

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

Sabor Criollo Grocery Corp,

Appellant,

v.

Case Number: C0211008

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 there is sufficient evidence to support a six-month disqualification from the Supplemental Nutrition Assistance Program (SNAP) as initially imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a six-month disqualification against Sabor Criollo Grocery Corp.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulation at 7 CFR § 279.1 provides 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

The USDA conducted an investigation of the compliance of Sabor Criollo Grocery Corp. with Federal SNAP law and regulations in August 2018 and September 2018. In a letter dated September 27, 2018, the Retailer Operations Division charged the Appellant store with accepting SNAP benefits in exchange for merchandise which included ineligible non-food items in violation of 7 CFR § 278.2(a). These SNAP violations occurred on four (4) out of five (5) compliance visits. The letter further informed the Appellant that the chargeable violations

warranted a disqualification period of six (6) months as provided in 7 CFR § 278.6(e)(5). The Appellant was informed it could respond to the charges within ten (10) calendar days following delivery of the charge letter. The charge letter was delivered to the store via UPS on October 1, 2018.

The Appellant responded to the charges in a letter dated October 4, 2018. Among other contentions, the Appellant stated that its employees denied the transactions took place.

After considering the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated November 1, 2018. The determination letter informed the Appellant it was disqualified from the SNAP for a period of six (6) months in accordance with 7 CFR § 278.6(a) and (e). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a hardship civil money penalty (CMP) under 7 CFR § 278.6(f)(1). The Retailer Operations Division determined that the Appellant was not eligible for the hardship CMP in lieu of the six-month disqualification because there were other authorized retail stores in the area selling as large a variety of staple foods at comparable prices. The determination letter was delivered to the Appellant on November 6, 2018.

In a letter postmarked November 13, 2018, the Appellant requested an administrative review of the Retailer Operations Division's determination. The request for review was granted. Upon acceptance of the administrative review request, implementation of the six-month disqualification was held in abeyance pending completion of this review.

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, might 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 covered 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) establish the authority upon which a disqualification may be imposed against a retail food store or wholesale food concern.

7 CFR § 278.2(a) states, in part:

Coupons may be accepted by an authorized retail food store only from eligible households ... and only in exchange for eligible food.

7 CFR § 271.2 states that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the “Food and Nutrition Act of 2008, as amended, for the purchase of 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....

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 ... (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 non-food items** due to carelessness or poor supervision by the firm’s ownership or management. [Emphasis added.]

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’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.

SUMMARY OF THE CHARGES

During an investigation conducted in August 2018 and September 2018, the USDA conducted five (5) compliance visits at Sabor Criollo Grocery Corp. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated September 27, 2018. The investigation report included Exhibits A through E which provide full details on the results of each compliance visit.

The investigation report documents that SNAP violations were recorded during four (4) of the five (5) compliance visits as documented by Exhibits B, C, D and E. The chargeable violations involved the sale of eight (8) ineligible non-food items in exchange for SNAP benefits in violation of 7 CFR § 278.2(a). These ineligible items consisted of:

- A “Scotch-Brite” scour pad

- A 15 fluid ounce bottle of “Mistolin” all-purpose cleaner
- A 14 fluid ounce bottle of “Joy” dish soap
- A 50 gram stainless steel scrubber by “Tyrone”
- A 12.6 fluid ounce bottle of “Dawn” dish soap
- A 22 count box of “Glad” sandwich bags
- A 34 count box of “Downy” fabric softener sheets
- A 450 ml bottle of “Suavitel” fabric softener liquid

These violations were all conducted by the same clerk. The clerk also refused to exchange cash for SNAP benefits as documented in Exhibit E.

APPELLANT’S CONTENTIONS

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

- The owner has repeatedly questioned his employees and they vehemently deny conducting these alleged illegal transactions.
- The employees have all been trained in the processing of SNAP transactions. They receive training every six (6) months covering the different types of EBT transactions and what items can and cannot be processed.
- On the occasion when the investigator requested an exchange of SNAP benefits for cash, the clerk refused. This is something that the clerk has been trained to do.
- A six-month disqualification will cause a financial hardship for the store. The owner requests an opportunity to stay in the program and continue to provide services to this community. The owner is willing to pay a CMP in lieu of the six-month disqualification.

