

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

A & R Mini Market Inc.,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0235261

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a permanent disqualification of A & R Mini Market Inc. (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was improperly imposed by FNS’s Retailer Operations Division. However, there is sufficient evidence to support a six-month disqualification from SNAP.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action consistent with Title 7 Code of Federal Regulations (CFR) Part 278 when it imposed a permanent disqualification against A & R Mini Market Inc.

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

A & R Mini Market Inc. was initially authorized to participate as a retailer in SNAP on May 16, 2019. Between February 21, 2021 and February 25, 2021, a USDA investigator conducted an undercover investigation at A & R Mini Market Inc. to ascertain the firm’s compliance with Federal SNAP laws and regulations. It was reported that during the course of the investigation the Appellant firm violated SNAP rules by allowing ineligible non-food items to be purchased with SNAP benefits on three separate occasions. The firm also reportedly committed the

violation of trafficking by twice exchanging cash for merchandise that had been originally purchased with SNAP benefits.

In a letter dated March 9, 2021, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations. It also charged the Appellant with accepting SNAP benefits in exchange for ineligible non-food merchandise. The misuse of SNAP benefits, as described in the charge letter, is a violation of 7 CFR § 278.2(a). The charge letter informed the Appellant that the trafficking violations warranted permanent disqualification from SNAP as provided in 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking but noted that such a request must be made within 10 days of receipt of the letter under the conditions specified in 7 CFR § 278.6(I).

In an e-mail dated March 23, 2021, the Appellant, through counsel, responded to the charge letter, denying that any trafficking occurred. The Appellant also argued that the charge letter and exhibits did not prove that ineligible items were sold during the investigation, and claimed that the store had been in business for over three years and had always been diligent in complying with SNAP regulations. The Appellant further argued that the details in the investigation report were vague or ambiguous and contended that the report did not show prices of the items purportedly purchased, so it was impossible to determine whether the investigator was actually charged for non-food items.

As to the trafficking allegations, the Appellant argued that the owner was not in the store when the violations supposedly occurred and claimed that the firm's employees denied that any trafficking took place.

Finally, the Appellant contended that the firm had an established training policy, had trained every employee to ensure proper processing of SNAP transactions, and requested that FNS consider imposing a civil money penalty instead of disqualification.

It is noted that in its e-mail communication, the Appellant submitted a request for case file information in a request made under the Freedom of Information Act (FOIA). However, FOIA is a separate process from the compliance action in this case and all FOIA requests must be made directly with the agency FOIA office. Additionally, in accordance with 7 CFR § 278.6(p), administrative actions are no longer held in abeyance pending a FOIA request or appeal. On March 24, 2021, the Retailer Operations Division responded to the Appellant's e-mail by providing contact information for the FNS FOIA office should the Appellant wish to pursue its FOIA request.

After considering the Appellant's response and further reviewing the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated April 21, 2021. This letter, delivered to Appellant's counsel on April 23, 2021, informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(I) of the regulations but determined that a CMP

was not appropriate in this case because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked April 27, 2021, the Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

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

7 U.S.C. § 2021(b)(3)(B) states, in part:

...[A] disqualification under subsection (a) shall be... permanent upon...the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards...

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 mean: (1) Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods 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.

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. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

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:

- (1) Disqualify a firm permanently if:
 - (i) Personnel of the firm have trafficked as defined in § 271.2...
- (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 § 271.2 states, in part:

Trafficking means:

- (1) The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone...
- (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.

7 CFR § 278.6(b)(2)(ii) states, in part:

Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence... that establishes the firm's eligibility for a civil money penalty in lieu of a

permanent disqualification in accordance with the criteria included in § 278.6(I). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).

7 CFR § 278.6(b)(2)(iii) states:

If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such a penalty.

7 CFR § 278.6(i) states, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking ... if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program...

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.... A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

7 CFR § 279.5(c) states:

Review of disqualification or civil money penalty or fine. When the action under review is disqualifying a firm from program participation or assessing a civil money penalty or fine against a firm, the designated reviewer shall: Sustain the action under review; specify a shorter period of disqualification; specify a reduced money penalty or fine; direct that an official warning letter be issued to the firm in lieu of a disqualification, civil money penalty or fine; or, direct that the action under review be reversed. The designated reviewer may change a disqualification of a firm to a civil money penalty if the disqualification would cause a hardship to participating households (except in the case of a permanent disqualification). The designated reviewer, working with the appropriate FNS office, shall determine if circumstances warrant a civil money penalty in accordance with §278.6 of this chapter.

