

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

Brownsville Deli & Grocery Inc,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0222014

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 Office of Retailer Operations and Compliance to impose a permanent disqualification against Brownsville Deli & Grocery Inc. (“Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of Code of Federal Regulations (CFR) § 278.6(e)(1)(i) in its administration of SNAP when it imposed a permanent disqualification against Appellant on April 1, 2021.

AUTHORITY

According to 7 U.S.C. § 2023 and its 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

The USDA conducted an investigation Appellant’s compliance with federal SNAP law and regulations during the period of May 16, 2019 through May 30, 2019. The investigation reported that personnel at Appellant accepted **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP

benefits in exchange for cash (trafficking) in the amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on one occasion and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on another occasion. The investigation revealed that one unidentified clerk was involved in the impermissible transactions.

As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant, in a letter dated June 25, 2021, that its firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.6(e)(1). This letter stated, in 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 replied to the charges in a subsequent letter to the Office of Retailer Operations and Compliance. The record reflects that the Office of Retailer Operations and Compliance received and considered this information prior to making a determination.

The Office of Retailer Operations and Compliance notified Appellant in a letter dated April 1, 2021 that the firm was being 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 stated that Appellant’s eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated to Appellant that “. . . 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.”

On April 5, 2021, Appellant appealed the Office of Retailer Operations and Compliance’s assessment and requested an administrative review of this action. The appeal was granted.

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 Part 278. In particular, 7 CFR § 278.6(e)(1)(i) establishes 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 § 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 or selling of [SNAP benefits] or other benefit instruments for cash or consideration other than eligible food” and “intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.”

APPELLANT’S CONTENTIONS

Appellant’s responses regarding this matter are essentially as follows:

- Notifying the firm of the allegations two months after the investigative period is unfair.
- Appellant denies the allegations. Appellant would not jeopardize its SNAP income by engaging in trafficking. Appellant denies a receipt was not provided to the investigator.
- Disqualification would pose a hardship to SNAP participants who rely on the firm.
- Appellant requests a CMP.
- Disqualification would pose a severe hardship to Appellant.
- Appellant described its compliance policy and training program.
- Appellant has not had any previous issues with SNAP compliance.
- Appellant did not secure the name of the clerks who allegedly committed the infractions.
- There is no evidence the clerk understood the investigator.
- The clerk did not exchange SNAP benefits for cash or non-food items.
- The investigator exchanged merchandise for cash which is not a violation of SNAP regulations.
- The time of the entry and exit from the store was not included in the investigative report.
- The name of the investigator was not disclosed.
- The owner was unaware of the violations until receiving the charge letter.
- Appellant did not receive any warnings, which violates due process.
- The sanction is unjustified, inappropriate, cruel and unusual.
- The owner relied on staff to properly handle transactions. The owner would not have jeopardized his livelihood by risking a permanent disqualification.
- There is no evidence to support the determination.

These explanations may represent only a brief summary of Appellant’s contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

Appellant denies the allegation and asserts that the owner would not have jeopardized his livelihood by risking a permanent disqualification. Appellant also denies that receipts were not issued. This review examines the relevant information regarding the determination. Once the Office of Retailer Operations and Compliance establishes a violation occurred, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that the permanent disqualification should be reversed. If this is not demonstrated, the case will be sustained. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

Appellant contends that the owner was unaware of the violations until receiving the charge letter. Appellant also contends the owner relied on staff to properly handle transactions, and the owner would not have jeopardized his livelihood by risking a permanent disqualification. Appellant also insists that it did not receive any warnings, which violates due process. When ownership signed the FNS application to become an authorized SNAP retailer, this included a certification and confirmation that the owner(s) would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification document include trafficking. Regardless of whom the ownership of a store may utilize to operate the cash register and handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons chosen to handle store business, or requiring warnings of violations during an ongoing investigation, would render the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA virtually meaningless.

Appellant contends the investigator exchanged merchandise for cash which is not a violation of SNAP regulations. According to 7 CFR § 271.2, trafficking includes “intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.”

First SNAP Violation

Appellant contends that this is the first time there has been an issue related to SNAP. A record of program participation with no documented previous violations, however, does not constitute valid grounds for mitigating the impact of the present serious determination of trafficking. Appellant is correct that a clerk refused trafficking on one occasion, and denied a non-food transaction on another occasion.

Egregiousness of Trafficking Violation

It is Appellant's contention that the sanction is unjustified, inappropriate, cruel and unusual. Neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations 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 extremely serious, 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 must 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.

No Undue Hardship to Appellant

Appellant maintains that disqualification would pose an extreme hardship to the firm. Economic hardship is a likely consequence whenever a store is permanently disqualified from SNAP participation. However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from such a penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

Moreover, giving special consideration to the firm for economic hardship would forsake fairness and equity to competing stores and other participating retailers who are complying fully with program regulations, and also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that it will incur economic hardship due to an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the imposed penalty.

