

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

Raspberry Deli Corp,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0246026

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 Raspberry Deli Corp (“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 March 29, 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 November 6, 2021 through November 12, 2021. The investigation reported that personnel at Appellant accepted a total of \$40 in SNAP benefits in exchange for cash (trafficking) in the amount of \$40 on one occasion. The investigation revealed that two unidentified clerks were involved in the impermissible transactions. The investigation also stated that clerks permitted the sale of nonfood items with SNAP benefits.

As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant, in a letter dated January 28, 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.”

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 March 29, 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 April 11, 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:

- This is the first time Appellant has had an issue with SNAP compliance.
- Appellant requests a hardship CMP. Disqualification would pose a hardship to SNAP participants who rely on the firm.
- Appellant trained staff in the proper handling of SNAP transactions.
- The worker who did not follow the rules was terminated.
- The owner was unaware of the violations.
- Disqualification would pose a hardship to the firm.
- No admissible supportive evidence was included with the charge letter. There is no evidence in support of the determination.
- The determination violates Appellant’s due process rights and right to confront their accusers.
- The investigative report is hearsay. Hearsay in administrative matters can only be relied upon if four conditions are met. Appellant cites *Veg-Mix, Inc. v. U.S. Dept. of Agric.*, *Glaros v. Immigration & Naturalization Serv.*, and *J.A.M. Builders, Inc. v. Herman*.
- Appellant denies the violations.
- FNS should consider the factors listed in 7 CFR § 278.6(d) before imposing a sanction.
- There is no evidence that Appellant’s sales of nonfood items were due to carelessness or poor supervision.
- Deciding that clerks who repeatedly allow the purchase of common ineligible items violates 278.6(e)(5) is arbitrary.
- FNS has the burden of proof.
- A warning letter is appropriate according to courts in *Primo Meat Market*.

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 stated that FNS has the burden of proof to establish that the violations occurred. As stated above, 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.

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 that the owner was unaware of the alleged violations. Appellant also contends it trained staff in the proper 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.

Appellant contends the determination violates Appellant’s Sixth Amendment right to confront their accusers. The Sixth Amendment refers to criminal actions. The determination is an administrative action.

Appellant contends a warning letter is appropriate according to courts in *Primo Meat Market*. Appellant is misinformed regarding the specifics of *Primo Meat Market vs. Retailer Operations Division*, which is an administrative review decision. Administrative review decisions do not establish policy or supersede federal law, regulations, or policy guidance. The determination in this case conforms to SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations.

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 of the offending employee does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

No Undue Hardship to Appellant

Appellant maintains that disqualification would pose an extreme hardship to the firm. Economic hardship is a likely consequence whenever a store is permanently disqualified from SNAP participation. However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from such

a penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

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

Hearsay in Administrative Hearings

Appellant contends that the investigative report is hearsay, and that according to *Veg-Mix, Inc. v. U.S. Dept. of Agric.*, *Glaros v. Immigration & Naturalization Serv.*, and *J.A.M. Builders, Inc. v. Herman*, 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.

Proper Reading of Regulations

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).

No Denial of Due Process

Appellant contends the investigative report violates Appellant's due process rights. In this regard, the permanent disqualification of Appellant by the ROC is neither a criminal nor a civil action, but rather an administrative action imposed against the firm as a result of trafficking

violations. Section 278.6(b)(1) of the SNAP regulations states that upon charging a firm with SNAP violations, the letter informing the firm of the charges “shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter.”

FNS’s due process procedures include two levels of review. First, the retailer is afforded an opportunity to reply to the charges leveled by the ROC. The regulations at 7 CFR § 278.6(c) state:

in the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section . . . the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

After the determination letter is issued, the second level of due process involves an administrative review. Appellant availed itself of this option and in the process of which Appellant was granted 21 days to provide additional information in support of the request for review. Appellant took advantage of this opportunity and provided additional information.

The purpose of the administrative review process is to ensure that a firm aggrieved by FNS’s adverse actions has the opportunity for their position to be fairly considered by an impartial reviewing authority prior to that adverse action becoming final. Through the administrative review process, Appellant has been duly given, and has taken, the opportunity to present any evidence and information it deemed as pertinent in support of its position that the ROC’s adverse action should be reversed. All evidence and information that Appellant presented to the ROC, as well as any such information submitted subsequently, have now been considered in this administrative review prior to rendering the final agency decision. The firm provided no additional records during the administrative review that would establish that the suspicious transactions were legitimate purchases. The record does not indicate any departure from established procedures with regard to Appellant’s right to a fair and thorough review. Appellant has exercised its opportunity to reply to the charge letter and its administrative review rights. By doing so, it has availed itself of the full complement of the agency’s statutory obligations with regard to due process.

Evidence of Violation

Appellant contends no admissible supportive evidence was included with the charge letter and there is no evidence in support of the determination.
there is no credible 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.)

Appellant was provided a copy of the investigation report with the charge letter, redacted to protect the identity of the investigative operative, which 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 administrative record also includes EBT receipts, photos of the items identified in the investigative report, and other supporting documentation related to the investigation. 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 January 28, 2022. A review of the administrative record indicates Appellant did not submit 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 . .

Appellant did not provide any documentation in support of its contention that it is eligible for a CMP. 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 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

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. As the consequence of trafficking is a permanent disqualification, it is unnecessary to address Appellant’s contentions regarding the lesser violations.

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against Raspberry Deli Corp 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

June 27, 2022