

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

Asvagh Arabyeh Inc,

Appellant,

v.

Case Number: C0205660

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 Asvagh Arabyeh Inc. by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against Asvagh Arabyeh Inc. on July 23, 2018.

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 Asvagh Arabyeh Inc. with Federal SNAP law and regulations during the period March 26, 2018 through April 11, 2018. The investigation report documents that personnel at Asvagh Arabyeh Inc., in addition to accepting SNAP benefits in exchange for ineligible items on five occasions, also exchanged SNAP benefits for cash during two 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, the Retailer Operations Division informed the Appellant, in a letter dated May 14, 2018, that it was charged with violating the terms and conditions of the SNAP regulations. The Charge Letter along with a copy of the investigation report was delivered by UPS on May 15, 2018 and signed for by “5 U.S.C. § 552 (b)(6) & (b)(7)(C)”. 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 replies to the Retailer Operations Division of May 17, 2018 and June 25, 2018, the Appellant, through counsel, replied to the charges therein indicating that the violative SNAP transactions were committed by a store employee without the Appellant’s knowledge, consent, or approval. The responsible employee has been terminated. The Appellant was not physically at the store supervising as needed as he was experiencing several health issues. Corrective actions have been implemented to ensure that SNAP violations do not occur in the future. The Appellant requests that a warning letter or a SNAP disqualification not to exceed six months be imposed in lieu of a permanent SNAP disqualification.

After giving consideration to the Appellant’s replies and the evidence in this case, the Retailer Operations Division informed the Appellant, by letter dated July 23, 2018, that Asvagh Arabyeh Inc. was permanently disqualified from participation as a retail store 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 August 2, 2018, the Appellant, through counsel, requested an administrative review of the permanent disqualification determination. FNS granted the Appellant’s request for administrative review by letter dated August 15, 2018.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions should be reversed. That means the 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

The controlling statute in this matter is covered in the Food and 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 ... [Emphasis added.]

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 coupons, ATP cards or other benefit instruments for cash or consideration other than eligible food ...

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 ...

7 CFR §278.6(i) states, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 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 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; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm

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 March 26, 2018 through April 11, 2018, the USDA conducted six compliance visits at Asvagh Arabyeh Inc. A report of the investigation was provided to the Appellant as an attachment to the Charge Letter dated May 14, 2018. The investigation report included Exhibits A through F which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations occurred during five of the six compliance visits. During two of the compliance visits, a clerk exchanged cash for SNAP benefits as documented by Exhibits E and F. The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR § 271.2.

APPELLANT'S CONTENTIONS

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

In the replies to the Charge Letter, in the administrative review request, and in subsequent correspondences to FNS, the Appellant, through counsel, made the following summarized contentions, in relevant part:

- The violative SNAP transactions were committed by a store employee without the Appellant’s knowledge, consent, or approval. The Appellant was not physically at the store supervising as needed as he was experiencing several health issues.
- In order to ensure that these types of SNAP violations do not occur in the future, the Appellant: (1) Is currently installing a security camera system so that the owner can monitor activities when he is not physically present. The owner will review the store video footage on a random, periodic basis; (2) Has prepared the attached “Employee’s Acknowledgment of Procedures Regarding SNAP, WIC, or Food Stamps or Any Other Related Governmental Food Assistance Purchase Programs” to additionally train employees on the SNAP rules; (3) Has displayed a notice in the cashier’s area of the store listing ineligible and eligible items allowed to be purchased with SNAP/LINK benefits; and (4) Has terminated the responsible employee.
- The Appellant has not received any prior violation warnings with regard to the SNAP.
- The SNAP violations were limited in nature.
- A temporary SNAP disqualification for any lengthy time period would impose a financial hardship on the Appellant and would likely cause the owner to have to close the store. The disqualification of the Appellant firm has already had a financial impact.
- The Appellant requests that FNS issue a warning letter or impose a SNAP disqualification not to exceed six months in lieu of a permanent SNAP disqualification. The owner has not operated this business for a long time and has not profited from any financial gains from the operations of the business let alone through any alleged violations of the SNAP regulations. The imposed permanent SNAP disqualification by the Retailer Operations Division is an abuse of discretion and is unwarranted. A zero tolerance policy of permanent disqualification is not what the SNAP regulations are for.

In support of these contentions, the following documents were submitted to FNS:

- “Employee’s Acknowledgment of Procedures Regarding SNAP, WIC, or Food Stamps or Any Other Related Governmental Food Assistance Purchase Programs”.
- List of eligible and ineligible items that may be purchased with SNAP benefits.
- LINK Eligible and Ineligible Foods List.
- USDA poster “Don’t Do It!”.
- 2016 U.S. income tax return.
- Letter from a medical doctor attesting that he/she saw the store owner on May 9, 2018.

