

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

Pan Am Supermarket,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case #: C0177883

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the six-month disqualification imposed upon Pan Am Supermarket (hereinafter “Appellant”) by the Retailer Operations Division, Investigations and Analysis Branch, hereinafter “ROD Office,” is hereby modified and Appellant is given the option to pay a civil money penalty in the amount of \$4530.00 in lieu thereof.

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a), 7 CFR § 278.6 (e) and 7 CFR § 278.6 (f) in its administration of the SNAP when it imposed a six-month disqualification upon Appellant.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 C.F.R. § 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

In a letter dated August 18, 2016, the ROD Office informed Appellant that it was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 271 – 282. The record reflects that the ROD Office received and considered Appellant’s reply to the Charge Letter. By a letter dated September 7, 2016, Appellant was informed that it was disqualified for a period of six-months from participation as a retail store in the SNAP and was instructed to cease accepting SNAP benefits or,

alternatively, request an administrative review of the decision. On September 16, 2016, Appellant requested an administrative review of the ROD Office's decision. The request was granted and the disqualification action held in abeyance pending the results of the 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, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, at 7 U.S.C. § 2021 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6 (e) of the Regulations establish the authority upon which a disqualification, or a civil money penalty in lieu thereof, may be imposed upon a retail food store or wholesale food concern. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to disqualify retail stores from the SNAP.

7 U.S.C. § 2021 states, *inter alia*:

- (1) IN GENERAL.—An approved retail food store or wholesale food concern that violates a provision of this Act or a regulation under this Act may be—
 - (A) disqualified for a specified period of time from further participation in the supplemental nutrition assistance program;
 - (B) assessed a civil penalty of up to \$100,000 for each violation; or
 - (C) both.

7 CFR § 278.6(a) states, *inter alia*:

FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food & 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.

7 CFR § 278.6(e)(5) states:

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.

7 CFR § 278.6(e)(6) states:

Double the appropriate period of disqualification prescribed in paragraphs (e)(2) through (5) of this section as warranted by the evidence of violations *if the same firm has once before been assigned a sanction.* (Emphasis added.)

7 CFR § 278.6(f)(1) states, *inter alia*:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm...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 store in the area selling as large a variety of staple food items... *FNS may disqualify a store which meets the criteria for a civil money penalty if the store had previously been assigned a sanction.* (Emphasis added.)

7 CFR §278.6(f)(2) states, *inter alia*:

In the event any retail food store...which has been disqualified is sold or the ownership thereof is otherwise transferred...the person or other legal entity who sells or otherwise transfers ownership...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).

7 CFR §278.6(h)(1),(2) and (3) state, *inter alia*:

1. Disqualify the firm for the period determined to be appropriate under paragraph (e) of this section if the firm refuses to pay any of the civil money penalty.
2. Disqualify the firm for a period corresponding to the unpaid part of the civil money penalty if the firm does not pay the civil money penalty in full or in installments as specified by the regional office.
3. Disqualify the firm for the prescribed period if the firm does not present a collateral bond or irrevocable letter of credit within the required 15 days. If the firm presents the required bond during the disqualification period, the civil money penalty may be reinstated for the duration of the disqualification period.

SUMMARY OF THE CHARGES

Among other documents, the record contains a Report of Positive Investigation, #ME39069, which indicates that investigative work was undertaken at Appellant's firm from July 28, 2015 through December 3, 2015 and reflects that five investigative visits were made to Appellant's firm during which store clerks sold common ineligible items (those normally seen in shopping baskets) in exchange for SNAP benefits in combination with eligible food items in a substantive ratio on three separate occasions, indicative of clearly violative activity. When the extent of violative activity was determined, the investigation was halted and a report issued and assigned to the ROD Office for consideration of administrative action.

APPELLANT'S CONTENTIONS

In its reply to the ROD Office's Charge Letter and in its written request for review dated September 16, 2016, Appellant provided information in which it was argued that:

1. Appellant did not receive the Charge Letter.
2. Appellant asserts that the investigator visited the store next door and not the Appellant store. This is because two to three years ago Appellant had its EBT services erroneously disconnected; the store next door was supposed to be suspended but the Appellant store was erroneously suspended instead. The two stores are sometimes confused due to their addresses. Both stores share the same mailing address but have different suite numbers. Appellant assumes the same error has again been committed by FNS. Additionally, during 2015, the store had only one clerk who was under five feet tall and was under 110 pounds; he was a tiny Mexican boy and the one and only worker hired last year. The firm did not employ a 35-40 year old lady (1st violation), any 20-25 year old men (2nd and 3rd violations) or any 60-65 year old men with glasses (5th violation). Instead, all of the clerks noted in the investigation describe employees of that firm. Appellant provides a photograph of the store front in support thereof.
3. Since starting the store in 2004, the ownership has not changed. The ownership of the store next door has changed every time they have gotten in trouble for committing violations.

