

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

D & B Market #1,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0206556

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS) finds there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification of D & B Market #1 (hereinafter “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 Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against D & B Market #1.

AUTHORITY

7 U.S.C. § 2023 and 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

D & B Market #1 was initially authorized to participate in SNAP on December 11, 2016. Between November 19, 2018, and December 3, 2018, the USDA conducted an undercover investigation of D & B Market #1 to ascertain the firm’s compliance with Federal SNAP law. It was reported that during the course of the investigation, Appellant firm violated SNAP rules by allowing ineligible non-food items to be purchased with SNAP benefits on five separate occasions. The firm also reportedly committed the violation of trafficking by exchanging SNAP benefits for cash on two occasions.

In a letter dated February 11, 2019, the Retailer Operations Division charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations. It also charged 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 Appellant that the violations warranted permanent disqualification from SNAP as provided in 7 CFR § 278.6(e)(1). The letter also stated that 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).

Although afforded the opportunity to respond to the charge letter, Appellant did not do so. After considering the available evidence in the case, the Retailer Operations Division issued a determination letter dated March 6, 2019, concluding that trafficking had occurred as charged. The determination letter informed 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 Appellant was not eligible for a trafficking CMP in accordance with paragraph § 278.6(i) because Appellant failed to submit sufficient evidence to demonstrate the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked March 12, 2019, Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

It should be noted that as part of the request for administrative review, Appellant submitted a written request for information relating to the investigation and permanent disqualification of the firm. This request was made under the Freedom of Information Act (FOIA) and was submitted to the FNS FOIA office. In response to this request, the agency provided 100 pages of documentation related to the case. This response was dated April 18, 2019, and was received by Appellant's counsel on April 19, 2019. This administrative review was held in abeyance, pending the processing of the FOIA request.

After receiving the FOIA response, Appellant requested an extension for submitting additional information in support of the request for administrative review. On June 21, 2019, Appellant, through counsel, provided the administrative review officer with its official written argument to be considered on review.

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 action should be reversed. This 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 & 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 November 19, 2018, and December 3, 2018, the USDA completed six compliance visits at D & B Market #1. A report of the investigation was provided to Appellant as an attachment to the February 11, 2019, charge letter. The investigation report included Exhibits A through F, which provided full details on the results of each compliance visit. SNAP violations were documented during every visit, except one, and included trafficking violations on the last two visits. During the one visit during which no violations were committed, ineligible non-food items were purchased on store credit, but then were paid for with SNAP benefits at the following visit. The report noted that the following ineligible non-food items were purchased by the investigator using SNAP benefits:

- One 100-count package plastic cups (Sunset brand), Exhibit A
- One roll toilet tissue (Scott brand), Exhibit B
- One eight-ounce can air freshener spray (Glade brand), Exhibit B
- One 80-count package plastic cups (Sunset brand), Exhibit D
- One 16-ounce bottle bleach (Clorox brand), Exhibit D
- One 10-count package trash bags (Red & White brand), Exhibit D
- One DVD of Night School, Exhibit D
- One heavy duty sponge (SOS brand), Exhibit E
- One 12.6-ounce bottle dish soap (Simply Clean brand), Exhibit E
- One roll toilet tissue (Scott brand), Exhibit F

Trafficking was reported during the last two compliance visits, which took place on November 29, 2018, and December 3, 2018.

In reporting the November 29, 2018, visit, the USDA investigator provided the following details, as noted in Exhibit E:

5 U.S.C. § 552 (b)(7)(E)

In reporting the December 3, 2018, visit, the USDA investigator provided the following details, as noted in Exhibit F:

5 U.S.C. § 552 (b)(7)(E)

The report noted that one clerk conducted the violative transactions during the investigation.

APPELLANT'S CONTENTIONS

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

- The Retailer Operations Division took action inconsistent with 7 CFR § 278.6(a), (c), and (e)(1)(i) when it imposed permanent disqualification against Appellant;
- Appellant's counsel wishes to lodge a formal protest. The sum and substance of the protest is the fact that the burden of proof in an adverse action appeal is on Appellant. This means the Appellant must provide proof that would support a conclusion that the defense being presented is true. In the case at hand, the Appellant is being forced against his will to respond to damaging allegations, the facts of which are hidden behind a cloak of secrecy. In support of its allegation of violations, the federal government is relying on an EBT case analysis as part of the factual basis for the charges against the Appellant. When Appellant's counsel requested a copy of the document a severely redacted copy was provided. The end result is that the Appellant is expected to defend itself with only a fraction of the government's report, while the government has full and unfettered access to the entire file. It would seem that the government's actions in the matter are akin to a star chamber proceeding. It remains Appellant's hope that the matter will be held in abeyance until the FOIA appeal is finalized;
- The owner did not engage in transactions, nor were any of his employees involved in the complained about behavior that allegedly took place. During the relevant time period, the owner was working at a second store which he owns. Because it was physically impossible to be at the two stores at the same time, the owner placed a supervisor at the subject firm to manage the total operations of the business establishment.
- The owner trusted the manager. Unfortunately, it seems the manager was not worthy of that trust and saw an opportunity to enrich herself and assumed control and possession of the firm in contravention of her fiduciary duty to the owner, and without the consent or agreement of the owner;
- Once the new manager took possession of the store, chaos reigned supreme at the business, with the manager engaging in all types of improper and even illegal behaviors;

