

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

Hamilton Gas & Fuels, Inc,

Appellant,

v.

Case Number: C0208519

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 Hamilton Gas & Fuels, Inc. (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 Hamilton Gas & Fuels, Inc.

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

Hamilton Gas & Fuels, Inc. was initially authorized to participate as a retailer in SNAP on March 26, 2015. Between November 1, 2018, and August 21, 2019, investigators from USDA’s Office of Inspector General (OIG) and the Michigan State Police conducted an undercover investigation of Hamilton Gas & Fuels, Inc. to ascertain the firm’s compliance with Federal SNAP laws and regulations. It was reported that during the investigation the Appellant firm violated SNAP rules by allowing ineligible non-food items to be purchased with SNAP benefits on seven separate occasions. The firm also reportedly committed the violation of trafficking by exchanging SNAP benefits for cash on six occasions.

In a letter dated December 18, 2019, 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 a letter dated December 29, 2019, the Appellant, through counsel, responded to the allegations, stating that the store has not systematically trafficked in SNAP benefits. Rather, the violations, if they occurred at all, are indicative of an employee training issue and not a concerted effort to engage in trafficking. Key points in the Appellant's response included the following:

- FNS monitors every SNAP transaction in a national database called ALERT. This “computerized fraud detection tool” is used by FNS to identify statistically unusual EBT transaction patterns that may indicate SNAP violations. Statistical anomalies that may be identified by ALERT include high frequencies of whole-dollar and half-dollar amounts.
- Where courts have decided in the government's favor, the EBT transaction data of the disqualified store was found to be abnormal when compared with similar retailers or when other compelling circumstances were found, or both.
- The firm has not been presented with evidence that any of the transactions cited in the charge letter actually occurred, or that they occurred in the manner described. In the absence of such evidence, the firm is unable to defend itself against such allegations.
- The firm asks FNS to consider its history with accepting SNAP benefits.
 - 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- Based on the above numbers, it is clear that if the violations identified by FNS are true, they are not representative of the firm's normal business practices. This fact, coupled with the average sales numbers and demographics of the area support the conclusion that no systematic pattern of SNAP fraud is present at the store.
- The firm does not possess enough information to quantify the extent of any possible inappropriate practices in SNAP transactions. Any possible improprieties are likely to be a very small percentage of total transactions.
- If a small percentage of transactions were ineligible under SNAP, they would fall into the category of employee error and are not indicative of a concerted effort to engage in trafficking.
- It is noteworthy that a single employee is alleged to be responsible for all of the incidents listed in the charge letter. If the violative activity occurred at all, it is indicative of an employee training issue rather than a trafficking effort.
- Given the demographics of the area, any disqualification of the firm would create a hardship to the customers. The city of Highland Park and its neighbor, Detroit, have high percentages of SNAP participation. If the firm were to lose its SNAP authorization, the surrounding community would suffer a clear and significant hardship.

- The firm requests that no action be taken against the store, or in the alternative, requests a possible resolution, such as a civil money penalty, that does not include disqualification from SNAP.

In support of its response, the Appellant submitted several documents, including a spreadsheet summary of the firm's total sales for the period April 2018 to December 2018; a breakdown of EBT and credit card sales for the same period; and a 2018 Sales, Use and Withholding Tax Annual Return (Michigan Department of Treasury *Form 5081*) and accompanying worksheet.

After reviewing the Appellant's response and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated January 21, 2020. This 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 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 regulations, but determined that a CMP was not appropriate in this case 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 SNAP violations.

In a letter postmarked January 29, 2020, the Appellant, through counsel, 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:

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 November 1, 2018, and August 21, 2019, USDA's Office of Inspector General (OIG) and the Michigan State Police completed nine compliance visits at Hamilton Gas & Fuels, Inc. SNAP violations were documented during every visit, including the sale of cigarettes seven times and trafficking violations on six occasions. A summary of the violations is as follows:

5 U.S.C. § 552 (b)(7)(E)

The charge letter noted that the same clerk conducted every transaction.

Violations involving the sale of ineligible items typically result in a temporary disqualification from SNAP for a minimum period of six months. However, because trafficking violations also took place in this case, permanent disqualification is the required penalty in accordance with 7 CFR § 278.6(e)(1).

