

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

SoeSoe and Store,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0219382

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS) finds there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification of SoeSoe and Store (“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 Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against SoeSoe and Store.

AUTHORITY

7 U.S.C. § 2023 and 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

SoeSoe and Store was initially authorized to participate in SNAP on October 23, 2012. Between August 16, 2019, and January 24, 2022, investigators from USDA’s Office of Inspector General (OIG), the Federal Bureau of Investigation (FBI), and the Missouri Department of Social Services (MODSS) conducted an undercover investigation of SoeSoe and Store to ascertain the store’s compliance with Federal SNAP law and regulations. Agency records show that during the investigation Appellant violated SNAP regulations by engaging in trafficking. Appellant exchanged SNAP benefits for cash on three separate occasions. It was also reported that, during the investigation, Appellant violated SNAP rules by allowing ineligible non-food items to be purchased with SNAP benefits on five separate occasions.

In a letter dated December 12, 2022, the Retailer Operations Division charged Appellant with

trafficking, as defined in Section 271.2 of the SNAP regulations. It also charged Appellant with accepting SNAP benefits in exchange for ineligible non-food merchandise. The misuse of SNAP benefits, as described in the charge letter, is a violation of 7 CFR § 278.2(a). The charge letter informed Appellant that the violations warranted permanent disqualification from SNAP as provided in 7 CFR § 278.6(e)(1). The letter also stated that Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made within 10 days of receipt of the letter under the conditions specified in 7 CFR § 278.6(i).

In a letter dated December 22, 2022, Appellant, through counsel, responded to the allegations. Key points of the response included: Appellant's owner was not involved in trafficking, the trafficking violations were caused by employees removing excess funds from the cash drawer in an attempt to make the drawer balance, the employees responsible for the trafficking violations have been terminated, the sales of ineligible items for SNAP were employee mistakes, Appellant offers unique ethnic foods and disqualification would cause a hardship to its SNAP customers, and the store has a compliance policy posted.

After reviewing Appellant's response and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated January 12, 2023. This letter informed Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the regulations, but determined that a CMP was not appropriate in this case because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

On January 18, 2023, Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

STANDARD OF REVIEW

In an appeal of an adverse action, an appellant bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. This means an 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 law in this matter is found 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...

7 CFR § 271.2 states, in part:

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....

Trafficking means: (1) 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 § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food. [SNAP benefits] may not be accepted in exchange for cash....

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....** Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and **disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section.** [Emphasis added.]

7 CFR § 278.6(b)(2)(ii) states, in part:

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... 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).

7 CFR § 278.6(b)(2)(iii) states:

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.

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. 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.

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

[FNS] shall...disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

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....

SUMMARY OF INVESTIGATION

During an undercover investigation conducted between August 2019, and January 2022, USDA's Office of Inspector General (OIG), the Federal Bureau of Investigation (FBI), and the Missouri Department of Social Services (MODSS) completed eight compliance visits at SoeSoe and Store. The violations committed during these visits described by the Retailer Operations Division in the December 12, 2022, charge letter are as follows:

1. On August 16, 2019, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) completed a transaction in which \$199.21 in SNAP benefits was accepted in exchange for \$150.00 in cash.
2. Between August 29, 2019, and August 30, 2019, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), completed a transaction in which \$503.02 in SNAP benefits was accepted in exchange for \$253.00 in cash.
3. On October 8, 2019, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) completed a transaction in which \$1,010.14 in SNAP benefits was accepted in exchange for \$505.00 in cash.
4. On September 27, 2021, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) accepted SNAP benefits in exchange for ineligible non-food items which produced an EBT receipt totaling \$69.86.
5. On October 26, 2021, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) accepted SNAP benefits in exchange for eligible and ineligible non-food items which produced an EBT receipt totaling \$74.08. (This review has verified that the transaction amount of \$75.08, as listed

on the charge letter, was a typo and that \$74.08 is the correct amount. This minor error does not otherwise change the validity of the report in any way.)

6. On November 22, 2021, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) accepted SNAP benefits in exchange for eligible and ineligible non-food items which produced an EBT Receipt totaling \$122.74.
7. On January 20, 2022, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) accepted SNAP benefits in exchange for eligible and ineligible non-food items which produced an EBT Receipt totaling \$66.11.
8. On January 24, 2022, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) accepted SNAP benefits in exchange for eligible and ineligible non-food items which produced an EBT Receipt totaling \$51.86.

Violations involving the sale of ineligible items typically result in a temporary disqualification from SNAP for a minimum period of six months. However, because trafficking violations also took place in this case, permanent disqualification is the required penalty in accordance with 7 CFR § 278.6(e)(1).

APPELLANT'S CONTENTIONS

Appellant's contentions regarding this matter are summarized as follows:

- Appellant requests an administrative review of the permanent disqualification determination.
- Appellant was not provided with evidence in support of the charges.
- Appellant has not been provided a complete description of the property alleged to be in the USDA's possession, though it assumes the property is in the form of U.S. currency.
- Appellant has not been provided with the serial numbers or denominations of the bills.
- Appellant cannot verify the amount at issue without being able to count the currency.
- Appellant denies that the USDA has or had the currency.
- Even if the USDA has or did have the currency, Appellant has no proof that the currency came from Appellant and is forced to rely on USDA's statements about transactions that occurred three years ago, providing only the month and year of the transactions.
- Appellant confirms that it was in business at the time of the investigation but has no way to identify any specific transactions to show proof the currency came from Appellant.
- If the USDA has the property and has credible evidence that the currency came from Appellant, the owner denies personally engaging in trafficking.
- To Appellant's knowledge, the store has not violated SNAP rules, and this is the first time the firm has ever been accused of doing something improper.
- It is difficult for Appellant to fairly defend itself against illegal acts that were said to have occurred three years ago, have vague dates, and do not specify the name of the persons committing the acts.

