

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

La Morenita LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0210823

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 Morenita LLC (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 Food and Nutrition Service (FNS).

CASE CHRONOLOGY

By Charge Letter dated June 15, 2020, Retailer Operations informed the owners that Appellant was charged with violating the terms and conditions of the SNAP regulations. This was based on a violation during a Ohio Department of Public Safety investigation from September 14, 2018 through September 27, 2018. Retailer Operations granted counsel an extension to respond to the Charge Letter by letter dated June 25, 2020, that also states: “ The time to request a civil money

penalty in lieu of permanent disqualification and to provide the documentation to support such a request has not been extended.”

Counsel responded to the Charge Letter by letter dated June 26, 2020, addressed and mailed to an incorrect location. By Determination letter dated July 27, 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 civil money penalty (CMP) according to the terms of Section 278.6(i) because the firm failed to submit evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

By letter, again dated June 26, 2020, counsel appealed Retailer Operations’ July determination, and requested administrative review. The appeal was granted by letter dated August 18, 2020.

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(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(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(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

Appellant was investigated by the Ohio Department of Public Safety. On September 14, 2018, a Confidential Informant exchanged SNAP benefits for cash in violation of Section 278.2(a) of the SNAP regulations. Appellant was charged with trafficking, as defined in Section 271.2 of the regulations. As provided by Section 278.6(e)(1) of the regulations, the sanction for the trafficking violation is permanent disqualification.

APPELLANT’S CONTENTIONS

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

- We request the denial be reversed and allow La Morenita to be approved for a CMP. A disqualification would cause hardship to participating households.
- No extensions were allowed to permit a CMP, disallowing the severity and unanticipated circumstances beyond the control of the owners as well as reasonable time to prepare by the attorney. Attorney pleaded that the Pandemic was an emergency that caused all agencies and businesses unable to address normal work responsibilities; he cited Governor of Ohio orders to shut down businesses and allowed only essential businesses to provide [sic]. The agent refused any additional time to prepare a response to the notice of violation to allow a CMP instead of denial.
- After an initial review, the Attorney determined that an additional reason for allowing the CMP, was the hardship exception of participating households. Attorney requested a hardship exception under 7CFR Sect 278 3.91(b)(3)(i) FNA [sic].
- The statement describes how the owners were unaware of the SNAP violation and it is totally against their policy and training and the agreement. [Exhibit D; Business Agreement Exhibit E].

- The State of Ohio, Division of Liquor Control and Department of Public Safety Enforcement conducted the investigation of September 14, 2018. The owners were served with summons by the Ohio Liquor Control Division for the same violations. The adjudicating Ohio Commission heard pleadings, reviewed all documents and adjudicated in favor of CMPs and the case was closed, specifically citing that it is the first and only violation for La Morenita LLC.
- The store is currently in compliance under SNAP. The owners have complied with the SNAP FN The Required Training and Certification, including reviewing the Training Guide for Stores and videos posted on the FNS SNAP Website. The Policy statement of Commitment and Annual Training Certification and Posting of SNAP Requirements Signs are attached. [Exhibit H]
- The owners have paid the SNAP Benefits owed amount **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** sent on August 5, 2020.
- Closing the store if SNAP is denied would cause great hardship to Participating Households. The City of Hamilton in one of the poorest metropolitan areas in Ohio and Hamilton City Center the neighborhood the store serves is a very impoverished and depressed area with many households living below the poverty level. [Exhibit J] Closing it would create an urban food desert with no readily available food store.
- This correspondence is a response to your letter from USDA dated June 1, 2020 [sic] charging La Morenita LLC with a violation of FDA [sic] EBT violation. We are received an extension of the 10 calendar day deadline [Exhibit C].
- This violation charge relates back to the investigation of September 14, 2018 by the Ohio Division of Liquor Control as served by the Ohio Department of Public Safety Enforcement. See the Hearing Notice of May 21, 2019 summoning my clients to a hearing on two violations Cases 420-19 and 421-19 [Exhibit D]. At the Hearing, the Ohio Liquor Commission issued Order for case 420-19 and 421-19 [Exhibit E and F]. The Program Administrator provided the previous documents and a full record, including the Improper Conduct which constituted the EBT violation.
- The violations were fully litigated on June 12, 2019 and the Commission issued the orders dismissing the one violation and setting a penalty sanction for the other. This penalty was paid timely and met the satisfaction of the Ohio Liquor Control Commission.
- All documentation was submitted to the investigating officers and prosecutor managing the case. Our client understood the violation by a temporary worker and has since complied with all the requirements.
- We ask that you waive the sanctions presented in the letter as a single occurrence and one which was fully litigated by the USDA Official Representatives in Ohio and subjected to the full force and sanction of the State of Ohio Department of Commerce.
- Because of the limited tie [sic] to prepare, we will provide further support: an affidavit from the owners as to the application and initiation of the SNAP program in their very small business store. We will provide you with this affidavit and further documentary evidence in support.

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 Program 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 provided the details of the violative exchange of cash for SNAP benefits. By regulation and statute, an extension cannot be given to provide the documentation in support of a trafficking civil money penalty in lieu of permanent disqualification. The Charge Letter is clear that "no extension of time can be granted for making a request for a CMP or for providing the required documentation." As noted, Retailer Operations did grant an extension to furnish a reply to the Charge Letter.

The transaction cited in the Charge Letter is documented in the record. A review of this documentation has yielded no indication of error or discrepancy in the reported findings. Rather, the investigative record is specific and accurate with regard to the date of the violation, and the exchange of cash for SNAP benefits. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper 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, as amended, and the enforcement efforts of the USDA. 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 because of the wrongful conduct of an owner, manager, or someone acting on their behalf. Ownerships' contention that they did not know of or conduct any violations of Program regulations themselves cannot be accepted as a valid basis for diminishing the regulatory sanction.

The regulations at 7 CFR § 278.6(f)(1) state: "A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification." Thus, arguments as to household hardship are not on point. The data shows that there are 24 authorized retailers within a one mile radius of Appellant, including a super store. As such the claim that Appellant is in a food desert is not supported by the evidence in the record.

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 7 CFR § 271.2. The preponderance of the evidence under review supports that the permanent disqualification was properly applied. Retailer Operations confirmed that a fiscal claim payment **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** has been paid in full. The retailer account record has been updated to reflect said payment.

CIVIL MONEY PENALTY

The regulations at Section 278.6(i) specify the criteria for a firm's eligibility for a civil money penalty 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.

The trafficking transaction occurred on September 14, 2018. The policy statement submitted is dated August 5, 2020, clearly after the violative trafficking occurred. The submitted "Reminder to Store Owners – SNAP Training Expectations" from the USDA website shows checkmarks on point 2, items "a" through "e." This section specifically states training must occur within 30 days of employment for all new employees and that it must be documented. No training documentation was submitted for review. Thus, even had the documentation been submitted, within 10 days, as specified in § 278.6(b)(1), Appellant would not have qualified for a trafficking CMP based on this submission.

The record supports that Appellant did not submit timely, substantial evidence to support the criteria for a trafficking CMP in lieu of permanent disqualification, as required by the regulations. Retailer Operations applied the applicable regulations, and properly denied a trafficking CMP.

CONCLUSION

The preponderance of the evidence supports that the cited trafficking transaction, on the stated date, occurred at Appellant. The permanent disqualification of Appellant as a SNAP retail food store is therefore sustained. The effective date of this decision is thirty (30) days after delivery of the decision to Appellant. Please contact Rebekah Hilty at (334) 523-2315 with any operations questions.

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 owners reside or are 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

September 17, 2020