

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

**Apna Bazaar,**

**Appellant,**

**v.**

**Case Number: C0194822**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of Apna Bazaar 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 in its administration of the SNAP, when it imposed a permanent disqualification against Apna Bazaar.

**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.”

**CASE CHRONOLOGY**

The USDA conducted an investigation of the compliance of Apna Bazaar with Federal SNAP law and regulations from February 2017 through October 2017. The investigation report documents that a clerk at Apna Bazaar exchanged SNAP benefits for cash during two (2) 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 the evidence compiled from this investigation, the Retailer Operations Division informed the Appellant, in a letter dated January 3, 2018 that it was charged with violating the terms and conditions of the SNAP regulations. The letter stated, in relevant part, that:

Your firm is charged with trafficking, as defined in Section 271.2 of the SNAP regulations. As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for the trafficking violation(s) ... is permanent disqualification.

The charge letter also stated that:

...under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000.00 in lieu of permanent disqualification of a firm for trafficking. The SNAP regulations, Section 278.6(i), list the criteria that you must meet in order to be considered for a CMP. If you request a CMP, you must meet each of the four criteria listed and provide the documentation as specified within 10 calendar days of your receipt of this letter.

In response to the charge letter, the Appellant called the Retailer Operations Division on January 5, 2018 and stated that the violations were a "mistake." The Appellant asked for a warning letter in lieu of a permanent disqualification since this was the store's first violation. The Appellant asked about, but did not request, a trafficking CMP and stated that the store could probably not afford a CMP anyway.

After giving consideration to the evidence and the Appellant's response, the Retailer Operations Division informed the Appellant, by letter dated January 17, 2018, that Apna Bazaar was permanently disqualified from participation in the SNAP. The letter also stated that the Appellant was not eligible for a trafficking CMP as the Appellant did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked January 22, 2018, the Appellant requested an administrative review of the permanent disqualification determination. The request for administrative review was granted.

## **STANDARD OF REVIEW**

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means an 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 law in this matter is covered in the Food & 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 that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

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 states, in part:

**Trafficking** means the buying or selling of ... [SNAP] benefits for cash or consideration other than eligible food ....

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.

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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system.... [Emphasis added.]

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.

7 CFR § 278.6(b)(2) states, in part:

(ii) 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 as specified in § 278.6(i), 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).** [Emphasis added.]

(iii) **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. [Emphasis added.]

## SUMMARY OF CHARGES

During an investigation from February 2017 through October 2017, the USDA conducted five (5) compliance visits at Apna Bazaar. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated January 3, 2018. The investigation report included Exhibits A through E which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations occurred during all five (5) compliance visits. During two (2) of the compliance visits, a clerk exchanged cash for SNAP benefits as documented by Exhibits D and E.

## **APPELLANT'S CONTENTIONS**

The Appellant made the following summarized contentions in its reply to the charge letter and its request for administrative review, in relevant part:

- A mistake was made and the owners are seriously sorry for it. The violations were not intentional.
- The owners have run this small ethnic grocery store honestly for eleven (11) and this is the firm's first violation. Therefore, the Appellant requests a warning letter in lieu of a permanent disqualification.
- The store is the only source of income for the owners.
- Apna Bazaar is the only store in town for ethnic food and some of its customers will have to drive an extra ten (10) miles if the store is disqualified from the SNAP.

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

## **ANALYSIS AND FINDINGS**

### **Investigation Report**

The Appellant does not refute the findings of the investigation report. A full review of the case record shows that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted under the direction of a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no error or discrepancy. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. The documentation presented by the Retailer Operations Division establishes by a preponderance of the evidence that the violations as reported occurred at the Appellant store.

### **First Violation**

The Appellant states that this is the first SNAP violation at Apna Bazaar and requests a warning letter in lieu of a permanent disqualification. With regard to this contention, 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 those charges.

Regarding warning letters, 7 CFR § 278.6(e)(7) states that FNS will “send the firm a warning letter if violations are too limited to warrant a disqualification.” However, trafficking transactions are not considered to be “violations that are too limited to warrant a disqualification.” Trafficking in SNAP benefits is an extremely serious violation and both 7 U.S.C. § 2021(b)(3)(B) and 7 CFR § 278.6(e)(1)(i) state that a first time violation warrants a permanent disqualification.

### **Intent to Violate**

The Appellant contends that the firm or its employees did not intend to violate any SNAP regulations. In response to this contention, please note that the definition of trafficking contained in the SNAP regulations at 7 CFR § 271.2 does not require an element of intent on the part of the violator. Therefore, whether or not the Appellant firm or its employees intended to violate SNAP regulations by exchanging cash for SNAP benefits is irrelevant.

### **Hardship to Owner**

The Appellant states that the store is the only source of income for the owners. 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 is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to either the owner personally or the firm resulting from the imposition of such penalty. To allow store ownership to be excused from assessed administrative penalties based on a purported economic hardship would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm 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 program in the past for similar violations. Therefore, Appellant’s contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Hardship to Community**

The Appellant contends that Apna Bazaar is the only store in town for ethnic food and some of its customers will have to drive an extra ten (10) miles if the store is disqualified from the SNAP. Regarding this contention, there are no provisions in the SNAP regulations for a waiver or a reduced disqualification period when a store is permanently disqualified for trafficking.

Where there is a hardship to SNAP households due to a lack of authorized stores in the area, FNS may impose a hardship CMP on a firm in lieu of a **less than permanent** disqualification. However, the regulations at 7 CFR §278.6(f)(1) clearly state that “a civil money penalty for hardship to [SNAP] households **may not be imposed** in lieu of a permanent disqualification.” [Emphasis added.] Because the Retailer Operations Division has taken action to permanently disqualify the Apna Bazaar, a hardship CMP in lieu of disqualification cannot be granted.

### **CIVIL MONEY PENALTY**

The Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i) even though it was informed of the right to do so in the charge letter. SNAP regulations at 7 CFR § 278.6(b)(2)(iii) states that “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 7 CFR § 278.6(b)(1), the firm **shall not be eligible** for such a penalty.” [Emphasis added.]

Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program prior to the violations. Therefore, the Retailer Operations Division’s decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

### **CONCLUSION**

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.” Trafficking is defined, in part, in 7 CFR § 271.2, as “the buying or selling of SNAP benefits for cash or consideration other than eligible food.” The law and regulations do not provide for a lesser period of disqualification for this violation.

Based on a full review of the evidence in this case, there is no question that trafficking violations did occur during a USDA investigation. Based on the analysis above, the decision to impose a permanent disqualification against Apna Bazaar, Appellant, is sustained.

## **RIGHTS AND REMEDIES**

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (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 thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, FNS is 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.

RONALD C. GWINN  
Administrative Review Officer

March 21, 2018