

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

Evergreen Market LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0186569

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that a permanent disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Evergreen Market LLC (Appellant) by the Retailer Operations Division (Retailer Operations).

ISSUE

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

AUTHORITY

7 U.S.C. § 2021 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

By Charge letter dated November 8, 2017, Retailer Operations informed the owner, that Appellant was charged with violating the terms and conditions of the SNAP regulations based on a USDA investigation conducted from January 19, 2017 through February 6, 2017. Appellant did not reply to the Charge letter.

By Determination letter dated December 20, 2017, Retailer Operations informed Appellant that it was permanently disqualified from participation as a retail store in the SNAP, and that the store was not eligible for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) because the firm failed to submit evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

The owner appealed Retailer Operations' determination and requested administrative review of this action by letter dated December 26, 2017. The appeal was granted by letter dated January 8, 2018. The owner and another stated owner telephoned this office January 22, 2018. They did not have the Charge letter, since it was stolen. This office provided the Retailer Operations telephone number so that a copy of the Charge letter could be requested. The owner provided additional information with a cover letter dated January 15, 2018, postmarked January 26, 2018.

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 actions should be reversed. That 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 argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

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

7 U.S.C. § 2021(b)(3)(B) states: "...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." Trafficking is defined, in part, in 7 CFR § 271.2, 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;"... (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.

7 CFR § 278.6(e)(5) states that a firm is to be disqualified 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 § 278.2(a) states: “Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food.” Further, the citation specifies that “Coupons may not be accepted in exchange for cash...or for any other nonfood use.”

SUMMARY OF THE CHARGES

The USDA conducted a compliance investigation of Appellant. The investigative report provided to Appellant gives details on the results of six compliance visits. Appellant was charged with trafficking in Exhibits E and F. The penalty for trafficking is permanent disqualification. The misuse of SNAP benefits was also noted in Exhibits A, B, C, and D, wherein non-food, ineligible items were sold for benefits which warrant a non-permanent disqualification period as specified in Section 278.6(e) of the SNAP regulations. The non-permanent disqualification is subsumed in the more egregious trafficking violations that carry a sanction of permanent disqualification.

APPELLANT’S CONTENTIONS

The following may represent a summary of the contentions presented in this matter. However, in reaching a decision, full attention and consideration have been given to all contentions presented, including any not specifically recapitulated.

- We would like clarification if there is further documentation that needs to be submitted.
- You can contact the owner **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.
- A plan of correction has been put in place. It is alleged the store was serving and selling cooked meals. We will ensure that this problem doesn’t reoccur again.
- If there are further deficiencies we will need clarification.

The owner provided: a letter dated January 9, 2018; copies of police reports dated 10/11/2017 and 12/8/17; 20 copies of vendor invoices; and 30 undated color store photos.

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or to invalidate the earlier determination made by Retailer Operations and it is limited to what circumstances were at the basis of Retailer Operations’ determination at the time such action was taken. The sole official owner of Appellant as noted on its March 7, 2014, application to FNS for SNAP authorization, is Mama Victorine Guilavogui. There is no record that FNS was notified of a change in Appellant’s

ownership or that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was ever added as an owner to the official SNAP record for Appellant.

The record supports that the Charge letter was issued November 8 and delivered November 13, 2017. A reply was required within 10 calendar days of receipt, before the December break-in at the store. The January 9, 2018, letter provided by the owner on review, confirms that the owner did have a copy of Retailer Operations' Determination letter. She requested review and was told this was a trafficking investigative case and that she could present any evidence in support of her case. A police report confirms that the cash register was claimed to have been stolen from Appellant in October 2017, and the December 8, 2017, police report is for cash stolen. The photographs and vendor invoices advanced by the owner do not provide evidence to undermine the validity of the USDA investigative report.

The USDA investigative Exhibits furnished to the owner demonstrate a pattern of violations at Appellant that occurred on multiple occasions. As described in Exhibit E and F, the most egregious violation, trafficking, occurred when firm personnel exchanged cash for SNAP benefits. Appellant also exchanged nonfood items for SNAP benefits on four visits which warrant a non-permanent disqualification period, subsumed in the trafficking sanction which carries a permanent disqualification.

The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. Regardless of whom the owner of a store may utilize to handle store business, the owner is accountable for the proper handling of SNAP benefit transactions. A review of the documentation in this matter has yielded no indication of error or discrepancy in the report findings. The investigative record is specific and thorough with regard to the dates of the violations, the specific facts related to the trafficking incidents, and in all other critically pertinent detail.

CIVIL MONEY PENALTY

The regulations at Section 278.6(i) specify the criteria for a firm's eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. A firm must submit a timely request for a civil money penalty that shows substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. The record supports that Appellant did not submit evidence to support a CMP in lieu of trafficking.

CONCLUSION

The review of the evidence in this case supports that program violations occurred at Appellant. The investigative record is specific and accurate with regard to the dates of the violations, the exchange of SNAP benefits for cash, or trafficking, on two separate dates, the violative sale of ineligible items for benefits on four visits, and in all other pertinent detail. The contentions

advanced by the owner do not constitute, by preponderance of the evidence, grounds for dismissal of the charges. The permanent disqualification of Appellant as a SNAP retailer food store for trafficking during a USDA investigation is sustained.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to applicable rights to judicial review of this determination. 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 where Appellant's owner resides or is 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, 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.

M. Viens
Administrative Review Officer

February 12, 2018