

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

DJ SUPERMARKET,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0216397

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of DJ SUPERMARKET as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

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, when it imposed a permanent disqualification against DJ SUPERMARKET.

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

In a letter dated April 3, 2019, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of August 2018 through January 2019. The letter noted that the penalty for trafficking is 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 to provide explanations for the irregular SNAP transaction patterns.

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). The charge letter was delivered to the Appellant by UPS on April 4, 2019.

The Appellant, through counsel, responded to the charges in a letter mailed on April 12, 2019. The letter stated that the trafficking violations were conducted, without the knowledge of ownership, by an employee who was subsequently fired. The Appellant also provided affidavits from a store owner and spouse, the violating employee's start and termination documents, and SNAP/EBT/WIC employee regulation material used by the firm. The Appellant requested that either no penalty be assessed or that a trafficking CMP be imposed in lieu of a permanent disqualification.

After considering the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated April 18, 2019. The determination letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and 7 CFR § 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 7 CFR § 278.6(i). The Retailer Operations Division determined that the Appellant was not eligible for a 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 postmarked April 29, 2019, the Appellant, through counsel, requested an administrative review of the Retailer Operation Division's determination. The request for administrative review 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 action 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 AND REGULATIONS

The controlling law in this matter is covered in the Food & 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 § 271.2 states that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

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 defines 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

7 CFR § 271.2 defines eligible food, in part, as:

Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption

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, inconsistent redemption data, **evidence obtained through a transaction report under an electronic benefit transfer system...**

[Emphasis added.]

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.

7 CFR § 278.6(b)(2) states, in part:

- (ii) 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 as specified in § 278.6(i), 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).
- (iii) 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.

SUMMARY OF CHARGES

The Appellant was charged with trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from August 2018 through January 2019. This involved the following transaction patterns:

- **Charge Letter Attachment 1:** Multiple transactions were made from accounts of individual SNAP households in a set time frame. This attachment lists 20 sets of 44 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits.
5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- **Charge Letter Attachment 2:** The store conducted EBT transactions that are large based on the observed store characteristics and recorded food stock. This attachment lists 146 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**
5 U.S.C. § 552 (b)(6) & (b)(7)(C).

APPELLANT'S CONTENTIONS

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

- Upon receipt of the permanent disqualification letter, the owners of DJ Supermarket investigated and identified the employee who committed the infractions and he was instantly terminated.
- The illegal activity was not sanctioned by the firm's ownership.
- The owners should not be penalized as no amount of training could have prevented the action of an employee with criminal intent.
- If the penalty cannot be mitigated or waived, the Appellant requests a trafficking CMP in lieu of a permanent disqualification.
- A permanent disqualification will impose a hardship on the local SNAP community that relies upon the store.

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

Authorization and Compliance History

FNS first authorized DJ SUPERMARKET for the SNAP on February 18, 2009. The store was disqualified for six-months on January 21, 2014 for exchanging SNAP benefits for ineligible food items and was later reinstated. The store is currently classified by FNS as a conveniences store.

Owner Responsibility

A store owner signed a SNAP application for the store on December 22, 2016 and acknowledged on behalf of all store owners that the owners were aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owners 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 as repayment on credit accounts or in exchange for ineligible items.

The Appellant acknowledges that the irregular transaction patterns identified in the charge letter were due to an employee who was trafficking in SNAP benefits. Trafficking in SNAP benefits is an extremely serious violation and both 7 U.S.C. §2021(b)(3)(B) and 7 CFR §278.6(e)(1)(i) state that a first time violation warrants a permanent disqualification. Therefore, a preponderance of the evidence supports the determination made by the Retailer Operations Division to permanently disqualify DJ Supermarket.

