

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

Des Bazar,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0193747

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Des Bazar (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the program, 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 Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provides 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

On April 22, 2015, the USDA conducted an investigation of the compliance of a SNAP authorized retailer with Federal SNAP law and regulations. The investigation report documents that Appellant committed a SNAP violation when it effectuated the exchange of SNAP

benefits for cash with another SNAP retailer. The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR § 271.2.

As a result of evidence compiled from this investigation, the Retailer Operations Division informed the Appellant, in a letter dated January 12, 2017, that it was charged with violating the terms and conditions of the SNAP regulations. The letter stated, in relevant part, that:

Your firm is charged with trafficking, as defined in Section 271.2 of the SNAP regulations. As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for the trafficking violation(s) ... is permanent disqualification.

The charge letter also stated that:

Under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of permanent disqualification of a firm for trafficking. The SNAP regulations, Section 278.6(i), list the criteria that you must meet in order to be considered for a CMP. If you request a CMP, you must meet each of the four criteria listed and provide the documentation as specified within 10 calendar days of your receipt of this letter.

In correspondence dated August 21, 2017, Appellant, through counsel, replied to the charge letter and generally stated that the alleged incident occurred over two years ago. As defined in Section 271.2 of the SNAP Regulation regarding being charged under “Trafficking”, my client did not do any action that is enumerated under this regulation. My client cannot be charged under the trafficking provisions as the definitions of trafficking do not encompass any of my client’s actions. Though this case is very old and witnesses and memories have diminished, he somewhat recollects that he was at his children’s school and doing other activities and was not present when this occurred, and more-than-likely left his cell phone at the store waiting for vendors to call for deliveries while he was absent. When my client returned to his store and was told by a former employee (actually, a friend who was assisting him but not an actual employee of the transaction in question), he informed the friend never to do that again and would not let him work back in the store.

Appellant, through counsel, stated that previous to this, there was an episode where his wife was working at his store and sold some hygiene and other items that were not on the approved list, taking money off the person’s card. She was not aware that this was not allowed. The SNAP program issued a violation, but subsequently it was worked out where my client was allowed to retain their merchant account. Appellant, through counsel, stated that the owner was unaware of the activities, did not benefit from them, did not approve of them, and was not in any way involved in the conduct of any trafficking violation.

Appellant’s counsel also stated that because of the incidents above, my client has instituted a training policy where SNAP cards cannot purchase hot or cooked-immediately-to-eat items, tobacco, alcohol, and non-food items. His preventive policy encompasses issues prohibiting the exchange of money for the SNAP card, checking identification when the SNAP card is presented, and other safeguards. Any employee not following policy is immediately terminated. As the time lapse has seriously impeded our ability to defend this matter, such circumstances

should count as mitigation in the event my client is still found guilty. In the event the SNAP finds that there is a violation, then it is requested that the sanctions provided for in Section 278.6 subsection (h)(i), Criterion 4 of the SNAP Regulations, be applied and allow the owner of the store continued participation, in the SNAP, with a minimal monetary fine and not admit or deny any wrongdoing.

After considering the Appellant's reply and the evidence in the case, the Retailer Operations Division issued a determination letter dated September 11, 2017. The determination letter informed the Appellant it was permanently disqualified from the SNAP 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 the terms of Section 278.6(i) of the SNAP regulations. The Retailer Operations Division determined that the Appellant was not eligible for the trafficking CMP because the Appellant failed to 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 dated September 22, 2017, the Appellant requested an administrative review of the Retailer Operations Division's determination. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). 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, *inter alia*:

... 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.

7 CFR § 271.2 states, *inter alia*:

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 § 278.6(a) states, *inter alia*:

FNS may disqualify any authorized retail food store... if the firm fails to comply with the Food and Nutrition Act of 1977, 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....

7 CFR § 278.6(f)(1) states, *inter alia*:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to [SNAP] households because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices... A civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a permanent disqualification.

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(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 on April 22, 2015, the USDA conducted a trafficking transaction. The investigation report documents that Appellant committed a SNAP violation when it effectuated the exchange of SNAP benefits for cash with another SNAP retailer. The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR § 271.2.

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review and in subsequent correspondence dated November 9, 2017, in relevant part:

- Our previous responses outlined the facts of the case and based on those facts we do not believe that Des Bazar Food Store was at all involved with trafficking as the term is defined. Specifically my client did not “buy”, “sell”, “steal”, or otherwise knowingly “effect and exchange” of SNAP benefits. For cash or consideration, directly, indirectly, or in complicity or collusion with others or acting alone. (sic)
- My client was not involved at all with the transaction in question. The SNAP benefits paid to Des Bazar Food Store were used by the cardholder to purchase eligible items. My client did not pay cash to the cardholder in exchange for SNAP benefits.
- The incident is alleged to have occurred more than 2 years ago severely prejudicing my client’s ability to defend against this agency action. This violates fundamental fairness and due process in these proceedings.
- The players involved in the actual transaction could not be found and records of the transaction at the store on the relevant dates are no longer available.

Appellant’s counsel requested and received two extensions of time in which to provide additional information in support of its position. The notification sent via UPS was never picked up by counsel however; counsel did receive the email notifications, granting the extensions, dated October 23, 2017 and November 6, 2017.