ANALYSIS AND FINDINGS

Unaware of SNAP Violations

The Appellant contends that the violative SNAP transactions were committed by a store employee without the Appellant’s knowledge, consent, or approval. The Appellant was not physically at the store supervising as needed as he was experiencing several health issues.

These contentions cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. As owner of the store, the Appellant is liable for all violative transactions that occur at Asvagh Arabyeh Inc. Regardless of whom the ownership of a

store may utilize to handle store business (i.e., regardless of whether a store owner, store manager, store clerk, family member, etc. was involved in the violative transactions), ownership is accountable for the proper handling of SNAP benefit transactions. Prior to becoming authorized to participate in the SNAP on November 23, 2016, the Appellant completed and submitted a SNAP Application for Retail Stores. The SNAP Application contained a section indicating that the person(s) signing the Application understood and agreed to ensure that store employees follow the SNAP rules and regulations and that the person(s) accepts responsibility for any SNAP violations that may occur at the store that were committed by any of the store's employees---paid, unpaid, new, temporary, full-time, part-time, etc. The SNAP Application also included a section that contained a statement which acknowledged that the person(s) signing the Application was aware that violations of program rules could result in fines, legal sanctions, withdrawal, or disqualification of the store. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

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. Trafficking is defined in 7 CFR § 271.2 of the SNAP regulations which states that trafficking means 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... The Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement 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, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. The Appellant's implied contention that the SNAP violations were committed by a store employee without its knowledge, consent, or approval cannot be accepted as a valid basis for diminishing the penalty. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of USDA.

Corrective Action

The Appellant contends that in order to ensure that these types of SNAP violations do not occur in the future, it: (1) Is currently installing a security camera system so that the owner can monitor activities when he is not physically present. The owner will review the store video footage on a random, periodic basis; (2) Has prepared the attached “Employee's Acknowledgment of Procedures Regarding SNAP, WIC, or Food Stamps or Any Other Related Governmental Food Assistance Purchase Programs” to additionally train employees on the SNAP rules; (3) Has displayed a notice in the cashier's area of the store listing ineligible and eligible items allowed to be purchased with SNAP/LINK benefits; and (4) Has terminated the responsible employee.

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that it has taken or will take corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

No Prior Violations

The Appellant contends that it has not received any prior violation warnings with regard to the SNAP. However, 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. 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.

SNAP Violations Minor

The Appellant contends that the SNAP violations were limited in nature. However, the Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement 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, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. Additionally, the Act noted herein and the regulations pursuant thereto do not stipulate a minimum dollar amount of SNAP benefits trafficked in order to meet the definition of "trafficking" at 7 CFR § 271.2.

Financial Hardship

The Appellant contends that a temporary SNAP disqualification for any lengthy time period would impose a financial hardship on the Appellant and would likely cause the owner to have to close the store. The disqualification of the Appellant firm has already had a financial impact. However, there is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm 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, the 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.

Reassessment of Sanction

The Appellant requests that FNS issue a warning letter or impose a SNAP disqualification not to exceed six months in lieu of a permanent SNAP disqualification. The owner has not operated this business for a long time and has not profited from any financial gains from the operations of the business let alone through any alleged violations of the SNAP regulations. The imposed permanent SNAP disqualification by the Retailer Operations Division is an abuse of discretion and is unwarranted. A zero tolerance policy of permanent disqualification is not what the SNAP regulations are for.

However, as mentioned previously, the Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that "... a disqualification . . . 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 ...". In keeping with this legislative mandate, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked.

CIVIL MONEY PENALTY

As previously indicated, the July 23, 2018 Determination Letter advised the Appellant of the ineligibility for consideration for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations. The letter of charges dated May 14, 2018 advised the Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The regulations specify that such documentation must, in part, establish that there was an effective compliance policy and training program and that both were in effect and implemented prior to the occurrence of violations. The letter indicates that no information was provided by the Appellant for consideration; therefore, on review the Retailer Operations Division's determination that the Appellant firm is ineligible for the imposition of civil money penalties in lieu of disqualification is affirmed.

CONCLUSION

As previously stated, 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 review of the evidence in this case, there is no question that program violations did occur during a USDA investigation. All transactions cited in the letter of charges were conducted or supervised by a USDA investigator and all are thoroughly 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, including the exchange of SNAP benefits for cash, and in all other critically pertinent details. Therefore, the decision to impose a permanent disqualification against the Appellant, Asvagh Arabyeh Inc., is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to 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.

LORIE L. CONNEEN
Administrative Review Officer

March 8, 2019