

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

Grand Rapids African Market & Store,

Appellant,

v.

Case Number: C0198199

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a permanent disqualification of Grand Rapids African Market & Store (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Grand Rapids African Market & Store.

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

Grand Rapids African Market & Store was initially authorized to participate in SNAP on January 5, 2016. Between August 30, 2017, and December 21, 2017, the USDA conducted an undercover investigation of Grand Rapids African Market & Store to ascertain the firm’s compliance with Federal SNAP law and regulations. It was reported that during the course of the investigation, the Appellant firm violated SNAP rules by allowing ineligible non-food items to be purchased with SNAP benefits on four separate occasions. The firm also reportedly committed the violation of trafficking by exchanging SNAP benefits for cash on two occasions.

In a letter dated April 24, 2018 and delivered to the firm on April 30, 2018, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations. It also charged the Appellant with accepting SNAP benefits in exchange for ineligible non-food merchandise. The misuse of SNAP benefits, as described in the charge letter, is a violation of 7 CFR § 278.2(a). The charge letter informed the Appellant that the violations warranted permanent disqualification from SNAP as provided in 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made within 10 days of receipt of the letter under the conditions specified in 7 CFR § 278.6(i).

In response to the charge letter, the Appellant submitted a faxed letter dated May 8, 2018. In this letter, the Appellant owner acknowledged that some violations may have occurred, but claimed that some of the circumstances are a bit hazy. For instance, the cashiers remembered allowing ineligible items to be purchased after being misled by the investigator, but did not recall exchanging SNAP benefits for cash. The Appellant further blamed the violations on clerks with limited English speaking skills who were employed by the firm as part of a refugee training program in partnership with a local church. The refugees were employed with the purpose of teaching them basic job skills. The Appellant noted that when the owner was handling the cash register himself, program violations did not occur, as the store has strict policies against accepting SNAP benefits for cash or ineligible items. According to the Appellant, most violations took place when the owner was away from the store. The Appellant further noted that before it received the charge letter, the firm had discontinued its partnership with the church, in part because the refugee employees had difficulties complying with the store's policies and procedures. The store has also made several additional improvements to prevent future violations, including allowing only the owner and one trained employee to access the cash register, and updating the firm's cash register equipment. The Appellant provided its assurance that program violations would not happen again at the store.

After considering the Appellant's response and further analyzing the evidence in the case, the Retailer Operations Division issued a determination letter dated June 21, 2018. The determination letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter 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 in accordance with paragraph § 278.6(i), but determined that the Appellant was not eligible for a CMP because it failed to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked July 2, 2018, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 & REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. 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, in 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) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food.

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.... Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and **disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section.**[Emphasis added.]

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(e) states, in part:

The FNS regional office shall:

(1) Disqualify a firm permanently if:

(i) Personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, in part:

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, in complicity or collusion with others, or acting alone...

7 CFR § 271.2 states, in part:

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 § 278.6(b)(2)(ii) states, in part:

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(b)(2)(iii) states:

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 § 278.6(b)(1), the firm shall not be eligible for such a penalty.

7 CFR § 278.6(i) states, in 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 of the Program....

SUMMARY OF INVESTIGATION

During an undercover investigation conducted between August 30, 2017, and December 21, 2017, the USDA completed six compliance visits at Grand Rapids African Market & Store. A report of the investigation was provided to the Appellant as an attachment to the April 24, 2018, charge letter. The investigation report included Exhibits A through F, which provided full details on the results of each compliance visit. SNAP violations were documented during five of the six visits and included trafficking violations on the third and sixth visits as noted in Exhibits C and F. The report noted that the following ineligible non-food items were purchased by an investigator using SNAP benefits:

- One 30-count package of kid's floss-ups (*H-E-Buddy* brand), Exhibit A
- One 2.9-ounce tube of toothpaste (*Crest* brand), Exhibit A
- One 30-count package of kid's floss-ups (*H-E-Buddy* brand), Exhibit B
- One 2.9-ounce tube of toothpaste (*Crest* brand), Exhibit B
- One 110-gram bar of soap (*Dettol* brand), Exhibit B
- One bottle of antiseptic liquid (*Dettol* brand), Exhibit C
- One 2.9-ounce tube of toothpaste (*Crest* brand), Exhibit C
- One 110-count bag of dental flossers (*Plackers* brand), Exhibit C

