

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

Crown Grocery Store,

Appellant,

v.

Case Number: C0139604

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 a permanent disqualification of Crown Grocery Store (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Crown Grocery Store.

AUTHORITY

7 U.S.C. § 2023 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

Crown Grocery Store was initially authorized to participate in SNAP on June 14, 2008. Between July 13, 2011, and July 25, 2011, USDA investigators conducted an undercover investigation of Crown Grocery Store to ascertain the firm’s compliance with Federal SNAP law and regulations. It was reported that on two occasions during the investigation the Appellant firm violated SNAP rules by exchanging SNAP benefits for cash (i.e. trafficking).

In a letter dated June 29, 2018, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations. The charge letter informed the

Appellant that the violations warranted permanent disqualification from SNAP as provided in 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made within 10 days of receipt of the letter under the conditions specified in 7 CFR § 278.6(i).

In response to the charge letter, the Appellant, through counsel, submitted a letter dated July 19, 2018. In this letter, the Appellant raised a concern that the charges were not presented to the Appellant until almost seven years after the alleged violations occurred. Appellant's counsel acknowledged that SNAP violations do not have a statute of limitations, *per se*, but argued that the charges should be barred under the Administrative Procedure Act or "by laches of the government." To support its contentions, the Appellant cited two court cases to show that charges must be filed within a reasonable timeframe. Based on the second case, *Craig Clymore, aka Cliff G v. Unites States of America*, the Appellant argued that the trafficking charges should have been filed within six years. The Appellant contended that it is unreasonable, arbitrary, and capricious to expect a store owner to remember the transactions that occurred so long ago. According to the Appellant, such a delay puts an unconscionable burden on the firm to expect it to have any recollection of the alleged violations. As such, the Appellant argued that the case must be dismissed. Finally, the Appellant argued that the store was sold in April 2018, before the charges were even filed against the firm, which means neither the buyer nor seller were aware of the violations at the time of the transfer of ownership.

In support of its response, the Appellant submitted a copy of a bill of sale dated April 17, 2018.

After considering the Appellant's response, the Retailer Operations Division issued a determination letter dated August 7, 2018. The determination letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP in accordance with paragraph § 278.6(i), but determined that the Appellant was not eligible for a CMP because it failed to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked August 10, 2018, the Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 & REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

7 U.S.C. § 2021(b)(3)(B) states, in part:

...[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 § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food.

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.... Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and **disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section.**[Emphasis added.]

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(e) states, in part:

The FNS regional office shall:

(1) Disqualify a firm permanently if:

(i) Personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, in part:

Trafficking 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...

7 CFR § 271.2 states, in part:

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 § 278.6(b)(2)(ii) states, in part:

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(i) states, in part:

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 INVESTIGATION

During an undercover investigation conducted between July 13, 2011, and July 25, 2011, the USDA completed five compliance visits at Crown Grocery Store. A report of the investigation was provided to the Appellant as an attachment to the June 29, 2018, charge letter. The investigation report included Exhibits A through E, which provided full details on the results of each compliance visit. SNAP violations were documented during three of the five visits and included trafficking violations on the last two visits as noted in Exhibits D and E. The report noted that the following ineligible non-food items were purchased by an investigator using SNAP benefits:

- One 40-count box of dryer sheets (*Kash 'N Carry* brand), Exhibit B
- One 500-sheet roll of toilet paper (*Splendid* brand), Exhibit B
- One 250-gram package of soap powder (*Ariel* brand), Exhibit B

Trafficking was reported during the fourth and fifth compliance visits, which took place on July 20, 2011, and July 25, 2011. In reporting the first trafficking violation, the USDA investigator provided the following details, as noted in Exhibit D:

5 U.S.C. § 552 (b)(7)(E)

In reporting the second trafficking violation, the investigator provided the following details, as noted in Exhibit F:

5 U.S.C. § 552 (b)(7)(E)

The report noted that the investigator attempted to purchase ineligible items with SNAP benefits in Exhibit C, but the clerk on duty did not allow the purchase. In Exhibit A, the investigator did not attempt to commit any violations. The report noted that the same clerk conducted all three violative transactions during the investigation.

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- The determination letter issued by the Retailer Operations Division was essentially boilerplate. In its response to the charges, the Appellant raised issues of laches and the fact that the store was sold prior to the issuance of the charge letter. Neither one of these issues was addressed in the determination letter.
- The laches issue was raised because the alleged violations took place more than six and a half years prior to the charges being filed. Although there is no specific statute of limitations section, Federal Rules, which the Appellant set out in its initial response, do allow for a cause to be dismissed for laches. Appellant set out the Rules and case law, and all of this was ignored by the Retailer Operations Division.
- Appellant submitted evidence showing that the store was sold in April 2018, which is prior to the issuance of the charge letter in June 2018. This was also ignored by the Retailer Operations Division.
- For all these reasons, the decision to permanently disqualify Crown Grocery Store must be reversed.
- To show that the action taken by the Retailer Operations Division violates laches and Federal Rules regarding when an action must be brought, the Appellant cites *N.V. Philips' Gloeilampenfabrieken v. Atomic Energy Com'n*.