SUMMARY OF INVESTIGATION

During an undercover investigation conducted between February 21 and 25, 2021, a USDA-contracted investigator completed five compliance visits at A & R Mini Market Inc. A report of the investigation was provided to the Appellant as an attachment to the March 9, 2021 charge letter. The investigation report included Exhibits A through E and provided details on the results

of each compliance visit. SNAP violations were documented during all five visits, including trafficking violations in Exhibits D and E. The report provided the following details:

Exhibit A

Four SNAP-eligible items purchased. Two ineligible items purchased:

- One 80-count box of plastic sandwich bags (*Red & White* brand)
- One 4-count box of steel wool pads (*Brillo* brand)

Exhibit B

Three SNAP-eligible items purchased. Two ineligible items purchased:

- Two 1-count packages of scrubber sponges (*S.O.S.* brand)

Exhibit C

Two SNAP-eligible items purchased. Two ineligible items purchased:

- Two 4-count boxes of steel wool pads (*Brillo* brand)

This exhibit also indicated that the investigator negotiated a future trafficking incident with the clerk. This was described by the investigator as follows:

5 U.S.C. § 552 (b)(7)(E)

Exhibit D

Two SNAP-eligible items purchased. This exhibit also described the purchase of 5 U.S.C. § 552 (b)(7)(E), as noted in Exhibit C, as well as 5 U.S.C. § 552 (b)(7)(E). The investigator explained these events as follows:

5 U.S.C. § 552 (b)(7)(E)

Exhibit E

Four SNAP-eligible items purchased. This exhibit also described the purchase of 5 U.S.C. § 552 (b)(7)(E) as well as 5 U.S.C. § 552 (b)(7)(E). The investigator explained these events as follows:

5 U.S.C. § 552 (b)(7)(E)

APPELLANT'S CONTENTIONS

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

- As stated in its original response to the charge letter, the Appellant did not commit the violations charged in the letter.
- The owner has participated in SNAP for several years and has never had an issue with any of his permits.
- The Appellant has an established training policy and has trained every worker, every quarter, to ensure proper processing of SNAP transactions.
- Appellant also submitted a FOIA request to the FNS FOIA officer, but FNS has not responded to that request.
- As to the specifics of the investigation, the report is vague or ambiguous. For instance, it does not identify the store clerks. Additionally, the investigator’s narrative “does not affirm that any ineligible items were purchased, but rather, tangentially states that ‘the clerk made no mention of the non-food item’ without identifying it.”
- The report does not show prices of the food and non-food items purportedly purchased, so it is impossible to tell with certainty whether the investigator was charged for non-food items.
- With respect to the trafficking allegations, the owner was not in the store at the time these transactions allegedly occurred, and he does not have personal knowledge of the events. However, his employees deny that any trafficking occurred. The time of the transactions is redacted from the reports, making it difficult for the owner to pinpoint how the transactions might have occurred.
- “If any such sale did occur, [the owner] believes that the purchaser bought the cans for his own account, to be sold at a different store.”

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 type of trafficking alleged to have taken place in this case is described in the definition of *Trafficking* as found in 7 CFR § 271.2, paragraph 5, which states that trafficking includes “intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.” After analyzing the Retailer Operations Division’s case file, it is the finding of this review that a determination of trafficking is not supported by the evidence. Accordingly, the determination to impose a permanent disqualification against A & R Mini Market Inc. for trafficking is reversed. However, this review finds that there is sufficient evidence to impose a temporary disqualification based on the firm’s sale of ineligible non-food items in exchange for SNAP benefits on three occasions. Based on 7 CFR § 278.6(e)(5), the minimum disqualification period for such violations is six months.

The record shows that in three consecutive transactions, three different cashiers at A & R Mini Market Inc. permitted the investigator to purchase ineligible merchandise with SNAP benefits (see Exhibits A, B, and C of the investigation report). These transactions, including the names of the products, are clearly detailed in the report. The agency’s record includes photographs of the merchandise as well as EBT receipts for each transaction. This review finds that the investigation report is sufficiently thorough to reach a conclusion that program violations likely did occur.

