

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

Matalka Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0194866

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 Program¹ was properly imposed against Matalka Inc (hereinafter “Matalka Inc” or “Appellant”), and its owners/corporate officers of record, by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a Permanent Disqualification against Matalka Inc in a letter dated October 10, 2017.

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.”

¹ Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

CASE CHRONOLOGY

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period between December 23, 2016 and May 11, 2017. As a result of the investigation a report titled USDA-FNS Report of Positive Investigation (hereinafter Investigative Report) number CH46542, dated May 16, 2017 was provided to the Retailer Operations Division for consideration.

The Investigative Report documents eight (8) visits to Appellant by a USDA Investigator. During the initial visit (Exhibit A) an unidentified male clerk refused to exchange non-food items and cash for SNAP. During five (5) of the visits an unidentified female clerk is documented to have exchanged non-food items, as defined in 7 CFR § 278.2(a), for SNAP. The non-food items included lighters, rolls of tissue; plastic cups, and trash bags. Additionally, the Investigative Report documents that in two (2) of the remaining visits the same unidentified female clerk exchanged cash on each occasion for SNAP benefits. In each of the visits involving the cash exchange a discussion is reported as being held with the female clerk prior to the completion of the exchange transactions. In Exhibit G the unidentified female clerk exchanged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and a can of tea priced at \$0.99 for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on April 13, 2017. In Exhibit H the same scenario repeated with the exchange of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash and a can of tea marked at \$0.99 on May 11, 2017. This activity is trafficking as defined in 7 CFR § 271.2.

In a letter dated August 11, 2017 the Retailer Operations Division informed Matalka Inc that it was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 271 – 282, specifically 7 CFR § 271.2 and 7 CFR § 278.2(a). The letter of charges, which included a copy of the Investigative Report includes details of each visit as documented in Exhibits A through H, which indicates that Appellant was specifically charged with trafficking, therefore subject to permanent disqualification.

The letter of charges further provides Appellant information regarding the potential for the imposition of a civil money penalty (CMP) in lieu of permanent disqualification delineating the conditions for the consideration of that alternative sanction.

The Retailer Operations Division record indicates that counsel provided a letter dated August 23, 2017 requesting an “administrative hearing” be set and contact be made for discussion. The Retailer Operations Division documents placing telephone calls to counsel on August 31, 2017 receiving a message in reply indicating counsel would not be back until after the holiday. The record documents that again on September 13, 2017 the Retailer Operations Division called counsel. No response is documented to have been received as of October 10, 2017 resulting in the Retailer Operations Division informing Matalka Inc, through counsel, that it was permanently disqualified from participation as a retail store in the SNAP in a letter dated October 10, 2017. The October 10, 2017 letter further advised Appellant, through counsel, that it was not eligible for a civil money penalty (CMP) in lieu of the permanent disqualification because it

failed to submit evidence to demonstrate that an effective compliance policy and program had been established to prevent violations of SNAP.

Appellant, through counsel, submitted a request for administrative review, appealing the Retailer Operations Division's assessment via letter dated October 24, 2017. The appeal was granted as affirmed in a letter dated October 31, 2017.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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 AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the "Act")², 7 USC § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR).³ Part 278.6(e)(1)(i) establishes the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking of SNAP benefits as defined in Part 271.2.

7 U.S.C. § 2021(b)(3)(B) states, in relative 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..."

7 CFR § 278.2(a) specifies, in relevant part, that "Coupons [benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food." Further, the citation specifies that "Coupons [benefits] may not be accepted in exchange for cash...or for any other nonfood use."

7 CFR § 278.6(e) states, in relevant part, "Penalties. FNS shall take action as follows against any firm determined to have violated the Act or regulations..."

7 CFR § 278.6(e)(1)(i) reads, in relevant part, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2."

² Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246, further amended through P.L. 113-79 effective February 7, 2014.

³ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

7 CFR § 271.2 specifies, in relevant part, that “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 or in complicity or collusion with others, or acting alone;
- (2) The exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code, for SNAP benefits;
- (3) Purchasing a product with SNAP benefits that has a container requiring a return deposit with the intent of obtaining cash by discarding the product and returning the container for the deposit amount, intentionally discarding the product and intentionally returning the container for othe deposit amount;
- (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.
- (6) Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers (PINs), or by manual voucher and signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.”

7 CFR § 278.6(f)(1) states, in relevant part, “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm is selling a substantial variety of staple food items, and the firm’s disqualification would cause hardship to SNAP households...A civil money penalty for hardship to SNAP households **may not** be imposed in lieu of a permanent disqualification.” [Emphasis added]

7 CFR § 278.6(i) states, in relevant part, “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...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...”
[Emphasis added]

APPELLANT’S CONTENTIONS

Via letter dated October 24, 2017, Appellant, through counsel, requested an administrative review indicating that while some minor violations may have occurred Appellant had taken all steps necessary to educate his employees to prevent further occurrences. The letter also indicates that absent an appeal Appellant’s due process rights may have been violated.

