

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

**La Zapopan, Inc,**

**Appellant,**

**v.**

**Office of Retailer Operations and  
Compliance,**

**Respondent.**

**Case Number: C0192682**

**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 Zapopan, Inc. (Appellant), by the Office of Retailer Operations and Compliance (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. § 2021 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 FNS.

**CASE CHRONOLOGY**

By Charge letter dated November 16, 2017, Retailer Operations informed the owners that Appellant was charged with violating the terms and conditions of the SNAP regulations based on a USDA investigation conducted from September 12, 2017 through October 3, 2017. The record shows counsel made a FOIA request dated November 27, 2017. The agency replied to the FOIA

with information and a cover letter dated February 26, 2018. Counsel filed a FOIA appeal dated May 24, 2018. The agency replied to the FOIA appeal August 21, 2019.

Retailer Operations sent counsel a ten day Charge letter reply letter delivered August 29, 2019. Counsel replied on September 9, 2019. By Determination letter dated October 17, 2019, Retailer Operations informed Appellant that it was permanently disqualified from participation as a retail store in the SNAP, and 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.

The owners, via counsel, appealed Retailer Operations' determination and requested administrative review by letter dated October 28, 2019. The appeal was granted by letter dated December 12, 2019. By email dated January 2, 2020, counsel provided a brief.

### **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 actions should be reversed. That means the Appellant has the burden of providing credible, relevant evidence which 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 U.S.C. § 2021(b)(3)(B) states: "...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 § 278.6(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**

The USDA conducted a compliance investigation of Appellant. The investigative report details the results of six compliance visits. Appellant was charged with trafficking in Exhibits B and F. The penalty for trafficking is permanent disqualification. Exhibits A, B, C, D, E, and F also show that Appellant sold ineligible nonfood items including: light bulbs, fidget spinners, paper towels, and envelopes.

### **APPELLANT’S CONTENTIONS**

In reaching a decision, full attention and consideration have been given to all contentions presented, including any not specifically recapitulated.

- The Appellants deny the allegations of trafficking. The Store has a policy against trafficking. Without corroborating evidence on the part of the Department, this matter boils down to contradictory statements.
- The Investigator’s affidavit is “hearsay” by definition.
- There has been no disclosure of the identity of the undercover investigator. As such, a determination as to whether or not the declarant had an interest or was biased is virtually impossible. The investigator is paid by the Department to find SNAP violations, so in that way there is an argument that he is inherently biased. But without knowing the identity of the person, there would be no way for the store to determine if the investigator had any personal bias or interest against the store beyond his/her professional duties.
- The information presented by the investigator is inconsistent and uncorroborated. The items that he/she allegedly purchased are all fully documented, except the cash. Given that there are no regulations or guidelines to instruct an undercover investigator to not take pictures of the cash, his/her statements regarding trafficking are inconsistent with their documentation.
- The evidence relied upon [sic] the Department is without sufficient support and the charges come without credible information upon which the Department could possibly rely.
- What the Department released in response to a FOIA request was a seemingly incomplete investigation report with no corroborating evidence. While the documents show illegible

pictures of transaction receipts, they have little to no information pertaining to the trafficking that allegedly occurred.

- The photographs taken by the investigator that are dated September 14, 2017, fail to capture either the receipt or the alleged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) that was trafficked. Furthermore, the alleged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in trafficked benefits from October 3, 2017 fails to capture an image of the trafficked bills. There is no way to verify that the bills that the Department claims were involved in the transaction ever existed. It is accordingly an insurmountable high burden for the retailer to dispute these transactions where the bills are never produced by the Department, the bills may not actually exist, and there is no contemporaneous evidence showing the bills were from the same transaction.
- There is no operating procedure or handbook (as far as we are aware) that prohibits an investigator from documenting the cash, and given that investigators document everything else, this absence is glaring.
- In addition to the absence of corroborating photographic evidence of the bills, there is no disposition report for it either. For every other item purchased at the store, a disposition report was documented by the investigator. For example, the items purchased in Exhibit B on September 14, 2017 appear to have been donated on the same date, as documented by CH46202. Yet, there is no mention of the cash that was allegedly received.
- Likewise those items from Exhibit F were also not documented, despite the fidget spinners and soda being donated on October 5<sup>th</sup>. The investigator's statements are conspicuously uncorroborated.
- There are no reasons or explanations in the Investigator's affidavits as to why the Investigator sometimes received a general receipt along with an itemized receipt for a transaction and in other investigations only received a general, non-itemized one, or why some of the transactions are broken into smaller ones and the others completed as a single transaction. As such, these unexplained inconsistencies with the Investigator's report presents even more questions with regard to the validity of the investigation itself and the reliability thereof.
- What is more likely is that the Investigator has a personal interest in obtaining proof of trafficking, and simply manufactured a transaction that did not occur as it is alleged to have.
- The Department appears to lack sufficient evidence upon which to base an allegation of trafficking against the Appellants.
- The evidence relied upon the Department is without sufficient support and the charges come without credible information upon which the Department could possibly rely.

