

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

Fresh Gourmet Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0251535

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 Fresh Gourmet Corp (hereinafter “Fresh Gourmet Corp” 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 Fresh Gourmet Corp.

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 Fresh Gourmet Corp with Federal SNAP law and regulations during the period February 18, 2022 through March 12, 2022. 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 five occasions, also exchanged SNAP benefits for cash during two undercover compliance visits. 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 April 4, 2022, 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). The 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 April 5, 2022.

In a response to the Retailer Operations Division of April 14, 2022, the Appellant, through counsel, replied to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

After considering the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated April 15, 2022, informing the Appellant that Fresh Gourmet Corp was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations. The letter also stated that the Appellant was not eligible for a trafficking civil money penalty (CMP) in accordance with 7 CFR § 278.6(i) 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 April 22, 2022, the Appellant requested an administrative review of the permanent disqualification determination. FNS granted the Appellant's request for administrative review by letter dated May 12, 2022. Via email correspondence of May 13, 2022, the Appellant requested an extension in time for providing additional information in support of the request for administrative review. Via email of May 13, 2022, the Appellant's time extension request was granted to July 2, 2022. No additional information was provided by the Appellant or counsel.

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 February 18, 2022 through March 12, 2022, the USDA conducted six undercover compliance visits at Fresh Gourmet Corp. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated April 4, 2022. The investigation report included Exhibits A through F which provide a narrative on the results of each compliance visit. 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 five occasions (Exhibits A, B, D, E, and F), exchanged SNAP benefits for cash during two undercover compliance visits (Exhibits E and F).

The buying or selling of SNAP benefits for cash or consideration other than eligible food 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 reply to the charge letter and in the request for administrative review, the Appellant, through counsel, made the following summarized contentions, in relevant part:

- The owner vehemently denies the allegations contained in the investigation reports.
- If any violations occurred, they were done so inadvertently and not with intent to defraud since on the dates in question, the owner was out of the country and left his colleague and his 21-year old son in charge of the store.
- In spite of their relative inexperience, the clerk and owner's son did refuse to make several sales of ineligible items with SNAP benefits.
- However, they may have allowed a couple of minor items to be purchased with SNAP benefits, totaling \$12.15.

- A disqualification of any kind is not warranted, even a civil money penalty, given the relatively minor dollar amounts allegedly involved, which total less than \$30.00.
- The owner has spoken to his son about how unacceptable it is to exchange SNAP benefits for cash, even for \$10.00, and he has decided to not allow his son to manage the store unsupervised in the future.
- This is the first time that the Appellant has been cited for SNAP violations.
- A SNAP disqualification would impose a financial hardship on the Appellant, especially during the COVID-19 pandemic.

In support of these contentions, the Appellant, through counsel, submitted for review a copy of the owner's Jet Blue travel itinerary from February 16, 2022 – March 9, 2022 and a copy of an April 21, 2022 text stating that due to a medical emergency, counsel's office will be closed until further notice.

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.

The Appellant contends that if any violations occurred, they were done so inadvertently and not with intent to defraud since on the dates in question, the owner was out of the country and left his colleague and his 21-year old son in charge of the store. In spite of their relative inexperience, the clerk and owner's son did refuse to make several sales of ineligible items with SNAP benefits.

However, 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.

Regardless of who the store owner utilizes to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf.

The owner vehemently denies the allegations contained in the investigation reports. However, 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 employees committed trafficking violations by buying or selling SNAP benefits for cash or consideration other than eligible food.

Upon review, the evidence supports that SNAP violations occurred at the Appellant firm. The store employee(s) identified in Exhibits E and F 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 March 10, 2022 (Exhibit E), a male employee accepted \$10.00 in SNAP EBT benefits in exchange for \$10.00 in cash. Exhibit E of the investigation report states, in part:

“5 U.S.C. § 552 (b)(7)(E).”

The investigation report documents that on March 12, 2022 (Exhibit F), a male employee accepted \$10.00 in SNAP EBT benefits in exchange for \$10.00 in cash. Exhibit F of the investigation report states, in part:

“5 U.S.C. § 552 (b)(7)(E).”

The Appellant is correct that the firm has not been cited for prior 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.

The Appellant contends that a disqualification of any kind is not warranted, even a civil money penalty, given the relatively minor dollar amounts allegedly involved, which total less than \$30.00. However, neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be extremely serious, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a nonmanagerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store.” In keeping with this legislative mandate, § 278.6(e)(1)(i) of the SNAP regulations states that FNS must disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved.

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.

Corrective Action

The owner contends that he has spoken to his son about how unacceptable it is to exchange SNAP benefits for cash, even for \$10.00, and he has decided to not allow his son to manage the store unsupervised in the future.

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that it has taken or will take corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Financial Hardship

With regard to the Appellant's contention that a SNAP disqualification would impose a financial hardship on the firm, there is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, the Appellant's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

As previously indicated, the April 15, 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 April 4, 2022 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 Fresh Gourmet Corp, the Appellant, as an authorized retailer in the Supplemental Nutrition Assistance Program. As such, the decision to impose a permanent disqualification against Fresh Gourmet Corp, 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

July 25, 2022