

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

Bangs African Caribbean Market Place,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0163685

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Bangs African Caribbean Market Place (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 retailer in the program, as initially imposed by the Retailer Operations Division was appropriate.

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 Appellant in a letter dated May 27, 2016.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provides 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 Appellant with Federal SNAP law and regulations from January 2013 to June 2013. The investigation report documents that personnel working at Appellant committed SNAP violations on three (3) occasions where store

personnel exchanged SNAP benefits for cash. 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 March 10, 2016, that it was charged with violating the terms and conditions of the SNAP regulations. The letter stated, in relevant part, that:

There is evidence that your firm violated the Supplemental Nutrition Assistance Program (SNAP) regulations. Based on the transactions which occurred during this investigation 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 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 correspondence dated March 23, 2016, and in response to the Charge letter, the Appellant generally stated that the transactions listed on the Charge letter for January 18, 2013, March 1, 2013, did not occur in the store and the copy of the batch history shows no sales for the amounts listed. The transaction on June 25, 2013 did occur however it was for a food purchase. Ownership also stated that he was enrolled in school from April 2012 to June 2014 and during those times a cousin was helping out in the store and was fully aware that it was against the law to exchange food stamps for cash. Additionally, ownership indicated that when the investigator visited the store he was in school and the investigator waited until the store was reopened. However, ownership informed the investigator that no exchange of food benefits for cash would occur in the market. Appellant provided a “verification of student status” document dated March 23, 2016, stating that “5 U.S.C. § 552 (b)(6) & (b)(7)(C) was a former full-time student attending California College San Diego....on 5/23/11 and graduating 7/22/14. Students attend either day or evening sessions defined as 8:30 am–2:30 pm or 6:00 pm–10:00 pm.” Also included were three pages containing 10 EBT receipts dated for March 1, 2013 and June 25, 2013.

In an April 2, 2016 telephone conversation with Retailer Operations Division, Appellant stated the owner worked the store with one employee who was a cousin (5 U.S.C. § 552 (b)(6) & (b)(7)(C)). Appellant also stated that both the owner and the employee never exchanged SNAP benefits for cash; any amount debited from SNAP customers cards was for food; during the dates of the investigation the owner was not at the store and attending school full time; and during the month of January 2013 the owner traveled to Africa.

After considering the Appellant’s reply and the evidence in the case, the Retailer Operations Division issued a determination letter dated May 27, 2016. The determination letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c)

and § 278.6(e)(1). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations. The Retailer Operations Division determined that the Appellant was not eligible for the trafficking CMP because the Appellant failed to 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 dated May 31, 2016, and subsequent correspondence dated June 15, 2016, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. The appeal 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 actions should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would 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 contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). In particular, 7 CFR § 278.6(a) and (e)(1)(i) establishes 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, inter alia: "... 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, inter alia: "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;..."

7 CFR § 278.6(e)(1)(i) states, in relevant part, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2."

7 CFR § 278.6(a) states, inter alia: "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]

7 CFR § 278.6(b)(2)(ii) states, inter alia: “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, inter alia: “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 on-site investigation from January 2013 to June 2013, the USDA conducted three (3) compliance visits at Appellant. The investigation report documents the following:

1. On June 25, 2013, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) completed a transaction in which 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits was accepted in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash.
2. On March 1, 2013, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) completed a transaction in which 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits was accepted in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash.
3. On January 18, 2013, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) completed a transaction in which 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits was accepted in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash.

APPELLANT’S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- I am appealing the denial of my CMP.
- All three allegations are incorrect as I have documentation proving that I was a full time student and was in school day and night trying to achieve my goals by earning my degree.
- There has never been any other trafficking of SNAP in my store as I am aware of the consequences or outcome.
- If the violations cited occurred in my store, why did it take three years to be brought to my attention?

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

The Appellant contends that there had never been any other trafficking of SNAP at the store, ownership was aware of the consequences or outcome, and all three allegations were incorrect as ownership has documented proof that he was a full time student and was in school day and night trying to achieve the goal of earning a degree. With regards to these contentions, 7 CFR § 278.6(a), noted herein, establishes the authority upon which FNS may disqualify an authorized retail food store as a result from a finding of a violation on the basis of evidence that may include facts established through on- site investigations. The record reflects that an on-site investigation was conducted at Appellant's firm which resulted in three (3) separate instances of SNAP violations of trafficking as defined in Section 271.2 of the SNAP regulations. Moreover, the charges of violations are based on the findings of a formal Department of Agriculture investigation; all transactions cited were conducted under the direct supervision of a Department Investigator. All such transactions are fully documented and a review of this documentation has yielded no indication of substantial error or discrepancy in the reported findings; the investigative record is specific and thorough with regard to the dates and other specifics of the violations and in all other critically pertinent detail.