## ANALYSIS AND FINDINGS

The purpose of this review is to either validate or to invalidate the decision of Retailer Operations. It is limited to the facts in the record 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(s), manager(s), or someone

acting on their behalf. Regardless of whom the owner(s) of a store may utilize to handle store business, the owner(s) is accountable for the proper handling of SNAP benefit transactions.

Exhibits B and F give the details of the trafficking violations at Appellant when a firm employee exchanged cash for SNAP benefits. Violations of the sale of ineligible nonfood items for SNAP benefits were cited in all the Exhibits in the record. The sale of nonfood items carries a penalty of term disqualification which is subsumed under the permanent disqualification penalty for trafficking.

The record shows that via the certification portion of the report of investigation, the investigator signed a statement asserting that the facts stated in the declaration are true to his/her knowledge, and that if he/she was called to testify as a witness in any proceeding, he/she is competent to testify to the matters stated therein. The investigative report also states that the investigator declares under penalty of perjury the details of the transactions are true and correct.

Counsel states that the corroborating evidence of the alleged cash exchange is missing from the report; specifically, there are no photos of the cash given to the investigator, nor are there any disposition reports for said money. While there are no photos of the cash/bills received by the investigator from the same clerk during two different store visits, the report does state the serial numbers and series of the trafficked cash received in the identified trafficking Exhibits. The cash's serial numbers and series numbers support that the bills did exist. Moreover, according to the October 10, 2017, investigative report, the investigator signed a statement under penalty of perjury that the declarations made in the report were true and correct. There are no SNAP regulations that require that photos of cash transacted during trafficking investigations must be taken. The claim that the investigative report is unreliable because there is no photograph of the cash bills trafficked at Appellant is unpersuasive. The report provides the serial number from the recovered cash bills as required by the agency. The agency does not photograph cash recovered in trafficking investigations.

Counsel states there are no explanations in the investigator's Exhibits as to why the investigator sometimes received a general receipt along with an itemized receipt for a transaction, and on other store visits only received a general, non-itemized receipt, or why some of the transactions are broken into smaller ones and others completed as a single transaction. While these comments may raise questions, the way in which the investigator received the receipts was not up to him/her. Appellant's clerks distributed the receipts as reported. It is not the purview of the investigator to question the actions of store personnel. Exhibit A, does evidence that there were two separate transactions for two different amounts. Likewise Exhibit B shows two transactions, one for "items purchased," and another one described as a trafficking 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.

On May 24, 2018, counsel submitted a FOIA appeal that raised the following challenges:

1. Improperly withheld information as it pertains to the invasion of personal privacy;

2. Improper application of FOIA Exemption (b)(7)(C) to an officer, agent, investigator, or investigative assistant including the time of entry and departure from the retailer's store; and
3. Failure to provide pictures of the cash "bills" referenced in the investigation.

The agency considered and responded to each FOIA challenge in writing and determined it had produced all relevant responsive records in this matter.

The regulations stipulate "FNS shall disqualify a firm permanently if personnel of the firm 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 civil money penalty in lieu of permanent disqualification for trafficking. A firm must submit a request for a trafficking civil money penalty that shows substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

Contentions:

- Here, an effective compliance policy and program is reflected by the Store's clerk during the September 20<sup>th</sup>, September 26<sup>th</sup>, and September 29<sup>th</sup> investigations, wherein said clerk outright refused to traffick SNAP benefits.
- The administrative operations of the Store are relatively limited, with less than a handful of employees having ever operated the cash register. However, each employee has been trained to implement the SNAP program and accept EBT payment since the Store started accepting EBT payments. This training included a disclosure of the Store's policies regarding violations of the SNAP regulations, and a complete guide for what transactions were permissible, what items were eligible, and how/when payments could be accepted.

The record does not present corroborating documentation to support the contentions noted herein. The record supports that Appellant did not submit substantial evidence for a trafficking, CMP in lieu of permanent disqualification. As such, Retailer Operations properly applied the applicable regulations and denied a CMP.

### **CONCLUSION**

The preponderance of the evidence supports that program violations did occur at Appellant. The investigative record is specific and accurate with regard to the dates of the violations. The exchange by store personnel of cash for SNAP benefits is a violation of the regulations at 7 CFR § 271.2. Trafficking carries a sanction of permanent disqualification. The sale of ineligible items at Appellant on multiple visits is subsumed in the trafficking violation. The permanent

disqualification of Appellant as a SNAP retail food store is herein sustained. This decision is effective 30 days from receipt of such.

### **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 determination. 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 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.

M. Viens  
ADMINISTRATIVE REVIEW OFFICER

January 27, 2020