

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

Barnes Grocery,

Appellant,

v.

Case Number: C0212363

Retailer Operations Division,

Respondent.

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 Retailer Operations Division to impose a permanent disqualification against Barnes Grocery (hereinafter Appellant) from participating 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 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), in its administration of the SNAP when it imposed a permanent disqualification against Appellant on May 23, 2019.

AUTHORITY

According to 7 U.S.C. § 2023 and the 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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period October 29, 2018, through December 13, 2018. The investigation determined that personnel at the Appellant firm accepted an unknown amount of SNAP benefits in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash (trafficking) on two occasions as noted in the letter of charges.

These transactions were deemed clearly violative and warrant a permanent disqualification. Additionally, the investigation determined that personnel at the firm accepted SNAP benefits in exchange for ineligible merchandise on four separate occasions. The items sold are best described in regulatory terms as common nonfood items such as plastic cups, paper towels, and paper plates. The investigative report indicates that these violative transactions were handled by the same clerk.

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated April 23, 2019, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.6(e)(1). The letter of charges states, in relevant 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 responded to the charges in a letter dated May 2, 2019, that did not request or provide any documentation in support of a CMP. After giving consideration to the evidence, the Retailer Operations Division notified Appellant in a letter dated May 23, 2019, that the firm was 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 states that Appellant’s eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated “. . . 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.”

By letter postmarked May 31, 2019, Appellant appealed the Retailer Operations Division’s decision and requested an administrative review of this action. The appeal was granted. Subsequent correspondence was received.

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 Section 278. In particular, Sections 278.6(a) and Part 278.6(e)(1)(i) establish 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 § 271.2 states that: 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 § 278.2(a) states that: Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food. Further, the citation specifies that coupons may not be accepted in exchange for cash, in payment of interest on loans, or for any other nonfood use.

7 CFR § 278.6(a) states that: 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(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, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone . . .” Trafficking is further defined, in 7 CFR § 271.2, to include “(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.”

7 CFR § 278.6(f)(1) states in relevant part, “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm is selling a substantial variety of staple food items, and the firm’s disqualification would cause hardship to SNAP households. A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.”

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.”

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).” Part 278.6(b)(2)(ii) further 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 Part 278.6(b)(1), the firm shall not be eligible for such a penalty.

In addition, 7 CFR § 278.6(i)(2) states in relevant part, “As specified in Criterion 3 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with this part 278 of current FNS regulations and current FSP policy on the proper acceptance and handling of food coupons.” This section goes on to state, “As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation.” This section further states, “A firm which seeks a civil money penalty in lieu of permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted . . .”

APPELLANT’S CONTENTIONS

The following may represent a summary of Appellant’s contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- A review is requested in consideration of all the documentation sent asking for USDA’s understanding that this employee did not respect his job or the owners;
- The son took over running the store from his father two years ago and has had to terminate four clerks in that time. He works full time at a roofing company and then takes over at the store. It’s been a struggle to keep his main job and find someone he can trust to run the store. The son had no knowledge of the violations until December 2018 when he noticed money missing from the register so he fired the clerk;
- The store broke even the first year, but was under the second year. The son works at the store seven days a week, but problems only happen when he’s not working. He has seen them come in and ask for the clerk and then leave when the clerk is not there. He fired the clerk in December and didn’t get the USDA letter until May 2019. USDA has seen the bank account and knows he doesn’t even have the money to pay the fine he’s been charged;
- The owner watched some of the camcorder video and saw the clerk chatting with the investigator for about 12 minutes like they knew each other and then exchanging papers like they were giving each other their phone numbers; they walked out to the car together on another occasion. They got so friendly that they knew his nickname, height, and weight. They came by again in January, February, March, and April 2019 after he’d fired the clerk and asked if the clerk was there and wouldn’t try him knowing the owner would not tolerate it. All the time they come in asking for the clerk not knowing he’s been fired and they turn around and walk out when he’s not there. He is glad he fired his clerk on December 23, 2018, but thinks the investigator was unprofessional and would do anything to get a charge and that’s not right; and,
- USDA closed the case up in December only because the clerk was no longer there and in May 2019, the owner got the first USDA letter. If the USDA knew the owner wouldn’t go for it, why would USDA keep looking for the clerk, only to hurt the owner? The owner will never ever hire a young person again as they don’t care and the

USDA people would do anything to make a charge. The owner hopes and prays the decision is reversed as the store has been open since 1947 and in his family for 72 years.

Appellant submitted no evidence or other rationales in support of these contentions.

ANALYSIS AND FINDINGS

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 and is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. In this case, the store owner has not denied that a store employee conducted violative transactions that included the trafficking of SNAP benefits. The Report of Investigation clearly shows the exchange of an unknown amount of SNAP benefits for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash in Exhibits E and F as well as the exchange of SNAP benefits for ineligible items in Exhibits B, C, D, and E.

Both the FNS SNAP retailer application and retailer reauthorization application contain a certification page whereby applicants must confirm their understanding of, and agreement with, SNAP retailer requirements in order to complete the application/reauthorization process. The requirements state that store ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time regardless of the amount of time the owner(s) is present at the subject firm. Store ownership certified its understanding and agreement to abide by these program rules and regulatory provisions when it applied for authorization as a SNAP retailer and again when it applied for reauthorization.

The FNS investigative report shows that an employee of the Appellant firm transacted SNAP benefits for ineligible items on four separate occasions and for cash on two occasions over more than a six week period indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The transactions from the investigative report have been matched to SNAP transactions posted on the dates in question with no disagreements and a review of the investigative report shows no errors or discrepancies. There is no evidence of involvement by the firm's ownership or management. The acceptance of SNAP benefits for ineligible items or for cash are both violations of SNAP rules and regulations with the penalty for trafficking being permanent disqualification. There is no regulatory threshold for the exchange of SNAP benefits for cash or for the dollar value of the ineligible items purchased and store ownership does not dispute that violations occurred or that SNAP benefits were exchanged for cash and ineligible merchandise.

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not 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 the most serious violation, 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 shall 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 and second chances are not an authorized option.

Regarding ownership’s contentions, the USDA investigator did not visit the Appellant firm in January 2019, February 2019, March 2019, or April 2019 as the investigation ended on December 13, 2018, after a store employee trafficked SNAP benefits for cash on two separate occasions. There was no need for USDA personnel to return to the firm after this date since the investigating officer had sufficient evidence of trafficking. Any groups looking for the clerk after December 13, 2018, had likely been exchanging SNAP benefits for ineligible items and/or cash with the clerk and were looking to do so again. As explained in the Report of Investigation, the clerk freely provided his nickname during the first visit when no violations occurred. It is also standard procedure during undercover investigations for the investigating officer to provide descriptions of employees that includes an estimate of height and weight so that store ownership might be able to identify which employee conducted each transaction.

Based on the discussion above, there is not any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because Appellant failed to submit any evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

Based on the above discussion and the evidence under review, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division’s decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

Appellant does not deny that the violations occurred. A review of the evidence in this case supports that the program violations at issue did 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 by a USDA investigator, signed under penalty of perjury, 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, the specific exchange of SNAP benefits for cash, and in all other critically pertinent detail. Additionally, the decision by the Retailer Operations Division that Appellant was not eligible for a trafficking CMP is also found to be correct.

Based on the discussion above, the determination by the Retailer Operations Division to impose a permanent disqualification against the Appellant business 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 a judicial review is desired, 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.

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

August 16, 2019