

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

Jensen's Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0244233

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 Jensen's Market (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 4, 2021, through August 17, 2021. The investigation report documents that personnel at Appellant exchanged cash for SNAP benefits during two 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 September 20, 2021, that it was charged with violating the terms and conditions of the SNAP regulations. On October 4, 2021, Appellant, through counsel, replied to the charge letter and denied that the transactions occurred and that there was no evidence to support the violations.

After considering the retailer's reply and the evidence, the Retailer Operations Division notified Appellant in a letter dated January 4, 2022, 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 January 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(1) defines trafficking, in part, as:

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 Jensen's Market from August 4, 2021, through August 17, 2021. The investigation report dated August 23, 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 \$20.00 in cash for SNAP benefits (Exhibit D) and on another occasion exchanged \$50.00 in cash for SNAP benefits (Exhibit E). Transactions of this nature are referred to in the regulations as “trafficking”. During the visits, Appellant also exchanged ineligible non-food items, including plastic cups, foam plates, plastic forks, plastic bowls, and t-shirts for SNAP benefits.

APPELLANT’S CONTENTIONS

In its January 7, 2022, administrative review request, and subsequent correspondence dated February 4, 2022, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- It is FNS’s position that it can now make decisions prior to the retailer receiving a FOIA response, thereby depriving the retailer of a full opportunity to respond.
- Appellant denies the allegations of trafficking and has a strict policy against trafficking.
- Appellant disputes the transactions occurred at all without the support of affidavits, attachments, records, statements, or photos.
- In the case Pak N Save vs. Retailer Operations Division, the administrative review officer states that such scant detail cannot be the basis of a permanent disqualification.
- The RIB investigations include date, time, a description of the transactions, an outline of the products involved, the serial numbers of the bills involved, and a description of the clerk, all which are provided without a sworn affidavit.
- There were no photos of the cash allegedly exchanged.
- The statements are hearsay.
- It is a deprivation of due process by not providing sworn affidavits or details of the transactions.
- The government lack admissible evidence to sustain allegations of trafficking.
- If the Department’s position is that merely writing an allegation into a letter without date, testimony, or anything else in support is sufficient evidence, it is only reasonable to ask whether the standard of proof has devolved into: “the allegations are within the realm of possibility, and therefore sufficient.”
- Allegations must be more substantial than what exists here, and based in real, tangible, and verifiable facts to even begin to give lip service to the due process of rights.
- The allegations fall short of the requirements for suspension under the rules, and given the lack of credibility, it should be wholly disregarded.

ANALYSIS AND FINDINGS

Appellant contends that there is no evidence to support that trafficking occurred. However, the investigation report, which was provided as an attachment to the charge letter, 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. A full review of the case record shows that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted by an investigator and are thoroughly documented. 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 and E of the investigation report meet the definition of trafficking. The documentation presented by the Retailer Operations Division establishes by a preponderance of the evidence that the violations as reported occurred at Appellant. 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.

FOIA Regulations and Due Process

Appellant contends that the failure to hold the case in abatement pending a FOIA response is a violation of 7 CFR § 278.6(b)(1). A final rule published on August 26, 2020, amended SNAP regulations to ensure that the FOIA process could no longer be used to delay administrative actions to sanction a retail food store for SNAP violations. The final rule added paragraph (p) to 7 CFR Section 278.6. Under this rule, FNS processes FOIA requests and FOIA appeals separately from administrative actions against SNAP retailers. Therefore, a FOIA request or appeal for records, does not delay or prohibit FNS from making a determination regarding disqualification or penalty against a firm.

Case Law and Precedent

Regarding the contentions related to another administrative review, it is important to note that this administrative review decision is based on the specific circumstances of this case as documented by materials provided by Appellant and the Retailer Operations Division. In addition, this administrative review decision does not establish policy or supersede federal law or regulations.

Hearsay

Appellant states that the investigation report is “hearsay” under the Federal Rules of Evidence and the Administrative Procedures Act. Regarding this contention, the administrative review process and administrative determinations made by the SNAP Administrative Review Branch are not subject to the Federal Rules of Evidence or the Administrative Procedures Act. This is because the SNAP administrative review process has its own separate authority under Section 14(a)(5) of the Food and Nutrition Act of 2008. The statute and regulations do not provide for formal discovery procedures or adversary cross-examination as part of the review process. Accordingly, the contentions regarding hearsay are not relevant to administrative review, which is to ensure that the review process is conducted in accordance with the applicable statute and regulations.

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 did not request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i), even though it was informed of the right to do so in the charge letter.

Even if a timely request had been submitted, Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy to prevent SNAP violations. 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. Therefore, 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 owners 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, 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 18, 2022