

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

Express Mart,

Appellant,

V.

Retailer Operations Division,

Respondent.

Case Number: C0209452

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Express 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 June 25, 2018 to August 22, 2018. The investigation report documents that personnel at Appellant committed SNAP violations on five (5) out of five (5) 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 May 28, 2019, 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.

In correspondence dated June 3, 2019, Appellant, through counsel, responded to the charge letter and generally stated that the request was being sent as evidence to demonstrate that Express Mart implemented an effective compliance program to prevent SNAP violations and that the owner did not gain from the transactions identified in the investigative report. The petitioner was a victim of employee theft both from every source of machine operated register and since the onset of Petitioner's business, there were never any violations of USDA and/or SNAP law. Appellant, through counsel, stated that the Petitioner has never been under investigation by the USDA for SNAP trafficking charges and his employees review their SNAP user's manual on a regular basis. Appellant listed aspects of its "Effective Compliance Policy" but did not provide the required regulatory documents as evidence.

Appellant indicated that it also provided exhibits that included an owner's affidavit, employee affidavits, training log and certifications, customer affidavits, list of markups, wholesale invoices, store pictures and the owner's driver's license. Appellant, through counsel, also stated that the employee responsible for these transactions has stolen cash and inventory from the Petitioner. Most importantly, this individual will more than likely get another job at a similar store with EBT and repeat his mistakes since the Petitioner is paying the penalty for his negligence. Petitioner has tried his best to protect his business interest by complying with all government regulations, inclusive of state and local laws, filing his Federal and State income tax returns, and most importantly the USDA, which allows him to act as an EBT vendor.

After considering the Appellant's reply and the evidence in the case, the Retailer Operations Division issued a determination letter dated July 8, 2019. 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 July 15, 2019, 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 1977, 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 June 25, 2018 through August 22, 2018, the USDA conducted five (5) compliance visits at Appellant. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated May 28, 2019. The investigation report documents that, SNAP violations were committed during all five (5) 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, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

1. We wish to prove that Petitioner had implemented a thorough training program for his employees and did not gain from the transactions identified in the investigative report.
2. The petitioner was a victim of employee theft both from every source of machine operated register.
3. Since the onset of Petitioner’s business, there were never any violations of USDA and/or SNAP law.
4. The Petitioner has never been under investigation by the USDA for SNAP trafficking charges.
5. The Petitioner and his employees review their SNAP user’s manual on a regular basis.

Appellant submitted the following exhibits in support of its position. Exhibit A: Owner’s Letter and Police Report; Exhibit B: Employees’ Affidavits; Exhibit C: List of Markups; Exhibit D: Wholesale Invoices; Exhibit E: Store Pictures; Exhibit F: Driver’s License and Exhibit G: Transaction Receipts. It is noted that no driver’s license was submitted. 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

With regards to Appellant's contentions, they cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. As owner of the store, Appellant is liable for all volatile 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.

Additionally, the police report is dated July 11, 2019, however the employee, in question, was allegedly terminated on October 14, 2018, which is nine (9) months before the police report was made and the report indicates that the theft occurred between October 1, 2018 and July 11, 2019. The question remains that if the employee was terminated October 14, 2018 why would the owner report that the thefts occurred after the time the employee was allegedly terminated? It is also noted that the police report was filed after Appellant received the determination letter dated July 8, 2019 and received on July 10, 2019, which may be an indication that the report was filed as a tactic to have the SNAP charges dismissed and may be falsified.

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, through counsel, contends that it implemented an effective compliance policy to prevent SNAP violations and wished to prove as much with the submission of the previously stated exhibits.

The issue to be decided here, then, is whether, through a preponderance of the evidence, Express Mart had an effective policy and program to prevent trafficking violations that was fully in accord with the provisions of 7 CFR §278.6(i), and thus that it is eligible for a CMP.

7 CFR §278.6(i) specifies that in order for a firm to qualify for a CMP in lieu of permanent disqualification, it must submit *substantial evidence* that it has fulfilled 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...”

As it relates to the above Criteria 1 and 2, 7 CFR §278.6(i)(1), entitled “Compliance policy standards,” provides the following, in relevant part:

“...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 and current SNAP policy on the proper acceptance and handling of food coupons. 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 SNAP compliance and to prevent SNAP 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 SNAP regulations;
- ii. Documentation of the development and/or continued operation of firm policy and procedures resulting in appropriate corrective action following complaints of SNAP 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 SNAP regulations;
- iv. The nature and scope of the violations charged against the firm;
- v. Any record of previous firm violations under the same ownership; and
- vi. Any other information the firm may present to FNS for consideration.”

As it relates to the above Criterion 3, 7 CFR §278.6(i)(2), entitled “Compliance training program standards,” provides the following, in relevant part:

“...the firm shall have developed and implemented an effective training program for all managers and employees on the acceptance and handling of (SNAP benefits)...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). FNS shall consider a training program effective if it meets or is otherwise equivalent to the following standards:

- (i) Training for all managers and employees whose work brings them into contact with (SNAP benefits) or who are assigned to a location where (SNAP benefits) are accepted, handled or processed shall be conducted within one month of the institution of the compliance policy under Criterion 1 above. Employees hired subsequent to the

- institution of the compliance policy shall be trained within one month of employment. All employees shall be trained periodically thereafter;
- (ii) Training shall be designed to establish a level of competence that assures compliance with Program requirements as included in this part 278;
 - (iii) Written materials, which may include FNS publications and program regulations that are available to all authorized firms, are used in the training program

Training materials shall clearly state that the following acts are prohibited and are in violation of the Food and Nutrition Act and regulations: the exchange of... (SNAP benefits)...for cash..."

Appellant failed to provide Retailer Operations Division with all required documentation to be considered for a trafficking CMP in lieu of disqualification. The owner's training sign-in sheets do not rise to the level, required by regulation, to be considered for a CMP in lieu of permanent disqualification. Retailer Operations Division correctly determined that Appellant was not eligible for a trafficking CMP as set forth in the SNAP regulations and its 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. 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 Express 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

January 23, 2020