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

Isis Grocery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0214917

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification against Isis Grocery (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), in its administration of the SNAP when it imposed a permanent disqualification against Appellant on September 3, 2019.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, "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 May 14, 2019, through June 24, 2019. The investigation determined that personnel at the Appellant firm accepted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash (trafficking) on two occasions as noted in the letter of charges. These transactions were deemed clearly violative and warrant a permanent disqualification. Additionally, the investigation determined that personnel at the firm accepted SNAP benefits in exchange for ineligible merchandise on five occasions. The items sold are best described in regulatory terms as common nonfood items such as a candle,

bar soap, shampoo, hair gel, facial cream, and a USB cable for a cell phone. The investigative report indicates that these violative transactions were handled by the same clerk.

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated August 22, 2019, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.6(e)(1). The letter of charges states, in relevant part, "As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking . . . is permanent disqualification." The letter also states that "under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of a permanent disqualification of a firm for trafficking."

Appellant, through its representative, responded to the charges in a phone call to the Retailer Operations Division on August 27, 2019, in which the unidentified clerk in the investigative report was identified as being the store owner. Written responses dated August 27, 2019, and September 3, 2019, which requested a CMP in lieu of permanent disqualification and included evidence in support of a CMP were also submitted by email. After giving consideration to the evidence, the Retailer Operations Division notified Appellant in a letter dated September 3, 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 also states that Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated ". . . you are not eligible for the CMP because you failed to submit sufficient evidence to demonstrate that your firm had established and implemented an effective compliance policy and program to prevent violations of the Supplemental Nutrition Assistance Program."

By letter dated September 5, 2019, Appellant, through its representative, appealed the Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted. No subsequent correspondence was received.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Section 278. In particular, Sections 278.6(a) and Part 278.6(e)(1)(i) 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 of SNAP benefits.

7 CFR § 271.2 states 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 § 278.2(a) states that: Coupons [SNAP 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 may not be accepted in exchange for cash, in payment of interest on loans, or for any other nonfood use.

7 CFR § 278.6(a) states that: 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)(i) reads, in part, "FNS shall . . . . [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined, in part, in 7 CFR § 271.2, as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone . . . ." Trafficking is further defined, in 7 CFR § 271.2, to include "(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food."

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."

7 CFR § 278.6(i) states, inter alia: "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)(ii) states, inter alia: "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)." Part 278.6(b)(2)(ii) further states that 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 Part 278.6(b)(1), the firm shall not be eligible for such a penalty.

In addition, 7 CFR § 278.6(i)(2) states in relevant part, "As specified in Criterion 3 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with this part 278 of current FNS regulations and

current FSP policy on the proper acceptance and handling of food coupons." This section goes on to state, "As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation." This section further states, "A firm which seeks a civil money penalty in lieu of permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted . . ."

APPELLANT'S CONTENTIONS

The following may represent a summary of Appellant's contentions 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 herein:

- The representative identified the unknown male clerk as being the store owner, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and stated that the owner conducted verbal meetings with his son to review the policies of FNS;
- A warning should be issued due to low-dollar ineligible items and low-dollar amount of cash exchanged for EBT benefits. The retailer did not profit from exchanging the cash and made very little profit from the ineligible items that were exchanged for EBT benefits;
- The owner reviewed the investigation report to determine the root cause for the violations and determined it to be management oversight due to exhaustion and long hours working at the store. The owner immediately reviewed SNAP regulations in order to understand the trafficking charge. The owner has taken necessary measures to prevent any future violations from re-occurring by enhancing the company's SNAP operational compliance policy and program. In addition to required annual training, he has implemented a quarterly meeting and training session to review the SNAP training guide and video. He has also displayed additional copies of the SNAP Fraud and Abuse poster in the store and included a printed copy of the SNAP Training Guide for Retailers in the management files and employee handbook;
- The firm had established and implemented an effective compliance policy to prevent future violations of the program, including videos and other available materials and resources provided by SNAP. The firm had also developed and instituted an effective training program for management and employees. Today [August 27, 2019], a special meeting was carried out to make sure all employees comply with SNAP rules;
- The amounts involved in the alleged violations were not intended to enrich the firm or the owner. Please let us know how we can resolve this situation without causing serious financial harm. The firm is a small grocery store serving mainly the local Hispanic community for many years;
- A civil money penalty in lieu of permanent disqualification is requested. The amount of the proposed penalty of $30,120 will result in a tremendous economic hardship to the retailer because the store does not generate enough income to bear the TCMP amount and it is requested that the size of the business be taken into consideration; and,
- The owner is fully committed to ensuring the firm remains in compliance post the investigation and requests consideration. SNAP accounts for approximately 40 percent

of sales so a permanent disqualification will most likely result in the firm going out of business and, since the firm is the owner's primary source of income, will result in the owner going on welfare.

