

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

Bald Guy C-Store,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0221603

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 a permanent disqualification of Bald Guy C-Store from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) as imposed by FNS's Retailer Operations Division.

ISSUE

The issue accepted for review is whether 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 Bald Guy C-Store.

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

Bald Guy C-Store, under the ownership of Hussein Abdallah, was originally authorized to participate as a retailer in SNAP on September 26, 2014. Between November 25, 2018 and December 15, 2018, USDA conducted an undercover investigation at Bald Guy C-Store to ascertain the firm's compliance with Federal SNAP laws and regulations. It was reported that during the course of the investigation, store personnel violated SNAP rules by allowing ineligible non-food items to be purchased with SNAP benefits on four occasions. The firm also reportedly committed a trafficking violation by allowing an exchange of SNAP benefits for cash.

In a letter dated February 25, 2019, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations. The charge letter informed the Appellant that the trafficking violation 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).

On March 7, 2019, the Appellant owner, along with his accountant, provided an initial oral response to the charges. Later that same day, the Appellant retained an attorney, who provided a brief written reply. In the reply, Appellant's counsel requested an extension of time to compile information and complete a response. In its letter, counsel stated the following: "We are aware that in [requesting an extension] we will forfeit our right to request the issuance of a civil money penalty in lieu of other sanctions."

The record shows that an extension was granted, but on March 12, 2019, the Appellant submitted a request for case file information in a request made under the Freedom of Information Act (FOIA). This request put a hold on any case activity until after FNS responded to the FOIA request.

On April 2, 2019, FNS provided the Appellant with its response to the FOIA request. The response included a five-page letter and 296 pages of responsive documents. The response letter further stated that the Appellant could appeal the agency's response, but must do so within 90 days of the date of the letter.

In a letter dated June 27, 2019, Appellant's counsel filed an appeal to the agency's FOIA response. This appeal meant that the case continued to be held in abeyance pending completion of the FOIA process.

On February 2, 2021, the FOIA appeal response was completed by FNS sent to Appellant's counsel.

On February 22, 2021, Appellant's counsel provided its final response to the charge letter. In this five-page response, the Appellant denied that trafficking occurred, and stated that the case was based on little more than a "he-said, she-said" set of allegations, and argued that the agency's evidence of trafficking was insufficient to satisfy the preponderance of evidence standard. The Appellant further argued that the investigator's claims were hearsay, in part because the Appellant was not given an opportunity to subpoena or otherwise depose the investigator.

After evaluating the Appellant's response and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated July 26, 2021. This letter 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 SNAP regulations, but that a CMP was not appropriate 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 August 5, 2021, the Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and the case was assigned to an administrative review officer.

On September 23, 2021, Appellant's counsel submitted an eight-page brief detailing its contentions in this matter.

On January 20, 2022, the review was reassigned to administrative review officer Jon Yorgason.

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)(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...

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 § 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.** [Emphasis added.]

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:

The FNS regional office shall:

(1) Disqualify a firm permanently if:

(i) Personnel of the firm have trafficked as defined in § 271.2.

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...

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...

SUMMARY OF INVESTIGATION

During an undercover investigation conducted between November 25 and December 15, 2018, two USDA investigators completed seven compliance visits at Bald Guy C-Store. A report of the investigation was provided to the Appellant as an attachment to the February 25, 2019 charge letter. The investigation report included Exhibits A through G and provided details on the results of each visit. SNAP violations were documented in four of the seven exhibits, including a trafficking violation in Exhibit G. The report provided the following details:

Exhibit A

Two SNAP-eligible items purchased with an EBT card. No ineligible items were attempted.

Exhibit B

One SNAP-eligible item purchased; one ineligible item purchased (bar of soap). The investigator described this transaction as follows:

5 U.S.C. § 552 (b)(7)(E)

Exhibit C

Two SNAP-eligible items purchased; one ineligible item purchased (box of plastic spoons). The investigator described this transaction as follows:

5 U.S.C. § 552 (b)(7)(E)

Exhibit D

Two SNAP-eligible items purchased. One ineligible item (cigarette lighter) was attempted to be purchased, but the clerk refused. The clerk also refused an attempt by the investigator to obtain cash from the EBT card (i.e. trafficking).

