

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

La Gran Placita Meat Market,

Appellant,

v.

Case Number: C0196490

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 there is sufficient evidence to support a finding that a permanent disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against La Gran Placita Meat Market (Appellant), by the Retailer Operations Division (Retailer Operations).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a), 7 CFR § 278.6(e)(1)(i) and 7 CFR § 278.6(i) in its administration of the SNAP when it imposed a permanent disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7, may file a written request for review of the administrative action with the FNS.

CASE CHRONOLOGY

By Charge letter dated September 18, 2017, Retailer Operations informed Appellant it was charged with violating the terms and conditions of the SNAP regulations based on trafficking violations noted in Exhibits C and E, determined by a USDA investigation conducted from June 5, 2017 through June 26, 2017. On September 19, 2017, the charge letter was rescinded due to an administrative error, and a new Charge letter was sent to the retailer.

Counsel responded to the Charge letter by letter dated October 2, 2017, which included a FOIA request. The FOIA reply was issued October 5, 2017. Counsel appealed this FOIA response by

letter dated October 25, 2017. By letter dated January 23, 2018, counsel noticed Retailer Operations that he had filed a FOIA appeal. The FOIA office provided a reply to the FOIA appeal by letter dated September 8, 2020. Counsel provided a response to the Charge letter dated September 18, 2020. By Determination letter dated October 7, 2020, Retailer Operations informed Appellant that it was permanently disqualified from participation as a retail food store in the SNAP in accordance with Section 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter states that the store was not eligible for a trafficking CMP according to the terms of Section 278.6(i) because the firm failed to submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

By letter dated October 8, 2020, counsel requested administrative review. The appeal was granted by letter dated November 10, 2020. By email dated January 8, 2021 counsel stated he did not receive the November 10, 2020 letter, which is office noticed was sent to an incorrect email. Counsel was granted to January 29, 2021 to email any additional information. No further information was received by this office.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing credible, 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 not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the Act), 7 U.S.C. § 2021, and § 278 of Title 7 of the Code of Federal Regulations (CFR).

7 CFR § 271.2 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;”... (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.”

7 CFR § 278.6(b)(2)(ii) states: “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(c) states in part: “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.”

7 CFR § 278.6(e)(1)(i) states: FNS shall disqualify 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, 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 § 278.6(i) states: “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 THE CHARGES

The USDA conducted a compliance investigation of Appellant. Appellant was charged with conducting trafficking transactions as described in Exhibits C and E provided with the Charge letter. The penalty for trafficking is permanent disqualification.

APPELLANT’S CONTENTIONS

The following may represent a summary of the contentions presented. In reaching a decision, full attention and consideration have been given to all contentions presented, including any not specifically recapitulated.

- The retailer denies the allegations and to preserve his rights under Section 278.6 of the SNAP regulations, he requests a civil money penalty in lieu of permanent disqualification.
- Disqualification from SNAP would cause hardship to SNAP households; there is no other authorized store in the area selling as large a variety of staple foods at comparable prices.
- The Retailer Operations Division took action inconsistent with Title 7 of the CFR Section 278.6 (a), (c), and (e)(1)(i) when it imposed permanent disqualification against the owner.
- The finding of trafficking is not predicated on the classic scenario where benefits are exchanged for cash with my client being the person who is identified as directly involved, i.e. the card is given to the vendor by government agent, the vendor submits an arbitrary amount to the USDA for payment, and the proceeds are divided with the alleged recipient.
- The finding of trafficking is predicated on data derived from the pattern of transactions between a federal agent and a clerk at my client’s business. At no time in the documents accompanying the charge letter is there a reference to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as being the one who participated in the suspect transactions.

- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was not the person who engaged in the transactions nor was he present when the complained about behavior allegedly took place. During the relevant time periods in question 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was on an extended vacation in the Dominican Republic. He named 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as the manager of the business while he was gone. After taking possession of the store 5 U.S.C. § 552 (b)(6) & (b)(7)(C) saw an opportunity to line her pockets and assumed illegal control and possession of the firm. This was done without the consent or agreement of 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- Once she took possession of the store chaos reigned supreme at the store. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) began to engage in all types of improper and even illegal behaviors. The end result is that when 5 U.S.C. § 552 (b)(6) & (b)(7)(C) returned he found that she had stolen checks from the business and was benefitting herself to the detriment of his business. To protect himself and his business 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was forced to change the locks on the business. (See the legal pleadings in the matter.)
- It is black letter law that FNS may disqualify a firm from participation in the SNAP program if "...personnel of the firm have trafficked..." (7 CFR Section 278.6 (e) (1) (i)). The courts have upheld the disqualification imposed by FNS when it is factually clear that the owner or his employee committed the charged offense.
- The person who engaged in the alleged misdeeds was acting beyond the scope of the duties delegated to her. As such she was no longer acting as an employee of his firm. Since it was not 5 U.S.C. § 552 (b)(6) & (b)(7)(C) who engaged in the corrupt practices at the business location he cannot be disqualified on the basis of what 5 U.S.C. § 552 (b)(6) & (b)(7)(C) did or did not do.
- The factual predicate that would sustain the Retailer Operations Division is missing. I would appreciate it if you would overturn the decision and permit my client to participate in the SNAP once again.

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or to invalidate the decision of Retailer Operations. This review is limited to the facts at the basis of Retailer Operations' determination at the time it was made. The regulations establish that an authorized retail food store may be disqualified from participating in the SNAP when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. The Charge letter Exhibits recount the details of the two violative exchanges by the store personnel who exchanged cash with the investigator for items that the investigator acquired with SNAP benefits.

The store owner is accountable for the proper training of staff, and the effective monitoring and handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons whom the owner 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. The regulations establish that an authorized food store may be disqualified from participating in the SNAP when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf.

In the present case, on two occasions, the investigator approached store personnel, who engaged in the exchange of cash for items acquired by the investigator using SNAP benefits. A review of the case evidence has yielded no indication of error or discrepancy in the investigative report. The record is specific with regard to the dates of the violations, the conversations relative to the exchange of cash by the clerk with the investigator to acquire items that the investigator purchased with SNAP benefits. The preponderance of evidence in the record supports that trafficking, as described in the regulations, did occur at Appellant. The regulations stipulate the FNS shall disqualify a firm permanently if firm personnel have trafficked as defined in § 271.2.

CIVIL MONEY PENALTY

The regulations at Section 278.6(i) specify the criteria for a firm's eligibility for a CMP in lieu of permanent disqualification for trafficking. A firm must submit a timely request for a CMP that shows substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. The standard of substantial evidence is difficult to meet, indeed impossible if such policy and program are not implemented and documented prior to the violations. Nevertheless, such is the standard required by the regulations, and to which Appellant is held during the course of this review.

Counsel contends:

- The owner has owned the business for nearly three years, and this is the first time he has been cited for any type of violation of the SNAP.
- The compliance policy and program were in effect since 2014 when the owner first purchased the business. The fact that he successfully operated the store for almost seventeen years prior to the incident in question is proof of the efficacy of the policy and program.
- During his ownership **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** has employed one full time employee. Since being authorized he has ensured that each individual that worked the register has a firm grasp on what is allowed under the SNAP regulations and clearly knows how to handle SNAP. All of his employees are trained shortly after being hired and the owner continues to monitor the employees until they exhibit a firm grasp of the precepts noted therein.
- The owner 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.

Retailer Operations determined that Appellant did not meet the regulatory criteria for a CMP in lieu of permanent disqualification. On review, the record supports that Appellant did not submit substantial evidence to support the criteria for a trafficking CMP in lieu of permanent disqualification. Therefore, it is decided that Retailer Operations properly applied the applicable regulations, and correctly denied a trafficking CMP.

CONCLUSION

The investigative report supports the trafficking transactions on the stated dates on the cited Exhibits. The preponderance of the evidence supports that SNAP violations did occur at

Appellant. The denial of a trafficking CMP is also properly documented and in accordance with the applicable regulations. The permanent disqualification of Appellant as a SNAP retail food store is therefore sustained. The effective date of this decision is 30 days after delivery of the decision to Appellant.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023), and to 7 CFR § 279.7 of the regulations with respect to applicable rights to judicial review of this decision. 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 where 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 delivery 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.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

February 9, 2021