

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

Everything and More Tobacco Mart,

Appellant,

v.

Case Number: C0193686

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Everything and More Tobacco Mart (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

The USDA conducted an investigation of the compliance of Appellant with Federal SNAP law and regulations from March 4, 2015 to April 15, 2015. The investigation report documents that personnel at Appellant committed SNAP violations on five (5) out of six (6) compliance visits. During two (2) compliance visits, store personnel exchanged SNAP benefits for cash. 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 September 15, 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) of up to \$59,000.00 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.

The record reflects that in correspondence dated September 22, 2017, the Appellant submitted an FOIA request, based on the language in the correspondence, which was completed on September 28, 2017. The record also reflects that Appellant had 90 days in which to appeal the completed FOIA request but failed to do so.

In a facsimile dated January 23, 2018, Appellant replied to the charge letter and generally stated that the store did not ask for an FOIA request and the store does not employ anyone fitting the describing in the RIB report. These alleged infractions occurred in March and April of 2015 and the store is just now being notified of these charges. The store cannot go back two years and look for surveillance video. Management stated that the alleged infractions are false and unfair and any disqualification would cause a hardship for the firm and the community. The Appellant asked that the charges be dismissed due to the time frame and statute of limitations.

After considering the Appellant's reply and the evidence in the case, the Retailer Operations Division issued a determination letter dated March 29, 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 postmarked March 29, 2018, 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 from March 4, 2015 to April 15, 2015, the USDA conducted six (6) compliance visits at Appellant. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated September 15, 2017. The investigation report documents that, SNAP violations were committed during five (5) of the six (6) compliance visits. During two (2) of the compliance visits, store personnel committed a trafficking violation by exchanging SNAP benefits for cash.

APPELLANT’S CONTENTIONS

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

1. Management does not employ anyone fitting the description in the investigative report.
2. The alleged infractions happened during 5 U.S.C. § 552 (b)(6) & (b)(7)(C), why is our firm just being notified of these alleged infractions? We cannot go back two years to look at our surveillance.
3. We stand firmly that we have not committed any violations and should not be subject to any penalties and no disqualified period.
4. Any disqualification would cause a hardship for this firm and the community.
5. Consider the facts, time frame, no surveillance, no marked bills, no customer complaints, and no current infractions. We ask that these charges be dismissed due to time frame and statute of limitations.

In a facsimile dated May 18, 2018, Appellant provided additional documentation in support of its position. Appellant provided a copy of its response to the charge letter dated September 22, 2017, two pages of medical documentation, a copy of its 2015 and 2016 Wage and Tax Statements and one page from the investigative report.

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 contends that management does not employ anyone fitting the description in the investigative report. With regard to this contention, descriptions are subjective in nature and may involve descriptive features that are relative with respect to the point of view of the observer. For example, a short investigator may view a taller clerk as being much taller than he/she really is, and a young investigator may deem an older clerk to be much older than he/she really is. In this case, the two parties differ in their respective description of clerk’s

height encountered. However, the USDA investigative employee stands by their report; the items listed in the Exhibits were purchased at the store and the trafficking transactions were conducted with store personnel.

Appellant contends that the alleged infractions happened more than two years ago and the firm cannot go back and look at surveillance video. Appellant also contends that consider the facts, time frame, no surveillance, no marked bills, no customer complaints, and no current infractions. We ask that these charges be dismissed due to time frame and statute of limitations. With regard to these contentions, although no receipts were provided to the investigator during the investigation, all investigative transactions were verified through the Agency's data systems. Furthermore, investigative results are routinely supported by documentation in the record 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 items, the name and address of the organization, the date the donation was made and the official's initials next to the items donated. The purchase costs of each of the transactions involved in the investigation are documented on SNAP terminal receipts obtained during each transaction.

Additionally, it should be noted that the Retailer Operations Division's administrative action is dependent on the release of the investigative report by the agency or branch that conducted the investigation. There are a number of reasons why an administrative action in a case could be delayed. For example, investigations often involve a number of different stores, and no arrests or charges are made until after all store investigations have been completed. Also, a delay may be due to determinations on whether or not prosecution will be pursued. 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.

Appellant contends that any disqualification would cause a hardship for the firm and the community. With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. Furthermore, giving special consideration to economic hardship of the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, ownerships contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

It is important to note that the charges of violations are based on the findings of a formal Department of Agriculture investigation; all transactions cited 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 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.

CIVIL MONEY PENALTY

The Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i) even though it was informed of the right to do so in the charge letter. Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is 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 program violations did occur during a USDA investigation. All transactions cited in the letter of charges were conducted or supervised by a USDA Investigator and all are thoroughly documented. It is reiterated that 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 dates of the violations, including the exchange of SNAP benefits for cash, and in all other critically pertinent details. The decision to impose a permanent disqualification against Everything and More Tobacco Mart 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

July 19, 2018