- One 2.9-ounce tube of toothpaste (*Crest* brand), Exhibit E

Trafficking was reported during the third and sixth compliance visits, which took place on October 13, 2017, and December 21, 2017. In reporting the first trafficking violation, the USDA investigator provided the following details, as noted in Exhibit C:

5 U.S.C. § 552 (b)(7)(E)

In reporting the second trafficking violation, the investigator provided the following details, as noted in Exhibit F:

5 U.S.C. § 552 (b)(7)(E)

The report noted that the investigator attempted to obtain cash on two other occasions, but both times, the attempts were refused by the clerks on duty. These refusals are documented in Exhibits D and E. In Exhibit D, the clerk also refused to permit the purchase of a tube of toothpaste with SNAP benefits. In Exhibit E, the clerk refused to allow the purchase of a micro SD card, but did allow the purchase of a tube of toothpaste.

The report noted that five different clerks conducted the violative transactions during the investigation – two female clerks and three male clerks.

APPELLANT'S CONTENTIONS

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

- The Appellant owner was not aware of the violations, did not allow them to happen at his store, and they did not happen under his watch. The violations were not made known to the owner until he received the charge letter. The store clerks also never informed the owner about the violations. They acted on their own will without consulting with the owner.
- This is the first and only time the firm has been cited for violations since the business began four years ago.
- The violations happened when the store agreed to train a small group of refugees in entry-level job skills. They had limited English proficiency, which was not an issue most of the time because they were serving fellow refugees.
- After it became known that the refugee employees had violated store policy relating to SNAP benefit transactions, the following actions were taken to reinforce program compliance:
 - The firm immediately ended the refugee training program and notified their church about the incidents. The owner is now the only officer operating the cash register and will be until this issue is fully resolved.
 - The firm purchased and installed 10 cameras inside the store to discourage any customer from making any solicitation which goes against the store's policies relating to SNAP. Since May 15, 2018, all transactions have been recorded.

- The firm has developed a training curriculum aimed at future volunteers and employees. The goal of this training is to prevent any future SNAP violations.
- The firm has upgraded its cash register from a manual cash register to a digital cash register which uses a scanning system.
- FNS should be aware that in Exhibit D, the owner was the clerk on duty. During this transaction, the owner refused to allow ineligible items to be purchased and refused to engage in trafficking.
- In Exhibit E, the trainee clerk on duty called the owner by telephone to ask for guidance with regard to the sale of the micro SD card and the request for cash. The owner told the clerk that such a transaction would be illegal. This information was repeated to the investigator, who left the store after the illegal sale was refused.
- The clerks' lack of experience and language barriers were their main weaknesses, which led to most of the violations.
- Appellant regrets any violations of SNAP and would like to apologize.
- The Appellant firm is a small store that assists vulnerable families. In addition to supplying ethnic and cultural food, the firm helps refugees and their families adjust smoothly to a new life in the United States. The store stands as a model for thousands of young men and women who are seeking to become the next generation of small business owners.
- The firm is willing to cooperate with SNAP offices in regard to this investigation and is willing to attend any SNAP trainings. The firm is also willing to implement SNAP policies, display SNAP posters, and prevent any future violations.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

As best as can be determined, the Appellant did not, at any point, offer any evidence or contentions to counter the claim that SNAP violations, including trafficking, occurred. In its request for administrative review, the Appellant appeared to acknowledge that violations took place, blaming them largely on inexperienced refugee cashiers who had limited English-speaking skills and who acted on their own will rather than consulting with the store owner.

Because the violations themselves do not appear to be in dispute, it is the determination of this review that program violations, including trafficking, did occur as charged by the Retailer Operations Division and warrants permanent disqualification from SNAP participation. The balance of this review will address the Appellant's remaining contentions.

Appellant Owner Not Involved in Violations

The Appellant owner contends that he was not aware of the violations, did not allow them to happen at his store, and they did not happen under his watch. According to the Appellant, the owner did not know about the violations until he received the charge letter.