Exhibit E

Two SNAP-eligible items purchased. One ineligible item (box of spoons) was attempted to be purchased, but the clerk refused. The clerk also refused an attempt by the investigator to engage in trafficking.

Exhibit F

Two SNAP-eligible items purchased; one ineligible item purchased (bar of soap). The investigator described this transaction as follows:

5 U.S.C. § 552 (b)(7)(E)

Exhibit G

Two SNAP-eligible items purchased; one ineligible item purchased (box of plastic spoons); one trafficking violation in which the store clerk gave the investigator 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits. The investigator described this transaction as follows:

5 U.S.C. § 552 (b)(7)(E)

The investigation report noted that there were four different store clerks identified during the investigation, but just two of the clerks were involved in program violations. The clerks in Exhibit A (no violations attempted) and Exhibit B were involved in those transactions only. The clerk in Exhibit C was also involved in the transactions in Exhibits F and G, which included the trafficking violation. The clerk in Exhibit D was also the clerk in Exhibit E. The transactions in Exhibits D and E are the only ones in which the investigator's attempts to violate were refused.

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following contentions in its request for administrative review, summarized by the review officer for purposes of brevity and relevance:

- The evidence presented by FNS is “unsworn to by the Investigator and contains no corroborating evidence.”
- The clerks during the December 4 and December 6, 2018 transactions refused to engage in trafficking.
- The Retailer Operations Division lacked sufficient evidence upon which to base a permanent disqualification.
- In order for USDA to impose a permanent disqualification in this matter, it must prove, by a preponderance of the evidence, that the store engaged in trafficking.
- Appellant denies the allegation of trafficking. As such, the case is based upon little more than a “he-said, she-said” set of allegations. Given USDA’s burden of proof obligations, this evidence is insufficient to satisfy the “preponderance of the evidence” standard by which these cases are measured. Specifically, the allegations are not corroborated by affidavits; there has been no reasonable opportunity for the Appellant to subpoena or

otherwise depose the witnesses because USDA did not provide any affidavits with the charge letter; and, as a result of the Appellant's inability to subpoena witnesses, it is impossible to determine the witnesses' veracity or whether their statements are biased.

- The investigator's statements are fundamentally flawed and are, by definition, hearsay.
- The Appellant has been deprived of its rights to due process. Normally, pages and pages of transactions or affidavits by investigators or witnesses are included with charge letters. Such is not the case here. How could USDA have met its burden if there are no sworn affidavits? If there was some larger criminal investigation upon which these allegations were based, why was there never any action taken? It is because the reliability of the evidence presented simply does not exist.
- USDA's position appears to be that if the allegations are merely written into a letter, it is sufficient, even without data, testimony, or anything else in support. Allegations must be more substantial than what exists in this case.
- The Appellant is committed to compliance and has always sought to make sure it is following all applicable laws and regulations. As evidence of this, it has purchased a new point-of-sale machine that will not allow ineligible purchases and will not give cash back for any SNAP transactions. Appellant recognizes that remedial actions are not taken into account, but these actions show the lengths and expense to which the Appellant will go to maintain compliance.
- The charges are meritless at best. There is no question that the allegations fall well short of the requirements for suspension, and given the lack of credibility, the allegations should be wholly disregarded.

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 submitted, including any not specifically summarized or explicitly referenced in this document.

ANALYSIS AND FINDINGS

It is important to reiterate that 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 not provided any evidence whatsoever to counter FNS's allegations of trafficking. With no evidence from the Appellant to show that violations did not take place, it is the finding of this review that SNAP violations did occur and a penalty is warranted.