In support of these contentions, Appellant submitted 41 pages of undated photographs of the store's stock and a particular customer's order. In addition, Appellant submitted an undated video of the same customer's order.

The preceding may represent only a summary of Appellant's contentions presented in this matter. However, in reaching a decision, full consideration was given to all contentions presented, including any not specifically summarized or referenced herein.

ANALYSIS AND FINDINGS

Trafficking is defined in SNAP regulations, at 7 CFR § 271.2, 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..." Trafficking is an extremely serious violation and both 7 U.S.C. § 2021(b)(3)(B) and 7 CFR § 278.6(e)(1)(i) provide that even one trafficking violation warrants a permanent disqualification.

This review examines the relevant information regarding the Retailer Operations Division's determination. Once the Retailer Operations Division establishes a violation occurred, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that the 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.

In this case, the charged violations are based on the findings of a formal OIG investigation. A complete review of the investigation has yielded no known error or discrepancy. The investigation report appears to be specific and thorough regarding the dates of the violations, the critical facts related thereto, and is supported by documentation that confirms the details of the transactions. The documentation on record includes information about the bills provided to the investigator in exchange for SNAP benefits including the denomination and serial number of each bill. The record further indicates that the OIG and the Retailer Operations Division have thoroughly documented the transactions in which personnel at the store trafficked SNAP benefits and sold ineligible items for SNAP benefits.

Insufficient Evidence from FNS

Appellant contends that it has not been presented with sufficient evidence that any of the transactions cited in the charge letter actually occurred, or that they occurred in the manner described. According to Appellant, the firm is unable to defend itself against such allegations without evidence of the transactions.

This review does not agree. This review finds that the information in the charge letter is specific enough to allow the firm to offer some kind of defense. For instance, if Appellant genuinely believed that the transactions were legitimate, it could have provided itemized cash register receipts or other documentation to prove what transpired during each of the transactions in question. Unfortunately, Appellant has offered no such evidence. As noted earlier, in an appeal of adverse action, the onus is on Appellant to prove, by a preponderance of the evidence, that the disqualification should be reversed. Appellant has not met this standard.

Lack of Timeliness

Appellant contends the violations occurred three years ago. The time elapsed negatively impacts Appellant's ability to defend itself.

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 Retailer Operations Division charges a firm for violations 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. 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.

Store Owner Accountability

Appellant claims the store's owner was not involved in or aware of the violative transactions. Appellant stated the investigative report 5 U.S.C. § 552 (b)(6) & (b)(7)(C) the trafficking occurrences 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The OIG report of investigation 5 U.S.C. § 552 (b)(6) & (b)(7)(C), the record shows Appellant owner signed an application to participate as a retailer in SNAP. By signing this application, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. The record clearly establishes that Appellant's owner agreed to abide by program rules, including taking responsibility for violations committed by any of the firm's employees, whether paid or unpaid, new, full-time or part-time.

An owner or manager is not free of responsibility simply by claiming they were not in the vicinity at the time the violations occurred or because they were unaware of the violations. Regardless of which employees are operating the cash register at a given time or whom firm ownership authorizes to handle store business, the ownership of the firm is ultimately responsible for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of its employees would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA. Therefore, Appellant's claim 5 U.S.C. § 552 (b)(6) & (b)(7)(C) does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

First SNAP Violation

Appellant maintains that this is the first time the store has been accused of improper handling of the SNAP.

While this may be true, 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 the violations upon which they are based. Federal statute at 7 U.S.C. § 2021(b)(3)(B) makes it clear that disqualification for trafficking shall be permanent.

Negative Impact to Business

Appellant has stated that a disqualification would have a negative impact on the business. With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty.

Hardship to SNAP Households

In its response to the Retailer Operation's Division, Appellant argued that it offers unique ethnic foods and disqualification would cause a hardship to its SNAP customers. On review, Appellant provided 41 pages of undated photographs and a short video showing the store's specialty stock and an individual order.

It is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and a household is forced to use its benefits elsewhere. Regulations at 7 CFR § 278.6(f) do allow, in limited circumstances, for a civil money penalty to be imposed in lieu of disqualification when there is an absence of other SNAP-authorized retailers in the area. However, the regulations are clear that a CMP for hardship to SNAP households may not be imposed in lieu of permanent disqualification for trafficking.

Civil Money Penalty (CMP)

When a store is subject to permanent disqualification for trafficking, the only way it can be eligible for an alternative sanction is to meet the CMP criteria found in 7 CFR § 278.6(b)(2) and (i). These regulations explain that a firm must specifically request a CMP in lieu of permanent disqualification and submit "substantial evidence" which demonstrates that the firm had previously established and implemented an effective compliance policy and program to prevent SNAP violations. This request and submission of evidence must occur within 10 days of receipt of the charge letter.

In this case, the Retailer Operations Division determined that Appellant firm was not eligible for a trafficking CMP in lieu of disqualification under 7 CFR § 278.6(i) because it did not submit, within the specified timeframe, substantial evidence of an effective compliance policy and program to prevent SNAP violations. This review agrees with that determination.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

This review finds, by a preponderance of the evidence, that program violations of 7 CFR § 278.2(a) did occur at SoeSoe and Store during a USDA investigation. Accordingly, the Retailer Operations Division's determination to impose a permanent disqualification against SoeSoe and Store under the ownership of Ei Shar is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this determination are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in SNAP regulations, at 7 CFR § 279.7. If 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a Complaint is filed, it must be filed within 30 days of receipt of this decision. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

AMIE CHURCHILL
Administrative Review Officer

March 22, 2023