Hardship to the SNAP Community

The Appellant claims that a permanent disqualification would be a hardship to the community as it relies on DJ SUPERMARKET for easy access to the SNAP in order to meet basic food needs. Regarding this contention, there is no provision in SNAP law or regulations that would negate, waive or reduce a permanent disqualification for trafficking due to a purported hardship to SNAP customers. Where there is a hardship to SNAP households due to a lack of authorized stores in the area, FNS may impose a hardship CMP on a firm in lieu of a **less than** permanent disqualification. However, the regulations at 7 CFR § 278.6(f)(1) clearly state that “a civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a **permanent** disqualification.” [Emphasis added.] Because the Retailer Operations Division has taken action

to permanently disqualify the Appellant firm, a hardship CMP in lieu of disqualification cannot be granted.

It should also be noted that there are 21 SNAP authorized stores located within a one-mile radius of DJ Supermarket including a superstore located 0.55 miles away. Therefore, it is unlikely that the local SNAP community will suffer a hardship as opposed to a mere inconvenience due to the permanent disqualification of DJ Supermarket, a convenience store.

CIVIL MONEY PENALTY

The Appellant timely requested consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i). However, the Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP in lieu of a permanent disqualification because there was insufficient evidence to demonstrate that the firm had established and implemented an **effective** SNAP compliance policy and program prior to the violations. The criteria for a trafficking CMP in lieu of disqualification is defined under 7 CFR § 278.6(i) which reads, in part:

In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, **at a minimum**, establish by **substantial** evidence its fulfillment of each of the following criteria:

Criterion 1. The firm shall have developed an **effective** compliance policy as specified in §278.6(i)(1); and

Criterion 2. The firm **shall establish** that both its **compliance policy and program were in operation** at the location where the violation(s) occurred **prior to the occurrence of violations** cited in the charge letter sent to the firm; and

Criterion 3. The firm had developed and instituted an **effective** personnel training program as specified in §278.6(i)(2); and

Criterion 4. **Firm ownership** was not aware of, did not approve, **did not benefit from**, or was not in any way involved in the conduct or approval of trafficking violations; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm [Emphasis added.]

Regarding compliance policy standards, 7 CFR 278.6(i)(1) further states, in part:

As specified in Criterion 1 above, in determining whether a firm has established an effective policy to prevent violations, **FNS shall consider written and dated statements** of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with this part 278 of current [SNAP] regulations As required by Criterion 2, **such policy statements shall be considered only if documentation is supplied** which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation. In addition, in evaluating the effectiveness of the firm's policy and program to ensure FSP compliance and to prevent FSP violations, FNS may consider the following:

- (i) **Documentation** reflecting the development and/or operation of a policy to terminate the employment of any firm employee found violating FSP regulations;

- (ii) **Documentation** of the development and/or continued operation of firm policy and procedures resulting in appropriate corrective action following complaints of FSP violations or irregularities committed by firm personnel;
- (iii) **Documentation** of the development and/or continued operation of procedures for internal review of firm employees' compliance with FSP regulations [Emphasis added.]

Regarding training program standards, 7 CFR 278.6(i)(2) further states, in part:

A firm which seeks a civil money penalty in lieu of a permanent disqualification **shall document its training activity by submitting to FNS its dated training curricula and records of dates** training sessions were conducted; a record of dates of employment of firm personnel; and contemporaneous documentation of the participation of the violating employee(s) in initial and any follow-up training held prior to the violation(s). [Emphasis added.]

Although the Appellant, through counsel, provided some dated documents outlining some very basic store policy regarding SNAP training and termination, it did not provide the type of substantial evidence required by the above regulations. For example, the Appellant did not provide written documentation of SNAP training curricula or any dated evidence of initial and follow-up training of the violating employee. In conclusion, 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

The Retailer Operations Division's analysis of the Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify the retailer. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges.

Supported by the admission of the Appellant store owners that trafficking occurred at the store, a preponderance of evidence supports that the "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges were due to trafficking in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did in fact occur as determined by the Retailer Operations Division. Based on the discussion above, the decision to impose a permanent disqualification against DJ SUPERMARKET, Appellant, is sustained.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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, FNS is 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.

RONALD C. GWINN
Administrative Review Officer

July 2, 2019