

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

Marathon Gas Station,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0212171

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against Marathon Gas Station (“Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of Code of Federal Regulations (CFR) § 278.6(e)(1)(i) in its administration of SNAP when it imposed a Permanent Disqualification against Appellant on July 28, 2020.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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 Appellant’s compliance with federal SNAP law and regulations during the period of August 23, 2018 through August 27, 2018. The investigation reported that personnel at Appellant accepted a total of \$193.25 in SNAP benefits in exchange for cash (trafficking) in the amount of \$47.35 on one occasion and \$50 on another occasion. The investigation revealed that Jatinder Singh was involved in the impermissible transactions.

As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant, in a letter dated June 25, 2020, that its firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.6(e)(1). This letter stated, in part, “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking . . . is permanent disqualification.” The letter also states that “under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of a permanent disqualification of a firm for trafficking.”

Appellant replied to the charges in a subsequent letter to the Office of Retailer Operations and Compliance. The record reflects that the Office of Retailer Operations and Compliance received and considered this information prior to making a determination.

The Office of Retailer Operations and Compliance notified Appellant in a letter dated July 28, 2020 that the firm was being 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 also stated that Appellant’s eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated to Appellant that “. . . you are not eligible for the CMP because you failed to submit sufficient evidence to demonstrate that your firm had established and implemented an effective compliance policy and program to prevent violations of the Supplemental Nutrition Assistance Program.”

On July 30, 2020, Appellant appealed the Office of Retailer Operations and Compliance’s assessment and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(e)(1)(i) establishes 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 of SNAP benefits.

7 CFR § 278.6(e)(1)(i) reads, in part:

FNS shall . . . [d]isqualify 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] or other benefit instruments for cash or consideration other than eligible food.”

APPELLANT’S CONTENTIONS

Appellant’s responses regarding this matter are essentially as follows:

- There is insufficient evidence to support the determination.
- The determination is arbitrary, capricious and unreasonable.
- The sanction is disproportionate considering the facts. Jatinder Singh used a card with a cash value of less than \$100.
- Appellant requests a CMP. Appellant described its compliance policy and program.
- Appellant has not previously had any issue with SNAP compliance.
- Disqualification would pose a hardship to SNAP households.
- The employee responsible for the violations was terminated and fined.
- The charge letter was improperly vague and does not specify who used the EBT card on two occasions.
- The amounts of the SNAP benefits and payment amounts listed in the charge letter are illogical, not credible, and incorrect.
- Jatinder Singh was acting outside the scope of his authority.
- Appellant questions where the cash exchanges occurred.
- The charge letter was issued after an unreasonable delay.
- Receipts were not provided in response to a FOIA request. Failure to provide these records has disparate impacts on immigrants and minorities.
- As Appellant cannot depose the investigator the investigative report is as reliable as the manager/owner’s declaration.

In support of its contentions, Appellant provided the following documents:

- Approximately six pages of SNAP training documents;
- An unsigned affidavit from Appellant’s manager/owner;
- A declaration from Appellant’s manager/owner;
- Three signed Certification and Signature Statements from two of Appellant’s officers;
- Appellant’s SNAP Program Permit;
- The cover letter of Appellant’s SNAP application;
- A SNAP compliance poster;
- Two pages of SNAP training materials;
- A Resolution of Directors to terminate Jatinder Singh as an employee and officer of Appellant dated June 2, 2020;
- Three pages of documents concerning Jatinder Singh’s surrender of ownership dated June 2, 2020; and,
- A resignation of Jatinder Singh signed June 2, 2020.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

Appellant contends the charge letter was improperly vague and does not specify who used the EBT card on two occasions. Appellant also contends the amounts of the SNAP benefits and payment amounts listed in the charge letter are illogical, not credible, and incorrect. Appellant miscalculated the amount of benefits received as the charge letter clearly states that on August 23, 2018 Jatinder Singh accepted \$94.60 in SNAP benefits and was also left with an EBT card with a balance of \$99.40. The charge letter did not list a transaction for ten cents that was made on August 23, 2018 after the EBT card was left with Jatinder Singh. A review of the charge letter indicates the document is specific and accurate with regard to the dates of the violations, the specific exchanges of SNAP benefits for cash, and in all other critically pertinent detail.

Appellant asserts that Jatinder Singh was acting outside the scope of his authority and questions where the cash exchanges occurred. The record indicates that the cash exchanges occurred at Appellant, the SNAP benefits were processed at Appellant, and the cash provided to the investigator on August 23, 2018 was retrieved from Appellant's cash register.

Appellant maintains receipts were not provided in response to a FOIA request and the failure to provide these records has disparate impacts on immigrants and minorities. The FOIA process is distinct from the administrative review process. Appellant has been made aware of its appeal rights if it is unsatisfied with the records it received to its FOIA request.

Appellant insists that as it cannot depose the investigator the investigative report is as reliable as the manager/owner's declaration. The entirety of the record has been considered in this administrative review.

No Statute of Limitations

Appellant contends the alleged violations occurred two years prior to the issuance of the charge letter which is a significant and severe delay. There is no statute of limitations with regards to an administrative action against a firm, although the agency does strive to take such actions as promptly as possible. When the Office of Retailer Operations and Compliance charges a firm for violation uncovered during a covert investigation is dependent primarily on when the investigative agency releases their report and gives approval for USDA to pursue administrative action. An investigation may be escalated from the administrative level to the criminal level, and after some time a decision might be made not to pursue criminal charges after all. In addition, undercover operations often involve multiple stores, and no arrests or charges are made until after all store investigations are complete. Administrative actions may be taken only after criminal actions against firms are resolved. The time elapsed between the SNAP violations and the charge letter does not have any effect on the potency or validity of the charges.

