

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

Super Carniceria El Corral #1,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0203031

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 that the Retailer Operations Division properly denied the application of Super Carniceria El Corral #1 (hereinafter “Super Carniceria El Corral” or “Appellant”) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

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 denied the retailer application of Super Carniceria El Corral.

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 Appellant firm, Super Carniceria El Corral, applied to participate as a retailer in SNAP on September 8, 2017. According to the Appellant’s application, the store has been opened for business under the current ownership since July 14, 2006.

In a letter dated September 14, 2017, the Retailer Operations Division informed the Appellant that its SNAP application was denied because the owners of the firm have an unpaid civil money penalty from a store that was previously permanently disqualified and subsequently assessed a transfer of ownership civil money penalty. According to the denial letter, the store in question is Super Carniceria El Corral #1, located in Tempe, Arizona. The civil money penalty dates back to August 2009, and according to the denial letter, has an outstanding balance **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

The Retailer Operations Division based its denial decision on SNAP regulations found at 7 CFR 278.1(k)(7).

In a letter postmarked September 8, 2017, the Appellant requested an administrative review of the Retailer Operations Division's decision. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as an application denial, 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. § 2018), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(k) establishes the authority upon which FNS shall deny the authorization of any firm applying for participation in SNAP if it has failed to pay a transfer of ownership civil money penalty assessed under 7 CFR § 278.6(f).

7 CFR § 278.1(k)(7) reads:

FNS shall deny the application of any firm if it determines that:

(7) The firm has failed to pay in full any fiscal claim assessed against the firm under § 278.7, any fines assessed under §§ 278.6(l) or 278.6(m), or a transfer of ownership civil money penalty assessed under § 278.6(f). The FNS officer in charge shall issue a notice to the firm (using any delivery method that provides evidence of delivery) to inform the firm of any authorization denial and advise the firm that it may request review of that determination.

7 CFR § 271.6(f) states, in part:

(2) In the event any retail food store or wholesale food concern which has been disqualified is sold or the ownership thereof is otherwise transferred to a purchaser or transferee, the person or other legal entity who sells or otherwise transfers ownership of the retail food store or wholesale food concern shall be subjected to and liable for a civil money penalty in an amount to reflect that portion of the disqualification period that has not expired, to be calculated using the method found at § 278.6(g). If the retail food store or wholesale food concern has been permanently disqualified, the civil money penalty shall be double the penalty for a ten year disqualification period. The disqualification shall continue in effect at the disqualified location for the person or other legal entity who transfers ownership of the retail food store or wholesale food concern notwithstanding the imposition of a civil money penalty under this paragraph.

7 CFR § 278.1(l)(1)(v) states:

(1) FNS shall withdraw the authorization of any firm authorized to participate in the program for any of the following reasons.

(v) The firm has failed to pay in full any fiscal claim assessed against the firm under § 278.7 or any fines assessed under §§ 278.6(l) or 278.6(m) or a transfer of ownership civil money penalty assessed under § 278.6(f).

APPELLANT'S CONTENTIONS

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

- Appellant has been in contact with various people at USDA since 2009. Most recently, Appellant was in constant contact 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in FNS's Financial Management Accounting Division. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) advised Appellant to provide proof of payments that have been made thus far. Appellant claims to have submitted the proof requested, but has received no response from 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- Appellant has made many attempts to make the account current and to continue with payments, to no avail.
- The balance of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), as indicated on the Retailer Operations Division's denial letter, is incorrect, as there have been many payments made, but not credited to the account.

In support of its contentions the Appellant provided "a copy of all payments sent and received by USDA." The Appellant also provided copies of e-mail correspondence with 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in payments has been recorded in the agency's records. These records show that the last payment was credited on August 9, 2011. The Appellant also sent copies of 12 money orders between 2010 and 2011. The last one is dated June 30, 2011. The total amount of the 12 money orders is 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a final agency decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. Thus, this review is limited to consideration of the relevant facts and circumstances as they existed at the time the Retailer Operations Division rendered its denial decision.

On September 8, 2017, the Appellant submitted an online form FNS-252, *Supplemental Nutrition Assistance Program Application for Stores*. Question #13a of this application reads: "Has any officer, owner, partner, member and/or manager ever been denied withdrawn or suspended, or fined for license violations (i.e. Supplemental Nutrition Assistance Program (SNAP), WIC, business, alcohol, tobacco, lottery, or health license)?"

In response to this question, the Appellant marked "no."

After a review of the case record, it is clear that the Appellant's answer of "no" was not accurate. The record plainly shows that on December 4, 2006, Super Carniceria El Corral #1 in Tempe, Arizona, was permanently disqualified from SNAP participation due to violations committed during an undercover investigation by USDA. The firm's ownership at that time **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

In July 2009, the store in Tempe was transferred to a new owner. Upon learning of this change of ownership, the Retailer Operations Division imposed **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** transfer of ownership civil money penalty (CMP) in accordance with 7 CFR § 278.6(f)(2). A letter to this effect was sent to the firm on August 25, 2009.

