

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

Fair Park Food Mart LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0191604

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the decision by the Retailer Operations Division to impose a permanent disqualification against the Fair Park Food Mart LLC (hereinafter Appellant) from participating as an authorized retailer in Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), in its administration of the SNAP when it imposed a permanent disqualification against Appellant on September 7, 2017.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period March 9, 2017, through June 21,

2017. The investigation determined that personnel at Appellant's store accepted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in exchange for cash in the amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (trafficking) as noted in the letter of charges. Additionally, the investigation determined that personnel at Appellant's store accepted SNAP benefits in exchange for ineligible merchandise on five separate occasions. The items sold are best described in regulatory terms as common nonfood items and included items such as paper towels and bar soap. The investigative report indicates that these violative transactions were handled by four different clerks.

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated August 18, 2017, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.6(e)(1). The letter of charges states, in relevant part, "As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking . . . is permanent disqualification." The letter also states that "under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of a permanent disqualification of a firm for trafficking."

Appellant did not respond to the charges and also did not request or submit any evidence in support of the trafficking CMP within the specified timeframe. The Retailer Operations Division notified Appellant in a letter dated September 7, 2017, that the firm was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6(c) and 278.6(e)(1) for trafficking violations. This determination letter also states that Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated ". . . you are not eligible for the CMP because you failed to submit sufficient evidence to demonstrate that your firm had established and implemented an effective compliance policy and program to prevent violations of the Supplemental Nutrition Assistance Program."

By letter dated September 18, 2017, Appellant appealed the Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted. No subsequent correspondence was received from Appellant.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that 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 untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR Part 278.6(a) and Part 278.6(e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking of SNAP benefits.

7 CFR § 271.2 states in part that, “Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot food and hot food products prepared for immediate consumption.”

7 CFR § 278.2(a) specifies in relevant part, “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.”

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* . . .” (Emphasis added.)

7 CFR § 278.6(e)(1)(i) reads, in part, “FNS shall . . . [d]isqualify 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, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone . . .” Trafficking is further defined, in 7 CFR § 271.2, to include “(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.”

7 CFR § 278.6(f)(1) states in relevant part, “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm is selling a substantial variety of staple food items, and the firm’s disqualification would cause hardship to SNAP households. A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.”

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.”

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).” Part 278.6(b)(2)(ii) further states 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 in Part 278.6(b)(1), the firm shall not be eligible for such a penalty.

In addition, 7 CFR § 278.6(i)(2) states in relevant part, “As specified in Criterion 3 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 FNS regulations and current FSP policy on the proper acceptance and handling of food coupons.” This section goes on to state, “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.” This section further states, “A firm which seeks a civil money penalty in lieu of permanent disqualification *shall document* its training activity by submitting to FNS its *dated training curricula and records of dates training sessions were conducted* . . .” (Emphasis added).

APPELLANT’S CONTENTIONS

In the request for administrative review, Appellant has stated as its position in the matter the following:

- The owner did not reply to the charge letter because he did not receive it; and,
- He always follows SNAP regulations because he has been doing SNAP for a long time.

Appellant submitted no evidence or documentation in support of these contentions.

The preceding may represent a summary of Appellant’s contentions in this matter, however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. While store ownership may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, the ownership is accountable for the proper training of staff and for the monitoring and handling of SNAP benefit transactions. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time regardless of the amount of time the owner is present at the subject firm.

The investigative report shows that four employees working at the Appellant business during the period under review transacted SNAP benefits for ineligible items on five separate occasions and also exchanged SNAP benefits for cash during one of these five occasions (Exhibit E) indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The investigative report also noted that store personnel initially refused to exchange SNAP benefits for ineligible merchandise on one visit (Exhibit A) and refused to exchange SNAP benefits for cash on one visit (Exhibit F). The transactions from the investigative report have been matched to SNAP transactions posted by the Appellant business on the dates in question with no discrepancies. There was no indication of involvement by the firm's management or ownership. The acceptance of SNAP benefits for ineligible items or for cash are both violations of SNAP rules and regulations with the penalty for trafficking being permanent disqualification. The owner does not deny that store employees violated SNAP regulations, but only states that he never received the charge letter and that he always follows SNAP regulations because he has been doing SNAP for a long time.

