

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

9th Ave. Deli & Grocery, Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0246152

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 that the Retailer Operations Division properly imposed a permanent disqualification of 9th Ave. Deli & Grocery, Inc (hereinafter “9th Ave. Deli & Grocery, Inc” or “Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against 9th Ave. Deli & Grocery, 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

The USDA conducted an investigation of the compliance of 9th Ave. Deli & Grocery, Inc with Federal SNAP law and regulations during the period November 1, 2021 through November 6, 2021. The investigation report documents that personnel at the Appellant firm, in addition to accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items on three occasions, exchanged SNAP benefits for cash during two undercover compliance visits (Exhibits F and H). The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR § 271.2.

As a result of evidence compiled from this investigation, the Retailer Operations Division charged the Appellant, in a letter dated December 6, 2021, with trafficking in SNAP benefits. The charge letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). Under certain conditions, FNS may instead impose a civil money penalty (CMP) in lieu of a disqualification as provided in 7 CFR § 278.6(f)(1). In addition, the Appellant was charged with accepting SNAP benefits in exchange for merchandise, which, in addition to eligible foods, included common ineligible nonfood items. The misuse of SNAP benefits noted in Exhibits B, C, and D violates Section 278.2(a) of the SNAP regulations. Further, the violations in Exhibits B, C, and D warrant a non-permanent disqualification period as specified in Section 278.6(e) of the SNAP regulations.

The charge letter stated that the Appellant had the right to respond to the charges within 10 days of receipt. The letter also stated that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i). Per UPS confirmation of delivery, the charge letter was delivered to the Appellant at the store address of record on December 7, 2021.

In responses to the Retailer Operations Division of December 10, 2021 and December 13, 2021, the Appellant, through counsel, replied to the letter of charges. The record reflects that on December 16, 2021, the Appellant's counsel requested an extension in time for providing a response to the letter of charges. By letter of December 16, 2021, the Retailer Operations Division granted counsel's time extension request to January 14, 2022. Counsel was informed in that letter that the time to request a civil money penalty in lieu of permanent disqualification and to provide the documentation to support such a request could not be extended per SNAP regulations.

In responses to the Retailer Operations Division of December 17, 2021 and January 14, 2022, the Appellant, through counsel, provided additional information in response to the letter of charges.

After giving consideration to the Appellant's responses and the evidence of this case, the Retailer Operations Division issued a determination letter dated February 3, 2022. The determination letter stated that the Appellant was permanently disqualified from participation as an authorized retailer in the SNAP in accordance with Section 278.6(c) and 278.6(e)(1) for trafficking violations. The determination letter also stated that the Appellant was not eligible for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations as the Appellant did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked February 5, 2022, the Appellant, through counsel, requested an administrative review of the permanent disqualification determination. FNS granted the Appellant's request for administrative review by letter dated February 10, 2022.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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

The controlling statute in this matter is covered 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)(1)(i) establish the authority upon which a permanent 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 ...[Emphasis added.]

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 § 278.6(e)(1)(i) states:

FNS shall ... disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, in part:

Trafficking means the buying or selling of coupons, ATP cards or other benefit instruments for cash or consideration other than eligible food ...

7 CFR § 271.2 defines eligible food, in part, as:

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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system....

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(b)(2) states, in part:

(ii) 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 as specified in § 278.6(i), 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).

(iii) 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.

SUMMARY OF CHARGES

During an investigation conducted during the period November 1, 2021 through November 6, 2021, the USDA conducted eight undercover compliance visits at 9th Ave. Deli & Grocery, Inc. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated December 6, 2021. The investigation report included Exhibits A through H which provide a narrative on the results of each compliance visit. SNAP violations were documented in five of the eight Exhibits, including the acceptance of SNAP benefits in exchange for merchandise which included ineligible nonfood items on three occasions (Exhibits B, C, and D) and the exchange of SNAP benefits for cash on two occasions (Exhibits F and H). The report provided the following details:

5 U.S.C. § 552 (b)(7)(E).

The buying or selling of SNAP benefits for cash or consideration other than eligible food in Exhibits F and H is trafficking as defined under 7 CFR § 271.2. The acceptance of SNAP benefits in exchange for cash or consideration other than eligible food is in violation of Section 278.2(a) of the SNAP regulations. As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for the trafficking is permanent disqualification.

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the replies to the charge letter and in the request for administrative review, the Appellant, through counsel, made the following summarized contentions, in relevant part:

- The Appellant has not been cited for any prior SNAP violations since it was authorized to participate in the SNAP.
- The Appellant always follows the SNAP rules and standards.