APPELLANT'S CONTENTIONS

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

- Appellant requests that FNS reconsider the evidence that was previously submitted to the Retailer Operations Division along with the following facts regarding future compliance, which seems to be at the center of the disqualification decision:
 - Hamilton Gas and Fuels, Inc. is a family-owned gas station/convenience store located in a low socio-economic area of Highland Park, Michigan, which is close to the border of Detroit.
 - The store serves a clientele that it typically low income and dependent on government assistance.
 - Issues with the firm's administration of SNAP came to light after a state search warrant was executed on September 17, 2019, on both the store and the family's home. Large sums of money were seized, bank accounts were closed, and records were taken from both locations. Everyone was rattled, the business suffered, and a decision was made to be extremely careful in the handling of SNAP and any government programs administered at the store.

- Needless to say, this has been a strong wake-up call and everyone involved wants to put this behind them and conduct business in a 100 percent compliant manner.
- As discussed in the firm's original response to the charge letter, the violations outlined in the letter, if true, are the rare exception and not the norm of the way business was and is conducted at the store.
- The remainder of the Appellant's contentions are largely a repeat of the arguments presented in the firm's original reply to the charge letter, with minor additions:
 - The firm has taken the necessary steps to ensure that anyone working at the store is fully aware of all governmental regulations, particularly the rules governing SNAP, and that no one will handle such benefits in the future in a manner contrary to the law and rules.
 - The permanent disqualification, which has already been imposed, has created a clear and significant hardship on not only the business, but also on the customers in the neighborhood. This hardship will continue as long as the store cannot accept SNAP benefits.
 - Appellant requests that the administrative review officer reverse the agency's permanent disqualification decision and discuss the matter with counsel in order to arrive at an alternative resolution, such as a CMP, that does not include disqualification from SNAP.

In support of its contentions, the Appellant submitted the same documents that it submitted in its original reply to the charges. The Appellant stated that it is prepared to provide FNS with additional credit card and sales records, similar to the ones provided previously, but for different months, if it is believed that these records would aid in the review officer's decision. 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 in this document.

ANALYSIS AND FINDINGS

After considering all information in this case, this review finds that the Appellant has not provided any relevant evidence or credible explanations to counter FNS's allegations of trafficking and the sale of ineligible items.

For instance, the Appellant submitted a summary of the firm's total sales for the period of April 2018 to December 2018; a breakdown of EBT and credit card sales for the same period; and a 2018 Sales and Use tax return. The Appellant claims that the data contained in these documents coupled with the demographics of the area show that violations are not representative of the firm's normal business practices and that no systematic pattern of fraud is present. But this review cannot comprehend how such a conclusion was reached. The Appellant's documentation shows little more than total sales volume and offers no clues about what transpired between SNAP customers and store clerks at the point of sale.

Even when considering the Appellant's evidence in connection with the demographics of the area, no further insight is gained. The fact that the store is located in a low-income area suggests

that the firm may have more SNAP business than stores in other areas of the state or country, but it does not suggest that all or even most of the SNAP transactions at that location are legitimate.

Without relevant evidence to refute what took place between the store clerk and the undercover investigator at the point of sale, the Appellant has not proven to any degree that the permanent disqualification determination should be overturned.

Contentions Regarding ALERT System

The Appellant has made a small number of arguments relating to FNS's use of a fraud detection system known as ALERT. This system identifies EBT transactions that form patterns having characteristics indicative of trafficking. However, ALERT data was not the basis for the trafficking charges in this matter. This case was based on an undercover investigation only. Any discussion regarding ALERT is wholly irrelevant.

Insufficient Evidence from FNS

The Appellant contends that it has not been presented with sufficient evidence that any of the transactions cited in the charge letter actually occurred, or that they occurred in the manner described. According to the Appellant, the firm is unable to defend itself against such allegations without evidence of the transactions.

This review does not agree. This review finds that the information in the charge letter is specific enough to allow the firm to offer some kind of defense. For instance, if the Appellant genuinely believed that the transactions were legitimate, it could have provided itemized cash register receipts or other documentation to prove what transpired during each of the transactions in question. Unfortunately the Appellant has offered no such evidence. As noted earlier, in an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the disqualification should be reversed. The Appellant has not met this standard.

Violations are Minimal

The Appellant argues that if a small percentage of transactions were ineligible under SNAP, they would fall into the category of employee error and are not indicative of a "concerted effort to engage in trafficking." The Appellant further contends that if the violative activity occurred at all, it is indicative of an employee training issue rather than a trafficking effort. Finally, the Appellant argues that the violations outlined in the charge letter, if true, are the rare exception and not the norm of the way business was and is conducted at the store.

