

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

Dragon Asian Grocery LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0245595

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 finding that the permanent disqualification of Dragon Asian Grocery LLC (Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

AUTHORITY

7 USC § 2021 and the 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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period from August 20, 2021, through September 15, 2021. The investigation report documents that personnel at Appellant exchanged cash for SNAP benefits during one of the visits. The store employees also sold ineligible non-food items in exchange for SNAP benefits. The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR §271.2.

USDA is an equal opportunity provider, employer and lender.

As a result of evidence compiled from the investigation, the Retailer Operations Division informed Appellant, in a letter dated November 1, 2021, that it was charged with violating the terms and conditions of the SNAP regulations. On November 9, 2021, Appellant, through counsel, replied to the charge letter and requested a civil money penalty (CMP).

After considering the retailer's reply and the evidence, the Retailer Operations Division notified Appellant in a letter dated November 29, 2021, that the firm was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6(c) and § 278.6(e)(1) for trafficking violations. This determination letter further stated that Appellant was not eligible for a trafficking CMP because it failed to timely 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 dated December 7, 2021, Appellant appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted.

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, 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 and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) and (e)(1) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 USC § 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 § 271.2 states, in part, that, eligible foods means:

Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption.

7 CFR § 278.6(a) states:

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,...

7 CFR § 278.6(e)(1) reads, in part:

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

7 CFR § 271.2 defines trafficking, in part, as:

- (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(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).** [Emphasis added.]

- (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. [Emphasis added.]

INVESTIGATION DETAILS

An investigator conducted five compliance visits at Dragon Asian Grocery LLC from August 20, 2021, through September 15, 2021. The investigation report dated September 21, 2021, was provided to the Appellant as an attachment to the charge letter and included Exhibits A through E

which provide details on the results of each compliance visit. The investigation report documents that SNAP violations were committed during each of the compliance visits. The investigation reported that personnel exchanged \$5.00 in cash for \$5.00 in SNAP benefits (Exhibit D). Transactions of this nature are referred to in the regulations as “trafficking”. During the visits, Appellant also exchanged ineligible non-food items, including sushi mats, bamboo chopsticks, plastic cutlery, plastic bowls, castor oil, and toothpaste for SNAP benefits.

APPELLANT’S CONTENTIONS

In its administrative review request dated December 7, 2021, Appellant provided the following summarized contentions, in relevant part:

- Appellant wishes to prove that it implemented an effective training program.
- Appellant never had any previous violations.
- The transactions are based on the sale of qualified merchandise.
- A photocopied booklet is provided to each of its employees and issues concerning EBT processing are addressed as they arise.
- Appellant’s compliance policy clearly states that there are no exchanges for cash for SNAP and Appellant only sells qualified EBT grocery items to its customers.
- The training program includes reviewing the FNS Handbook with the employees and calling the USDA or the store owner if there are any questions.
- Appellant has never encouraged or asked employees to partake in any transactions that could give rise to the trafficking charge.
- The violations were committed by an employee who stated that he was exhausted by the influx of customers and became inattentive.
- The older and handicapped individuals will be severely hurt by the disqualification of Appellant.

ANALYSIS AND FINDINGS

A full review of the case record shows that the charges of violations are based on the findings of a formal USDA investigation. The transaction cited in the letter of charges were conducted by a USDA investigator and are thoroughly documented. The investigation report is specific and details each occasion during which violations occurred, their dates, the amount of cash provided in exchange for SNAP benefits, and the descriptions and any comments of the clerk involved. The evidence in the record includes EBT receipts which substantiate the amounts of the trafficking transactions cited in the investigative report and photos of the items purchased. A complete review of this documentation has yielded no error or discrepancy.

The documentation presented by the Retailer Operations Division establishes by a preponderance of the evidence that the violation as reported occurred at Appellant. The evidence indicates that the violation described in Exhibits D of the investigation report meet the definition of trafficking. Trafficking in SNAP benefits is an extremely serious violation and both 7 USC §2021(b)(3)(B) and 7 CFR §278.6(e)(1)(i) state that a first-time violation warrants a permanent disqualification.

No Previous Violations

Counsel contends that Appellant has not had any other violations. 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 the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners.

Household Hardship

Counsel stated that a permanent hardship presents a hardship to the surrounding community. The available evidence shows that within a one-mile radius of Appellant there are 18 other authorized stores. Moreover, where there is a hardship to SNAP households, FNS may impose a hardship CMP on a firm in lieu of a disqualification where there is a lack of authorized stores in the area. However, 7 CFR § 278.6(f)(1) clearly states that “a civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a permanent disqualification.” Because the Retailer Operations Division has taken action to permanently disqualify Appellant’s firm, a hardship CMP in lieu of disqualification cannot be granted.

Civil Money Penalty

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR § 278.6(i). Appellant was informed that it would need to provide both the request and supporting evidence within ten calendar days of receiving the charge letter and that no extension of time could be granted for making the request or for providing the required evidence. Appellant requested consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i), however it did not provide any evidence in support of its compliance policy and program.

With its administrative review request, counsel also contends that the firm has an effective compliance policy in place prior to the violations and the firm has developed and set up an effective personnel training program. There was no evidence submitted to support the existence of a compliance policy and program. Therefore, the Retailer Operations Division’s decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

The evidence supports by a preponderance that program violations did occur during a USDA investigation. The decision to impose a permanent disqualification against Appellant is sustained. The determination that Appellant is not eligible for a CMP is also sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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's owner resides or is 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, 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

May 5, 2022