

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

Corner Food Mart,

Appellant,

v.

Case Number: C0164425

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 the permanent disqualification of Corner Food Mart (Corner Food Mart or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), 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 7 CFR § 278.6(a), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

AUTHORITY

7 USC § 2021 and the 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

The USDA Office of Inspector General (OIG) conducted an investigation of the compliance of Corner Food Market with Federal SNAP law and regulations. The OIG investigation report documents that, over the course of five undercover transactions, dating from June 3, 2014 through October 16, 2014, an employee at Corner Food Market exchanged SNAP benefits for cash. The buying or selling of SNAP benefits for cash or consideration other than eligible food is defined as trafficking under 7 CFR § 271.2.

On March 17, 2016, in the Harris County Circuit Court, Houston, Texas, the employee of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was charged with one count of EBT benefit trafficking. This employee subsequently plead guilty to the aforementioned charge and on September 22, 2016, was sentenced to 36 months of probation and order to pay \$656.23 in restitution.

The Retailer Operations Division charged Appellant, in a letter dated March 30, 2017, with trafficking in SNAP benefits. The charge letter noted that the penalty for trafficking is a permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated the Appellant had the right to respond to the charges within 10 days of receipt. The letter also stated that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant, through its previous counsel, responded to the charge letter in a written letter that was faxed to the Retailer Operations Division on April 6, 2017. Appellant denied that the store had trafficked in SNAP benefits and requested a CMP but did not provide the necessary supporting evidence for a trafficking CMP under 7 CFR § 278.6(i).

After giving consideration to the Appellant's response and the evidence in the case, the Retailer Operations Division informed the Appellant, by letter dated September 13, 2017, that Corner Food Market was permanently disqualified from participation in the SNAP. The letter also stated that Appellant was not eligible for a trafficking CMP as the Appellant did not 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 postmarked September 22, 2017, Appellant, through counsel, appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted. On October 4, 2017, counsel requested documents under the Freedom of Information Act (FOIA). FNS responded to the FOIA on November 14, 2017, and OIG responded to its request for documents on November 30, 2018. On November 30, 2018, counsel provided information in support of its administrative review request.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear 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 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 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) and (e)(1) 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 SNAP benefits.

7 CFR § 271.2 states, in part, 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 § 271.2 defines trafficking as: “(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; . . .”

7 CFR § 278.6(a) states, inter alia, 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**, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system, . . .” (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(b)(2)(iii) states, “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 § 278.6(b)(1), the firm shall not be eligible for such a penalty.”

7 CFR § 278.6(e)(1) reads, in part, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.”

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 investigation, the USDA-OIG conducted five undercover SNAP transactions at Corner Food Market. The violations were described by the Retailer Operations Division in the charge letter dated March 30, 2017, as follows:

1. Beginning on October 16, 2014 and ending on November 18, 2014, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, also known as **“5 U.S.C. § 552 (b)(6) & (b)(7)(C)** employee, in multiple transactions exchanged

- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits for a total 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash.
2. Beginning on August 12, 2014 and ending on August 28, 2014, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), also known as “5 U.S.C. § 552 (b)(6) & (b)(7)(C)”, employee, in multiple transactions exchanged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits for a total 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash.
 3. Beginning on July 15, 2014 and ending on July 23, 2014, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), employee, also known as “5 U.S.C. § 552 (b)(6) & (b)(7)(C)”, in multiple transactions exchanged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits for a total 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash.
 4. Beginning on June 3, 2014 and ending on June 9, 2014, a male clerk identified as “5 U.S.C. § 552 (b)(6) & (b)(7)(C)”, in multiple transactions exchanged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits for a total 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash.
 5. On June 3, 2014, a male clerk identified as “5 U.S.C. § 552 (b)(6) & (b)(7)(C)”, completed a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in exchange 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash.

APPELLANT’S CONTENTIONS

In its administrative review request and subsequent correspondence dated November 30, 2018, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- Appellant maintains a strict and thorough compliance training program for its employees.
- All employees are immediately trained on the SNAP rules and regulations and are shown which items are eligible and ineligible SNAP items.
- The employees are informed of the penalties for non-compliance and are made aware of the Appellant’s zero tolerance policy.
- All employees are required to sign an agreement to acknowledge their SNAP training.
- A copy of the SNAP rule and regulations are kept behind the counter at the store.
- The charging letter are merely cites with no attachments, records, affidavits, statements, or specific details regarding the charge of trafficking against Appellant.
- The allegations are from three years prior to the charging letter, such a significant and severe delay is inappropriate.
- There is no corroborating evidence in said statement, there are no sworn affidavits signed by undercover agents, and there are no photographs of the alleged cash received in exchange for the benefits.
- The charges are stale, too vague to be credible, and wholly lacking in supporting documents or evidence.

In support of its contention, Appellant provided the following documents:

- Two SNAP-EBT Employee Policy Agreement signed by two employees and dated February 27, 2014, and April 7, 2017;
- A torn Convenience Store Training Log with six employee names , dates of training between April 22, 2015 and January 10, 2016, and some signatures;

- USDA SNAP poster; and
- FNS January 2017 Profile of SNAP Households Texas Congressional District 18.

The preceding may represent only a brief summary of the Appellant's contentions presented 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.

ANALYSIS AND FINDINGS

Counsel contends that the charges are too vague and there is no supporting evidence. A full review of the case record shows that the charges of violations are based on the findings of a formal investigation. The transactions cited in the letter of are thoroughly documented. A complete review of this documentation has yielded no error or discrepancy. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. The documentation presented by the Retailer Operations Division establishes by a preponderance of the evidence that the violations as reported occurred at the Appellant store.

SNAP 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. Neither the Food and Nutrition Act of 2008, as amended, nor the regulations cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar. 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.

Time Period between Violations and Charge Letter

Counsel reports that the allegations are from three years prior to the charge letter and such a delay is inappropriate. In the present case, the administrative action appears to have been held in abeyance while the case was criminally prosecuted. After the criminal prosecution was complete, the Retailer Operations Division properly pursued the required administrative action by issuing a charge letter on March 30, 2017. A review of the case record indicates that the agency did not act improperly in issuing its charge letter.

CIVIL MONEY PENALTY

The Retailer Operations Division determined that the firm was not eligible for a civil money penalty in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and training program to prevent SNAP violations.

Although Appellant did not request a CMP in its administrative review request, counsel describes Appellant's training program. Counsel also submitted a training log that was signed by employees after the violations occurred. In addition, Appellant also submitted a SNAP-EBT Employee Policy Agreement that was signed by two different employees.

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is limited to what circumstances existed at the time that was the basis of the Retailer Operations Division's action. In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a civil money penalty to be considered, a firm must not only notify FNS that it desires the agency to consider a CMP in lieu of permanent disqualification, but it must also submit appropriate documentation within designated timeframes. In this case, Appellant replied to the charge letter and requested a CMP but it provided no evidence which would indicate that the firm had a compliance policy or training program of any kind. The regulations do not provide the agency discretion to extend the time within which documentation and evidence in support of a civil money penalty may be submitted. Therefore, in accordance with 7 CFR § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

Based on a review of the evidence in this case, there is no question that program violations did occur during a USDA-OIG investigation. The transactions cited in the letter of charges were thoroughly documented and a review of this documentation has yielded no indication of error or discrepancy in the reported findings. Therefore, the decision to impose a permanent disqualification against the Corner Food Mart is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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 the 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

December 17, 2018