

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

Cheers One Stop & More,

Appellant,

v.

Case Number: C0200458

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 Cheers One Stop & More (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 the implementing regulations at 7 CFR § 279.1 provide that a food retailer 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 24, 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 June 28, 2017 through August 2, 2017. One owner authorized counsel to reply to the Charge letter on November 1, 2017. Counsel also made a

FOIA request. The record shows the agency provided a reply to the FOIA request dated November 16, 2017.

By Determination letter dated August 3, 2018, 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 firm failed to submit evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

Counsel appealed Retailer Operations' determination and requested administrative review of this action by letter dated August 16, 2018. The appeal was granted by letter dated August 22, 2018.

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.” Further, 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 provided to Appellant gives details on the results of seven compliance visits. Appellant was charged with trafficking in Exhibits F and G. The penalty for trafficking is permanent disqualification. SNAP benefits were also improperly exchanged for nonfood items in Exhibits A, B, C, E, F and G, which warrant a non-permanent disqualification period as specified in Section 278.6(e) of the SNAP regulations.

APPELLANT'S CONTENTIONS

The following represent a summary of the contentions presented in this matter. In reaching a decision, full consideration has been given to all contentions presented, including any not specifically recapitulated.

- SNAP regulations that allow a permanent disqualification without sufficient evidence of wrongdoing, based on speculation, conjecture and unreliable computer generated data violates due process of law.
- Disqualification from the SNAP violates the Contracts Clause of the U.S. Constitution.
- Being forced out of business by the permanent disqualification from the SNAP is arbitrary, capricious, and done in bad faith and a denial of my clients' rights, including due process of law.
- There are no decent grounds for upholding the classification concerning the assessment of a permanent disqualification against foreign born persons.
- The statute or regulation constitutes a taking; this type of taking is unconstitutional.
- Your agency erroneously concluded that my clients have trafficked based on speculation and conjecture from reviewing computer sales records using the unreliable ALERT program with nothing more.
- The charges are speculative and violate due process and equal protection. The sanction is arbitrary and capricious.
- My clients deny the allegations and they have not been provided any reliable, credible evidence of any SNAP violations, including the administrative record, precluding them from fully responding to the charges.

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or to invalidate the decision of Retailer Operations. This review is limited to the facts that were at the basis of Retailer Operations' decision at the time the decision was made. The USDA Exhibits furnished with the Charge letter demonstrate a pattern of violations at Appellant that occurred on multiple occasions. As described in Exhibits F and G, the most egregious violation, trafficking, occurred when firm personnel exchanged cash for SNAP benefits. Appellant also exchanged nonfood items for SNAP benefits as noted in Exhibits A, B, C, E, F, and G which 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. The regulations stipulate "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2."

As a matter of fact, and as indicated in the Charge letter, Appellant was investigated. Contrary to the contentions, this is not a case based on computer data. All Exhibits were provided to the owners and counsel. Exhibits F and G support the charge of trafficking and the other Exhibits as noted herein, support the violative sale on nonfood items in exchange for SNAP benefits. Case information and documents were also provided to counsel in response to his FOIA request. The record supports that counsel did not pursue a FOIA appeal process, nor did he provide an additional response or documentation to support his contentions.

Counsel's contention regarding the use of computer data and the ALERT program is incongruous because the trafficking charges in this matter are directly derived from a formal USDA onsite investigation that included multiple passes at Appellant as indicated in the Charge letter and the provided Exhibits of each onsite visit.

The administrative review process does not include an assessment of the constitutionality of the laws and regulations under which the agency imposed this adverse action, but rather whether the agency action undertaken was proper pursuant to those laws and regulations, and sustainable by a preponderance of the evidence. As such, this office does not have the authority to assess whether the United States Congress, in its enactment of legislation, has conformed to Constitutional mandates. Additionally, challenges to the laws and regulations governing the SNAP are more appropriately the province of judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

As to the court cases cited by counsel, the administrative review process should determine whether FNS followed the Food and Nutrition Act and the regulations issued under the Act when it took action against the retailer. The administrative review officer is not responsible for determining whether any legal cases cited by counsel apply to Appellant's situation. If the final agency decision is appealed to the federal district court, the judge is responsible for determining whether case law cited by counsel is on point and applicable to Appellant's case.

Appellant appears to misconstrue its initial SNAP authorization as having bestowed upon it a right/entitlement to SNAP income and a corresponding perpetual and irreversible ownership/property interest in its SNAP authorization. It must be impressed upon Appellant that, SNAP authorization is an administratively-granted privilege subject to the terms and conditions for participation detailed in the Act and the regulations. Thus, if a firm does not conform to the applicable statutes and regulations, the same provide for the firm's removal from the program in accordance with the provisions detailed therein. SNAP authorization is dependent solely upon whether a firm meets the eligibility requirements for participation and subsequently abides by the statute and implementing regulations. That a firm has profited or otherwise benefitted from a SNAP authorization does not create a property interest which supersedes the statute or implementing regulations.

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 the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. The record supports that Appellant did not submit evidence to support a CMP in lieu of trafficking. As such, Retailer Operations properly did not assess a CMP in lieu of permanent disqualification.

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 details. The contentions advanced by counsel on behalf of the owners do not constitute, by preponderance of the evidence, grounds for dismissal of the charges of violations. The permanent disqualification of Appellant as a SNAP retail food store is therefore 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 the Regulations at 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

October 10, 2018