

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

McKenzie Market,

Appellant,

v.

Case Number: C0163503

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification against McKenzie Market (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), in its administration of the SNAP when it imposed a permanent disqualification against Appellant on October 11, 2017.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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 Office of Inspector General (OIG) conducted a joint investigation with the Federal Bureau of Investigation (FBI) of the compliance of Appellant with federal SNAP law and regulations during the period April 2013 through July 2013. The investigation determined that personnel at the Appellant firm accepted SNAP benefits in exchange for **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** cash (trafficking) and other ineligible items on three occasions

as noted in the letter of charges. These transactions were deemed clearly violative and warranted a permanent disqualification. As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated September 20, 2017, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.6(e)(1). The letter of charges states, in relevant part, “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking . . . is permanent disqualification.” The letter also states that “under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of a permanent disqualification of a firm for trafficking.”

Store ownership did not respond to the charge letter and no evidence was submitted to be considered in support of the CMP.

After giving consideration to the evidence, the Retailer Operations Division notified Appellant in a letter dated October 11, 2017, that the firm was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6(c) and 278.6(e)(1) for trafficking violations. This determination letter also states that Appellant’s eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated “. . . you are not eligible for the CMP because you failed to submit sufficient evidence to demonstrate that your firm had established and implemented an effective compliance policy and program to prevent violations of the Supplemental Nutrition Assistance Program.”

By letter dated October 27, 2017, Appellant, through counsel, appealed the Retailer Operations Division’s decision and requested an administrative review of this action. The appeal was granted. Counsel also submitted a Freedom of Information Act (FOIA) request via email to USDA FNS on November 27, 2017. USDA FNS responded to this request via email on January 8, 2018, and USDA OIG responded by correspondence dated October 31, 2018, that was also sent via email on November 2, 2018. Subsequent correspondence dated November 21, 2018, was received from Appellant.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing 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 untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Section 278. In particular, Sections 278.6(a) and Part 278.6(e)(1)(i) establish 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.

7 CFR § 271.2 states that: Eligible foods means any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot food and hot food products prepared for immediate consumption.

7 CFR § 278.2(a) states that: Coupons [SNAP 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 may not be accepted in exchange for cash, in payment of interest on loans, or for any other nonfood use.

7 CFR § 278.6(a) states that: 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(e)(1)(i) reads, in part, “FNS shall . . . [d]isqualify 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, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone” Trafficking is further defined, in 7 CFR § 271.2, to include “(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.”

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.”

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 of the Program.”

7 CFR §278.6(b)(2)(ii) states, inter alia: “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).” Part 278.6(b)(2)(ii) further states 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 in Part 278.6(b)(1), the firm shall not be eligible for such a penalty.

In addition, 7 CFR § 278.6(i)(2) states in relevant part, “As specified in Criterion 3 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with this part 278 of current FNS regulations and current FSP policy on the proper acceptance and handling of food coupons.” This section goes on to state, “As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation.” This section further states, “A firm which seeks a civil money penalty in lieu of permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted . . .”

APPELLANT’S CONTENTIONS

The following may represent a summary of Appellant’s contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- The firm is located in the 21st Congressional District with approximately 45,785 SNAP households. These households conform to traditional SNAP shopping patterns and expend half of their benefits within seven days of receipt;
- FNS issued a charge letter dated September 20, 2017, followed by a permanent disqualification letter dated October 11, 2017, which stated trafficking had occurred at the firm and that the firm did not qualify for a trafficking CMP. SNAP regulations at 278.6(d) state criteria that FNS shall consider when making a disqualification or penalty determination;
- The charge letter had no attachments, records, affidavits, statements, or specific details regarding the trafficking charges and is just an alleged factual scenario that occurred four years before the charge letter was issued. Such a significant and severe delay is inappropriate. The documents provided by the Office of Inspector General are also void of any corroborating evidence to support the trafficking allegations. They reveal an internal memo, highly redacted, that makes no reference to the amount of cash and/or SNAP benefits that were allegedly exchanged nor is there any reference to the alleged July 2, 2013, trafficking incident. There are no sworn affidavits by the undercover agents, no reports, no photos of the alleged cash received, nor even a reference to the bills which were exchanged for SNAP benefits. The Department’s charge in this instance is impermissibly stale, too vague to be credible, and woefully lacking in supporting documents or evidence. Furthermore, the Department does not even attempt to identify the “clerks” at the Store who had allegedly engaged in trafficking – there is not even a cursory description of the alleged Store personnel;
- This is also a deprivation of due process rights. Ordinarily, numerous pages of transactions, or affidavits by investigators or witnesses along with photographs are provided with Charging Letters. Such is not the case here. How could the Department have met its burden if there are no sworn affidavits or details of transactions? If the Department's position is that merely writing allegations on a letter, without data,

testimony or anything else in support, is sufficient evidence, it is only reasonable to ask whether or not the Department's standard of proof has devolved into: "the allegations are within the realm of possibility, and therefore sufficient." Allegations must be more substantial than what exists here, and based in real, tangible, and verifiable fact to even begin to give lip service to the due process rights of the Appellants; and,

- The Department has waited an unreasonably long period of time to bring forth stale allegations, has failed to identify the transactions, and has failed to produce any corroborating evidence in support of the trafficking allegations. As such, the Department's allegation is wholly without merit and is insufficient to support a finding of "trafficking" under the circumstances - any such finding would be little more than a violation of the Appellants' 4th Amendment rights. Appellant made two references to case law in support of these arguments.