Documentation dated March 23, 2016, as provided by Appellant regarding school attendance, stated "5 U.S.C. § 552 (b)(6) & (b)(7)(C) was a former full-time student attending California College San Diego....on 5/23/11 and graduating 7/22/14. Students attend either day or evening sessions defined as 8:30 am–2:30 pm or 6:00 pm–10:00 pm." This shows overall dates and possible times of attendance however, the document does not provide sufficient evidence verifying that ownership was actually in class and not present at the store during the times and dates of the investigative store visits. Additionally, in its reply to the charge letter, Appellant stated that he informed the investigator that no exchange of food benefits for cash would occur in the market. Therefore, it is plausible that ownership was present, in or at the store, during at least one of the investigative store visits.

Appellant contends that ownership traveled to Africa during the time of the investigative visits and provided a travel itinerary as documented proof. Regarding this contention, the investigative report indicates that the visits took place on January 18, 2013, March 1, 2013 and June 25, 2013. According to the travel itinerary, ownership departed on January 20, 2013, two days after the initial investigative visit, and returned February 5, 2013, which was approximately one month prior to the second investigative visit. Therefore Appellant's contention that ownership was out of the country at the time of the violations does not provide a valid basis for dismissing the charges or mitigating the penalty imposed.

The Appellant contends that ownership was not at the store during the dates of the investigation. With regards to this contention, as owner of the store, Appellant is liable for all violative

transactions handled by store personnel. Regardless of whom the ownership of a store may utilize to handle store business, whether employee or family member helping out, full-time, part-time, paid or unpaid, ownership is accountable for the proper handling of SNAP benefit transactions. 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 the USDA.

More importantly, on Appellants initial Supplemental Nutrition Assistance Program Application for Stores, annotated as received by FNS on May 27, 2010, the signature of the owner, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), affirms that:

“I accept responsibility on behalf of the firm for violations of the Supplemental Nutrition Assistance Program regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time. These include violations such as, but not limited to:

- Trading cash for Supplemental Nutrition Assistance Program benefits (i.e. trafficking);
- Accepting Supplemental Nutrition Assistance Program benefits as payment for ineligible items;
- Accepting Supplemental Nutrition Assistance Program benefits as payment on credit accounts or loans;
- Knowingly accepting Supplemental Nutritional Assistance Program benefits from people not authorized to use them;”

Appellant posed the question that if the violations cited occurred at its store why did it take three years to be brought to ownerships attention? It is acknowledged that a lengthy period of time elapsed between the documented trafficking violations and the issuance of the investigation report by the USDA’s Office of Inspector General, which conducted the investigation. There is no statute of limitations with regards to an administrative action against a firm, although the agency does strive to take such actions as soon as they are able. It is important to note that when the Retailer Operations Division charges a firm for violations uncovered during a covert investigation is dependent primarily on when the investigative agency releases their report and gives approval for USDA to pursue administrative action. There are a number of reasons an administrative action could be delayed. For example, an investigation may be escalated from the administrative level to the criminal level, and after some time a decision may be made not to pursue the criminal investigation after all; this could take a couple of years. In addition, investigations often involve a number of different stores, and no arrests or charges are made until after all store investigations have been completed. In the interim, no administrative actions are taken until after any civil and criminal actions against firms have been pursued. Prosecutors may also accept a case referral, and then months later decide to decline the case for prosecution. In the present case, the investigation report was dated January 20, 2015, and the charge letter was issued to Appellant on March 10, 2016. The time elapsed between the violations and the charge letter does not have any effect on the potency or validity of the charges.

CIVIL MONEY PENALTY

The Appellant contends that it is appealing the denial of a CMP. With regards to this contention, 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. 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 compliance policy to prevent SNAP violations. More importantly, per the investigative report, it was determined that ownership participated in the trafficking. Therefore, the Retailer Operations Division' decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

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. The decision to impose a permanent disqualification against Bangs African Caribbean Market Place 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 Title 7, Code of Federal Regulations, Part 279.7 (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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If the USDA receives such a request, it will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

MONIQUE BROOKS
ADMINISTRATIVE REVIEW OFFICER

August 16, 2016
DATE