

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

El Libanes 2 Supermarket LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0176537

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS) that the permanent disqualification from the Supplemental Nutrition Assistance Program (SNAP) imposed upon El Libanes 2 Supermarket LLC, hereinafter “Appellant,” by the Retailer Operations Division, Investigations and Analysis Branch, hereinafter “ROD Office” is hereby sustained.

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 271.2, 7 CFR § 278.6(a), 7 CFR § 278.6(e)(1) and 7 CFR § 278.6(i) in its administration of the SNAP when it imposed a permanent disqualification upon Appellant.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 C.F.R. § 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 Charge Letter dated October 24, 2016, the ROD Office informed Appellant that it was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 271 – 282. The record reflects that the ROD Office received and considered Appellant’s replies to the Charge Letter. By a letter dated June 8, 2017, Appellant was informed that it was permanently disqualified from participation as a retail store in the SNAP and was ordered upon receipt of the letter to cease accepting SNAP benefits; consequently, Appellant ceased to accept said benefits. On June 14, 2017, Appellant requested an administrative review of the ROD Office’s decision; the request 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, at 7 U.S.C. § 2021 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6 (e)(1)(i) of the regulations establish the authority upon which a permanent disqualification may be imposed upon a retail food store or wholesale food concern. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

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 § 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.

Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.

Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT)...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 & 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.

7 CFR § 278.6(e)(1)(i) states:

Disqualify a firm permanently if: Personnel of the firm have trafficked as defined in §271.2

7 CFR § 278.6(e)(5) states:

Disqualify the firm for six months if it is to be the first sanction for the firm and the evidence shows that personnel of the firm have committed violations such as but not limited to the sale of common nonfood items due to carelessness or poor supervision by the firm's ownership or management.

7 CFR § 271.2 states, *inter alia*, 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 §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...

7 CFR §278.6(f) states, *inter alia*:

In the event any retail food store or wholesale food concern which has been disqualified is sold or the ownership thereof is otherwise transferred to a purchaser or transferee, the person or other legal entity who sells or otherwise transfers ownership of the retail food store or wholesale food concern shall be subject to and liable for a civil money penalty in an amount to reflect that portion of the disqualification period that has not expired.

7 CFR §278.7(a) states, *inter alia*:

FNS may establish claims against firms or other entities which have accepted or redeemed coupons in violation of the Food and Nutrition Act of 2008 or this part regardless of whether the firms or entities are authorized to accept SNAP benefits.

SUMMARY OF THE CHARGES

Among other documents, the record contains a Report of Positive Investigation, #ME38621, which indicates that investigative work was undertaken at Appellant's firm from December 3, 2014 through December 9, 2014 and reflects that three investigative visits were made to Appellant's firm during which a store clerk accepted SNAP benefits in exchange for cash on one occasion, each instance of which is considered SNAP benefit trafficking and an egregious violation of the Act and the implementing regulations. When the extent of violations was determined, the investigation was halted and a report issued and assigned to the ROD Office for consideration of administrative action.

APPELLANT'S CONTENTIONS

In its reply to the Charge Letter, in its written request for review dated June 14, 2017, and in subsequent correspondence, Appellant provided information in which it was argued that:

1. The long delay in charging the firm has prejudiced the Appellant. The Charge Letter was received 23 months after the alleged incident, which

is an unreasonable delay. The store has cameras on each cashier recording each transaction for a period of approximately 90 days before it is erased. EBT transactions are kept for over a year. Appellant does not expect a claim against it from 23 months ago, which amounts to a “legal ambush.”

2. The confidential informant alleges that the Appellant failed one of the three attempts by exchanging 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits. The exchange should have generated a receipt which should have been maintained by the ROD Office. In its reply to the Charge Letter Appellant requested evidence of SNAP trafficking and since this was not provided, the presumption is that the transaction did not occur. It appears that the confidential informant was not subject to cross examination or any type of challenge. Was the informant keeping notes? What are the safeguards to keep informants honest?
3. The disqualification will work a hardship upon the community. The store is not a convenience store but rather is a supermarket or a large grocery store that sells staple food items to a large Hispanic community with no similar store within a 2.5 mile radius.
4. The amount of the alleged violation is too small to warrant a sanction. The sanction is the most severe penalty against Appellant.
5. The firm has an excellent history of good conduct in the SNAP.
6. Appellant requests consideration for a civil money penalty in lieu of a permanent disqualification for trafficking. Appellant complied with program rules, trained employees on the rules of the SNAP and regularly reminded employees of the program rules. Three attempts were made to test the integrity of the Appellant firm in December 2014. On two occasions clerks forcefully refused to commit violations, demonstrating that personnel training had been in place to safeguard the integrity of the program. Appellant has not been charged with any other violative transactions further demonstrating the Owner’s program in maintaining the integrity and purpose of the program. There is no doubt that the Appellant firm developed an effective compliance system because there have been hundreds of thousands of SNAP transactions since the alleged violation in December 2014. The firm did not benefit from the transaction.

