

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

4th Avenue Subway Deli & Grill Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0204415

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the record indicates that 4th Avenue Subway Deli & Grill Inc. (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retail food store in SNAP, as initially imposed by the Retailer Operations Division (Retailer Operations), was appropriate.

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Section 278.6 (c) and (e)(1), in its administration of SNAP, when it imposed a permanent disqualification against Appellant on November 13, 2018.

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer 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

USDA conducted an investigation of the compliance of Appellant with Federal SNAP law and regulations during the period from July 17, 2018, through July 26, 2018. The investigation report documents personnel at Appellant exchanged SNAP benefits for cash during two out of five undercover compliance visits. The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR § 271.2.

As a result of evidence compiled from this investigation, Retailer Operations charged Appellant, in a letter dated September 14, 2018, with trafficking in SNAP benefits. The charge letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

By letter dated September 28, 2018, the owner replied to the charge letter and requested a CMP.

After giving consideration to the evidence, Retailer Operations informed Appellant, by letter dated November 13, 2018, that it was permanently disqualified from participation as a retail food store in SNAP. The letter also stated that the store was not eligible for a trafficking CMP as Appellant did not submit evidence to demonstrate that the store had established and implemented an effective compliance policy and program to prevent violations of SNAP.

By letter dated November 21, 2018, Appellant, through counsel, appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated December 4, 2018.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means Appellant has the burden of providing credible, 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 not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under 7 CFR § 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 in the event that personnel of the firm have engaged in trafficking of SNAP benefits.

7 U.S.C. § 2021(b)(3)(B) states: "...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 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 § 278.6(e)(1)(i) states: “FNS shall disqualify 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, 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 § 278.6(b)(2)(ii) states: “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(i) states: “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 THE CHARGES

During an investigation conducted from July 17, 2018, through July 26, 2018, USDA conducted five undercover compliance visits at Appellant. A report of the investigation was provided to Appellant as an attachment to the charge letter dated September 14, 2018. The investigation report included Exhibits A through E which provides full details on the results of each compliance visit. The investigation report documents that SNAP violations occurred during two of the compliance visits. A single clerk exchanged cash for SNAP benefits as documented by Exhibits C and E.

APPELLANT’S CONTENTIONS

The following may represent a summary of the contentions presented; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- Owner is at a rage of what occurred and the unacceptable employee conduct; owner took immediate action and fired the employee who committed the said violations.
- As work commenced at Appellant, policies were put in place that encumber obeying the rule of law; employee training and orientations were provided to ensure compliance.
- Appellant has been serving the community since 2015 and has been well known for its great customer service.
- Appellant has always complied with the rule of law, and City and State regulations.
- Appellant has made sure to obtain all necessary licenses to perform the business’ activities.
- Appellant has been creating employment which contributes to the Tax system and files taxes every year.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the decision of Retailer Operations and is limited to the facts at the basis of Retailer Operations' determination at the time it was made.

The regulations establish that an authorized retail food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. The Charge letter gives details of a violative exchange of cash for SNAP benefits on two separate occasions by Appellant's employee. The regulations stipulate "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2."

Both the FNS SNAP retailer application and retailer reauthorization application contain a certification page whereby applicants must confirm their understanding of, and agreement with, SNAP retailer requirements in order to complete the application/reauthorization process. Store ownership certified its understanding and agreement to abide by program rules and regulatory provisions when it applied for authorization as a SNAP retailer.

The FNS investigative report shows that an employee of Appellant transacted SNAP benefits for cash on two separate occasions. There is no evidence of involvement by the firm's ownership or management. The acceptance of SNAP benefits for cash is a violation of SNAP rules and regulations with the penalty for trafficking being permanent disqualification. There is no regulatory threshold for the exchange of SNAP benefits for cash and store ownership does not dispute that violations occurred or that SNAP benefits were exchanged for cash and fired its employee.

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not 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 the most serious violation, 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 shall 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 and second chances are not an authorized option.

Based on the discussion above, there is not any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

SNAP regulations at § 278.6(i) specify the criteria for a firm’s eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. A firm must submit a timely request for a civil money penalty that shows substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

Retailer Operations determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i), 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 within the specified timeframe. The record supports that Retailer Operations properly applied the applicable regulations when it denied Appellant’s request of a trafficking CMP in lieu of permanent disqualification.

CONCLUSION

Trafficking is defined, in part, in 7 CFR § 271.2, as “the buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits... for cash or consideration other than eligible food” SNAP regulations at 7 CFR § 278.6(e)(1)(i) reads, in part, “FNS shall ... disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.” The law and regulations do not provide for a lesser period of disqualification for this violation.

Based on the discussion above, the determination by Retailer Operations to impose a permanent disqualification against Appellant from participating as an authorized retail food store in SNAP is sustained.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and 7 CFR § 279.7 addresses your right to a judicial review of this determination. Please note that if a 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 you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within 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.

Kim Dameron
ADMINISTRATIVE REVIEW OFFICER

November 26, 2019