

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

Santos Food #3,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0192637

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA) that the record indicates that Santos Food #3 (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP), and that there is sufficient evidence to support a six month disqualification from the SNAP as initially imposed by the Retailer Operations Division (Retailer Operations).

ISSUE

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

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

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of May 23, 2017 through June 21, 2017. 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.

As a result of evidence compiled during this investigation, by letter dated August 17, 2017, Retailer Operations charged the owners with violating the terms and conditions of the SNAP regulations at 7 CFR § 278.2(a). The misuse of SNAP benefits noted in Exhibits B, C and D warrants a disqualification as a SNAP retail food store for a period of six months. The Charge letter states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

The owner replied to the Charge letter in writing on August 29, 2017. The Determination letter dated September 18, 2017, states that the violations cited in the Charge letter occurred at the firm, and that a six month period of disqualification was warranted. The letter also stated that eligibility for a hardship CMP was not applicable as there are other authorized retail food stores in the area selling as large a variety of staple foods at comparable prices.

By letter dated September 25, 2017, Appellant, via counsel, appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated October 6, 2017. Counsel provided another letter misdated November 31, 2017, which was postmarked November 2, 2017.

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.

Section 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."

Section 278.6(e)(5) of the SNAP regulations 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(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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system...”

In addition, 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 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 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 with the Charge letter. The investigative report provides details on the results of each compliance visit. The investigation report documents that SNAP violations were recorded during three store visits that warrant a six month disqualification. The violations involved the sale of non-food items including: batteries, soap, laundry detergent, trash bags and fabric softener for SNAP benefits in violation of 7 CFR § 278.2(a).

APPELLANT’S CONTENTIONS

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

- Since I opened the store I never did these types of mistakes.
- I wasn’t planning to break the law.
- I will train myself and employees to be more careful.
- Per exhibits C and D, it appears 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was charged in error on June 13 and 16, 2017 for detergent. Exhibit B reflects 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for soap.
- My client has operated the store for decades without any violations. The violations total only 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and were unintentionally made.
- My client seems to have confused the charges on the cards for the program as being for someone who was not using the program, so the infractions were not intentional.
- My client seeks a CMP.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination made by Retailer Operations. This review is limited to what circumstances were at the basis of Retailer Operations' determination at the time such action was taken. Upon review, the evidence supports that Appellant established a record of selling non-food items as defined by Section 271.2 of the regulations on multiple occasions. Exhibits B, C, and D warrant a disqualification period of six months. 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 ownership 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....;" "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."

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.

A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or mitigate the impact of the violations upon which they are based. There are no provisions in the Act, or regulations that reverse or reduce a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

Ownership contends, through counsel, that the total cash amount involved in the alleged violations is only 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Regardless of cost, Appellant established a record of selling non-food items as defined by Section 271.2 on multiple occasions. No mention of minimum cost is cited in Section 278.6(e)(5) of the SNAP regulations, which states that FNS shall disqualify a store 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 the sale of common nonfood items in exchange for FSP benefits due to carelessness or poor supervision by the firm's ownership or management.

CIVIL MONEY PENALTY

Retailer Operations rendered a finding that it was not appropriate to impose a CMP in lieu of a six month period of disqualification because there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices as Appellant. The record lists other authorized stores within a nearby radius of Appellant that stock a variety of comparable staple foods and have comparable prices. Thus, the evidence does not support that it will cause hardship for SNAP recipients if Appellant is disqualified.

CONCLUSION

Based on a review of the evidence, the record indicates that the program violations at issue did occur at Appellant. The charges of violations are 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, the prices of the items or a notation of “npi” when no price was indicated, and in all other critically pertinent detail. The record also documents that Retailer Operations considered Appellant’s eligibility for a hardship CMP according to the terms of Section 278.6(f)(1), and properly denied it. Therefore, the six month disqualification of Appellant from participation as an authorized retail food store in the SNAP is sustained.

RIGHTS AND REMEDIES

This penalty shall become effective thirty (30) days after receipt of this decision. A new application for participation in the SNAP may be submitted ten (10) days prior to the expiration of the six month period of disqualification. Please contact the Retailer Center at 877-823-4369 with any questions regarding the SNAP application process. 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 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 the owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction.

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

November 16, 2017