

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

Ontario St Market,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0249565

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 Ontario St Market (“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 June 1, 2022.

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 February 28, 2022 through March 17, 2022. The investigation reported that personnel at Appellant accepted a total of \$85 in SNAP benefits in exchange for cash (trafficking) in the amount of \$35 on one occasion and \$10 on another occasion, as well as permitting the purchase of other non-food items with SNAP benefits. The investigation revealed that one unidentified clerk 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 May 4, 2022, 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.”

Although afforded the opportunity to do so, Appellant did not reply to the charges. 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 June 1, 2022 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 June 9, 2022, 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:

- Clerks refused trafficking on two occasions.
- Not holding determinations in abeyance while a FOIA response is pending violates 7 CFR §278.6(b)(1) according to *Triple E Express vs. ROD*, Case No. C0191279 because Appellant is not given a full opportunity to respond.
- There is no corroborating evidence that violations occurred.
- FNS should consider 7 CFR § 278.6(d) before issuing a determination.
- The investigative report is hearsay. Hearsay in administrative matters can only be relied upon if four conditions are met. Appellant cannot subpoena or depose the investigator. The investigative report should not be relied upon. Appellant cites *J.A.M. Builders, Inc. v. Herman and Glaros v. Immigration & Naturalization Service*.
- There are no affidavits, audio, or video of violations.
- There is a violation of due process because the details of transactions were not provided with the charge letter.
- The clerks had been properly trained in the handling of SNAP transactions.
- Appellant denies the allegations.

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

As to Appellant’s denial of violations, this review examines the relevant information regarding the determination. Once the Office of Retailer Operations and Compliance establishes a violation occurred, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that the permanent disqualification should be reversed. If this is not demonstrated, the case will be sustained. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

Appellant contends the clerks had been properly trained in the handling of SNAP transactions. When ownership signed the FNS application to become an authorized SNAP retailer, this included a certification and confirmation that the owner(s) would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification document include trafficking. Regardless of whom the ownership of a store may utilize to operate the cash register and handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons chosen to handle store business, would render the

enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA virtually meaningless.

Administrative Reviews Independent of FOIA Process

Appellant alleges not holding determinations in abeyance while FOIA responses are pending violates 7 CFR §278.6(b)(1) according to *Triple E Express vs. ROD*, Case No. C0191279 because Appellant is not given a full opportunity to respond. Effective October 26, 2020, the changes to 7 CFR §278.6 and 7 CFR §279.4 went into effect. These changes prohibit holding determinations and administrative reviews in abeyance while FOIA responses are pending. The finding in *Triple E Express* is based on outdated regulations.

Egregiousness of Trafficking Violation

Appellant contends that clerks refused trafficking on two occasions. Clerks did refuse trafficking on two occasions but permitted trafficking on one occasion. 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.

Consideration of Factors for a Sanction

Appellant stated that FNS should consider the factors listed in 7 CFR § 278.6(d) before imposing a sanction. Appellant lists these factors: the nature and scope of the violations; whether the firm was warned violations were occurring; and any evidence of intent to violate the regulations. This argument is based on an incorrect understanding of the regulations. The severity of the penalties, set forth in the subsequent paragraph 7 CFR § 278.6(e), are based on the factors listed in 7 CFR § 278.6(d). For example, permitting the sale of cigarettes with SNAP benefits results in a three-year disqualification, but this becomes five years if the firm had been previously warned. Other sanctions consider intent, such as whether false information on an application was “knowingly submitted” or whether the sale of nonfood items was “the firm’s practice” (which carries a three-year disqualification) rather than “due to carelessness or poor supervision” (which results in a six-month disqualification). In issuing Appellant a six-month disqualification, the Office of Retailer Operations and Compliance did consider the factors listed in 7 CFR § 278.6(d).

Hearsay in Administrative Hearings

Appellant contends that the investigative report is hearsay. Appellant insists that as it cannot subpoena or depose the investigator the investigative report should not be relied upon. Appellant argues that according to *J.A.M. Builders, Inc. v. Herman* and *Glaros v. Immigration & Naturalization Service* and hearsay is only admissible in this case if it meets four criteria: “(1) the Investigator was not biased and had no interest in the result of the case; (2) that [the owner] could have obtained the information contained in the statement before the hearing and subpoenaed the investigator; (3) the information is not inconsistent on its face; and (4) the information has been recognized by the courts has inherently reliable.” These cases also state hearsay must be reliable and credible.

However, the cases cited by Appellant refer to criteria for documents submitted into evidence in lieu of witness testimony in administrative *hearings*. Revisions to parts 278 and 279 of the Supplemental Nutrition Assistance Program regulations eliminated administrative hearings. The revisions became effective September 8, 2003. Accordingly, these case citations are not relevant to this administrative review.

Evidence of Violation

Appellant contends there is corroborating evidence that violations occurred, no affidavits, and no audio or video of violations. Appellant also insists there is a violation of due process because details of the investigative transactions were not provided with the charge letter. 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 record indicates that Appellant was provided a copy of the investigation report, redacted to protect the identity of the investigative operative. This document, signed under the penalty of perjury, details each occasion during which violations occurred, their dates, the nonfood items purchased with 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 transaction cited in the investigative report and photos of the items purchased. In contrast to Appellant’s assertions, there is substantial evidence that the violations occurred.

CIVIL MONEY PENALTY

For a firm to have the opportunity to be considered for a civil money penalty (CMP), it must request that FNS consider a CMP in lieu of permanent disqualification and submit supporting documentation within ten days of receipt of the charge letter. Appellant was advised of these provisions in the charge letter of May 4, 2022. The regulations specify that such supporting documentation must demonstrate that the firm had established and implemented an effective SNAP compliance policy and training program prior to the occurrence of violations. A review of

the administrative record indicates Appellant did not, at any time, request a CMP. Appellant also did not submit any documentation to support its eligibility for this alternative sanction, before or after the deadline.

In the absence of a request for a CMP and any supporting documentation, a CMP was not assessed by the Office of Retailer Operations and Compliance. 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

Based on a review of the evidence, it appears that the program violations at issue occurred 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 Ontario St Market 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

August 30, 2022