

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

Marco's Crab Shack,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0177959

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS) that the permanent disqualification from the Supplemental Nutrition Assistance Program (SNAP) imposed upon Marco's Crab Shack, hereinafter "Appellant, by the ROD Office (Retailer Operations Division, Investigations and Analysis Branch, hereinafter "SNAP Office") is hereby sustained.

ISSUE

The issue accepted for review is whether the SNAP Office took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 271.2, 7 CFR § 278.6(a), 7 CFR § 278.6(e)(1) and 7 CFR § 278.6(i) in its administration of the SNAP when it imposed a permanent disqualification upon Appellant.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 C.F.R. § 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

In a Charge Letter dated May 16, 2017, the SNAP Office informed Appellant that it was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 271 – 282. The record reflects that the SNAP Office received and considered Appellant’s replies to the Charge Letter. By a letter dated May 19, 2017, Appellant was informed that it was permanently disqualified from participation as a retail store in the SNAP and was ordered upon receipt of the letter to cease accepting SNAP benefits; consequently, Appellant ceased to accept said benefits. On May 26, 2017, Appellant requested an administrative review of the SNAP Office’s decision; the request was granted.

STANDARD OF REVIEW

In appeals of adverse actions an appellant bears the burden of proving by a preponderance of the evidence that the administrative actions should be reversed. That means 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

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, at 7 U.S.C. § 2021 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6 (e)(1)(i) of the regulations establish the authority upon which a permanent disqualification may be imposed upon a retail food store or wholesale food concern. **5 U.S.C. § 552 (b)(7)(E)**.

7 U.S.C. § 2021(b)(3)(B) states, *inter alia*:

...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 § 271.2 states, *inter alia*, Trafficking means:

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.

Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.

Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT)...for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.

7 CFR § 278.6(a) states, *inter alia*:

FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food & 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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system.

7 CFR § 278.6(e)(1)(i) states:

Disqualify a firm permanently if: Personnel of the firm have trafficked as defined in §271.2

7 CFR § 278.6(e)(5) states:

Disqualify the firm for six months if it is to be the first sanction for the firm and the evidence shows that personnel of the firm have committed violations such as but not limited to the sale of common nonfood items due to carelessness or poor supervision by the firm's ownership or management.

7 CFR § 271.2 states, *inter alia*, 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 §278.6(i) states, *inter alia*:

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...

7 CFR §278.6(f) states, *inter alia*:

In the event any retail food store or wholesale food concern which has been disqualified is sold or the ownership thereof is otherwise transferred to a purchaser or transferee, the person or other legal entity who sells or otherwise transfers ownership of the retail food store or wholesale food concern shall be subject to and liable for a civil money penalty in an amount to reflect that portion of the disqualification period that has not expired.

7 CFR §278.7(a) states, *inter alia*:

FNS may establish claims against firms or other entities which have accepted or redeemed coupons in violation of the Food and Nutrition Act of 2008 or this part regardless of whether the firms or entities are authorized to accept SNAP benefits.

SUMMARY OF THE CHARGES

Among other documents, the record contains a Report of Positive Investigation, #ME38717, which indicates that investigative work was undertaken at Appellant's firm from October 9, 2014 through November 22, 2016 and reflects that five investigative visits were made to Appellant's firm during which a store clerk accepted SNAP benefits in exchange for cash on one occasion, each instance of which is considered SNAP benefit trafficking and an egregious violation of the Act and the implementing regulations. When the extent of violations was determined, the investigation was halted and a report issued and assigned to the ROD Office for consideration of administrative action.

APPELLANT'S CONTENTIONS

In its replies to the Charge Letter and in its written request for review, dated May 26, 2017, Appellant provided information in which it was argued that:

1. Appellant fired all employees for warming up food sold in exchange for SNAP benefits.
2. The violation was committed by an employee due to greed and/or negligence. The employee accepted

5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash.

3. The violating employee has been terminated from employment.
4. Four out of the five visits to the store were unsuccessful and the Owner personally denied a transaction. The only successful trafficking attempt occurred when the Owner was not present.
5. Appellant apologizes for the violations and assures future compliance.
6. Appellant states that a disqualification will work a hardship upon the Owner and his family.

ANALYSIS AND FINDINGS

In regard to contention 1 above, the sale of hot foods in exchange for SNAP benefits, and Appellant's actions taken to prevent such violations, while laudable, is beyond the scope of this review, as the firm was not charged with the sale of hot foods in exchange for SNAP benefits. No further findings are rendered in this regard.

Regarding contention 2 above, for the record, Exhibit C of the Report of Positive Investigation (#ME38717) reflects that the clerk exchanged merchandise and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits.

