

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

Valentin Grocery,

Appellant,

v.

Case Number: C0198660

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 Valentin Grocery 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 Valentin Grocery.

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

Valentin Grocery was initially authorized to participate in SNAP as a convenience store on July 20, 2016. Between July 10, 2017, and July 20, 2017, the USDA conducted an undercover investigation of Valentin Grocery to ascertain the firm’s compliance with Federal SNAP law and regulations. It was reported that during the course of the investigation, the Appellant firm violated SNAP rules by allowing ineligible non-food items to be purchased with SNAP benefits

on four separate occasions. The firm also reportedly committed the violation known as trafficking by exchanging SNAP benefits for cash on two occasions.

In a letter dated August 10, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations. It also charged the Appellant with accepting SNAP benefits in exchange for ineligible non-food merchandise. The misuse of SNAP benefits, as described in the charge letter, is a violation of 7 CFR § 278.2(a). 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 charge letter under the conditions specified in 7 CFR § 278.6(i).

The case record shows that the charge letter was sent via United Parcel Service and that the Appellant signed for the letter on August 11, 2017. However, the record shows that the Appellant did not make any kind of response to the charge letter.

After further consideration of the evidence in the case, the Retailer Operations Division issued a determination letter dated August 24, 2017. In most cases, the violation of exchanging ineligible items for SNAP benefits results in a firm's temporary disqualification from SNAP. However, trafficking in SNAP benefits is a much more serious offense and warrants permanent disqualification. Since trafficking was alleged in this case, permanent disqualification was the determination made by the Retailer Operations Division.

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 according to 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 September 1, 2017, the Appellant 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: 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 10, 2017, and July 20, 2017, the USDA completed four compliance visits at Valentin Grocery. A report of the investigation was provided to the Appellant as an attachment to the August 10, 2017, charge letter. The investigation report included Exhibits A through D, which provided full details on the results of each compliance visit. SNAP violations were documented during each of the four visits and included trafficking violations on the last two visits as noted in Exhibits C and D. The report

noted that the following ineligible non-food items were purchased by an investigator using SNAP benefits:

- One package of plastic sandwich bags (*Premiere* brand), Exhibit A
- One 4-roll package of bathroom tissue (*Red & White* brand), Exhibit A
- One 30 square-foot package of aluminum foil (*Reynolds Wrap* brand), Exhibit A
- One 4-roll package of bathroom tissue (*Fluffs* brand), Exhibit B
- One 28-ounce bottle of multi-purpose cleaner (*Lestoil* brand), Exhibit B
- One 12.6-ounce bottle of dishwashing liquid (*Dermassage* brand), Exhibit C
- One 14-ounce can of cleaner (*Comet* brand), Exhibit C
- One 1.5-pound package of all-purpose detergent (*Sun* brand), Exhibit C
- Four AA batteries (*Duracell* brand), Exhibit D
- Two 1,000-sheet rolls of bathroom tissue (Scott brand), Exhibit D

Trafficking was reported during the last two compliance visits. The first trafficking violation occurred on July 15, 2017. In reporting this visit, the USDA investigator provided the following details, as noted in Exhibit C:

5 U.S.C. § 552 (b)(7)(E)

The report noted that the second trafficking incident occurred on July 20, 2017. The investigator made the following statement on the report, as noted in Exhibit D:

5 U.S.C. § 552 (b)(7)(E)

It is noted that one clerk conducted all four violative transactions during the investigation.

APPELLANT'S CONTENTIONS

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

- Appellant remembers the investigator as a man who came into the store a few times early in the morning asking if he could get some articles using food stamps, claiming that he needed them but didn't have any money to purchase them. Appellant owner told the investigator that she didn't do this with anyone, but agreed to help him.
- Appellant owner knows that she made a mistake, which she really regrets, and apologizes for the situation.
- Appellant would like FNS to take into consideration the fact that the Appellant never had any previous problems; only with this investigator.
- What the Appellant owner is claiming is true. She remembers the investigator very well and even remembers what she sold him.
- Appellant owner really needs the store to be able to accept SNAP. She depends on her grocery store for her livelihood.

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, dispute that the violations took place as described in the report of investigations. As noted earlier, the Appellant did not respond to the charge letter, and in its request for review, the Appellant acknowledged that mistakes were made. Because the SNAP violations do not appear to be in dispute, it is the determination of this review that program violations did occur as charged by the Retailer Operations Division. The balance of this review will address the Appellant's remaining contentions.

No Prior Violations

The Appellant stated that it would like FNS to take into consideration the fact that the firm has never had any previous problems with SNAP. According to the Appellant, the only violations at the store occurred during the undercover investigation. The Appellant further recognizes that it made a mistake and apologizes for the situation. These contentions imply that because the firm has been compliant with SNAP rules and regulations in the past, the charges should be dismissed or reduced.

With regard to these contentions, it is important to reiterate that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. This review is limited to the circumstances that existed at the time the violations were committed. The law requires that when serious violations, such as trafficking, occur, permanent disqualification is the required penalty, even on the first occasion, as noted in 7 U.S.C. § 2021(b)(3)(B).

Therefore, the contention that the Appellant has been compliant with SNAP rules in the past does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Hardship to Appellant

The Appellant owner contends that she really needs the store to remain SNAP-authorized because she depends on her grocery store for her livelihood.

With regard to this contention, 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 on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty.

To allow store ownership to be excused from being assessed administrative penalties based on a purported economic hardship to the store's ownership or to the firm itself would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. Moreover, 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, the Appellant's contention that the firm or its owner may incur economic hardship based on the assessment of an administrative sanction does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

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 respond 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), a civil money penalty in lieu of permanent disqualification for trafficking cannot be granted in this case.

CONCLUSION

Trafficking is defined in Section 271.2 of the SNAP regulations as "the buying or selling 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 for this violation.

Based on a review of the evidence in this case, there is no question that program violations did occur during a USDA investigation. All transactions cited in the letter of charges were conducted or supervised by a USDA investigator and all are thoroughly documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for cash, and in all other critically pertinent details. Therefore, the decision to impose a permanent disqualification against the Appellant, Valentin Grocery, under the ownership of Dayana Valentin, 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

March 14, 2018