

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

J & R Food Mart,

Appellant,

v.

Case Number: C0203027

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 J & R Food Mart (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 J & R Food Mart.

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

J & R Food Mart was initially authorized to participate in SNAP on December 4, 2012. Between December 7, 2017, and January 10, 2018, USDA investigators conducted an undercover investigation of J & R Food Mart 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 February 21, 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 letter dated March 1, 2018. In this letter, the Appellant owner denied selling ineligible items for SNAP benefits and denied engaging in trafficking. It further claimed that on December 20, 2017, and January 10, 2018 (the dates of the two alleged trafficking violations), the firm did not traffic, but rather sold the investigator frozen pizzas and stated that there was no discrepancy in the daily inventory report. The Appellant also claimed that it questioned the clerk about the allegations, but the clerk denied any wrongdoing. The Appellant also checked its camera system to see if plastic cups were sold, but did not see such transactions. Finally, the Appellant requested copies of cash register receipts from the investigation. In support of its response, the Appellant provided several photographs of the store and a handful of inventory invoices and receipts.

After reviewing the Appellant's response, the Retailer Operations Division determined that the request for cash register receipts from the investigation constituted a request for information under the Freedom of Information Act (FOIA). This request was forwarded to the agency FOIA office for processing. FNS then completed its FOIA response on March 14, 2018. This response was delivered to the Appellant on March 16, 2018.

In a letter dated May 24, 2018, attorney **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** notified the Retailer Operations Division that he was now representing the Appellant in this matter and requested additional time to present a more detailed response to the charges. On June 29, 2018, Appellant's counsel submitted a four-page brief outlining further contentions in the case, including the argument that the agency's investigative record does not include proof that cash was exchanged. Appellant's counsel also argued that the purchase of plastic cups cannot be a violation of SNAP regulations. Finally, the Appellant, through counsel, contended that the assessment of a permanent disqualification is arbitrary and capricious and an abuse of agency discretion. It stated that a permanent disqualification is "grossly disproportionate to the allegations presented, without more proof."

After considering the Appellant's responses and further analyzing the evidence in the case, the Retailer Operations Division issued a determination letter dated July 9, 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 17, 2018, 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:

- (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 December 7, 2017, and January 10, 2018, the USDA completed six compliance visits at J & R Food Mart. A report of the investigation was provided to the Appellant as an attachment to the February 21, 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 four of the six visits and included trafficking violations on the last two visits as noted in Exhibits E and F. The report noted that the following ineligible non-food items were purchased by an investigator using SNAP benefits:

- One 16-count package of 16-ounce plastic cups (*Party Essentials* brand), Exhibit B
- One 16-count package of 16-ounce plastic cups (*Party Essentials* brand), Exhibit C
- One 16-count package of 16-ounce plastic cups (*Party Essentials* brand), Exhibit E
- One 16-count package of 16-ounce plastic cups (*Party Essentials* brand), Exhibit F

Trafficking was reported during the fifth and sixth compliance visits, which took place on December 20, 2017, and January 10, 2018. In reporting the first trafficking violation, the USDA investigator provided the following details, as noted in Exhibit E:

I brought the items to the counter and gave the clerk the EBT card. He totalled the items and processed the total under the SNAP account. I asked him for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash. He asked where I worked. I gave him a cover story. He then said that it was going to be "2 pizza for \$9.99 each." I told him that I didn't care and whatever he wanted it to be. He processed 5 U.S.C. § 552 (b)(6) & (b)(7)(C) under the SNAP account. He gave me the receipts and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) wrapped up in the receipts. He took the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) from the cash register. I left the store.

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

I brought the items to the counter and gave the clerk the EBT card. He totalled the items. I told him that I wanted 5 U.S.C. § 552 (b)(6) & (b)(7)(C). He indicated that I should allow him to take care of the customer behind me. I moved aside. He took care of the customer. I moved back to the counter. He totalled the items. I told him to give me 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash. He said, "that will be 2 pizzas." I said okay. He added "9.99" twice to the total. He processed the final total under the SNAP account. He took out 5 U.S.C. § 552 (b)(6) & (b)(7)(C) from the cash register and gave me, along with the receipt. I left the store.

The report noted that the investigator attempted to purchase plastic cups with SNAP benefits in Exhibit D, but the clerk on duty, who was different from the clerk in the other exhibits, did not allow the purchase. In Exhibit A, the investigator did not attempt to commit any violations.

The report noted that the same clerk conducted all four violative transactions during the investigation.

