

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

Halal Meat,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0207899

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 the permanent disqualification of Halal Meat (Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), 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 7 CFR § 278.6(a), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

AUTHORITY

7 USC § 2021 and the 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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period from April 23, 2019, through May 28, 2019. The investigation report documents that personnel at Halal Meat exchanged cash for SNAP benefits. This occurred on two separate occasions. The store employee also sold ineligible non-food items in exchange for SNAP benefits. 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 the investigation, the Retailer Operations Division informed Appellant, in a letter dated August 5, 2019, that it was charged with violating the terms and conditions of the SNAP regulations. Appellant replied to the charges by e-mail on August 13, 2019, and explained that an employee conducted the transactions.

After considering the retailer's reply and the evidence, the Retailer Operations Division notified Appellant in a letter dated July 11, 2019, 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 further stated that Appellant was not eligible for a trafficking CMP because it 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 August 30, 2019, Appellant, through counsel, appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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 and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) and (e)(1) 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 SNAP benefits.

7 USC § 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 § 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 § 271.2 defines trafficking, in part, as:

- (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.
- (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 the 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 and personal identification 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(a) states:

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,...

7 CFR § 278.6(e)(1) reads, in part:

FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

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.

7 CFR § 278.6(b)(2) states, in part:

(ii) 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 as specified in § 278.6(i), 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).** [Emphasis added.]

(iii) **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. [Emphasis added.]

INVESTIGATION DETAILS

A USDA investigator conducted seven compliance visits at Halal Meat from April 23, 2019, through May 28, 2019. The investigation report dated July 15, 2019, was provided to the Appellant as an attachment to the charge letter, and included Exhibits A through F which provide details on the results of each compliance visit. The investigation report documents that SNAP violations were committed during five of the compliance visits.

The investigation reported that personnel exchanged **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in cash for an unknown amount of SNAP benefits on two occasions (Exhibit E and Exhibit F). Transactions of this nature are referred to in the regulations as "trafficking". During the visits, Appellant also exchanged ineligible non-food items, including hand soap, shampoo, dish soap, glass cleaner, and freezer bags, for SNAP benefits.

APPELLANT'S CONTENTIONS

In its August 30 2019, administrative review request, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- Appellant denies trafficking and has never been under investigation previously by USDA for SNAP trafficking.
- Appellant has implemented an effective compliance policy.
- There was no intent to violate the regulations.
- Appellant has provided verbal training, in-store training, and a copy of the manual to employees and store operators.
- The employee never exchanges funds over the amount charged and the employee was require to pay back the register from its own funds.
- The fact that a determination was made for a permanent disqualification for failure to provide enough evidence of a training compliance program is extremely harsh.
- Under 278.6(2)(d) Appellant and its employees have made every attempt to not violate SNAP law; they have never been reprimanded in the past; and there was no intent to violate.
- Appellant has had a compliance policy in place since the store was authorized in 2013.
- Appellant requests that the disqualification be removed and a CMP be imposed.

In support of its contentions, Appellant submitted the following documents:

- Affidavit from the store owner;
- SNAP training log and compliance posters;
- Three customer statements; and
- Four photographs of SNAP items sold in store.

The preceding may represent only a brief summary of the Appellant's contentions presented 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.

ANALYSIS AND FINDINGS

A full review of the case record shows that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted by a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no error or discrepancy. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. The documentation presented by the Retailer Operations Division establishes by a preponderance of the evidence that the violations as reported occurred at the Appellant store.

Ownership Involvement

Appellant states that an employee was responsible for the transactions. Although ownership was allegedly not involved in the violations, it cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. Regardless of whom the ownership of a store may utilize to handle store business, the ownership is accountable 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 persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Ownership signed the FNS application to become a SNAP authorized retailer on February 1, 2014, which included a certification and confirmation that the owner would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time." The violations listed on this certification include accepting SNAP benefits for cash and as payment for ineligible items, a violation of the SNAP rules and regulations. The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations.

Basis of Determination

Appellant implies that the Retailer Operations Division did not properly apply the three factors under 7 CFR § 278.6(d) before imposing a permanent disqualification on the firm. SNAP regulations at 7 CFR § 278.6(d) states, in part, that in making a disqualification determination FNS shall consider:

1. The nature and scope of the violations committed by personnel of the firm,
2. Any prior action taken by FNS to warn the firm about the possibility that violations are occurring, and
3. Any other evidence that shows the firm's intent to violate the regulations.

With regard to the nature and scope of the violations, trafficking in SNAP benefits is a very serious violation and warrants a permanent disqualification on the first violation. Trafficking is always considered to be extremely serious, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. Both 7 USC § 2021(b)(3)(B) and 7 CFR § 278.6(e)(1)(i) mandate that the penalty for trafficking is a permanent disqualification and does not provide for a lesser period of disqualification or a warning letter.

In addition, 7 CFR § 278.6(d) does not require the Retailer Operations Division to give prior warnings or to show the firm's intent to violate. The Retailer Operations Division only has to **consider**, when rendering a final determination, any prior warnings or intent to violate that might be evident if applicable. Intent to violate is not applicable in this case as the definition of trafficking at 7 CFR § 271.2 does not require an element of intent on the part of the violator.

SNAP regulations allow for the issuance of warning letters in some cases. Specifically, 7 CFR § 278.6(e)(7) states "send the firm a warning letter if violations are too limited to warrant a disqualification." However, in this case, a warning letter was not issued because the violations were not limited and trafficking in SNAP benefits warrants a permanent disqualification. In conclusion, the Appellant's contentions do not constitute valid grounds for dismissal of the trafficking charges or for mitigating the impact of those charges through a warning letter or lesser penalty.

No previous Violations

Appellant contends that it has not had any previous violations. Regarding this contention, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

Civil Money Penalty

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR § 278.6(i). Appellant was informed that it would need to provide

both the request and supporting evidence within ten calendar days of receiving the charge letter, and that no extension of time could be granted for making the request or for providing the required evidence. Appellant did not request a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i). Therefore, the Retailer Operations Division determined that there was insufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy to prevent SNAP violations.

The criteria for a trafficking civil money penalty in lieu of disqualification is established under 7 CFR § 278.6(i) which reads, inter alia:

“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; 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 ...”

With its administrative review request, Appellant, through counsel, requests a CMP and indicated that Appellant did have a training program in place. There is no authority to extend the deadline for making a request for a CMP and submitting the required evidence of its eligibility for this alternative penalty. The regulations are clear that a request for a CMP in lieu of permanent disqualification and any supporting documentation must be submitted to FNS within 10 days of the firm’s receipt of the charge letter. In this case, Appellant did not meet this regulatory deadline. Even if a timely request had been submitted, 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. For example, the training log dates provided were all after the dates the violations occurred. 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

A review of the evidence in this case, supports by a preponderance that program violations did occur during a USDA investigation. Therefore, the decision to impose a permanent disqualification against Appellant is sustained. The determination that Appellant is not eligible for a CMP is also sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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's owner resides or is 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, 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

January 9, 2020