

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

Farm Store #3713,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0196151

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 Program¹ was properly imposed against Farm Store #3713 (hereinafter “Farm Store #3713” or “Appellant”), and its owner of record², by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a Permanent Disqualification against Farm Store #3713 in a letter dated September 29, 2017.

¹ Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

² The initial SNAP retailer application identifies store ownership as 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as a sole proprietor however the Bank of America Merchant Services Card Processing Statements provided for consideration with materials dated November 10, 2017 identify the receiver as “5 U.S.C. § 552 (b)(6) & (b)(7)(C)”.

AUTHORITY

7 U.S.C. § 2023 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

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period between January 10, 2017 and April 5, 2017. As a result of the investigation a report titled USDA-FNS Report of Positive Investigation (hereinafter Investigative Report) number ME41138, dated April 20, 2017 was provided to the Retailer Operations Division for consideration.

The Investigative Report documents four (4) visits to Appellant by a USDA Investigator. During two (2) of the visits an unidentified male clerk is documented to have exchanged non-food items, as defined in 7 CFR § 278.2(a), for SNAP. The non-food items included chap stick and bathroom tissue. Additionally, the Investigative Report documents that in the remaining two (2) visits the same unidentified male clerk exchanged cash on each occasion for SNAP benefits. In each of the reported visits a discussion is reported as being held with a male clerk, approximately 45 to 50 years old, approximately 5’5” to 5’8” tall, weighing approximately 115 to 125 pounds with black hair. In Exhibit C the Investigator documents buying a soda 5 U.S.C. § 552 (b)(6) & (b)(7)(C) followed by an exchange of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) SNAP benefits described 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for each participant in the exchange. In Exhibit D the Investigator documents buying a soda 5 U.S.C. § 552 (b)(6) & (b)(7)(C) followed by an exchange of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) SNAP benefits described 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for each participant in the exchange. In each exhibit the cash exchanged is reported to have been retrieved from the cash register. This activity is trafficking as defined in 7 CFR § 271.2.

In a letter dated August 11, 2017 the Retailer Operations Division informed Farm Store #3713 that it was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 271 – 282, specifically 7 CFR § 271.2 and 7 CFR § 278.2(a). The letter of charges, which included a copy of the Investigative Report includes details of each visit as documented in Exhibits A through D, which indicates that Appellant was specifically charged with trafficking, therefore subject to permanent disqualification.

The letter of charges further provides Appellant information regarding the potential for the imposition of a civil money penalty (CMP) in lieu of permanent disqualification delineating the conditions for the consideration of that alternative sanction.

The Retailer Operations Division record indicates that both telephonic and written replies to the letter of charges were received and fully considered. In a letter dated September 29, 2017 the

Retailer Operations Division informed Farm Store #3713 that it was permanently disqualified from participation as a retail store in the SNAP; and, that Appellant was not eligible for a civil money penalty (CMP) in lieu of the permanent disqualification because it failed to submit evidence to demonstrate that an effective compliance policy and program had been established to prevent violations of SNAP.

Appellant, through counsel, submitted a request for administrative review, appealing the Retailer Operations Division's assessment via letter dated October 12, 2017. The appeal was granted as affirmed in a letter dated September 27, 2017.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter 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")³, 7 USC § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR).⁴ Part 278.6(e)(1)(i) establishes 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 as defined in Part 271.2.

7 U.S.C. § 2021(b)(3)(B) states, in relative part, "...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 § 278.2(a) specifies, in relevant part, that "Coupons [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 [benefits] may not be accepted in exchange for cash...or for any other nonfood use."

7 CFR § 278.6(e) states, in relevant part, "Penalties. FNS shall take action as follows against any firm determined to have violated the Act or regulations..."

³ Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246, further amended through P.L. 113-79 effective February 7, 2014.

⁴ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

7 CFR § 278.6(e)(1)(i) reads, in relevant part, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.”

7 CFR § 271.2 specifies, in relevant part, that “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 or in complicity or collusion with others, or acting alone;
- (2) The exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code, for SNAP benefits;
- (3) Purchasing a product with SNAP benefits that has a container requiring a return deposit with the intent of obtaining cash by discarding the product and returning the container for the deposit amount, intentionally discarding the product and intentionally returning the container for othe deposit amount;
- (4) Purchasing a product with SNAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with SNAP benefits in exchange for cash or consideration other than eligible food; or
- (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.
- (6) Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers (PINs), or by manual voucher and signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.”