Appellant submitted no evidence or other rationales in support of these contentions.

ANALYSIS AND FINDINGS

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 and is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. In this case, the store owner has not denied that store personnel conducted violative transactions that included the trafficking of SNAP benefits.

Both the FNS SNAP retailer application and retailer reauthorization application contain a certification page whereby applicants must confirm their understanding of, and agreement with, SNAP retailer requirements in order to complete the application/reauthorization process. These requirements include the prohibition against trading cash for SNAP benefits (i.e., trafficking) as well as the requirement for owners to train themselves and their employees on SNAP rules and regulations upon authorization as a SNAP retailer. Store ownership certified his understanding and agreement to abide by program rules and regulatory provisions when he applied for authorization as a SNAP retailer and again when he applied for reauthorization.

The investigative reports show that personnel at the Appellant firm transacted SNAP benefits for cash on three separate occasions indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The transactions from the investigative report have been matched to SNAP transactions posted on the dates in question with no disagreements and a review of the investigative reports show no errors or discrepancies. The acceptance of SNAP benefits for cash violates SNAP rules and regulations with the penalty for trafficking being permanent disqualification. There is no regulatory threshold for the exchange of SNAP benefits for cash nor do the regulations not cite any time frames that must be adhered to between the instance(s) of trafficking and the issuance of a charge letter. Appellant does not dispute that violations occurred and that SNAP benefits were exchanged for cash, only contending that insufficient documentation was provided with the charge letter and that the charge letter was issued four years after the violative transactions occurred.

Regarding the redacted information provided by USDA OIG in response to Appellant's FOIA request, the USDA OIG letter dated October 31, 2018, contains appeal instructions should Appellant desire to appeal their FOIA response. The three criteria from SNAP regulations at section 278.6(d) cited in Appellant's November 21, 2018, brief are those areas that FNS considers in determining the appropriate level of sanction for firms that have violated SNAP regulations. The level of sanction could include temporary or permanent disqualification. Since the matter under review involves trafficking and SNAP regulations stipulate that any occasion of trafficking will result in permanent disqualification, the decision by the Retailer Operations Division to permanently disqualify the firm was the appropriate penalty. Regarding Appellant's references to case law, considerations of legal precedent through case law, or the lack thereof in relation to the present case, are beyond the scope of this review; this review relies upon the statute, regulations and agency policy governing the SNAP and evaluates whether the decision of the SNAP Office to impose a permanent disqualification and deny a CMP upon Appellant was in accordance with same and sustainable by a preponderance of the evidence. Appellant's case law references are acknowledged in this context only. With regards to Appellant's contention that the store owner's rights to due process were violated, section 278.6(b)(1) of the SNAP regulations provides that upon charging a firm with SNAP violations, the letter informing the firm of the charges "shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter." This section further states 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 Retailer Operations Division's administrative actions regarding this matter indicates full compliance with applicable SNAP regulations, policies, and procedures. This disqualification is an administrative action and SNAP regulations provide 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. In such event, trial de novo proceedings ensure the firm of a full evidentiary hearing on the agency action at issue. Appellant's references to which Congressional District the Appellant firm is located in, the District's demographics, and household shopping patterns have no bearing on the matter under review

It is highly improbable, based on the readiness of store personnel to exchange SNAP benefits for cash, that the only instances of SNAP trafficking violations were the three identified as part of the joint USDA OIG/FBI undercover investigation and more likely than not that this represented an ongoing pattern of SNAP violations at the Appellant firm.

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which 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. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option under existing regulations.

Based on the discussion above, there is not any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because Appellant failed to request a CMP or to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

Based on the above discussion and the evidence under review, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division's decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA OIG investigation. All transactions cited in the letter of charges were conducted by or under the direct supervision of a USDA OIG investigator, signed under penalty of perjury, 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, the specific exchange of SNAP benefits for cash, and in all other critically pertinent detail. Additionally, the decision by the Retailer Operations Division that Appellant was not eligible for a trafficking CMP is also found to be correct.

Based on the discussion above, the determination by the Retailer Operations Division to impose a permanent disqualification against the Appellant business from participating as an authorized retailer in SNAP 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.

ROBERT T. DEEGAN
Administrative Review Officer

February 15, 2019