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

The Appellant, through counsel, contends that client did not “buy”, “sell”, “steal”, or otherwise knowingly “effect and exchange” of SNAP benefits for cash or consideration either directly or indirectly, in complicity or collusion with others or acting alone. With regard to this contention, and as previously cited, SNAP regulations define trafficking, in part, as 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. The investigative report and FNS system records evidence that a SNAP transaction was conducted at Appellant on April 22, 2015, while the confidential informant was present at the complicit SNAP retailer. System records also evidence that the EBT terminal at the complicit SNAP retailer was in full operation on the day of the transaction, therefore, it is unlikely that the confidential informant would need to conduct a SNAP transaction at one store then travel to Appellant’s store to pick up groceries. Moreover, the confidential informant received 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash from the complicit store 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits received by Appellant’s store. It is the determination of this review that the details of this transaction meet the definition of trafficking as outlined in Section 271.2 of the SNAP regulations.

Appellant, through counsel, contends that ownership was not involved with the transaction in question. The SNAP benefits paid to Des Bazar Food Store were used by the cardholder to purchase eligible items. My client did not pay cash to the cardholder in exchange for SNAP benefits. With regard to these contentions, it is important to note that as owner of the store, Appellant is liable for all violative transactions handled by store personnel. Regardless of whom the ownership of a store may utilize to handle store business, whether employee or family member helping out, full-time, part-time, paid or unpaid, ownership is accountable for the proper handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA.

Furthermore, the charges of violations are based on the findings of a formal Department of Agriculture investigation; the transaction cited was conducted under the direct supervision of a Department Investigator. The transaction was fully documented and a review of this documentation has yielded no indication of substantial error or discrepancy in the reported findings; the investigative record is specific and thorough with regard to the dates and other specifics of the violations and in all other critically pertinent detail. More importantly, and as previously noted, the investigation report does not document that the Appellant store was visited, by the investigator or confidential informant, for the purpose of obtaining food items in exchange for SNAP benefits it received during the commission of the trafficking transaction. Therefore Appellant’s contentions do not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

The Appellant, through counsel, contends that the incident is alleged to have occurred more than two years ago severely prejudicing my client's ability to defend against the agency action and violates fundamental fairness and due process in these proceedings. With regard to this contention, it is important to note that there is no statute of limitations with regards to an administrative action against a firm, although the agency does strive to take such actions as soon as they are able. It is also important to note that when the Retailer Operations Division charges a firm for violations uncovered during a covert investigation, it is dependent primarily on when the investigative agency releases their report and gives approval for USDA to pursue administrative action. There are a number of reasons an administrative action could be delayed. For example, an investigation may be escalated from the administrative level to the criminal level, and after some time a decision may be made not to pursue the criminal investigation after all; this could take a couple of years. In addition, investigations often involve a number of different stores, and no arrests or charges are made until after all store investigations have been completed. In the interim, no administrative actions are taken until after any civil and criminal actions against firms have been pursued. Prosecutors may also accept a case referral, and then months later decide to decline the case for prosecution. In the present case, the investigation report was completed on October 20, 2016 and the charge letter was issued to Appellant on January 12, 2017. The time elapsed between the violations and the charge letter does not have any effect on the potency or validity of the charges.

Additionally, 7 CFR §278.6(b) of the SNAP regulations provides that upon charging a firm with SNAP violations, the letter informing the firm of the charges "shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter." The letter was ultimately delivered on August 3, 2017 and presumably signed for by the Appellant. The record also reflects that Appellant, through counsel, responded to the charge letter in correspondence dated August 21, 2017, denying the charge of trafficking and offered various explanations for the transaction. After considering the evidence of the case and Appellant's reply, the Retailer Operations Division determined that a permanent disqualification was warranted. The action was not arbitrary or capricious as it followed the agency's due process procedures which are two-fold in nature.

First, the retailer is afforded an opportunity to reply to the charges as specified by the Retailer Operations Division; Appellant, through counsel, has availed itself of this first aspect of the due process procedures in the form of a written reply to the Retailer Operations. The second level of due process involves an administrative review, of which Appellant, through counsel, has likewise availed itself and in the process of which Appellant was granted an additional three (3) weeks within which additional information may be provided in support of the request for review. The purpose of the administrative review process is to ensure that firms aggrieved by FNS's adverse actions have the opportunity to have their position fairly considered by an impartial reviewing authority prior to that adverse action becoming final. Appellant has been duly given, and has taken, the opportunity to present to USDA through the administrative review process whatever evidence and information it deems as pertinent in support of its position that the Retailer Operations Division's adverse action should be reversed.

In the instant case Appellant, through counsel, was provided with two extensions of time in which to provide additional materials, in addition to the full month following delivery of the

letter acknowledging acceptance of the appeal, any additional information or material provided was accepted and included in the administrative review. Therefore, any evidence and information that Appellant presented to the Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established procedures with regard to Appellant's right to a fair and thorough review. Appellant has exercised its opportunity to reply to the charge letter and its administrative review rights, and by doing so has availed itself of the full complement of the agency's statutory obligations with regard to due process.

CIVIL MONEY PENALTY

The Appellant, through counsel, requested consideration of a trafficking CMP, in lieu of permanent disqualification, with its reply to the charge letter. Retailer Operations Division determined that Appellant did not qualify for a CMP in lieu of permanent disqualification because it did not submit insufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy to prevent SNAP violations. Therefore, the Retailer Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

As previously stated, 7 CFR § 278.6(e)(1)(i) reads, in part, "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, as "the buying or selling of SNAP benefits for cash or consideration other than eligible food." The law and regulations do not provide for a lesser period of disqualification for this violation.

Based on a review of the evidence in this case, there is no question that the program violation did occur during a USDA investigation. The transaction cited in the charge letter was conducted or supervised by a USDA Investigator and is 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 date of the violation, including the exchange of SNAP benefits for cash, and in all other critically pertinent details. The decision to impose a permanent disqualification against Des Bazar is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that 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 you 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 (FOIA), 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.

Monique Brooks
Administrative Review Officer

December 4, 2017