In support of its contentions, the Appellant submitted copies of its initial response to the charges and the bill of sale showing that the store was sold in April 2018.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

As best as can be determined, the Appellant did not, at any point, offer any evidence to show that the violations did not occur as described in the report of investigation. The Appellant neither

admitted to the violations nor disputed them, but rather claimed that the period of time between the conclusion of the investigation and the issuance of the charge letter was unreasonably long, essentially making it impossible for the Appellant to recall the transactions or to offer any kind of factual response.

Because the Appellant has offered no evidence to counter the trafficking allegations and because the agency's documentation strongly and persuasively implicates the Appellant in the trafficking charges, it is the determination of this review that program violations did occur as charged by the Retailer Operations Division. As such, permanent disqualification is warranted. The balance of this review will address the Appellant's remaining contentions.

Consideration of Appellant's Response to the Charges

The Appellant contends that the determination letter issued by the Retailer Operations Division was essentially boilerplate. The Appellant argues that in its response to the charge letter, it raised issues of laches and the fact that the store was sold prior to the issuance of the charge letter. Because neither of these issues was addressed in the determination letter, the Appellant concludes that they were ignored by the Retailer Operations Division.

With regard to this argument, it is noted that in accordance with 7 CFR § 278.6(c), the Retailer Operations Division is required to consider and evaluate all evidence and responses provided by the Appellant. However, as best as this review can determine, the agency is under no legal obligation in its determination letter to expound, point-by-point, on every contention or piece of evidence presented. In this case, the determination letter clearly states that consideration was given to the information and evidence available to the Retailer Operations Division and to the reply made by the Appellant. Documentation in the case record supports the agency's claim. After an evaluation of all information, the Retailer Operations Division determined that the violations cited in the charge letter occurred at the firm. Implied in the determination letter is a conclusion that the evidence or response by the Appellant was either irrelevant or was insufficient to prove that trafficking had not taken place. While the determination letter may not have been as comprehensive as the Appellant wishes, this review cannot find any evidence that the Retailer Operations Division ignored or disregarded the Appellant's response.

Length of Time between Investigation and Charge Letter

The Appellant's chief argument in this matter involves what the Appellant contends is an unreasonable time delay between the end of the investigation and the agency's issuance of the charge letter, which is a period of nearly seven years. The Appellant has cited two court cases as well as the Administrative Procedures Act to support its claim that the length of time between the investigation and charge letter is not only unreasonable, but essentially places an insurmountable burden on the Appellant to factually dispute the charges in any meaningful way. The Appellant acknowledges that there is no statute of limitations in the trafficking charges, but contends that the long delay violates laches and Federal rules regarding when charges must be brought against a firm. Finally, the Appellant argues that the store was sold in April 2018, more than two months before the charges were even filed against the firm.

With regard to these contentions, it must be made clear that the controlling law in this matter is not the Administrative Procedures Act (APA), but rather the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and the regulations promulgated under that Act. The Appellant has not cited any sections of the APA that were supposedly violated in this case. As such, this review can offer no opinions or findings related to the APA.

Similarly, with regard to the Appellant's judicial citations, it must be noted that considerations of legal precedent through case law is beyond the scope of this review. This review is limited to determining whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action consistent with the Food and Nutrition Act of 2008, as amended, and the regulations promulgated under the Act when it imposed a permanent disqualification against Crown Grocery Store. Therefore, any application of a supposed judicial precedent would best be addressed in a judicial review in a court of law. Accordingly, no further findings or conclusions are rendered in this regard.

It should be noted that the Food and Nutrition Act of 2008 and the associated SNAP regulations are silent with regard to timeframes between the conclusion of an investigation and the issuance of a charge letter. This review acknowledges that a very long delay makes it difficult to effectively dispute allegations of trafficking. But since a statute of limitations does not exist in this matter, this review has little option but to conclude that issuance of the charge letter and subsequent permanent disqualification action taken by the Retailer Operations Division is wholly supported by the Act and accompanying SNAP regulations.

With regard to the charge letter being issued after the change of ownership at the store, this fact has no bearing on this matter. **5 U.S.C. § 552 (b)(7)(E)**

Trafficking Civil Money Penalty

As noted earlier, the Retailer Operations Division determined that the Appellant 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 it had established and implemented an effective compliance policy and training program to prevent SNAP violations.

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 trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate documentation within designated timeframes. The case record shows that the Appellant did not request a civil money penalty when it replied to the charge letter and there is no evidence that the Appellant submitted any documentation that would indicate that the firm had a compliance policy or training program of any kind.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

Trafficking is defined in Section 271.2 of the SNAP regulations as the buying, selling, or effecting an exchange of SNAP benefits for cash or consideration other than eligible food. Pursuant to regulations at 7 CFR § 278.6(e)(1)(i), permanent disqualification is the required penalty for such violations. The law and regulations do not provide for a lesser penalty.

Based on a review of all information in this case, this review finds through a preponderance of the evidence that trafficking violations did occur at Crown Grocery Store during a USDA investigation. All transactions cited in the letter of charges were either conducted or supervised by a USDA investigator and all are thoroughly documented. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(1), the decision to impose a permanent disqualification against the Appellant, Crown Grocery Store, under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

February 20, 2019