

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

Living Water,

Appellant,

v.

Case Number: C0202013

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 Living Water by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against Living Water on September 18, 2018.

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

The USDA conducted an investigation of the compliance of Living Water with Federal SNAP law and regulations during the period October 4, 2017 through December 6, 2017. The investigation report documents that personnel at Living Water, in addition to accepting SNAP benefits in exchange for ineligible items on four occasions, also exchanged SNAP benefits for cash during two undercover compliance visits. The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR § 271.2.

As a result of evidence compiled from this investigation, the Retailer Operations Division informed the Appellant, in a letter dated August 15, 2018, that it was charged with violating the terms and conditions of the SNAP regulations. The Charge Letter along with a copy of the investigation report was delivered by UPS on August 16, 2018. The letter stated, in relevant part, that:

“Your firm is charged with trafficking, as defined in Section 271.2 of the SNAP regulations. As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for the trafficking violation(s) ... is permanent disqualification”.

The Charge Letter also stated that:

“...under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000.00 in lieu of permanent disqualification of a firm for trafficking. The SNAP regulations, Section 278.6(i), list the criteria that you must meet in order to be considered for a CMP. If you request a CMP, you must meet each of the four criteria listed and provide the documentation as specified within 10 calendar days of your receipt of this letter”.

The Appellant did not respond to the charges outlined in the August 15, 2018 Charge Letter. After giving consideration to the evidence in this case, the Retailer Operations Division informed the Appellant, by letter dated September 18, 2018, that Living Water was permanently disqualified from participation as a retail store in the SNAP. The letter also stated that the Appellant was not eligible for a trafficking CMP as the Appellant did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked September 26, 2018, the Appellant, through counsel, requested an administrative review of the permanent disqualification determination. FNS granted the Appellant’s request for administrative review by letter dated October 4, 2018.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is covered 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 ... [Emphasis added.]

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.

7 CFR § 271.2 states, in part:

Trafficking means the buying or selling of coupons, ATP cards or other benefit instruments for cash or consideration other than 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 ...

7 CFR §278.6(i) states, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 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

In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in §278.6(i)(1); and

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in §278.6(i)(2); and

Criterion 4. Firm ownership 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; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm

7 CFR § 278.6(b)(2) states, in part:

(ii) 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 as specified in § 278.6(i), 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). [Emphasis added.]

(iii) 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. [Emphasis added.]

SUMMARY OF CHARGES

During an investigation from October 4, 2017 through December 6, 2017, the USDA conducted six compliance visits at Living Water. A report of the investigation was provided to the Appellant as an attachment to the Charge Letter dated August 15, 2018. The investigation report included Exhibits A through F which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations occurred during six of the six compliance visits. During two of the compliance visits, a clerk exchanged cash for SNAP benefits as documented by Exhibits E and F. The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR § 271.2.

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the administrative review request postmarked September 26, 2018, the Appellant, through counsel, made the following summarized contentions, in relevant part:

- Although the Charge Letter was delivered to the store, the owner had limited English proficiency and failed to realize the serious nature of the charges outlined in the Charge Letter.
- The Appellant is not contesting the charges. It realizes that mistakes were made and the immediate need to make changes to how it operates the business.

- Living Water is a small market so changes can easily be implemented. The owners handle the majority of the cashier responsibilities. There is only one other employee who has cashier responsibilities. This employee has already been advised of the SNAP policies and regulations. Further, SNAP sales represent only a small percentage (less than 10%) of the store's revenues so there is little incentive to violate the SNAP regulations in the future. The owners want to stay clean and avoid future problems and financial penalties. Also, both owners and the cashier have reviewed the written "SNAP Training Guide for Retailers" available on the USDA website. The owners have implemented a new training policy requiring that any future employees review the Training Guide and also review the training video available on YouTube.
- The owners have operated this business for the last five years. This is the first time that the Appellant has had any problems with the SNAP. Also, there have been no prior warnings, violations, or reports.
- The Appellant requests that FNS restore its SNAP/EBT privileges.
- In lieu of a permanent disqualification from the SNAP, the Appellant requests that a civil money penalty be imposed.

In support of these contentions, the Appellant provided FNS with a copy of the "SNAP Training Guide for Retailers".