Appellant submitted a copy of a training document dated January 15, 2018, and training logs for 2018, 2019, and a training schedule for 2020 in support of these contentions.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division and is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. In this case, store ownership has admitted to the trafficking of SNAP benefits. The Report of Investigation clearly shows the exchange of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash in Exhibits E and F.

Both the FNS SNAP retailer application and retailer reauthorization application contain a certification page whereby applicants must confirm their understanding of, and agreement with, SNAP retailer requirements in order to complete the application/reauthorization process. Store ownership certified its understanding and agreement to abide by program rules and regulatory provisions when it applied for authorization as a SNAP retailer.

The FNS investigative report shows that an employee of the Appellant firm, subsequently identified as being the store owner, transacted SNAP benefits for cash on two occasions. The transactions from the investigative report have been matched to SNAP transactions posted on the dates in question with no disagreements and a review of the investigative report shows no errors or discrepancies. There is evidence of involvement by the firm's ownership. The acceptance of SNAP benefits for cash is a violation of SNAP rules and regulations with the penalty for trafficking being permanent disqualification. There is no regulatory threshold for the exchange of SNAP benefits for cash and store ownership does not dispute that violations occurred or that SNAP benefits were exchanged for cash.

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification "shall be permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store." In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option.

Based on the discussion above, there is not any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR § 278.6(i) because 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 within the specified timeframe and because store ownership was responsible for the violative transactions. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

SNAP regulations are explicit in what constitutes substantial evidence. Specifically, 7 CFR § 278.6(i)(2) states in relevant part, "As specified in Criterion 3 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with part 278 of current FNS regulations and current FSP policy on the proper acceptance and handling of food coupons." This section goes on to state, "As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation." This section further states, "A firm which seeks a civil money penalty in lieu of permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted…".

Appellant did request a trafficking CMP and submitted a single training document dated January 15, 2018, as evidence in support of the trafficking CMP within the specified timeframe. Additional documentation was included with the request for administrative review which was submitted after the specified timeframe. A review of the additional documentation shows that it was most likely fabricated for the purposes of this administrative review. The documents show an employment date of July 27, 2012, for both the store owner and his son, the only other employee, with initial training occurring on January 15, 2018, and refresher training occurring on January 15, 2019, and August 22, 2019. Since the Appellant firm was authorized as a SNAP retailer on June 19, 2006, the employment date of July 27, 2012, makes no sense whatsoever and it also makes no sense for the initial training to occur years after the employment start date. It is also unlikely that refresher training was conducted on August 22, 2019, the day before the store owner received the FNS charge letter since he would have had no knowledge of the violations and therefore no basis to conduct refresher training only eight months after the previous refresher training was purportedly held. Additionally, Appellant's email dated August 27, 2019, submitted in response to the letter of charges mentions that the owner held a special meeting on August 27, 2019, to make sure all employees comply with SNAP rules, but this response makes no mention of refresher training occurring on January 15, 2019, or just five days earlier on August 22, 2019.

A possible explanation for these discrepancies may be that the dates listed were from another firm's training document that Appellant copied for the purpose of attempting to qualify for a trafficking CMP and that SNAP training was not actually being conducted at the Appellant firm. Appellant did not submit a copy of the firm's SNAP compliance policy and program or copies of any other written and dated statements of firm policy. Lastly, it is noted that since the store owner was identified as being the employee responsible for the violative transactions, that Criterion 4 of the trafficking CMP regulatory criteria was not met thus making the Appellant firm ineligible to receive a trafficking CMP. Based on the above, the Retailer Operations Division's decision not to impose a 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 that the program violations at issue did occur as charged and as admitted to by Appellant. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted by a USDA investigator, signed under penalty of perjury, 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 is specific and accurate with regard to the dates of the violations, the specific exchange of SNAP benefits for cash, and in all other critically pertinent detail. Additionally, the decision by the Retailer Operations Division that Appellant was not eligible for a trafficking CMP is also found to be correct.

Based on the discussion above, the determination by the Retailer Operations Division to impose a permanent disqualification against the Appellant business from participating as an authorized retailer in SNAP 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.

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

November 26, 2019