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Investigation Report

The Appellant disputes that the violations took place. However, the investigation report documents that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted under the direction of a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no known error or discrepancy. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is

supported by documentation that confirms specific details of the transactions. The investigation report documents by a preponderance of the evidence that personnel at the store exchanged ineligible items for SNAP benefits.

Violations Warrant a Six-Month Disqualification

The SNAP regulation at 7 CFR § 278.6(e)(5) states, in part, that “FNS **shall** take action as follows against any firm determined to have violated the Act or regulations ... **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 non-food items due to carelessness or poor supervision by the firm’s ownership or management.” [Emphasis added.] The investigation report documents that the chargeable violations in this case consisted of eight (8) inexpensive non-food items over four (4) transactions and therefore by FNS’s standards equate to carelessness or poor supervision by ownership.

Although the clerk in Exhibit E refused to exchange SNAP benefits for cash, this does not ameliorate or mitigate the penalty for exchanging SNAP benefits for non-food items as documented by Exhibits B, C, D and E. Therefore, the Retailer Operations Division correctly determined that the violations warranted a six-month disqualification.

Owner Responsibility

Although the store owner was allegedly not involved in the violations, the store owner signed the SNAP authorization application for Sabor Criollo Grocery Corp. on February 28, 2016. That application included a signed certification 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.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations including accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible non-food items.

Regardless of whom the owner of a store may utilize to handle store business, the owner is accountable for the training of staff and the monitoring and handling of SNAP benefit transactions. To allow store owners to disclaim accountability for the acts of persons whom the owners choose to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Training Program

The Appellant states that the store has a training program in place for store employees on the SNAP rules and regulations. Regarding this contention, there are no provisions in the SNAP regulations for a waiver or reduction of a six-month disqualification on the basis of an alleged

training program in place prior to the violations. Therefore, the Appellant's contention does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed. In any case, it also appears that the alleged training program was not very effective due to the multiple violations that occurred over several transactions in this case.

Hardship to Firm

The Appellant contends that a six-month disqualification will create a financial hardship for the store. With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in the SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to either the owners personally or the firm resulting from the imposition of such penalty. To allow stores to be excused from assessed administrative penalties based on a purported economic hardship would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

HARDSHIP CIVIL MONEY PENALTY

The Retailer Operations Division determined that the Appellant was not eligible for a hardship CMP under 7 CFR § 278.6(f)(1). That regulation 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 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." [Emphasis added.]

The case record documents that the Retailer Operations Division determined that a six-month disqualification of Sabor Criollo Grocery Corp., a convenience store, would not cause a hardship to SNAP households as there are other comparable or larger SNAP authorized stores in the area. The Retailer Operations Division determined there were 168 larger stores including small grocery stores, medium grocery stores, large grocery stores, supermarkets and superstores, located within a one-mile radius of Sabor Criollo Grocery Corp. All of these larger stores likely had a superior depth and breadth of stock at comparable or better prices. Based on this evidence, a six-month disqualification of Sabor Criollo Grocery Corp. would not cause a hardship to SNAP recipients in the area, as opposed to a mere inconvenience; therefore, the Retailer Operations Division decision not to assess a hardship CMP in lieu of a six-month disqualification is sustained as appropriate under 7 CFR § 278.6(f)(1).

CONCLUSION

It is established that the violations as described in the letter of charges did in fact occur at Sabor Criollo Grocery Corp. warranting a disqualification of six (6) months in accordance with 7 CFR § 278.6(e)(5). That regulation states 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 non-food items due to carelessness or poor supervision by the firm's ownership or management." Therefore, the decision to impose a six-month disqualification, **the least severe penalty** allowed by regulation, against Sabor Criollo Grocery Corp., Appellant, is appropriate and the action is sustained.

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

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a 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 you reside or are 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.

RONALD C. GWINN
Administrative Review Officer

March 18, 2019