ANALYSIS AND FINDINGS

In regard to contention 1 above, it is acknowledged that a lengthy period of time elapsed between the documented trafficking violations and the issuance of the Charge Letter by the ROD Office. Agency data indicates however that the ROD Office did not receive clearance from the investigation branch to proceed with administrative action until July 2016. There is no provision in the statute,

regulations or agency policy allowing documented violations to be dismissed due to the time elapsed since such violations occurred; SNAP Offices have no latitude to disregard investigative reports on the basis of time elapsed between the occurrence of violations and their receipt of an investigative report and clearance to initiate action thereupon. The SNAP Office is required to take action on evidence of violations irrespective of the dates involved. In the present case, the investigation was conducted by departmental investigators and processed through the normal channels within which such matters are handled. The charge of trafficking is based on the findings of a formal Department of Agriculture investigation; all transactions cited in the Charge Letter were conducted under the direct supervision of a Department Investigator. All such transactions are fully documented and a review of this documentation has yielded no indication of error or discrepancy in the reported findings. The investigative record is specific and thorough with regard to the date of the violation, the specific facts related to the trafficking incident and in all other critically pertinent detail. No further evidence or detail is required by the agency in order for the ROD Office to issue a Charge Letter. As such, the record reflects no procedural failure on the part of the ROD Office in its issuance of the Charge or Determination Letters.

Regarding contention 2 above, the record does contain a debit machine receipt reflecting the exchange of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits. The receipt is dated and time stamped and matches agency transaction records reflecting that this exact amount was transacted at the Appellant firm at the date and time described in the report. Additionally, investigative results are routinely supported by documentation that confirms items purchased at a retail firm in the course of an investigation are donated to and signed for by a charitable organization following the transactions. Such documentation includes the signature and title of the official of the charitable organization accepting the donated item, the name and address of the organization, the date the donation was made and the official's initials next to the items donated. Handwritten notes of each transaction detailing all relevant particulars are found in the record. As noted, the purchase costs of each of the transactions involved in the investigation are documented on SNAP terminal receipts obtained during each transaction. Moreover, transaction data generated by each investigative purchase at Appellant's firm is stored in agency data systems (see table excerpted from data below).

5 U.S.C. § 552 (b)(7)(E)

Appellant offers no compelling information or supporting documentation which would constitute evidence that any relevant detail is incorrect in any substantial respect. As such, Appellant's denial of the charges exerts little force in the context of the considerable information and documentation presented by the SNAP Office, as referenced above, which indicate that the merchandise and

cash, as described, was in fact obtained at the Appellant firm on the dates noted, that the manner in which it was obtained is accurately described and that the clerks in attendance throughout did in fact conduct the transactions described.

With regard to contention 3 above, the issue of hardship worked upon retailers or SNAP clients is not a consideration under the statute or regulations in decisions to disqualify firms due to SNAP-benefit trafficking. The only alternative to permanent disqualification, once trafficking is established, is to impose a trafficking civil money penalty in lieu of permanent disqualification, which will be discussed in greater detail below.

In regard to contention 4 above, neither the Food & Nutrition Act of 2008 nor the regulations issued pursuant thereto cite any minimum dollar amount of cash or SNAP benefits, number of occurrences or number of personnel or customers involved for such exchanges to be defined as trafficking. The Act reads, in part, that disqualification shall be "permanent upon ... the first occasion of a disqualification based on ... trafficking ... by a retail food store." In keeping with this legislative mandate, section 278.6(e)(1)(i) of the SNAP regulations states that FNS *shall* (emphasis added) disqualify a firm permanently if personnel of the firm have trafficked SNAP benefits.

Regarding contention 5 above, Appellant notes that this case represents the firm's first and only SNAP violation; however, a record of program participation with no previously or subsequently documented violations does not constitute valid grounds for dismissing the present serious charges or for mitigating the impact of the violations upon which they are based. There is no provision in the Act, regulations or agency policy that reverses or reduces a sanction based upon a lack of prior and/or subsequent violations or assurances of future compliance by a firm and its owners, managers and/or employees; likewise, sanctions for prior violations are not prerequisite to sanctions due to later violations. Moreover, prior sanctions may precipitate an increase in the severity of a later sanction (see §278.6(e)(6)). Further, as noted above, the Food & Nutrition Act of 2008 provides that a store's disqualification "*shall be* (emphasis added) permanent upon ... the first occasion of... trafficking."