That these violations were allowed to take place on three consecutive visits to the store strongly suggests that the store clerks were either careless in their duties or were not properly supervised by the firm's ownership or management. As such, a six-month disqualification is appropriate.

It should be noted as well that the Appellant has not submitted any evidence to prove that the violations did not occur. As noted earlier, in an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. In this case, the Appellant has offered no evidence to counter the agency's allegations.

No Prior Violations

The Appellant contends that the store owner has participated in SNAP for several years and has never had an issue with any of his permits. It further argues that the store has an established training policy and has trained every worker, every quarter, to ensure proper processing of SNAP transactions.

While the Appellant may have been authorized for several years without any violations or sanctions, the regulations are clear that when program violations do occur, specifically the exchange of ineligible nonfood items for SNAP benefits due to employee carelessness or poor supervision by the firm's ownership or management, a six-month disqualification is the required penalty, even on the first occasion.

With regard to employee training, it is notable that the Appellant has not, at any time, offered any evidence of its supposed training regimen. As indicated earlier, the store clerks permitted the investigator to purchase ineligible non-food items with SNAP benefits on three separate occasions. Based on the actions of the clerks in Exhibit A, B, and C, it is apparent to this review that carelessness or poor supervision was commonplace at this store and that employee training was likely not as robust as the Appellant claims. Accordingly, this review finds that a six-month disqualification penalty is appropriate and is entirely in line with SNAP regulations. This penalty is also consistent with sanctions imposed upon other retailers that have committed similar violations. As such, a dismissal of the charges related to the sale of ineligible items is not appropriate.

Hardship Civil Money Penalty

To address potential difficulties that SNAP households might face when a firm is temporarily disqualified from SNAP, 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 A & R Mini Market Inc., a convenience store, would not cause hardship to SNAP households because there are many other shopping options in the area. According to agency records, there are approximately 50 similarly-stocked or larger SNAP-authorized retail stores located within a one-mile radius of A & R Mini Market Inc., including a full-service superstore quite literally across the street. There is also no

evidence that the inventory at other stores in the area is not comparably priced. Because hardship conditions do not exist in this case, a CMP in lieu of disqualification is not an available option.

FOIA Request Status

The Appellant contends that it submitted a FOIA request to the FNS FOIA office, but the agency has not responded to its request.

With regard to this contention, it must be again stated that a FOIA request and an agency compliance action are separate processes and one does not impact the other. A new SNAP regulation related to FOIA became effective on October 26, 2020. This new regulation, found at 7 CFR § 278.6(p), states: “A FOIA request or appeal for records shall not delay or prohibit FNS from making a determination regarding disqualification or penalty against a firm under paragraphs (c) and (d) of this section, or delay the effective date of a disqualification or penalty listed in paragraph (e) of this section.” Similarly, Section 279.4(c) states: “...FNS may not grant extensions of time or hold the administrative review process in abeyance solely on the basis of a pending FOIA request or appeal.”

Because all actions in this case took place after October 26, 2020, FNS is prohibited from holding the disqualification determination or the administrative review decision in abeyance pending the response to the Appellant’s FOIA request. It may be worth noting that due process rights are protected by the provision within the Food and Nutrition Act of 2008 which provides for judicial review. Once an administrative review decision has been made, if an appellant is dissatisfied with the decision, 7 U.S.C. § 2023 provides for the right to a judicial review and a trial de novo, which includes an opportunity for discovery.

CONCLUSION

Based on a review of all available information in this case, this administrative review finds that there is insufficient evidence to support a permanent disqualification against A & R Mini Market Inc. as a result of trafficking. However, there is sufficient evidence that other program violations of 7 CFR § 278.2(a) did occur; namely, that the Appellant permitted the exchange of SNAP benefits for ineligible, nonfood merchandise on three occasions. A review of the documentation relating to these lesser charges has yielded no indication of error or discrepancy and all three transactions are sufficiently documented. In accordance with 7 CFR § 278.6(e)(5), the appropriate disqualification period for these violations is six months. Therefore, the case against the Appellant, A & R Mini Market Inc. is modified from a permanent disqualification to a six-month disqualification.

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. The Appellant shall be credited for any “time served” between the original effective date of the permanent disqualification (April 23, 2021) and the new effective date for the six-month penalty.

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. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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 2, 2021