With regard to these claims, it must be noted that disqualification for trafficking does not require a pattern of fraud or abuse or a "concerted effort" of such behavior. A single incident of trafficking is sufficient to permanently disqualify a firm from SNAP participation, even on the first occasion. Trafficking is among the most serious violations in SNAP, and regulations at 7 CFR § 278.6(e)(1) require that a firm engaging in such activity be assessed a penalty of permanent disqualification.

As for the claim that the violations are indicative of a training issue, it must be noted that prior to the firm's authorization in SNAP, the Appellant owner signed an application to participate as a SNAP retailer. 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. Regardless of which clerks are operating the cash register at a given time and regardless of 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. A firm is not exempt from penalties on the basis that some employees were not fully or properly trained.

Finally, the Appellant's claim that the violations listed in the charge letter are rare exceptions is not believable in any respect. According to OIG's report, serious program violations occurred every time the undercover investigator visited the store, including trafficking in SNAP benefits on six occasions. These are not rare or accidental incidents, but rather patterns of abuse that are indicative of a firm that openly disregards program rules.

Hardship to SNAP Recipients

The Appellant contends that if the firm loses its SNAP authorization, the surrounding community will suffer a clear and significant hardship.

With regard to this claim, it is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and a household is forced to use its benefits elsewhere. Regulations at 7 CFR § 278.6(f) do allow, in some circumstances, for a 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 CMP for hardship to SNAP households may not be imposed in lieu of permanent disqualification for trafficking.

Hardship to Appellant

The Appellant contends that the permanent disqualification, which has already been imposed, has created a significant hardship on the business and claims that this hardship will continue as long as the store cannot accept SNAP benefits.

With regard to this contention, Federal statute at 7 U.S.C. § 2021(b)(3)(B) makes it clear that disqualification for trafficking shall be permanent. It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP; however, there is no provision in the statute or regulations for a waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty.

To allow store ownership to be excused from administrative penalties based on a purported economic hardship would render virtually meaningless the provisions of the Food and Nutrition

Act of 2008 and the enforcement efforts of USDA. Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations.

Therefore, the Appellant's contention that the firm will experience hardship as a result of the store's permanent disqualification does not provide a valid basis for dismissing the charges or for modifying the penalty imposed.

Remedial Actions Taken

The Appellant contends that the issues in this case came to light after a state search warrant was executed on September 17, 2019. After this event, everyone at the firm was rattled, the business suffered, and a decision was made to be extremely careful in the handling of SNAP benefits. The Appellant claims that this situation has been a strong wake-up call and everyone involved wants to put this behind them and conduct business in a 100 percent compliant manner. According to the Appellant, the firm has taken the necessary steps to ensure that anyone working at the store is fully aware of all governmental regulations, particularly the rules governing SNAP, and that no one will handle such benefits in the future in a manner contrary to the law and rules.

With regard to these claims, it must be made clear that this review is limited to the facts that existed at the time the alleged 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 after the discovery of program violations. Accordingly, the firm's alleged remedial actions do not provide a valid basis for reversing the agency's disqualification determination.

Civil Money Penalty

The Appellant requests that the permanent disqualification decision be reversed and that an alternative penalty, such as a civil money penalty, be considered.

When a store is subject to permanent disqualification for trafficking, the only way it can be eligible for an alternative sanction is to meet the CMP criteria found in 7 CFR § 278.6(b)(2) and (i). These regulations explain that a firm must specifically request a CMP in lieu of permanent disqualification and submit "substantial evidence" which demonstrates that the firm had previously established and implemented an effective compliance policy and program to prevent SNAP violations. This request and submission of evidence must occur within 10 days of receipt of the charge letter.

In this case, the Retailer Operations Division determined that the Appellant firm was not eligible for a CMP because it did not submit any evidence to demonstrate that it had established and implemented an effective compliance policy and program of any kind. This review agrees with

that determination, as no evidence pertaining to a compliance policy or training program has been submitted by the Appellant.

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

Based on a review of all information in this case, this review finds through a preponderance of the evidence that trafficking violations did occur at Hamilton Gas & Fuels, Inc. during a USDA investigation. Likewise, the Appellant has not offered any explanation or evidence that would persuade this review to reverse the agency's determination. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(1), the decision to impose a permanent disqualification against the Appellant, Hamilton Gas & Fuels, Inc., under the ownership **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. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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

May 6, 2020