Appellant has asserted that the Owner of the firm had no knowledge of violations of the SNAP regulations, that the Owner did not personally commit violations of the SNAP Regulations and notes that an employee committed the trafficking violation at issue. This contention cannot be accepted as a valid basis for dismissing the charge or for mitigating the impact of the violation upon which it is based. Appellant is liable for all violative transactions handled by full or part-time, paid or unpaid store personnel, whether or not ownership is aware of such transactions. 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 to whom it delegates responsibility to act on behalf of the firm would render virtually meaningless the enforcement provisions of the Food & Nutrition Act of 2008 and the enforcement efforts of the USDA. Additionally, ownership of the Appellant firm signed an FNS-252, SNAP Application for Stores, on August 25, 2011, by means of which Appellant acknowledged and agreed to accept responsibility to prevent violations of the program by any and all employees of the firm. Moreover, case law further confirms that owners may indeed be held accountable for the actions of employees: see *Woodard v. USA* (6th Cir. 1987), upholding a sanction for trafficking regardless of the owner's lack of knowledge of violations, and *Freedman v. United States Dept. of Agriculture* (3rd Cir. 1991), noting that permanent disqualification of even an

"innocent owner" is consistent with the legislative history of the statute and regulations.

Furthermore, culpability need not be imputed to an owner through the actions of an employee if the owner was involved in the violative activity, whether accidental or otherwise. Again, to allow store ownership to disclaim accountability for the acts of persons to whom the responsibility to handle store business has been assigned would render inert the enforcement provisions of the Food and Nutrition Act of 2008 and corresponding provisions of the regulations.

With regard to contention 3 above, it is important to clarify for the record that there is no provision in the statute or regulations for waiver or reduction of an administrative penalty on the basis of corrective action implemented subsequent to findings of program violations. The purpose of this review is to determine if the earlier decision of the SNAP Office was proper and in compliance with pertinent laws and regulations. Accordingly, this review is limited to considerations relevant at the time such decision was made. It is beyond the scope of this review to consider what subsequent remedial actions, such as changes in store management, procedures, internal controls, employee discipline/training or facility and/or inventory changes and improvements Appellant may propose to take or may have taken in order to comply with program requirements. Therefore, to the extent Appellant implies that it will, or has, implement(ed) corrective and/or remedial actions, though this would likely have been valuable in preventing program violations at an earlier time, such cannot now apply retroactively and does not provide a valid basis for dismissing the charge or for mitigating the serious impact of the violation upon which it is based. It is further added for the record that, although Appellant claims corrective action has been taken, it offers no documentary evidence of same. As such, the claim carries little weight, and as noted above, corrective action following findings of violations is not relevant in ROD Office sanction decisions.

In regard to contention 4 above, Appellant's refusals to commit violations, as noted in the investigation report, are duly acknowledged; such refusals tend to indicate that violations are not firm practice, despite the evidence noted above that there was indeed present a degree of intent to commit SNAP-benefit trafficking on one occasion. However, neither the Food & Nutrition Act of 2008 nor the regulations issued pursuant thereto cite any minimum dollar amount of cash or SNAP benefits, number of occurrences or number of personnel or customers involved for such exchanges to be defined as trafficking. The Act reads, in part, that disqualification shall be "permanent upon ... the first occasion of a disqualification based on ... trafficking ... by a retail food store." In keeping with this legislative mandate, section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked SNAP benefits.

Regarding contention 5 above, assurances that no further violations would occur if Appellant were allowed to remain on the program do not constitute valid grounds for dismissal of the current charge of trafficking or for mitigating the impact of the violation upon which it is based. Accordingly, once trafficking is established, there is no latitude to impose a lesser sanction, with the exception of a civil money penalty. There is provision at 7 CFR §278.6(i) for the imposition of a civil money penalty in lieu of permanent disqualification for trafficking. Appellant was advised of this provision in the SNAP Office's Charge Letter dated May 16, 2017, which also advised that documentation of eligibility for that alternative sanction was to have been provided within a specific time limit. In its reply to the Charge Letter Appellant did not request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and provided no evidence/information in support thereof. Accordingly, the ROD Office correctly withheld this alternate sanction.

With regard to contention 6 above, the issue of hardship worked upon retailers or SNAP clients is not a consideration under the statute or regulations in decisions to disqualify firms due to SNAP-benefit trafficking. The only alternative to permanent disqualification, once trafficking is established, is to impose a trafficking civil money penalty in lieu of permanent disqualification. As noted, in order for this alternate penalty to be considered, a retailer must provide sufficient evidence demonstrating that the firm had established and implemented an effective compliance policy and program to prevent violations prior to said violations, as stipulated in § 278.6(i). Appellant did not request consideration for same and did not provide such evidence and, accordingly, this alternate penalty was correctly withheld.

CONCLUSION

In view of the above, the decision of the ROD Office to permanently disqualify Marco's Crab Shack from participation in the SNAP is hereby sustained and will become final upon the 30th day following your firm's receipt of this document.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the provisions of the Freedom of Information Act (FOIA), 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.

DANIEL S. LAY
Administrative Review Officer

December 27, 2017