

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

7 To 11 Grocery,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0203312

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 7 To 11 Grocery (“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 October 16, 2019.

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 December 19, 2017 through January 5, 2018. The investigation reported that personnel at Appellant accepted SNAP benefits in exchange for cash (trafficking) in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on one occasion and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on another occasion, as well as permitting the purchase of

other non-food items and alcohol with SNAP benefits. The investigation revealed that one unidentified clerk was involved in the impermissible transactions.

As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant, in a letter dated June 4, 2019, 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 October 16, 2019 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 October 26, 2019, 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:

- The penalty is too severe.
- Appellant has not been provided with any evidence of SNAP violations.
- The investigation was unreliable.
- The persons who conducted the investigation were not properly trained.
- The penalty is unconstitutional and violates the Equal Protection Clause, Takings Clause, and the Contracts Clause.
- Appellant denies the allegations.
- Appellant has been denied due process
- The penalty is arbitrary and capricious.

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

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 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.

Egregiousness of Trafficking Violation

Appellant contends the permanent disqualification is too severe. The investigation report indicates that both times that trafficking was attempted, it was permitted by store personnel. Neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations 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 extremely serious, 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 must 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.

Constitutionality

Appellant contends that both the federal statute and its implementing regulations do not meet the requirements of the United States Constitution. In reference to these contentions, no findings or conclusions are rendered. The administrative review process does not include an assessment of the constitutionality of the laws, regulations and policies under which the agency imposed adverse actions, but rather whether the agency actions undertaken were proper pursuant to those laws, regulations and policies and sustainable by a preponderance of evidence. As such, this office does not have the authority to assess whether the United States Congress, in its enactment of legislation, has conformed to Constitutional mandates.

No Denial of Due Process

Appellant contends that it has been denied due process. In this regard, the disqualification of Appellant by the Office of Retailer Operations and Compliance is neither a criminal nor a civil action, but rather an administrative action imposed against the firm as a result of trafficking violations. Only after a careful, comprehensive and complete analysis, from which appropriate conclusions are logically derived, will a firm be issued a charge letter. The firm that is charged is then given the opportunity to reply to the charges and provide any information it deems appropriate in justifying as legitimate the transaction activity detailed in the charge letter. In cases such as this where investigations have been performed, the charge letter is accompanied by a redacted copy of the investigative report. The calculus for determining whether or not to issue a charge letter in cases where investigations have taken place is straightforward and uncomplicated. Either violations were found to have occurred, or they were not found to have occurred. Section 278.6(b)(1) of the SNAP regulations provides 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.”

The letter was delivered on June 5, 2019 and provided Appellant the opportunity to reply to the charges and provide explanations for the questionable transactions. On June 10, 2019, Appellant requested documents pursuant to a FOIA request. Appellant also requested and received an extension of time to respond to the charge letter. On June 1, 2019, Appellant received a response to the FOIA request. On October 1, 2019 the Office of Retailer Operations and Compliance sent a letter providing an additional ten days to respond the charge letter. Appellant provided written documents to the Office of Retailer Operations and Compliance in a letter dated October 10,

2019. After considering the evidence of the case, the Office of Retailer Operations and Compliance determined that a permanent disqualification was warranted.

The agency's due process procedures are two-fold in nature. First, the retailer is afforded an opportunity to reply to the charges leveled by the ROD. 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 provided additional information in support of the request for review.

The purpose of the administrative review process is to ensure that firms aggrieved by FNS's adverse actions have 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 Office of Retailer Operations and Compliance's adverse action should be reversed. All evidence and information that Appellant presented to the Office of Retailer Operations and Compliance, as well as any such information submitted subsequently, have now been considered in this administrative review prior to rendering the final agency decision. No additional records were provided during the administrative review that would establish that the impermissible purchases did not occur. 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, and by doing so has availed itself of the full complement of the agency's statutory obligations with regard to due process.

Adequacy of Investigation

Appellant contends the investigation was inadequate, and that it has not been provided with any evidence of SNAP 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, redacted to protect the identity of the investigative operative, which details each occasion during which violations occurred, their dates and times of day, what ineligible nonfood items were sold for SNAP benefits, and the descriptions and any comments of the clerk involved. Appellant has also received all file information requested under the Freedom of Information Act except information that is specifically exempt from disclosure by law. In contrast to Appellant's assertions, there is substantial evidence that the violations occurred. Although Appellant

contends that the persons who conducted the investigation were not properly trained, Appellant did not provide any basis for this assertion.

Investigative Record

Appellant argues that the penalty is arbitrary and capricious, but it has not provided sufficient evidence to rebut the investigative findings as outlined in the charge letter. It has not convincingly rebutted the ROD's determination that Appellant most likely engaged in trafficking of SNAP benefits. The SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have committed trafficking of SNAP benefits.

Based on a review of the evidence, 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 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. The investigative record is specific and accurate with regard to the dates of the violations, the specific ineligible merchandise sold in exchange for SNAP benefits, and in all other critically pertinent detail.

CIVIL MONEY PENALTY

For a firm to have the opportunity to be considered for a civil money penalty (CMP), it must request that FNS consider a CMP in lieu of permanent disqualification and submit supporting documentation within ten days of receipt of the charge letter. Appellant was advised of these provisions in the charge letter of June 4, 2019. The regulations specify that such supporting documentation must demonstrate that the firm had established and implemented an effective SNAP compliance policy and training program prior to the occurrence of violations. A review of the administrative record indicates Appellant did not, at any time, request a CMP. Appellant also did not submit any documentation to support its eligibility for this alternative sanction, before or after the deadline.

In the absence of a request for a CMP and any supporting documentation, a CMP was not assessed by the Office of Retailer Operations and Compliance. 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 did, in fact, occur 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.

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against 7 To 11 Grocery 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

January 30, 2020