

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

Botello’s Market, Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0198149

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 Botello’s Market, Inc. (Appellant) by the Retailer Operations Division (Retailer Operations).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a), 7 CFR § 278.6(e)(1)(i) and 7 CFR § 278.6(i) in its administration of the SNAP when it imposed a permanent disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2021 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

By Charge letter dated October 12, 2017, Retailer Operations informed the owners, that Appellant was charged with violating the terms and conditions of the SNAP regulations based on a USDA investigation conducted from April 25, 2017 through June 5, 2017. Appellant replied to the Charge letter October 13, 2017.

By Determination letter dated November 16, 2017, Retailer Operations informed Appellant that it was permanently disqualified from participation as a retail store in the SNAP, and that the store was not eligible for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) because the owners failed to submit evidence to demonstrate that they had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

One owner appealed Retailer Operations' determination and requested administrative review of this action by letter dated November 21, 2017. The appeal was granted by letter dated December 7, 2017.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a 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, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the Act), 7 U.S.C. § 2021, and § 278 of Title 7 of the Code of Federal Regulations (CFR).

7 U.S.C. § 2021(b)(3)(B) states: "...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 § 278.6(e)(1)(i) states: "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, means: (1) 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;"... (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.

7 CFR § 278.6(e)(5) states that a firm is to be disqualified for six months: "if it is to be the first sanction for the firm and the evidence shows that personnel of the firm have committed

violations such as but not limited to the sale of common nonfood items due to carelessness or poor supervision by the firm's ownership or management.”

7 CFR § 278.2(a) states: “Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food.” The citation specifies that: “Coupons may not be accepted in exchange for cash...or for any other nonfood use.”

SUMMARY OF THE CHARGES

The USDA conducted a compliance investigation of Appellant. The investigative report details the results of six compliance visits. Appellant was charged with trafficking in Exhibits E and F. The penalty for trafficking is permanent disqualification. The misuse of SNAP benefits was also noted in Exhibits A, B, C, and D, and the violations in Exhibits B, C, and D warrant a non-permanent disqualification period as specified in Section 278.6(e) of the SNAP regulations.

APPELLANT'S CONTENTIONS

The following may represent a brief summary of the contentions presented in this matter. However, in reaching a decision, full attention and consideration have been given to all contentions presented, including any not specifically recapitulated.

- I understand my disqualification from the SNAP.
- I understand that if I sell or transfer my business a penalty will apply.
- I would like to be considered for a second chance.
- I'm the one that supports my family.

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 Retailer Operations. This review is limited to what circumstances were at the basis of Retailer Operations' decision at the time such decision was made. The USDA Exhibits demonstrate a pattern of violations at Appellant that occurred on multiple occasions. As described in Exhibit E and F, the most egregious violation, trafficking, occurred when firm personnel exchanged cash for SNAP benefits. Appellant also exchanged nonfood items for SNAP benefits, and Exhibits B, C, D warrant a non-permanent disqualification period, which is subsumed in the trafficking sanction that carries a permanent disqualification.

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. Regardless of whom the owner of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. A review of the documentation in this matter has yielded

no indication of error or discrepancy in the report findings. The investigative record is specific and thorough with regard to the dates of the violations, the specific facts related to the trafficking incidents, and in all other critically pertinent detail.

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 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 ownership to be excused from an assessed administrative penalty 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. Furthermore, 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, 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.

CIVIL MONEY PENALTY

The regulations at Section 278.6(i) specify the four criteria for a firm's eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. A firm must submit a timely request for a civil money penalty that shows substantial evidence which demonstrates that it had established and implemented an effective compliance policy and program to prevent SNAP violations. The record supports that Appellant did not submit evidence for a CMP in lieu of trafficking, and that Retailer Operations properly applied the SNAP regulations.

CONCLUSION

The review of the evidence in this case supports that program violations did occur at Appellant. The investigative record is specific and accurate with regard to the dates of the violations, the exchange of SNAP benefits for cash and ineligible items, and in other pertinent detail. The contentions advanced do not constitute by a preponderance of the evidence grounds for dismissal of the charges of violations. The permanent disqualification as a SNAP retailer food store is sustained.

RIGHTS AND REMEDIES

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 applicable rights to judicial review of this determination. 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 where Appellant's owners 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, 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.

M. Viens
Administrative Review Officer

January 17, 2018