.

After further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter dated May 7, 2019. This letter informed the Appellant that it was the determination of the Retailer Operations Division that violations did occur as outlined in the charge letter 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 May 14, 2019, the Appellant appealed the agency's determination by requesting an administrative review. The request was granted and implementation of the disqualification 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 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 October 3, 2018, and March 14, 2019, the Food and Nutrition Service completed five compliance visits at Pulperia Buen Porvenir. The agency record indicates that a report of the investigation was provided to the Appellant as an attachment to the April 16, 2019, charge letter. The investigation report includes Exhibits A through E, and provides full details on the results of each compliance visit. SNAP violations were documented during each of the five 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:

- Two 160-sheet rolls of paper towels (*Kirkland* brand), Exhibit A
- One 4-roll package of bathroom tissue (*Monarca* brand), Exhibit A
- One 16.9-ounce bottle of dishwashing liquid (*Sapolio* brand), Exhibit B
- One 4-count package of multipurpose towels (*Sapolio* brand), Exhibit B
- One 4-count package of scouring pads (*Retine Laser* brand), Exhibit B
- One 14-ounce can of powdered cleanser (*Ajax* brand), Exhibit C
- One 17.63-ounce bag of laundry detergent (*Roma* brand), Exhibit C
- One mop (*Pinto* brand), Exhibit C
- One 12.6-ounce container of dishwashing cream (*Sapolio* brand), Exhibit D
- One 500-milileter bottle of liquid cleaner (*Fabuloso* brand), Exhibit D
- One 12.6-ounce bottle of dishwashing liquid (*Palmolive* brand), Exhibit D
- One 20-count pack of cigarettes (*Marlboro* brand), Exhibit D
- One 12.6-ounce bottle of dishwashing liquid (*Palmolive* brand), Exhibit E
- Two 20-count packs of cigarettes (*Marlboro* brand), Exhibit E

The report indicates that in Exhibits D and E, the clerk on duty refused to allow an exchange of SNAP benefits for cash (i.e. trafficking). The report states that one clerk conducted all five violative transactions.

The charge letter states that the violations that occurred in Exhibits A, B, C, D, and E, 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 owner intended to reply to the charge letter, but was not able to do so on time. She is currently dealing with health-related issues, which not only caused her to not respond to the charges, but also keeps her away from her business from time to time.
- Appellant owner has been in business for almost 10 years and has worked hard to keep the business afloat and in compliance with all rules and regulations.
- Appellant owner was horrified and concerned when she learned that the store was being charged with SNAP violations.
- Appellant owner does not blame her employees for what happened, as she recognizes that it is her responsibility to be in compliance even when she is not around. However, because she was not in the store when the alleged violations occurred, she cannot admit to or deny the charges. She can only say that the firm has never been disqualified before and she is sure that it will never happen again.
- Appellant requests leniency, as a six-month disqualification will greatly affect both the business and its clients who depend on its products and services.
- Appellant is in the process of installing new technology to help its employees quickly and accurately distinguish between eligible and ineligible items. Appellant owner has also talked to her employees about SNAP compliance and will provide periodic reminders and increase supervision.

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 in this document.

## **ANALYSIS AND FINDINGS**

The Appellant has not provided any evidence or documentation to counter FNS's investigation report. In its request for review, the Appellant owner claimed that she was not in the store when the violations allegedly occurred and thus cannot admit to or deny the charges. Because the Appellant has not refuted the allegations, it is the determination of this review that SNAP violations did occur as charged and that a six-month disqualification is warranted. The balance of this review will address the Appellant's remaining contentions.

### **Owner Not Involved in Violations**

The Appellant owner contends that she is currently dealing with health-related issues. These issues not only prevented her from responding to the charge letter, but have also occasionally kept her away from the store. The owner further states that she was not in the store when the violations took place and thus cannot admit to or deny that they occurred. Finally, the owner states that she does not blame her employees for what happened, as she recognizes that it is her responsibility for the store to be in compliance even when she is not around.

With regard to these claims, the record shows that the Appellant owner signed an application to participate as a SNAP retailer on November 21, 2011, and then signed a reauthorization application on November 30, 2016. By signing these applications, 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 or manager is not free of responsibility simply because he or she was not in the vicinity at the time the violations occurred or because he or she was uninvolved in the violations. The Appellant is correct that 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.

### **No Prior Violations**

The Appellant owner contends that she has been in business for almost 10 years and has worked hard to keep the business afloat and in compliance with all rules and regulations. She further argues that the store has never been disqualified before. These contentions imply that because of the firm's history of complying with SNAP rules, the disqualification penalty should be reconsidered or reduced.

With regard to these contentions, the law is clear that when program violations occur, specifically the exchange of ineligible nonfood items for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management, a six-month disqualification is the required penalty, even on the first occasion. In this case, the sanction imposed by the Retailer Operations Division for these first-time violations is entirely in line with SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations. As such, a dismissal or reduction of the six-month disqualification is not appropriate.

### **Remedial Actions Taken**

The Appellant contends that it is in the process of installing new technology to help its employees quickly and accurately distinguish between eligible and ineligible items. The Appellant also claims that the owner has talked to her employees about SNAP compliance and will provide periodic reminders and increased supervision. The Appellant owner states that she is confident that violations will never happen again.

With regard to these contentions, it must be stated 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 facts 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 after the discovery of program violations.

### **Hardship to Households / Civil Money Penalty / Hardship to Appellant**

The Appellant requests leniency in this case, claiming that a six-month disqualification will greatly affect both the business and the clients who depend on its products and services.

With regard to the contention that the firm's customers will be impacted by a disqualification, it is recognized that some degree of inconvenience to SNAP recipients is likely whenever a retail food store is disqualified and households are forced to use their benefits elsewhere. To address potential difficulties that SNAP households might face when a firm is disqualified, regulations at 7 CFR § 278.6(f)(1) allow for a CMP to be imposed instead of disqualification when the firm's disqualification would cause "hardship" to SNAP households. According to this regulation, hardship occurs when there is "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 Pulperia Buen Porvenir, a convenience store, would not cause hardship to SNAP households because there are several other shopping options in the area. According to agency records, there are approximately 20 similarly-stocked or larger SNAP-authorized retail stores located within a one-mile radius of Pulperia Buen Porvenir, including two supermarkets. There is also no evidence that Pulperia Buen Porvenir sells its inventory at unusually low prices in comparison to nearby stores. Because

hardship conditions do not exist in this case, a civil money penalty in lieu of disqualification is not an available option.

As to the claim that a disqualification would negatively affect the firm, 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 itself. As such, the Appellant's request for leniency cannot be granted.

### **CONCLUSION**

Based on a review of all information in this case, this administrative review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at Pulperia Buen Porvenir 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. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(5), the decision to impose a six-month disqualification against the Appellant, Pulperia Buen Porvenir, 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 authorization 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

August 13, 2019