

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

2 Brothers Deli LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0192822

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 a Permanent Disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program¹ was properly imposed against 2 Brothers Deli LLC (hereinafter “2 Brothers Deli LLC” or “Appellant”), and you as its owner of record, by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a Permanent Disqualification against 2 Brothers Deli LLC in a letter dated September 21, 2017.

AUTHORITY

7 U.S.C. § 2023 and its 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.”

¹ Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

CASE CHRONOLOGY

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period between November 17, 2016 and February 10, 2017. As a result of the investigation a report titled USDA-FNS Report of Positive Investigation (hereinafter “Investigative Report”) number TR38673, dated May 4, 2017 was provided to the Retailer Operations Division for consideration.

The Investigative Report documents six (6) visits to Appellant by a USDA Investigator. During four (4) of the visits two (2) unidentified male clerks are documented to have exchanged non- food items, as defined in 7 CFR § 278.2(a), for SNAP. The non-food items included plastic forks, sandwich bags, a scrubbing (SOS) sponge, dishwashing soap, Ajax cleanser, and plastic spoons. Additionally, the Investigative Report documents that in the remaining two (2) visits one (1) of the unidentified male clerks returned cash in the amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on February 9, 2017 and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on February 10, 2017 together with the eligible items and ineligible items exchanged for SNAP on those dates. This activity is trafficking as defined in 7 CFR § 271.2(1).

In a letter dated July 25, 2017 the Retailer Operations Division informed 2 Brothers Deli LLC that it was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 271 – 282, specifically 7 CFR § 271.2 and 7 CFR § 278.2(a). The letter of charges, which included a copy of the Investigative Report including specifics of each visit as detailed in Exhibits A through F, indicates that Appellant was specifically charged with trafficking, therefore subject to permanent disqualification.

The letter of charges further provides Appellant information regarding the potential for the imposition of a civil money penalty (CMP) in lieu of permanent disqualification delineating the conditions for the consideration of that alternative sanction.

The Retailer Operations Division record indicates that a written reply to the letter of charges were received and fully considered. Subsequently, in a letter dated September 21, 2017 the Retailer Operations Division informed 2 Brothers Deli LLC that it was permanently disqualified from participation as a retail store in the SNAP; and, that Appellant was not eligible for a civil money penalty (CMP) in lieu of the permanent disqualification because it failed to submit evidence to demonstrate that an effective compliance policy and program had been established to prevent violations of SNAP.

Appellant submitted a request for administrative review, appealing the Retailer Operations Division's assessment via letter dated October 2, 2017. The appeal was granted as affirmed in a letter dated October 12, 2017.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the "Act")², 7 USC § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR).³ Part 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 as defined in Part 271.2.

7 U.S.C. § 2021(b)(3)(B) states, in relative 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 § 278.2(a) specifies, in relevant part, that "Coupons [benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food." Further, the citation specifies that "Coupons [benefits] may not be accepted in exchange for cash...or for any other nonfood use."

7 CFR § 278.6(e) states, in relevant part, "Penalties. FNS shall take action as follows against any firm determined to have violated the Act or regulations..."

² Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246, further amended through P.L. 113-79 effective February 7, 2014.

³ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

7 CFR § 278.6(e)(1)(i) reads, in relevant part, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.”

7 CFR § 271.2 specifies, in relevant part, that “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 or in complicity or collusion with others, or acting alone:
- (2) The exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code, for SNAP benefits;
- (3) Purchasing a product with SNAP benefits that has a container requiring a return deposit with the intent of obtaining cash by discarding the product and returning the container for the deposit amount, intentionally discarding the product and intentionally returning the container for the deposit amount;
- (4) Purchasing a product with SNAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with SNAP benefits in exchange for cash or consideration other than eligible food; or
- (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.
- (6) Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers (PINs), or by manual voucher and signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.”

7 CFR § 278.6(f)(1) states, in relevant part, “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm is selling a substantial variety of staple food items, and the firm’s disqualification would cause hardship to SNAP households...A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.”

7 CFR § 278.6(i) states, in relevant 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...In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, 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 §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 §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..." [Emphasis added]

APPELLANT'S CONTENTIONS

Via letter dated October 2, 2017 Appellant requested an administrative review indicating that 2 Brothers Deli LLC had been closed due to insolvency; and, that Appellant employees had been trained, with monthly renewal of that training regarding SNAP rules and regulations; thus averting previous incidence of SNAP violation.