- The black letter of the law provides that FNS may disqualify a firm from participation in the SNAP program if “personnel of the firm have trafficked”, and courts have upheld the disqualification imposed when it is factually clear that the owner or his employee committed the charged offense;
- The manager was not employed to engage in illicit behavior and by engaging in such behavior, the manager was acting ultra vires and no longer functioning as an employee; and
- Appellant cannot be disqualified on the basis of what the manager did or did not do. The factual predicate that would sustain the Retailer Operations Division’s decision is missing. Therefore Appellant requests that the decision be overturned.

Appellant failed to submit any evidence in support of the above contentions.

The preceding may represent only a brief summary of 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

The investigation report documents that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted by a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no known 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.

In response to the charge letter and on administrative review, Appellant did not offer any evidence or alternative theories to counter the agency’s investigative report. In fact, Appellant, through counsel, concedes that the violative transactions were conducted by a manger hired directly by the firm’s owner.

Based on the evidence in this case, there is little question that Appellant firm exchanged cash for SNAP benefits with an undercover investigator. The actions taken by the store manager clearly fall under the definition of trafficking as found in SNAP regulations at 7 CFR § 271.2. Accordingly, permanent disqualification is the required penalty pursuant to the Food and Nutrition Act of 2008, as amended (see 7 U.S.C. § 2021(b)(3)(B)) and SNAP regulations at 7 CFR § 278.6(e). The balance of this review will address Appellant’s contentions.

Owner Accountability

Appellant, through counsel, contends that the owner did not engage in transactions, nor did any of his employees. Appellant says the owner was working at a second store that he owns when the violations took place, and that he had hired a supervisor to manage the subject store. Appellant contends the new manager violated the trust of the owner, without the consent or

agreement of the owner and that the manager was not employed to engage in illicit behavior and that by engaging in such behavior, the manager was no longer functioning as an employee.

With regard to these contentions, even if the owner was not involved in the violations or if the manager was acting illicitly without the consent or agreement of the owner, this cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. Regardless of whom the owner of a store may utilize to handle store business, the owner is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons whom the owner chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

In addition, the store owner signed the SNAP authorization application for the store on August 12, 2016, which said the owner agreed to comply with SNAP regulations. That application also included a certification and confirmation that the owner 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 include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits for ineligible non-food items or as repayment on credit accounts. Nothing in the certification requires that the owner consent or agree to such violations in order to be held responsible.

Agency FOIA Response

Appellant, through counsel, contends that the government’s case against Appellant is hidden behind a cloak of secrecy and that the government is relying on an EBT case analysis as part of its factual allegations. Appellant’s counsel alleges to have been provided a severely redacted copy of the document. As a result, Appellant claims to be expected to defend itself with only a fraction of the government’s records, while the government has full and unfettered access to the entire file. Appellant argues that the government’s actions in this matter are akin to a star chamber proceeding, which is a judicial or quasi-judicial action that violates standards of due process.

With regard to these contentions, it must first be acknowledged that Appellant mistakes the basis of the charges in this case, which is not predicated on any EBT case analysis, but rather on an in-store investigation conducted by an undercover investigator. Regardless, any complaints or protests related to the agency’s FOIA response is beyond the scope of this review. If an appellant is dissatisfied with the FOIA response, it can appeal the response by writing to the FNS Administrator within 90 calendar days from the date of the response letter. In this case, Appellant has, in fact, filed such a FOIA appeal. It should be noted, however, that administrative review decisions are not held in abeyance pending the outcome of a FOIA appeal.

Trafficking Civil Money Penalty

As noted earlier, the Retailer Operations Division determined Appellant 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 Appellant did not request a civil money penalty in response to the charge letter and there is no evidence 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), Appellant is not eligible for a civil money penalty in lieu of permanent disqualification.

CONCLUSION

Trafficking is defined in Section 271.2 of 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 does not provide for a lesser penalty for this violation.

Based on a review of the evidence in this case, there is little question that trafficking violations did occur at D & B Market #1 during a USDA investigation. All transactions cited in the charge letter 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 appears to be 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 Appellant, D & B Market #1, 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 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.

MICHELLE WATERS
Administrative Review Officer

July 3, 2019