Regarding Appellant's contentions, FNS records show that the charge letter was received at the Appellant business on August 22, 2017, and signed for by "5 U.S.C. § 552 (b)(6) & (b)(7)(C)". Additionally, a comprehensive review of the FNS Report of Positive Investigation shows no discrepancies and the transaction amounts cited in the Report all match FNS transaction records for the business on the dates in question. The descriptions provided in the Report of Positive Investigation are provided to assist store ownership in identifying those employees responsible for the violative transactions. Many variables can affect the description of an employee (e.g. whether the employee was sitting or standing or on a platform, the fit of their clothing, changing hair styles/lengths/colors, etc.) so these descriptions may not be one hundred percent accurate which does not mean that the violations did not occur.

It is highly improbable, based on the readiness of the four store employees to exchange SNAP benefits for ineligible items and for cash, that the only instances of SNAP violations were the five identified as part of the FNS undercover investigation and more likely than not that this represented an ongoing pattern of SNAP violations, that included trafficking, at the Appellant business. As previously stated, the store owner is responsible for all SNAP transactions at the firm and therefore a certain minimal level of oversight on the part of the owner to ensure employees are not violating SNAP laws or regulations is expected. It would be unusual and irresponsible for a store owner to not be monitoring all transactions, including those involving SNAP, and reviewing daily balance sheets to ensure store employees were not stealing from the business or conducting other activities that would jeopardize the licenses and income that the business is dependent upon.

Neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which 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 disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option.

Based on the discussion above, there is not any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP. Additionally, there are 16 SNAP authorized stores located within a one mile radius of Appellant's business that includes one supermarket and one super store. There is also a medium grocery store located 0.48 miles from Appellant's location. The many nearby stores appear readily accessible to SNAP recipients and offer a variety of staple foods comparable to, or better than, those offered by Appellant. Appellant does not carry any unique items or foods that cannot be found at other stores. Some degree of inconvenience to SNAP benefit users is inherent in the disqualification from SNAP of any participating food store as the normal shopping pattern of such SNAP benefit holders may be altered. Additionally, the Appellant

business is situated one block away from Asher Avenue which has scheduled bus service.

To be considered eligible for a trafficking CMP a firm must 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 Section 278.6(i)(1).
- 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.
- Criterion 3: The firm had developed and instituted an effective personnel training program as specified in Section 278.6(i)(2).
- 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 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.

SNAP regulations are explicit in what constitutes substantial evidence. Specifically, 7 CFR § 278.6(i)(2) states in relevant part, “As specified in Criterion 3 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 part 278 of current FNS regulations and current FSP policy on the proper acceptance and handling of food coupons.” This section goes on to state, “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.” This section further states, “A firm which seeks a civil money penalty in lieu of permanent disqualification *shall document* its training activity by submitting to FNS its *dated training curricula and records of dates training sessions were conducted*. . .” (Emphasis added).

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because Appellant failed to request a trafficking CMP or to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

Appellant made no mention of how the business met any of the four criteria in the request for administrative review and no documentation or other evidence of any kind, including written statements, was subsequently received from Appellant in support of a trafficking CMP. Therefore, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met

all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division's decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted by a USDA investigator, signed under penalty of perjury, 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, the specific exchange of SNAP benefits for cash, and in all other critically pertinent detail. Additionally, the decision by the Retailer Operations Division that Appellant was not eligible for a trafficking CMP is also found to be correct.

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which 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 disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved.

Based on the discussion above, the determination by the Retailer Operations Division to impose a permanent disqualification against the Appellant business from participating as an authorized retailer in SNAP is sustained.

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 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.

ROBERT T. DEEGAN
Administrative Review Officer

December 11, 2017