Further, Appellant requests removal of the permanent disqualification to support potential application by ownership in any future new business.

Notably in the written response to the Retailer Operations Division Appellant's ownership apologizes for the alleged violations and asserts that ownership at no time was a participant or gave authorization for the alleged violations.

The preceding may represent only a brief summary of the contentions presented in this matter. Please be assured, however, that, in reaching a decision, full attention and consideration have been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Declaration of Regular Training:

In reference to the contentions that Appellant trained, and monthly renewed the training of employees in regard to SNAP rules and regulation. Notably training, with regular refresher or re-training, is a standard expectation for all SNAP Authorized retailers. Agreement to implement training procedures and schedules is first cited in Appellant's application to serve as a SNAP authorized retailer which in the instant case occurred in May of 2010 upon initial SNAP authorization. Subsequent to the initial training materials Appellant received full training materials and a reminder of the relevant SNAP rules and regulations at the time of the periodic reauthorization which is documented to have been completed on August 5, 2015; together with other routine mailings released by FNS to remind Retailers of the expectation to follow all SNAP rules and regulations.

Appellant Closed for Insolvency:

Although Appellant indicates in request for administrative review that the business was closed due to insolvency, the closure of the operation does not mitigate the findings as recounted in the May 14, 2017 Investigative Report number TR38673. Clearly the instances of SNAP trafficking occurred at Appellant on February 9, 2017 and February 10, 2017 as recounted in Exhibits E and F of the cited Investigative Report.

Civil Money Penalty:

7 CFR §278.6(f)(1) of the SNAP regulations provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable SNAP authorized firm in the area to meet their needs. However, this regulation also sets forth the following specific exception to assessments: **"A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification."** Therefore, because the matter at hand involves a permanent disqualification, this civil money penalty provision is not applicable in the present case, and there is no comparison of similar firms made.

The September 21, 2017 determination letter advised Appellant of its ineligibility for the imposition of a trafficking civil money penalty in lieu of permanent disqualification as allowed in 7 CFR § 278.6(i) based on failure to submit evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of SNAP. Declaration of the existence of a training program is not "evidence" such as

records of dates, times and participants of said training and the materials provided. Moreover, the exchange of SNAP for cash without notable comment evidences that any compliance policy in place was not effective.

Appellant's request removal of the permanent disqualification to support potential application in future business endeavors cannot be honored. The imposition of permanent disqualification is the most severe sanction imposed by FNS against Retailers who commit the most egregious of SNAP violations defined as trafficking. There is no latitude for the reduction or removal of a sanction to support future endeavors. Any future applications by Appellant or Appellant ownership to participate as a SNAP retailer will likely result in denial based on the instant permanent disqualification.

Based on a review of the record, the decision of Retailer Operations Division not to impose a civil money penalty in lieu of permanent disqualification is sustained as appropriate pursuant to 7 CFR §278.6(b)(1), 7 CFR §§278.6(b)(2)(ii), and 7 CFR §278.6(i).

CONCLUSION

Based on a review of the evidence in this case, it appears 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 an official USDA investigation and the evidence gathered as a result of that investigation. The materials recount trafficking that is clearly a violation of the SNAP regulations. Notably the official Investigative Report includes a statement introducing each of the Details of the Transaction/Visit affirming that the USDA Investigator makes the statements included "freely and voluntarily, knowing that this statement may be used in evidence."

It is further noted that, at a minimum, a six-month period of disqualification or a civil money penalty in lieu thereof would have been imposed in the absence of SNAP benefit trafficking in the present case, in accordance with 7 CFR § 278.6(e), due to the sale of ineligible items documented in Exhibits C, D, and E of the Investigative Report; however, this lesser sanction is merely subsumed under the sanction of permanent disqualification. Thus, had Appellant qualified for a civil money penalty in lieu of permanent disqualification for trafficking, the firm would continue to be liable for sanctioning for the sales of ineligible items. However, in SNAP- benefit trafficking cases the only sanctioning option, other than permanent disqualification, afforded the SNAP Office is a civil money penalty. The issue of Appellant's liability for a lesser sanction for the sale of ineligibles is moot, as Appellant did not qualify for a civil money penalty in lieu of a permanent disqualification.

The decision to impose a permanent disqualification against 2 Brothers Deli LLC 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 a judicial review is desired, 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.

NANCY BACA-STEPAN
Administrative Review Officer

November 30, 2017