APPELLANT'S CONTENTIONS

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

- To establish that a store violated SNAP regulations, FNS must provide records which show that the firm accepted SNAP benefits as payment for ineligible items or exchanged for cash. It must be proven that the transactions at the Appellant firm fall within these criteria to disqualify it from SNAP participation.
- The Appellant denies the allegations of trafficking.
- The only proof provided by FNS are photographs of the items purchased. There is no photographic evidence to indicate the receipt of cash.
- Because the allegations in Exhibits E and F imply that pizzas were rung up in the cash register but not actually sold, the Appellant owner reviewed his inventory for any anomalies, but found none.
- The Appellant owner has been in business at the same location for approximately six years and he properly trains his staff regarding SNAP. He recognizes that the exchange of cash for EBT benefits can be a problem, and has employed a security guard to monitor activities outside the store to deter potential violations.
- FNS charges that the investigator purchased plastic cups with SNAP benefits. However, the purchase of these items cannot be a violation of the regulations. Fountain drinks are eligible for purchase under SNAP regulations as long as the drink is not consumed on the store's premises. Therefore, stores with fountain drink machines are allowed to sell fountain drinks within the rules of the regulations. Fountain drinks have to be sold in a cup, which is part of the wholesale price of the drink. In this instance, the Appellant does not have a fountain drink machine. As a result, they offer their customers the ability to purchase a bottled drink along with a plastic cup to use at their desired destination. This is no different from a store who offers cups for its fountain drink machines. In one instance, FNS is allowing conduct to fall within the regulations, yet in another instance, it charges that the sale is a violation of the regulations. FNS should not punish the Appellant for not having the ability to offer fountain drinks.
- The firm has never had any previous issues or violations with USDA and contends that the allegations are not enough to disqualify it from SNAP.
- The agency's assessment of a permanent disqualification is arbitrary and capricious and an abuse of agency discretion. Permanent disqualification is grossly disproportionate to the allegations presented, without more proof.

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 that the violations did not occur as described in the report of investigations. The Appellant has disputed the allegations of trafficking, stating that the clerk in question has denied any wrongdoing and claiming that it could not find any discrepancy in the number of pizzas sold on the days that trafficking violations allegedly took place. However, 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 administrative action should be reversed. Assertions of innocence, by themselves and without supporting documentation, do not constitute valid grounds for dismissal of the trafficking charges. Conversely, the Retailer Operations Division has submitted ample evidence, including a detailed investigation report, photographs of the items purchased, and transaction receipts, to prove that violations did occur as charged. All of this evidence was provided to the Appellant in response to its FOIA request. A review of the documentation in this case 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.

While the Appellant anecdotally claims that it did not engage in trafficking, the evidence in this case overwhelmingly favors the Retailer Operations Division and strongly suggests that trafficking violations did occur as charged.

Penalty is Arbitrary and Capricious

The Appellant, through counsel, has argued that the allegations listed in the investigation report are not enough to disqualify the firm from SNAP and claims that a permanent disqualification is grossly disproportionate to the allegations presented, without more proof. The Appellant further contends that the agency's assessment of a permanent disqualification is arbitrary and capricious and an abuse of its discretion. The Appellant also contends that the firm has been in business for more than six years without being cited for any program violations.

With regard to these contentions, SNAP regulations at 7 CFR § 278.6(e) necessitate that when serious violations, such as trafficking, occur, permanent disqualification is the required penalty, even on the first occasion, regardless of a firm's prior compliance with program rules.

Additionally, the regulation does not allow for a lesser penalty for trafficking violations involving small dollar amounts. As for the element of proof, the evidence in this case substantially favors the Retailer Operations Division, particularly since the Appellant has offered no relevant evidence to counter the allegations of trafficking.

Based on the investigation report and other evidence provided by the agency, it is the finding of this review that the Retailer Operations Division took appropriate action in its imposition of a permanent disqualification against J & R Food Mart. The administrative action taken by the agency fully conforms to SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations. Accordingly, this review finds that the Appellant's claims that the agency's actions were arbitrary and capricious and an abuse of agency discretion are without merit.

Plastic Cups

The Appellant, through counsel, has presented an unusual argument that the sale of plastic cups in exchange for SNAP benefits cannot be a violation of the regulations. The Appellant's rationale for this argument is that fountain drinks, which are eligible for purchase with SNAP benefits, are sold in a cup, which is part of the wholesale price of the drink. The Appellant argues that USDA is essentially allowing firms with fountain drink machines to sell cups, while stores without a fountain drink machine, such as J & R Food Mart, cannot sell cups, even if a customer purchases a bottled drink at the same time. According to the Appellant, FNS should not punish the Appellant for not having the ability to offer fountain drinks.

This review finds such a contention to be entirely without merit. Regulations have never permitted a nonfood item, by itself, to be purchased with SNAP benefits. In the case of a fountain drink, the cup and the beverage cannot be considered separate items any more than a bottle or carton of a certain drink could be separate from the drink itself. Similarly, FNS would not permit a firm to sell empty boxes to a customer using SNAP benefits just because it allows boxed or canned food items to be purchased with such benefits. There are no circumstances in which a non-food item, by itself, would be eligible for purchase with SNAP benefits. As such, the Appellant's argument has no relevance to the matter at hand.

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, selling, or effecting an exchange 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 trafficking violations did occur at J & R Food Mart 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. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(1), the decision to impose a permanent disqualification against the Appellant, J & R Food Mart, 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

February 11, 2019