

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

**68th Street Gourmet Deli Corp,**

**Appellant,**

**v.**

**Case Number: C0235095**

**Retailer Operations Division,**

**Respondent.**

**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 Program (SNAP) was properly imposed against 68<sup>th</sup> Street Gourmet Deli Corp. (Appellant), by the Retailer Operations Division (Retailer Operations).

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a), 7 CFR § 278.6(e)(1)(i) and 7 CFR § 278.6(i) in its administration of the SNAP when it imposed a permanent disqualification against Appellant.

**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 the Food and Nutrition Service (FNS).

**CASE CHRONOLOGY**

By Charge letter dated February 4, 2021, Retailer Operations informed Appellant it was charged with violating the terms and conditions of the SNAP regulations determined by a USDA investigation based on trafficking violations noted in Exhibits E and H. The sanction for trafficking is permanent disqualification. The misuse of SNAP benefits was also noted in Exhibits A, B, C, D, and F warrant a term disqualification. The investigation was conducted

during the period of November 18, 2020, through January 7, 2021, and outlined in the investigative report dated January 15, 2021. The owner replied to the Charge letter in writing on March 1, 2021.

By Determination letter dated March 3, 2021, Retailer Operations informed Appellant that it was permanently disqualified from participation as a retail food store in the SNAP in accordance with Section 278.6(c) and 278.6(e)(1) of the SNAP regulations, and a fiscal claim was established. The letter states that the store was not eligible for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i), because the firm failed to submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent violations of the SNAP. By letter postmarked March 17, 2021, the owner appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated March 26, 2021.

## **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the 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 and Nutrition Act of 2008, as amended (the Act), 7 U.S.C. § 2021, and § 278 of Title 7 of the Code of Federal Regulations (CFR).

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. 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;”... (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; (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 and personal identification 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(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**

The USDA conducted a compliance investigation of Appellant. Appellant was charged with conducting trafficking transactions as described in Exhibits E and H. The penalty for trafficking is permanent disqualification. In Exhibits E and H, the store personnel exchanged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash for SNAP benefits. Further, the violations in Exhibits A, B, C, D, and F warrant a non-permanent disqualification period specified in Section 278.6(e) of the SNAP regulations. The store personnel exchanged ineligible nonfood items, common and major, including cigarettes and nicotine products for SNAP benefits.

### **APPELLANT’S CONTENTIONS**

In reaching a decision, full attention and consideration have been given to all contentions and submissions as presented, including any not specifically recapitulated. The owner submitted medical reports.

- Everyone that works in the store is instructed about ineligible items that cannot be charged with an EBT card and to process EBT transaction for only qualified food items. business. If the business is involved in illegal EBT transactions, the amount of money from EBT would have been much higher than what the store is making in the past and in the present time.
- I tried to work hard in this store to support my family and myself. I did my best because I want to rely on myself and not rely on any government assistant. At times, I worked with Uber because the store is not providing me with sufficient income to cover my everyday needs. If my intention was to cheat the system, I would have done so long time ago. But I always do everything legally because I want to keep my record and the business record clean and trouble-free. I also strongly believe it is totally wrong and demeaning to assist anybody to buy anything other than food items using money the government allocated to help the poor and the needy who would be suffering otherwise. I have kept my personal and business record clean not only with the SNAP program, but also with all the licenses the store has. All licenses are in good standing so far and no major infraction has occurred.
- I hired one of my friends to help me with the evening shift right when my shift ends. All the transactions mentioned in the report occurred during that person shift and he is the only worker on the evening time. He has worked for me in the past and he was doing well. A

year ago, he stopped working for me and he went to open his own business. He ended up going out of business and he owes a lot of money as well. I offered him the job again because I wanted someone to help me in the store giving the fact that my mother takes a lot of my time when her health gets really bad at times. I also wanted to help because he needs money to support himself and his family and pay out his huge debt. I thought that he will do his job well as he was doing in the past. I did not know that his psychological issues have deteriorated so much and that the prescription medications that he is using seriously affect his mood, memory and concentration.

- He insisted that he never performed such transactions whatsoever. He said that he always performs non-food items transactions by cash and Credit/debit cards only. But I suspect he might be the one who performed such transactions. The prescription drugs and psychological issues has affected him so much to the degree that he started forgetting things easily and his concentration on everyday tasks has deteriorated recently.
- Can you help me out by keeping the EBT open and drop the charges and I will do everything possible to make sure no such alleged infractions happen ever again. Closing the EBT will only make my business gets much worse. I need only few months to sell the store or shut down and go out of business if I can not sell it. All I want is to keep my name clean and be able to work hard to support myself and my family and not be a burden on the government, especially during these difficult times.
- If you cannot help me by keeping the EBT active, you can close the account as long as my name is clean and no penalty is issued. As I have mentioned before, this might be a mistake that was done by the worker who is suffering from psychological issues and taken prescription drugs that affect his mental capabilities. If I was doing anything illegally, the EBT transaction would have been at least 5 U.S.C. § 552 (b)(6) & (b)(7)(C) daily, not the current 5 U.S.C. § 552 (b)(6) & (b)(7)(C) daily.

## ANALYSIS AND FINDINGS

The purpose of this review is to either validate or to invalidate the decision of Retailer Operations. This review 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. Two Charge letter Exhibits recount the details of the violative trafficking exchanges by store personnel, who intentionally exchanged cash for SNAP benefits. The owner presented no evidence to refute the violations.

Ownership is accountable for the proper handling of SNAP benefit transactions. To allow the store owner to be free from accountability for the acts of persons whom the owners allowed to conduct store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. The regulations establish that an authorized 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.

It is recognized that some degree of economic hardship is a likely consequence whenever an authorized food store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of a regulatory sanction. To allow store ownership to be excused from an assessed administrative sanction, based on purported economic hardship to the firm, would render virtually meaningless the enforcement provisions of the Act, as amended, and the enforcement efforts of the USDA. Moreover, giving special consideration to economic hardship to Appellant would forsake fairness and equity, not only to competing stores, and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the SNAP for similar violations.

A review of the entirety of the case record has yielded no indication of error in the investigative report with regard to the dates of the violative trafficking exchanges by the store personnel of cash for SNAP benefits. The preponderance of evidence in the record supports that trafficking, as described in the regulations, did occur at Appellant. The regulations stipulate the FNS shall disqualify a firm permanently if firm personnel have trafficked.

### **CIVIL MONEY PENALTY**

The regulations at Section 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 CMP that shows substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. The record supports that Appellant did not submit timely substantial evidence, as required by the regulations, to meet the criteria for a trafficking CMP in lieu of permanent disqualification. A trafficking CMP is properly denied.

### **CONCLUSION**

The record supports the intentional violative exchanges by store personnel of cash for SNAP benefits that meet the regulatory definition of trafficking. The preponderance of the evidence under review supports that SNAP violations, including the sale of ineligible nonfood items, did occur at Appellant as described in the Exhibits. Retailer Operations' denial of a trafficking CMP was in accordance with the applicable regulations. The permanent disqualification of Appellant as a SNAP retail food store is sustained. The effective date of this decision is thirty (30) days after delivery of the decision to Appellant. **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

### **RIGHTS AND REMEDIES**

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and to 7 CFR § 279.7 of the regulations, with respect to applicable rights to judicial review of this decision. 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 where Appellant's owner resides or is 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 thirty (30) days of delivery 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.

M. Viens  
ADMINISTRATIVE REVIEW OFFICER

April 22, 2021