With regard to these contentions, the record shows that the Appellant owner signed an application to participate as a SNAP retailer on December 2, 2015. By signing this application, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. The record clearly establishes that the Appellant owner agreed to abide by program rules, including taking responsibility for violations committed by any of the firm's employees, whether paid or unpaid, new, full-time or part-time. An owner or manager is not free of responsibility simply because he or she was not in the vicinity at the time the violations occurred or because he or she was uninvolved in the violations. Regardless of which clerks are operating the cash register at a given time or whom firm ownership authorizes to handle store business, the ownership of the firm is ultimately responsible for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of its employees would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA.

Therefore, the Appellant's claim that the violations were not the fault of the owner does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

No Prior Violations

The Appellant contends that it has been authorized in SNAP for more than four years without being cited for any program violations. This contention implies that because the firm does not have a history of program violations, the permanent disqualification determination should be overturned or reduced.

With regard to this contention, SNAP regulations at 7 CFR § 278.6(e) require that when serious violations, such as trafficking, occur, permanent disqualification is the necessary penalty, even on the first occasion, regardless of a firm's prior compliance with program rules. As stated earlier, the issue under review is whether or not the Retailer Operations Division took appropriate action, consistent with SNAP regulations, in its imposition of a permanent disqualification against Grand Rapids African Market & Store. As long as the administrative action taken by the agency fully conforms to SNAP regulations, this review has no authority to dismiss or reduce a period of disqualification.

In this case, the sanction imposed by the Retailer Operations Division is in wholly line with SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar first-time violations.

Remedial Actions Taken

The Appellant has stated that once it became aware of the violations, it immediately took actions to ensure that program violations would never happen again, including ending the refugee training program, installing video cameras in the store, developing a training curriculum, and upgrading its cash register system. The Appellant further states that it is willing to implement SNAP policies, attend agency training, and do whatever is necessary to prevent future violations.

With regard to these contentions, it must be noted that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. This review is limited to the circumstances that existed at the time the violations were committed. It is not the authority of this review to consider any subsequent remedial actions that may have been taken or that will take place so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations.

Therefore, the Appellant's contention that corrective actions have taken place or that further remedial actions are planned does not provide a valid basis for dismissing the charges.

Hardship to SNAP Recipients

The Appellant contends that the firm is a small store that assists vulnerable families. Not only does it supply ethnic and cultural foods to the community, but it also helps refugees and their families adjust to a new life in the United States. The Appellant claims that the firm stands as a model for thousands of young men and women who are seeking to become small business owners. These contentions imply that the local community, particularly refugee families, will experience some level of hardship if the firm's permanent disqualification is upheld.

With regard to these contentions, it is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and households are forced to use their benefits elsewhere. However, there are no provisions within the regulations that would allow for a dismissal or reduction of the charges due to hardship to SNAP households. Regulations at 7 CFR § 278.6(f) do allow, in some circumstances, for a hardship civil money penalty to be imposed in lieu of disqualification when there is an absence of other SNAP-authorized retailers in the area. However, the regulations are clear that a hardship CMP may not be imposed in lieu of permanent disqualification for trafficking.

Therefore, the Appellant's claim that the community will be adversely affected by the firm's disqualification does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Trafficking Civil Money Penalty

As noted earlier, the Retailer Operations Division determined that the Appellant firm was not eligible for a civil money penalty in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and training program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a civil money penalty to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate documentation within designated timeframes. The case record shows that the Appellant did not request a civil money penalty when it replied to the charge letter and there is no evidence that the Appellant

submitted any documentation that would indicate that the firm had a compliance policy or training program of any kind.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

Trafficking is defined in Section 271.2 of the SNAP regulations as “the buying or selling of SNAP benefits for cash or consideration other than eligible food.” Pursuant to regulations at 7 CFR § 278.6(e)(1)(i), permanent disqualification is the required penalty for such violations. The law and regulations do not provide for a lesser penalty for this violation.

Based on a review of all information in this case, this review finds through a preponderance of the evidence that program violations of 7 CFR § 278.2(a) did occur at Grand Rapids African Market & Store during a USDA investigation. All transactions cited in the letter of charges were either 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 appears to be 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. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(1), the decision to impose a permanent disqualification against the Appellant, Grand Rapids African Market & Store, under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

December 17, 2018