

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

In and Out,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0212643

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 In and Out (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 October 16, 2018, through December 13, 2018. The investigation report documents that personnel at In and Out exchanged SNAP benefits for cash during two of the compliance visits. The store employees 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 April 16, 2019, that it was charged with violating the terms and conditions of the SNAP regulations. Appellant replied to the charges by letter dated April 30, 2019, through previous counsel. Appellant requested a CMP and explained that the violations were committed by a store employee, and that the listed owner is the owner in name only.

After considering the retailer's reply and the evidence, the Retailer Operations Division notified Appellant in a letter dated June 18, 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 June 27, 2019, Appellant, through counsel, appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted. Counsel also requested documents under the Freedom of Information Act (FOIA) by letter dated June 27, 2019. On August 30, 2019, FNS responded to the FOIA request. On September 3, 2019, counsel requested additional time to provide information in support of its administrative review request, which was approved. Counsel submitted supporting documentation for this review on October 3, 2019.

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:

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 § 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 In and Out from October 16, 2018, through December 13, 2018. The investigation report dated March 20, 2019, was provided to the Appellant as an attachment to the charge letter, and included Exhibits A through G which provide details on the results of each compliance visit. The investigation report documents that SNAP violations were committed during six of the compliance visits. The investigation reported that personnel exchanged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits on one occasion (Exhibit F), and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of SNAP benefits on a separate occasion (Exhibit G). Transactions of this nature are referred to in the regulations as “trafficking”. During the compliance visits, Appellant also exchanged ineligible non-food items, including plastic cups and plastic plates, for SNAP benefits.

APPELLANT’S CONTENTIONS

In its June 27, 2019, administrative review request, and subsequent correspondence submitted on October 3, 2019, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- Appellant denies that the store owner or its manager engaged in trafficking of SNAP benefits.
- Counsel requests that the owner be disassociated from the store.
- The owner was listed as the owner for estate planning purposes only.
- The owner was not involved in the operation or management of Appellant at any time.
- The owner has been a student at Central Arkansas University at all times.
- The store is the mother’s store and the listed owner should not be held responsible for the rest of her life for the actions of a cashier that she neither hired nor supervised.

Appellant provided the following documents in support of its contentions:

- June 18, 2019 determination letter;
- April 16, 2019, charge letter;
- Declaration of the store owner’s mother; and
- Declaration of the store owner.

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 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 Appellant.

Ownership Involvement

Appellant states that an employee was responsible for the transactions. Although ownership was 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 May 17, 2017, 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.

Counsel contends that the owner was in name only for estate planning purposes, and requests that she be disassociated from the store. Appellant submitted an affidavit from the store owner and the store owner’s mother in support of this contention. The record indicated that the store owner was present at the store on October 16, 2018, when the first investigative visit occurred, as well as June 20, 2017, when the onsite visit for store authorization was conducted. While counsel argues that the store owner was not actively engaged in the store’s management, the record supports that she did sign the application for authorization, and accept responsibility for violations committed by employees as indicated above, which includes a permanent disqualification for trafficking.

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 requested a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i), but it did not provide any documentation to support this request. 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 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

October 24, 2019