ANALYSIS AND FINDINGS

In regard to contention 1 above, the record reflects that Appellant received the SNAP Office's August 18, 2016 Charge Letter on August 19, 2016 at 9:27 AM at the address listed on the firm's application to participate in the SNAP and was signed for by an individual using a signature matching the last name of the Store Owners. Such constitutes ample notice to the firm of the charges against it.

Regarding contention 2 above, data in the table below was taken directly from raw data contained in the agency's redemption tracking system and clearly reflects that the transactions described in the Report of Positive Investigation as having occurred at the Appellant firm in fact did occur at Appellant's place of business located at 151 Nellie B Avenue, Athens, Georgia 30601-3371 on the noted dates and times and in the exact same amounts:

Store Name	Store Type	Date/Time	Amount	Method
PAN AM SUPERMARKET	MG	07/28/2015	\$9.30	Swipe
PAN AM SUPERMARKET	MG	08/04/2015	\$10.00	Swipe
PAN AM SUPERMARKET	MG	10/14/2015	\$8.07	Swipe
PAN AM SUPERMARKET	MG	11/03/2015	\$3.88	Swipe

PAN AM SUPERMARKET	MG	12/03/2015	\$3.29	Swipe
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That Appellant takes issue with the descriptions of store clerks does little to controvert the above data; had the transactions noted during the investigation taken place at the neighboring store the transaction data for that store would have contained the above transactions and the Appellant firm's data would not.

With regard to contention 3 above, the ownership history of the Appellant store and that of the neighboring store has no bearing on the present case, nor does the compliance history of the neighboring store. There is no information in the record indicating that any confusion Appellant may point to as having occurred in the past has occurred in the present case.

CIVIL MONEY PENALTY

The Appellant firm is categorized as a small grocery store. Agency data indicates that there were no comparable firms (comparable to or better-stocked than typical small grocery stores) within a one-mile radius at the time of the sanction decision; there was one seafood specialty store and there were six convenience stores. The same is true of the current time frame (from January to February 2017). The firm is not located in a rural area; thus, there being no comparable firms in the area, the firm qualifies for a civil money penalty in lieu of a six-month disqualification. The amount is calculated as noted below:

Hardship CMP Calculation

Store/Meal Service Name: Pan Am Supermarket

Case Number: C0177883

Month of Charge Letter: August 2016

SNAP Redemptions -- 12 Months Preceding Month of Charge Letter

Month	Amount	Month	Amount
07/2016	\$7,189.37	1/2016	\$8378.71
06/2016	\$6,246.08	12/2015	\$7234.13
05/2016	\$7,320.38	11/2015	\$7156.19
04/2016	\$8,266.65	10/2015	\$8882.92
03/2016	\$7,430.32	9/2015	\$8711.81
02/2016	\$5,658.14	8/2015	\$8150.61

Hardship CMP Calculations

Total Redemptions: \$90,625.31

Number of Authorized Months: 12

Average Monthly Redemption (AMR): \$7552.11

AMR Rounded to the Nearest Dollar: \$7552.00

10% of Rounded AMR: \$755.20

Rounded to the Nearest Dollar: \$755.00

Term Multiplier (DQ term in months):	6
Initial Hardship CMP Amount:	\$4530.00
Statutory Limit (number of violations X \$11,000.00):	\$33,000.00
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Hardship CMP Amount:	\$4530.00
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Collateral Bond/LOC Amount:	\$0.00
(Requires greater than a 6-month disqualification)	

CONCLUSION

In view of the above, the decision of the ROD Office to disqualify Pan Am Supermarket for a period of six-months from participation in the SNAP is hereby modified and Appellant is provided the option of paying a civil money penalty in the above amount in lieu thereof; the decision will become effective upon the 30th day following your firm’s receipt of this document. In the event the civil money penalty is not paid, the six-month disqualification will be imposed and Appellant may reapply for authorization to participate in the SNAP up to 10 days prior to the end of the six-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 provisions of the Freedom of Information Act (FOIA), FNS is 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.

DANIEL S. LAY
ADMINISTRATIVE REVIEW OFFICER

March 20, 2017