In a subsequent letter, dated November 23, 2017 counsel, on behalf of Appellant, provided a letter contending that:

- Appellant was prominently displaying SNAP benefit posters on all inward facing walls.
- All employees were given express instructions on SNAP eligible and ineligible merchandise, and advised that failure to follow the cited procedures would be grounds for immediate dismissal.

- Appellant is run by conscientious business people evidenced by a copy of a recognition award from the Wayne County Mental Health Authority attesting to ownership’s commitment to not sell tobacco to minors.

Notably the materials provided for consideration to the Retailer Operations Divison did not deny the charges and the October 24, 2017 letter requesting appeal indicated that “minor violations may have occurred.”

The preceding may represent only a brief summary of the contentions presented in this matter. Please be assured, however, that, in reaching a decision, full attention and consideration have been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Operational policies:

Appellant contends that it has a policy regarding SNAP processing that was made known to the employees that includes explicit information indicating that failure to follow the stated procedures would result in dismissal. The material further indicate that steps have been taken to post signage at Appellant.

The provision of SNAP training, with regular refresher or re-training and the posting of signage regarding SNAP redemption, is a standard expectation for all SNAP authorized retailers. Agreement to implement training procedures and schedules is first cited in Appellant's application to serve as a SNAP authorized retailer which the record shows was submitted on March 24, 2009 and affixed with the signature of the owner of record on May 8, 2009. Although Appellant is reporting having implemented corrective action measures to avert future SNAP violations these measures do not serve to mitigate or reverse the current charges of trafficking which are specifically reference in 7 U.S.C. § 2021(b)(3)(B) requiring permanent disqualification on the first offense.

Due Process:

Counsel, on behalf of Appellant, has indicated that absent an "appeal" Appellant's due process rights may have been violated. Absent explanation regarding this contention it can only be assumed that the holding of a "hearing" is being considered the venue for appeal in the instant case.

7 CFR § 278.6(b)(1) of the SNAP regulations provides that "Any firm considered for disqualification, shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination." A review of the record indicates full compliance with applicable SNAP regulations, policies, and procedures.

This disqualification is an administrative action and SNAP regulations do not provide for a hearing, but rather for an administrative review of the action. The Act and regulations provide that any firm aggrieved by an administrative review determination may seek judicial review of the determination in Federal court or a State court of record having competent jurisdiction as defined in 7 CFR § 279.7. In such event, trial de novo proceedings ensure the firm of a full evidentiary hearing on the agency action at issue.

Conscientious Ownership:

Appellant, through counsel, has provided evidence in the form of a copy of an award from the Michigan Department of Community Health, Detroit Wayne Mental Health Authority supporting the contention that ownership is recognized for their commitment not to sell tobacco to minors. The receipt of the award while laudable, does not diminish the fact that an official USDA investigation, fully documented and supported, uncovered SNAP trafficking at Appellant. The contention cannot be accepted as an influence to mitigate or reverse the current permanent disqualification in consideration.

Civil Money Penalty

7 CFR §278.6(f)(1) of the SNAP regulations provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP households because of the unavailability of a comparable SNAP authorized firm in the area to meet their needs. However, this regulation also sets forth the following specific exception to assessments: **“A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.”** Therefore, because the matter at hand involves a permanent disqualification, this civil money penalty provision is not applicable in the present case, and there is no comparison of similar firms made.

The October 10, 2017 determination letter advised Appellant of its ineligibility for the imposition of a trafficking civil money penalty in lieu of permanent disqualification as allowed in 7 CFR § 278.6(i) based on failure to submit evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of SNAP.

Based on a review of the record, the decision of Retailer Operations Division not to impose a civil money penalty in lieu of permanent disqualification is sustained as appropriate pursuant to 7 CFR §278.6(b)(1), 7 CFR §§278.6(b)(2)(ii), and 7 CFR §278.6(i).

It is further noted that, at a minimum, a six-month period of disqualification or a civil money penalty in lieu thereof would have resulted in the absence of SNAP benefit trafficking in the present case, in accordance with & CFR § 278.6(e); however, though Appellant is likewise liable for this lesser sanction, it is merely subsumed under the precedent sanction of permanent disqualification.

CONCLUSION

Based on a review of the evidence in this case, it appears that the program violations at issue did, in fact, occur as charged. As noted previously, the charges of violations are based on the findings of an official USDA investigation and the evidence gathered as a result of that investigation.

The materials recount trafficking that is clearly a violation of the SNAP regulations. Notably the official Investigative Report includes a statement introducing each of the Details of the

Transaction/Visit affirming that the USDA Investigator makes the statements included “freely and voluntarily, knowing that this statement may be used in evidence.”

The decision to impose a permanent disqualification against Matalca Inc is sustained.

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 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.

NANCY BACA-STEPAN
Administrative Review Officer

January 5, 2018