Evidence of Violation

Appellant contends there is no credible evidence of violations. As previously stated, 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** (Emphasis added.)

Appellant was provided a copy of the investigation report, redacted to protect the identity of the investigative operative, which details each occasion during which violations occurred, their dates, the amount of cash provided in exchange for SNAP benefits, and the descriptions and any comments of the clerk involved. Appellant stated

there is no evidence the clerk understood the investigator. The investigative report does not support Appellant's contention. Appellant has also received all file information requested under the Freedom of Information Act except information that is specifically exempt from disclosure by law. In contrast to Appellant's assertions, there is substantial evidence that the violations occurred.

No Undue Hardship to SNAP Participants

Appellant asserts that disqualification would be a hardship to SNAP households who rely on the store. Some degree of inconvenience to SNAP benefit users is inherent in the disqualification from SNAP of any participating food store, since the normal shopping pattern of such SNAP participants may be changed due to the disqualification. Section 278.6(f)(1) of SNAP regulations provides for Civil Money Penalty (CMP) assessments in lieu of disqualification in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable participating retail food store in the area to meet their needs. However, this regulation also sets forth the following specific exception: "A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification." Because the matter at hand involves a permanent disqualification, this CMP provision is not applicable.

No Statute of Limitations

Appellant contends it is highly prejudicial to issue charges against it as the alleged violations occurred two months prior to the issuance of the charge letter. Appellant stated the owner no longer has videos related to the store. 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 promptly as possible. When the Office of Retailer Operations and Compliance charges a firm for violation 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. An investigation may be escalated from the administrative level to the criminal level, and after some time a decision might be made not to pursue criminal charges after all. In addition, undercover operations often involve multiple stores, and no arrests or charges are made until after all store investigations are complete. Administrative actions may be taken only after criminal actions against firms are resolved. The time elapsed between the SNAP violations and the charge letter does not have any effect on the potency or validity of the charges.

CIVIL MONEY PENALTY

Appellant requested a civil money penalty (CMP) contending that it had established and implemented an effective compliance policy and program to prevent SNAP violations. According to 7 CFR § 278.6(i) of the SNAP regulations, FNS may impose a CMP in lieu of permanent disqualification for trafficking.

For an Appellant's request for a CMP to be considered, the regulations at 7 CFR § 278.6(b)(2) require that Appellant submit supporting documentation within ten days of receipt of the chargeletter. Appellant was advised of this provision in the charge letter of June 25, 2021. A review of the administrative record indicates Appellant did not submit documentation to support its eligibility for this alternative sanction by this deadline.

7 CFR § 278.6(i) sets forth the eligibility requirements for a CMP:

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 Section 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 Section 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 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 . . .

In support of Appellant's contention that it is eligible for a CMP, it described its store policy and training program. In this regard, the various statements made by Appellant is not "substantial evidence" that fulfills each of the four criteria of 7 CFR § 278.6(i), demonstrating "that the firm had established and implemented an effective compliance policy and program to prevent violations."

The standards of eligibility for a trafficking CMP are high. They require substantial proof that a compliance policy and program was established and implemented prior to the occurrence of violations. These standards exist to thwart attempts to falsely present compliance policies and programs that were not actually implemented prior to violations. As Appellant did not provide the required supporting documentation, the Office of Retailer Operations and Compliance did not assess a CMP. According to the requirements stated in 7 CFR § 278.6(b)(1), § 278.6(b)(2)(ii and iii), and § 278.6(i), Appellant is not eligible for a CMP in lieu of a permanent disqualification from participation as an authorized retailer in SNAP. The determination by the Office of Retailer Operations and Compliance to deny Appellant a civil money penalty is sustained.

CONCLUSION

Based on a review of the evidence, it appears that the program violations at issue did, in fact, 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 under the supervision of a USDA investigator and all are fully documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Appellant contends the name of the clerk was not secured during the investigation, and there is no description of the clerk provided. The investigative record is specific and accurate with regard to the dates of the violations, the description of the clerk, the specific exchanges of SNAP benefits for ineligible items, and in all other critically pertinent detail. The name of the clerk is not included as customers do not typically request the name of the clerk serving them when purchasing groceries. Such behavior might seem suspicious and interfere with the investigation.

Appellant stated the name of the investigator was not disclosed nor the time of the investigator's entry and exit from the store. Appellant is not provided with information that could compromise the identity of the undercover investigator.

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against Brownsville Deli & Grocery Inc. 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 Appellant desires a judicial review, 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.

RICH PROULX
ADMINISTRATIVE REVIEW OFFICER

June 1, 2021