In a letter dated September 16, 2010, FNS's Financial Management Division confirmed a payment agreement between the Appellant and FNS. This payment agreement stated that the firm would make monthly payments **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** until August 2015, with interest accruing at a rate of 1 percent each year.

The repayment agreement was signed by **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** on September 29, 2010.

On January 17, 2014, the Retailer Operations Division determined that the Appellant was delinquent in its obligation to make monthly payments. Accordingly, it withdrew the SNAP authorization of the Appellant's other store, Super Carniceria El Corral Inc., in Lake Havasu City, Arizona. This action was taken in accordance with 7 CFR § 278.1(l)(1)(v), which states that a firm's authorization must be withdrawn if it has failed to pay a transfer of ownership civil money penalty. The withdrawal action took effect on February 19, 2014 and the store has remained unauthorized since that time.

The Appellant submitted an appeal of the withdrawal decision to FNS's Administrative Review Branch, but the request for review was submitted long after the deadline for requesting a review had passed. As such, the appeal was not heard. It is worth noting that in the Appellant's untimely request for review, it stated that it had made regular payments in 2010 and 2011, but in 2012, "hard times hit and we were unable to make payments." The Appellant then requested to make a lump sum payment of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) by March 14, 2014, and then continue making regular monthly payments of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) until the debt was paid off. There is no indication, however, that a lump sum was ever paid by the Appellant or that it made regular monthly payments after March 14, 2014.

It should be noted that the current SNAP application is the same Lake Havasu City location that was withdrawn in 2014.

Correspondence with FNS's Financial Management Accounting Division

The Appellant contends that it has been in contact with various people at USDA since 2009, particularly 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in FNS's Financial Management Accounting Division (hereinafter "Financial Management"). According to the Appellant, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) advised the firm to provide proof of any payments that it had made. The Appellant claims to have submitted the information requested by 5 U.S.C. § 552 (b)(6) & (b)(7)(C), but has received no response from 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Appellant also claims to have made many attempts to make the account current and to continue with payments, but to no avail.

In support of this contention the Appellant provided what it said was "a copy of all payments sent and received by USDA." The Appellant also provided copies of e-mail correspondence with 5 U.S.C. § 552 (b)(6) & (b)(7)(C) showing that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in payments has been recorded in the agency's records. These records show that the last payment was credited on August 9, 2011. The Appellant also sent copies of 12 money orders between 2010 and 2011. The last one is dated June 30, 2011. The total amount of the 12 money orders is 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

This review can neither confirm nor disprove the Appellant's claim of attempting to remain in contact with Financial Management or attempting to keep its account current. However, the information provided by the Appellant clearly shows that the last payment to FNS was in 2011 – more than six years ago. This review can find no record of any payments made since that point. Because the account is clearly delinquent, it is the determination of this review that the Retailer Operations Division was correct to deny the Appellant's September 2017 SNAP application for failure to pay a transfer of ownership CMP as it had agreed to do. The denial determination is wholly in accordance with SNAP regulation at 7 CFR § 278.1(k)(7).

Remaining Balance Incorrect

The Appellant has argued that the Retailer Operations Division was incorrect when it stated in its denial letter that the firm still owed 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Appellant

contends that there have been many payments made, but the payments have not been credited to the account.

Based on the payment records provided by the Appellant, this review agrees that a balance of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is not accurate. Records clearly show that some payments have been made. Based on the payment amounts listed above, this review estimates that the remaining balance is approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C). To get a more precise picture of the account or to pay the amount owed, this review recommends that the Appellant owners contact Financial Management at (703) 605-0483.

Despite the fact that the denial letter listed an imprecise debt amount, this review does not find such an aberration to be of any significant consequence with respect to the denial decision. The record is clear that the Appellant has failed to maintain its monthly payment obligations, and has not made a payment toward the CMP for more than six years. As such, the denial decision is appropriate. It should be noted that there is not a specific duration of time associated with this denial decision. Once the CMP has been paid, the firm is free to reapply for SNAP participation.

CONCLUSION

Based on the analysis above and in accordance with 7 CFR § 278.1(k)(7), it is the determination of this review that the Appellant firm, Super Carniceria El Corral, has failed to pay a transfer of ownership civil money penalty that was properly assessed against a separate firm owned by the Appellant. The contentions and evidence presented by the Appellant are not sufficient to prove that the denial decision made by the Retailer Operations Division should be reversed. Therefore, the decision by the Retailer Operations Division to deny the application of Super Carniceria El Corral to participate as a retailer in SNAP is sustained.

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

November 13, 2017