First SNAP Violation

Appellant contends that this is the first time there has been an issue related to SNAP. A record of program participation with no documented previous violations, however, does not constitute valid grounds for mitigating the impact of the present serious determination of trafficking.

This review is limited to considering the circumstances at the time the Office of Retailer Operations and Compliance's decision was made. It is not within this review's scope to consider actions that Appellant may have taken subsequent to this decision to begin to comply with program requirements. There is no provision in SNAP regulations for reducing an administrative penalty on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, Appellant's termination/severance and fine of the offending employee/corporate officer do not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Egregiousness of Trafficking Violation

It is Appellant's contention that the sanction is disproportionate considering the facts. Jatinder Singh used a card with a cash value of less than \$100. The card used by Jatinder Singh had a cash value of \$194.

Regardless, 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 non-managerial 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, Section 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.

Evidence of Violation

Appellant contends there is insufficient evidence of violations. As previously stated, 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** . . . (Emphasis added.)

The investigation report 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 employee/officer involved. Appellant has also received all file information requested

under the Freedom of Information Act except information that is specifically exempt from disclosure by law. In contrast to Appellant's assertions, there is substantial evidence that the violations occurred.

No Undue Hardship to SNAP Participants

Appellant asserts that disqualification would be a hardship to SNAP households who rely on the store. Some degree of inconvenience to SNAP benefit users is inherent in the disqualification from SNAP of any participating food store, since the normal shopping pattern of such SNAP participants may be changed due to the disqualification. Section 278.6(f)(1) of SNAP regulations provides for Civil Money Penalty (CMP) assessments in lieu of disqualification in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable participating retail food store in the area to meet their needs. However, this regulation also sets forth the following specific exception: "A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification." Because the matter at hand involves a permanent disqualification, this CMP provision is not applicable.

CIVIL MONEY PENALTY

Appellant requested a civil money penalty (CMP) contending that it had established and implemented an effective compliance policy and program to prevent SNAP violations. According to 7 CFR § 278.6(i) of the SNAP regulations, FNS may impose a CMP in lieu of permanent disqualification for trafficking.

For an Appellant's request for a CMP to be considered, the regulations at 7 CFR § 278.6(b)(2) require that Appellant submit supporting documentation within ten days of receipt of the charge letter. Appellant was advised of this provision in the charge letter of June 25, 2020. A review of the administrative record indicates Appellant did not submit much its documentation to support its eligibility for this alternative sanction by this deadline.

7 CFR § 278.6(i) sets forth the eligibility requirements for a CMP:

The firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:

Criterion 1: The firm shall have developed an effective compliance policy as specified in Section 278.6(i)(1); and,

Criterion 2: The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and,

Criterion 3: The firm had developed and instituted an effective personnel training program as specified in Section 278.6(i)(2); and,

Criterion 4: Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations; or it is the first occasion in which a member of firm management was aware of, approved,

benefited from, or was involved in the conduct of any trafficking violations by the firm . . .

In support of Appellant's contention that it is eligible for a CMP, it provided six pages of SNAP training documents, an unsigned affidavit and a declaration from Appellant's manager/owner, two pages of SNAP training materials, and a description of its compliance policy and program.

In this regard, the various documentation provided by Appellant is not "substantial evidence" that fulfills each of the four criteria of 7 CFR § 278.6(i), demonstrating "that the firm had established and implemented an effective compliance policy and program to prevent violations." The regulations at 7 CFR § 278.6(i) specify the criteria for a firm's eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. Together, the criteria listed are specifically identified as the minimum standard that firms must meet in order to be eligible for such a penalty. Given these considerations, the statute and the regulations allow no flexibility below the level of this stated standard. The record reflects that Appellant's reply to the charge letter fell short of this standard. For example, Appellant did not provide records of dates of employment of all firm personnel and evidence of training for all who work in the store within one month of implementing the compliance policy. Additionally, there insufficient evidence to support the contention that ownership or management was not aware of, did not approve, and did not benefit from or was not involved in trafficking, as the individual who conducted the trafficking was an officer of the company.

The standards of eligibility for a trafficking CMP are high. They require substantial proof that a compliance policy and program was established and implemented prior to the occurrence of violations. These standards exist to thwart attempts to falsely present compliance policies and programs that were not actually implemented prior to violations. As Appellant did not provide the required supporting documentation, the Office of Retailer Operations and Compliance did not assess a CMP. According to the requirements stated in 7 CFR § 278.6(b)(1), § 278.6(b)(2)(ii and iii), and § 278.6(i), Appellant is not eligible for a CMP in lieu of a permanent disqualification from participation as an authorized retailer in SNAP. The determination by the Office of Retailer Operations and Compliance to deny Appellant a civil money penalty is sustained.

CONCLUSION

Contrary to Appellant's contention that the determination is arbitrary, capricious and unreasonable, the evidence supports that the program violations at issue did, in fact, occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted under the supervision of a USDA investigator and all are fully documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and accurate with regard to the dates of the violations, the specific exchanges of SNAP benefits for cash, and in all other critically pertinent detail.

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against Marathon Gas Station from participating as an authorized retailer in SNAP is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

RICH PROULX
ADMINISTRATIVE REVIEW OFFICER

May 4, 2022