Contrary to the Appellant's repeated claims that the agency's allegations contained no corroborating evidence or affidavits, the record clearly shows that both were provided to the Appellant. Included with the charge letter was a copy of the investigation report, which listed details about the EBT transactions. The report not only identified the dates and amounts of the transactions and information about the clerks involved, but also included a list of specific items purchased and a written narration of each incident. On the cover page of the report, the investigator signed and dated the report, and attested to the following statement:

"This report consists of 7 exhibit(s) letter(s) A to G totaling 15 pages. The facts stated in this declaration are true to my knowledge. If I am called to testify as a witness in any proceeding, I

am competent to testify to the matters stated herein. Further declarant sayeth not. I declare under penalty of perjury the foregoing is true and correct.”

Additionally, as noted earlier, the Appellant submitted a FOIA request in which it asked for copies of the agency’s records. In response, the agency provided the Appellant with a large number of documents, including photographs of the items obtained from the store during the investigation (including the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash), and copies of EBT receipts for each transaction. Further, the Appellant was given ample time to respond to the allegations and submit any counter-evidence it deemed relevant.

This review finds that the Retailer Operations Division’s actions in this case fully complied with SNAP regulations and agency policies in effect at the time the investigation was conducted and at the time the charge and determination letters were issued. There is no evidence that the Appellant’s due process rights were violated in any respect. Further, the preponderance of the evidence unquestionably leans in the agency’s favor, as the Appellant has offered no evidence in response to the trafficking allegations.

As for the Appellant’s contention that it has not had an opportunity to subpoena or otherwise depose the witnesses in this case, it must be made clear that administrative proceedings related to SNAP retailer compliance do not include formal discovery procedures or an adversarial hearing. There is no provision in the statute or regulations for confrontation with Department witnesses or cross-examination of any such witnesses during this process. However, due process rights are protected by the provision within the law which provides for judicial review. Once an administrative review decision has been made, if the Appellant is dissatisfied with the determination, 7 U.S.C. § 2023 provides for the right to a judicial review and a trial de novo.

Remedial Actions Taken

While acknowledging that remedial actions are not taken into consideration during an administrative review, the Appellant argues that the firm is committed to compliance and has always sought to make sure it is following all applicable laws and regulations. As evidence of this, it has purchased a new point-of-sale machine that will not allow ineligible purchases and will not give cash back for any SNAP transactions. According to the Appellant, these actions show the lengths and expense to which the Appellant will go to maintain compliance.

Regarding these steps taken by the Appellant, it is true that such steps cannot be considered in this matter. This review is limited to the facts that existed at the time the violations were committed, and it has no authority to consider any subsequent remedial actions that may have been taken or that will take place so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of alleged or planned corrective actions implemented after the discovery of program violations.

Trafficking Civil Money Penalty

The Retailer Operations Division determined that the Appellant was not eligible for a civil money penalty in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a CMP to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate supporting documentation within 10 days of receipt of the charge letter. The case record shows that in its response to the charge letter, the Appellant waived consideration of a CMP and there is no evidence that the Appellant submitted any documentation that would indicate that the firm had a compliance policy or program of any kind.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

Trafficking, as defined in Section 271.2 of the SNAP regulations, includes the exchange of SNAP benefits for cash. Pursuant to regulations at 7 CFR § 278.6(e)(1)(i), permanent disqualification is the required penalty for such a violation.

Based on a review of all available information in this case, this review finds, through a preponderance of the evidence, that a trafficking violation did occur at Bald Guy C-Store during a USDA investigation. All transactions cited in the letter of charges were either conducted or supervised by a USDA investigator and all are thoroughly documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record appears to be specific and accurate with regard to the date of the trafficking violation and in all other critically pertinent details. Further, the Appellant has not offered any evidence in support of its counterarguments, and its contentions do not persuade this review to conclude that a reversal of the agency's sanction determination would be appropriate. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(1), the decision to impose a permanent disqualification against the Appellant, Bald Guy C-Store, under the ownership of Hussein Abdallah, 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. 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

May 2, 2022