- The investigation report provides a one-sided story, is inaccurate and lacks credible evidence.
- The Appellant questions the integrity of the investigator.
- The investigation report is extremely biased and unfair and does not represent the actual reality and practices of the business.
- It is also concerning that all eight visits were conducted by one investigator in a span of five days. The report lacks credibility and proof and that the investigator's claim of "money trafficking" and being charged extra is out of proportion and context.
- The attached register receipts show the items that were purchased.
- In Exhibit B, the report incorrectly states that the investigator purchased five items, was overcharged \$0.04 and purchased two ineligible nonfood items. The submitted itemized receipt indicates that the investigator purchased six items, no ineligible nonfood items and was not overcharged by \$0.04.
- In Exhibit C, the report incorrectly states that the investigator purchased six items, was overcharged \$0.76 and purchased three ineligible nonfood items. The submitted itemized receipt indicates that the investigator purchased five items, no ineligible nonfood items and was not overcharged by \$0.76.
- In Exhibit D, the report incorrectly states that the investigator was over charged \$0.20 and purchased three ineligible nonfood items. The submitted itemized receipt indicates that the investigator purchased six items, no ineligible nonfood items and was not overcharged by \$0.20. The verbal exchange regarding cash off the EBT card did not occur because there are several signs posted on store walls and on the counter stating that selling SNAP benefits and/or trafficking SNAP benefits is illegal and can lead to financial penalties or jail.
- In Exhibit F, the report incorrectly states that the investigator made a single transaction for \$2.49 and was provided \$40.00 (two-twenty-dollar bills) in exchange for \$80.00 in SNAP benefits. The submitted itemized receipts indicate that the investigator made two transactions, one for a Snapple lemonade for \$2.49 and a second for \$96.95 that the investigator split into two transactions--an \$80.00 EBT transaction and a \$16.95 cash transaction.
- The investigation summary for Exhibit H is fascination and unrealistic. The report incorrectly states that the investigator made one transaction. The investigator made two transactions—first for a KitKat for a transaction total of \$2.25, which the report falsely states it was given for free, and the second transaction was a catering order for \$214.25 which the investigator split into two transactions, one for \$160.00 in SNAP benefits and the other for \$54.25 in cash. The statement that "the clerk handed me \$80.00 in cash, four twenty-dollar bills from the bottom drawer of the register", is inaccurate. Store employees attest that the firm does not store any cash under the register drawer. The drawer has sufficient space to hold all currency denominations removing the need to store currency under the cash drawer.
- Z Data Services conducted a pop up visit of the firm on December 27, 2020 and noted that the store is located in a "good hood", is very busy, and at the time of the visit was not soliciting EBT transactions for cash or providing free food. There was also an absence of interactions between cashiers and customers.
- Z Data Services conducted a pop up visit of the firm on January 13, 2022 and noted price discrepancies with the evening match.
- Z Data Services affirms that the Appellant and its employees show good business integrity and conduct and is law abiding and in alignment with the SNAP rules.

In support of these contentions, the Appellant, through counsel, provided the following information for review:

- November 2, 2021 cash register receipt for \$22.58;
- November 3, 2021 cash register receipt for \$31.00;
- November 3, 2021 cash register receipt for \$22.44;
- November 5, 2021 cash register receipt for \$2.49;
- November 5, 2021 cash register receipt for \$96.95;
- November 5, 2021 cash register receipt for \$2.25;
- November 6, 2021 cash register receipt for \$214.25;
- Photo of two SNAP fraud posters on Appellant's checkout counter;
- Photo of SNAP fraud poster above sink in store;
- Photo of inside cash register with drawer; and
- 21 photos of food stock (some foods include price tags).

ANALYSIS AND FINDINGS

SNAP Violations

This review is to either validate or to invalidate the determination made by the Retailer Operations Divisions; it is limited to the facts at the basis of the Retailer Operations Division's determination at the time it was made.

Prior to becoming authorized to participate in the SNAP, the Appellant completed and submitted a SNAP Application for Retail Stores. When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

The Appellant contends that the investigation report provides a one-sided story, is inaccurate and lacks credible evidence. The Appellant questions the integrity of the investigator. The investigation report is extremely biased and unfair and does not represent the actual reality and practices of the business. It is also concerning that all eight visits were conducted by one investigator in a span of five days. The report lacks credibility and proof and that the investigator's claim of "money trafficking" and being charged extra is out of proportion and context.