ANALYSIS AND FINDINGS

Corrective Actions Implemented

The Appellant contends that Living Water is a small market so changes can easily be implemented. The owners handle the majority of the cashier responsibilities. There is only one other employee who has cashier responsibilities. This employee has already been advised of the SNAP policies and regulations. Further, SNAP sales represent only a small percentage (less than 10%) of the store's revenues so there is little incentive to violate the SNAP regulations in the future. The owners want to stay clean and avoid future problems and financial penalties. Also, both owners and the cashier have reviewed the written "SNAP Training Guide for Retailers" available on the USDA website. The owners have implemented a new training policy requiring that any future employees review the Training Guide and also review the training video available on YouTube. In support of its contentions, the Appellant provided FNS with a copy of the "SNAP Training Guide for Retailers".

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. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that it has taken or will take corrective actions, though they would have

been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

First Time Violator

The Appellant contends that the owners have operated this business for the last five years. This is the first time that the Appellant has had any problems with the SNAP. Also, there have been no prior warnings, violations, or reports. However, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges. Trafficking in SNAP benefits is an extremely serious violation and both 7 U.S.C. § 2021(b)(3)(B) and 7 CFR § 278.6(e)(1)(i) state that a first time violation warrants a permanent disqualification.

Reconsideration of Penalty

The Appellant requests that FNS restore its SNAP/EBT privileges. However, the Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that "... a disqualification . . . 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 ...". In keeping with this legislative mandate, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked.

CIVIL MONEY PENALTY

The Appellant requests that in lieu of a permanent disqualification from the SNAP, a civil money penalty be imposed. The Appellant contends that both owners and the cashier have reviewed the written "SNAP Training Guide for Retailers" available on the USDA website. The owners have implemented a new training policy requiring that any future employees review the Training Guide and also review the training video available on YouTube.

In the August 15, 2018 Charge Letter the Appellant was informed by the Retailer Operations Division that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000 in lieu of permanent disqualification of a firm for trafficking. Per Section 278.6(i) of the SNAP regulations, four criteria must be met in order to be considered for a trafficking civil money penalty. If requesting a trafficking CMP, an Appellant must meet each of the four criteria listed and provide the documentation as specified **within ten days** of the Appellant's receipt of its Charge Letter. As specified in 7 CFR § 278.6(i), in determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following four criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in 7 CFR § 278.6(i)(1);

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violations(s) occurred prior to the occurrence of violations cited in the Charge Letter;

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in 7 CFR § 278.6(i)(2); and

Criterion 4. Firm ownership 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.

If the Appellant's request for a trafficking CMP and the required documentation are not submitted on time, it will lose its rights for any further consideration for a trafficking CMP. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) 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**, the firm shall not be eligible for such a penalty". The regulations do not provide the agency discretion to extend the time within which documentation and evidence in support of a trafficking civil money penalty may be submitted. The August 15, 2018 Charge Letter to the Appellant stated that "If you request a CMP [in lieu of a permanent SNAP disqualification], you must meet each of the four criteria listed and provide the documentation as specified within 10 calendar days of your receipt of this letter. Your request and all documentation must be postmarked by midnight on the 10th calendar day after you receive this letter in order to be considered timely". The Appellant's request for an imposition of a civil money penalty in lieu of permanent disqualification, via its request for administrative review postmarked September 26, 2018, was not timely.

The Retailer Operations Division determined that Appellant was not eligible for a trafficking civil money penalty in lieu of a disqualification under 7 CFR § 278.6(i) because the 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. **5 U.S.C. § 552 (b)(7)(E).**

Therefore, based on the lack of substantial evidence and information submitted and the fact that the Appellant did not submit its request for an imposition of a civil money penalty in lieu of a permanent SNAP disqualification within the 10 day specified timeframe, the Appellant failed to demonstrate that Living Water had established and implemented an effective compliance policy and program prior to the SNAP violations that occurred. As such, the Appellant's request for consideration of a trafficking civil money penalty in lieu of a permanent SNAP disqualification was appropriately denied by the Retailer Operations Division.

CONCLUSION

As previously stated, 7 CFR § 278.6(e)(1)(i) reads, in part, "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, as "the buying or selling of SNAP benefits for cash or

consideration other than eligible food.” The law and regulations do not provide for a lesser period of disqualification for this violation.

Based on a review of the evidence in this case, there is no question that program violations did occur during a USDA investigation. All transactions cited in the letter of charges were conducted or supervised by a USDA investigator 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, including the exchange of SNAP benefits for cash, and in all other critically pertinent details. Therefore, the decision to impose a permanent disqualification against the Appellant, Living Water, is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that 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 you 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, FNS is 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.

LORIE L. CONNEEN
Administrative Review Officer

February 25, 2019