With regard to contention 6 above, 7 CFR §278.6(i) provides for the imposition of a civil money penalty in lieu of permanent disqualification for trafficking; Appellant was advised of the requirement regarding civil money penalties in lieu of permanent disqualification in the SNAP Office's October 24, 2016 Charge Letter, which further advised that documentation of eligibility for this sanction was to be provided within a given time limit. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) that "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, the firm shall not be eligible for such a penalty." The regulations provide no discretion to extend the time within which documentation and evidence in

support of a civil money penalty may be submitted. Appellant presented a request for consideration of a trafficking civil money penalty (TCMP) in its November 7, 2016 reply to the Charge Letter. The documentation and evidence provided by Appellant clearly fall short of the standard detailed at § 278.6(i), as noted in the following:

Criterion 1:

- Appellant provided insufficient written and dated documentation to reflect a commitment to ensure that the firm was operated in a manner consistent with SNAP regulations and policy:
 - Documentation of the development and/or operation of a policy to terminate violating employees (not provided). Documentation of the development and/or operation of procedures/policy to implement corrective action in response to complaints of violations (not provided).
 - Documentation of the development and/or operation of procedures providing for internal review of employees' compliance (not provided).
 - Documentation must establish that the policy statements were provided to violating employees prior to the commission of the violation(s) (not provided).

Criterion 2:

- Appellant did not provide documentary evidence which establishes that the firm's compliance policy and program were in operation prior to the occurrence of the violations at issue.

Criterion 3:

- Appellant did not provide the following:
 - Documentation of dated training curricula and dates of training sessions prior to the violations.
 - Records of dates of employment of all firm personnel.
 - Contemporaneous documentation of participation of violating personnel in initial and follow-up training prior to violations.
- Appellant provided insufficient documentation to demonstrate that its training program meets or is otherwise equivalent to the following standards:
 - Training shall be designed to establish a level of competence that assures compliance with program requirements as included in part 278.
 - Written materials, which may include FNS publications and program regulations available to all authorized firms, are used in the training program.
 - Training materials shall clearly state that that the following acts are prohibited and are in violation of the statute and regulations:
 - The exchange of SNAP benefits for cash.
 - The exchange of SNAP benefits for firearms, ammunition, explosives or controlled substances.

- Training for all who work in the store within one month of implementing the compliance policy documented in Criterion 1.
- Any subsequently hired employees are trained within one month of hiring and trained periodically thereafter.

Criterion 4:

- Appellant provided insufficient evidence in support of the following:
 - Ownership/Management was not aware of, did not approve, did not benefit from or was not involved in trafficking. Appellant has provided no records or documentation demonstrating that SNAP benefits used in the transaction noted in the Charge Letter was in fact not deposited into its bank account. Conversely, as noted above, transaction data and other evidence confirms that the violative transaction did in fact result in a monetary deposit into the firm's bank account in the exact amount noted in the Charge Letter. It is noted for the record that the regulations allow an exception to the Criterion 4 language if it is ownership/management's first involvement in SNAP-benefit trafficking.

The statute, regulations and agency policy do not limit the scope of the required compliance policy and program to the prevention of violations other than those caused by error, inadvertence, oversight or lack of management supervision, but rather direct that the policy and program are structured to prevent all violations, regardless of cause. The standard of substantial evidence employed above is difficult to meet, indeed impossible if such policy and program are not implemented and documented prior to the violations, but such is the standard required by the regulations, as noted above, and to which Appellant is held during the course of this review. Additionally, neither the size of an organization nor the number of its personnel is a consideration in determining the eligibility of a firm for a civil money penalty in lieu of permanent disqualification for trafficking. Moreover, while significant effort may be required to develop and maintain a compliance policy and program, if such fails to meet the requirements, that level of effort, even if substantial, does not mitigate the insufficiency. Lastly, the criteria for eligibility for a civil money penalty in lieu of permanent disqualification are clearly stated as *minimum* standards below which eligibility is precluded. The regulations at 7 C.F.R § 278.6(i) are purposely prescriptive and require an unequivocal and well-documented commitment to compliance and training. Accordingly, the SNAP Office correctly determined that Appellant did not qualify for a civil money penalty in lieu of a permanent disqualification.

Lastly, as noted in the foregoing, refusals to violate do not mitigate the impact of the trafficking violation; as noted, any amount of trafficking or number of instances warrants permanent disqualification. The statute and regulations provide the ROD Office no latitude to impose a lesser sanction in such cases, other than a civil money penalty, for which, as noted, the firm was not eligible.

CONCLUSION

In view of the above, the decision of the ROD Office to permanently disqualify El Libanes 2 Supermarket LLC from participation in the SNAP is hereby sustained and will become final upon the 30th day following your firm's receipt of this document.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the provisions of 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.

DANIEL S. LAY
Administrative Review Officer

January 2, 2018