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.” [Emphasis added]

7 CFR § 278.6(i) states, in relevant part, “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...In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, 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 §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...”
[Emphasis added]

APPELLANT’S CONTENTIONS

Via letter dated October 12, 2017, Appellant, through counsel, requested an administrative review. In a subsequent letter, dated November 10, 2017 counsel, on behalf of Appellant, provided a letter contending that:

- Appellant ownership has a strict policy for employees operating cash register that includes adherence to the SNAP regulations and, that further steps have been taken to post signage and provide printed copies of SNAP regulations to Appellant’s current employees.
- Appellant is unable to determine which of three (3) former employees committed the reported violations.
- The number of transactions represented by the reported violations is a small percentage of Appellant’s overall transactions; and, a smaller percentage of total sales amounts.
- There are no allegations of repetitive transactions or the exhaustion of SNAP benefits as identified in review of previous court cases. As evidence bank records were provided showing a history of SNAP income.
- The complete revocation of SNAP authorization is the strictest punishment that can be applied and is too drastic given the small nature of the violations and the steps Appellant is taking to avert further violations.

Notably neither the materials provided for consideration to the Retailer Operations Division, nor on Administrative Review have included denial of any of the charges as documented in the Investigative Report.

The preceding may represent only a brief summary of the contentions presented in this matter. Please be assured, however, that, in reaching a decision, full attention and consideration have

been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Operational policies:

Appellant contends that it has a strict policy regarding cash register operation that includes adherence to SNAP regulations; and, that further steps have been taken to post signage and provide printed copies of SNAP regulations to Appellant's current employees. The provision of SNAP training, with regular refresher or re-training, is a standard expectation for all SNAP authorized retailers.

Agreement to implement training procedures and schedules is first cited in Appellant's application to serve as a SNAP authorized retailer which the record shows was submitted on November 19, 2015 and affixed with the signature of the owner of record on November 20, 2015.

Clerk Identification:

Although Appellant indicates it is unable to determine which of three (3) former employees committed the reported violations the record includes a copy of the Investigative Report which includes four (4) exhibits A through D, each consisting of two (2) pages. The second page of each exhibit includes a description of the clerk involved together with individual identification of the items involved in each SNAP transaction. In the instant case the exhibits document that the same unidentified male clerk, described as approximately 45 to 50 years old, approximately 5'5" to 5'8" tall, weighing approximately 115 to 125 pounds with black hair conducted each of the four (4) identified violative transactions.

Minimal Transaction and Amounts Involved:

Appellant contends that the number of transactions represented by the reported violations is a small percentage of Appellant's overall transactions; and, a smaller percentage of total sales amounts. The permanent disqualification merited in the instant case is not based on any percentages of transactions or amounts; instead, the permanent disqualification is merited on the two (2) documented instances of trafficking as defined in 7 CFR § 271.2. The exchange of cash, in any amount, is considered trafficking and is considered the responsibility of the ownership of record.

No repetitive transactions or exhaustion of benefits:

Appellant correctly indicates that there are no allegations of repetitive transactions; or, the exhaustion of SNAP benefits as identified in review of previous court cases. The trafficking identified in the instant case was the result of on-site store investigation and did not involve analysis of the SNAP transactions occurring at Appellant.

Drastic punishment:

As Appellant identifies the permanent disqualification of SNAP authorization is indeed the most drastic or strictest punishment that can be applied and is specifically warranted in accordance with both the Food and Nutrition Act of 2008 and the SNAP regulations at 7 CFR § 278.6(e)(1)(i).

CIVIL MONEY PENALTY

7 CFR §278.6(f)(1) of the SNAP regulations provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP households because of the unavailability of a comparable SNAP authorized firm in the area to meet their needs.

However, this regulation also sets forth the following specific exception to assessments: **“A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.”** Therefore, because the matter at hand involves a permanent disqualification, this civil money penalty provision is not applicable in the present case, and there is no comparison of similar firms made.

The September 29, 2017 determination letter advised Appellant of its ineligibility for the imposition of a trafficking civil money penalty in lieu of permanent disqualification as allowed in 7 CFR § 278.6(i) based on failure to submit evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of SNAP.

Based on a review of the record, the decision of Retailer Operations Division not to impose a civil money penalty in lieu of permanent disqualification is sustained as appropriate pursuant to 7 CFR §278.6(b)(1), 7 CFR §§278.6(b)(2)(ii), and 7 CFR §278.6(i).

CONCLUSION

Based on a review of the evidence in this case, it appears that the program violations at issue did, in fact, occur as charged. As noted previously, the charges of violations are based on the findings of an official USDA investigation and the evidence gathered as a result of that

investigation. The materials recount trafficking that is clearly a violation of the SNAP regulations. Notably the official Investigative Report includes a statement introducing each of the Details of the Transaction/Visit affirming that the USDA Investigator makes the statements included “freely and voluntarily, knowing that this statement may be used in evidence.”

The decision to impose a permanent disqualification against Farm Store #3713 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.

NANCY BACA-STEPAN
Administrative Review Officer

December 28, 2017