The transactions cited in the letter of charges were conducted by a USDA investigator and are thoroughly documented. Investigators sign, under penalty of perjury, that investigative reports are true and correct. All transactions are fully documented and a complete review of this documentation has yielded no known error or discrepancy in the reported findings. 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 the store employee(s) committed trafficking violations by buying or selling SNAP benefits for cash or consideration other than eligible food.

The documentation on record includes EBT receipts and photos showing that 8 ineligible nonfood items and 19 eligible food items were purchased by the investigator with SNAP benefits during the investigation. In addition, one chocolate/candy bar was given to the investigator by the clerk for free. The investigation report notates the serial numbers of the cash/bills that were given to the investigator by the employee(s) in exchange for SNAP benefits. Also on record is documentation that confirms that the ineligible nonfood items and the eligible food items previously noted were donated to and signed for by a charitable organization following the transaction. Such documentation includes the signature and title of the official of the charitable organization accepting the donated item, the name and address of the organization, the date the donation was made, and the official's initials next to the items donated. Moreover, the total purchase costs of each of the transactions involved in the investigation is documented on SNAP terminal receipts obtained during each transaction and matches the reported purchase totals indicated in the investigation report.

Upon review, the evidence supports that SNAP violations occurred at the Appellant firm. The store employee(s) identified in Exhibits F and H was found to be trafficking as defined under 7 CFR § 271.2 by buying or selling of SNAP benefits for cash or consideration other than eligible food. The investigation report documents that on November 5, 2021 (Exhibit F), a male employee accepted \$80.00 in SNAP EBT benefits in exchange for \$40.00 in cash; and on November 6, 2021 (Exhibit H), a male employee accepted \$160.00 in SNAP EBT benefits in exchange for \$80.00 in cash.

Exhibit F of the investigation report states, in part:

5 U.S.C. § 552 (b)(7)(E).

Exhibit H of the investigation report states, in part:

5 U.S.C. § 552 (b)(7)(E).

FNS acknowledges the Appellant's itemized receipts submitted for Exhibits B, C, D, F, and H; however, the integrity of these receipts is in question as none of the itemized purchased products noted on the Appellant's receipts match the investigative photos, report of investigation product purchase listing, or charitable donation reports. The Appellant's receipts have no comparison to the receipts ascertained by the investigator. 5 U.S.C. § 552 (b)(7)(E). As such, the submitted receipts do not validate that the violative SNAP transactions as noted in the charge letter did not occur. Likewise, the submitted photos of SNAP fraud posters in the store, photo of inside of cash register, and food stock photos taken as part of the Z Data Services inspections do not validate that trafficking of SNAP benefits did not occur during the investigation period.

The Appellant is correct that the firm has not been cited for prior SNAP violations. However, 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 for mitigating the impact of those charges.

Trafficking is defined in 7 CFR § 271.2 of the SNAP regulations which states that trafficking means 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... The Food

and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that “Disqualification ... shall be permanent upon ... the first occasion of a disqualification based on ... trafficking ... by a retail food store”. The law and regulations do not provide for a lesser period of disqualification or sanction for this violation.

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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. The Appellant did not provide any evidence that the violations cited in the charge letter did not occur. The preponderance of the evidence in the record supports that trafficking, as defined in the regulations, did occur at the Appellant and that the permanent disqualification was properly applied.

CIVIL MONEY PENALTY

As previously indicated, the February 3, 2022 determination letter advised the Appellant of the ineligibility for consideration for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations. The letter of charges dated December 6, 2021 advised the Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The regulations specify that such documentation must, in part, establish that there was an effective compliance policy and training program and that both were in effect and implemented prior to the occurrence of violations. The letter indicates that no information was provided by the Appellant for consideration; therefore, on review the Retailer Operations Division’s determination that the Appellant firm is ineligible for the imposition of civil money penalties in lieu of disqualification is affirmed.

CONCLUSION

As previously stated, 7 CFR § 278.6(e)(1)(i) reads, in part, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.” Trafficking is defined, in part, in 7 CFR § 271.2, as “the buying or selling of SNAP benefits for cash or consideration other than eligible food.” The law and regulations do not provide for a lesser period of disqualification for this violation.

Based on a full review of the evidence in this case, the Retailer Operations Division properly imposed a permanent disqualification of 9th Ave. Deli & Grocery, Inc, the Appellant, as an authorized retailer in the Supplemental Nutrition Assistance Program. As such, the decision to impose a permanent disqualification against 9th Ave. Deli & Grocery, Inc, the Appellant, is sustained.

RIGHTS AND REMEDIES

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 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, 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

May 17, 2022