

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

M & F Grocery,

Appellant,

v.

Case Number: C0190362

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 M & F Grocery by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1)(i) in its administration of the SNAP, when it imposed a Permanent Disqualification against M & F Grocery on May 18, 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.

CASE CHRONOLOGY

In a letter dated March 30, 2017, the Retailer Operations Division informed the Appellant that his firm was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270 – 282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm."

In telephone conversations with Retailer Operations Division staff on April 11, 2017 and May 2, 2017, the Appellant responded to the charges therein denying that trafficking of SNAP benefits had occurred at M & F Grocery and indicated that he would provide FNS with written statements from SNAP customers refuting the trafficking charges.

After considering the Appellant's replies and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated May 18, 2017, informing the Appellant that M & F Grocery was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations.

In a letter postmarked June 1, 2017, the Appellant requested an administrative review of the Retailer Operations Division's decision to permanently disqualify the firm from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated June 6, 2017.

STANDARD OF REVIEW

In appeals of adverse actions, 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 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 and Nutrition Act of 2008, amended, 7 U.S.C. § 2021 and 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. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

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 § 278.6(a) states, inter alia:

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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system ... [Emphasis added].

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 § 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...

7 CFR § 278.6(f)(1) states, inter alia:

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 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 ...

7 CFR § 278.6(b)(2) states, inter alia:

(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 penalty. [Emphasis added].

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from March 2016 through December 2016. This involved the following SNAP transactions patterns which are indicative of trafficking:

Charge Letter Attachment 1: Multiple transactions made from individual benefit accounts in unusually short timeframes: This Attachment 1 lists 24 transaction sets (61 total transactions) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Charge Letter Attachment 2: Excessively large purchase transactions made from recipient accounts: This Attachments lists 189 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Based on the FNS store visit observations, there is no indication that M & F Grocery would be likely to have SNAP redemption patterns significantly different from similar-sized competitors offering similar food items.

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 Appellant's replies to the Charge Letter and in the administrative review request postmarked June 1, 2017 and in a subsequent correspondence postmarked July 5, 2017, the Appellant stated the following summarized contentions, in relevant part:

- The store manager trafficked SNAP benefits at M & F Grocery without the Appellant's knowledge, consent, or approval.
- To prevent future SNAP violations from occurring at M & F Grocery, the Appellant:
(1) Replaced all employees who worked at the store prior to the Appellant's receipt of the Charge Letter; (2) Has downloaded the "Training Guide for Retailers", posted the "Using SNAP Benefits" poster in the store, and posted a warning in the store that trafficking is not allowed; and (3) Has instituted a training program for all store employees on the do's and don'ts of the SNAP and required each employee to sign a statement that they have received said training which will be kept on file.
- The Appellant is requesting that FNS give him a second chance and allow M & F Grocery to continue to participate in the SNAP.

ANALYSIS AND FINDINGS

Store Characteristics

FNS authorized M & F Grocery as a convenience store on March 6, 2014. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a December 6, 2016 store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information obtained from the store visit was also used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- M & F Grocery is approximately 900 square feet in size and it does not have a storage area outside of the public view;
- M & F Grocery is located in a suburban commercial area of Columbus, Mississippi;
- There were no shopping carts and no hand-held baskets available for customer use;
- M & F Grocery has one cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- There was no optical scanner or conveyor belt for the speedy processing of transactions;
- M & F Grocery has a food stock that is typical of convenience stores and it offers customers a minimal variety and amount of eligible staple foods for sale;
- Many of the store shelves were scantily filled with items which were pushed to the front of the shelves in an attempt to make them look more fully stocked;
- There were no meat/seafood specials or bundles that might sell for high prices;
- M & F Grocery is not a WIC Program vendor and it does not sell infant formula or infant foods;
- The store does not stock any expensive food items;
- It does not appear from the store visit observations that M & F Grocery extends credit to customers;
- No signs were posted in the store nor were there any flyers advertising the availability of bulk foods offered at a discounted rate to include grocery package deals;
- The checkout counter has a limited space as it has miscellaneous items stocked there. As such, the checkout counter does not provide adequate space for the large amounts of individual food items necessary to make up many of the large transactions cited in the Charge Letter Attachments;
- There were no fresh or frozen meats, poultry, or fish items;
- M & F Grocery does not have a deli case/section and it does not sell deli meats and cheeses by the pound;
- M & F Grocery does not have a kitchen and it does not prepare and sell hot and cold prepared, ready-to-eat foods that are intended for immediate consumption;
- Meat items available for sale included a minimal variety and quantity of canned/potted meat, canned fish, meat jerky, eggs, and packaged lunch meat;
- M & F Grocery stocked a minimal variety and amount of fresh produce items to include lemons, onions, and potatoes;
- M & F Grocery did not stock any frozen fruits or vegetables;
- The only frozen food item stocked at M & F Grocery is ice cream;

- Other staple foods available for purchase included such items as a minimal variety and amount of canned fruits and canned vegetables, pasta, corn meal, flour, milk, margarine, snack foods, cakes/pastries, etc.;
- Much of the remaining food stock consisted of accessory foods such as candy and gum, carbonated and non-carbonated drinks, condiments, vegetable oil, and spices;
- M & F Grocery stocked a large supply of ineligible nonfood items such as health and beauty aids, household cleaning supplies, over-the-counter medications, jewelry, alcoholic beverages, automotive supplies, cell phone accessories, pet food, tobacco, paper products, clothing, laundry detergent, incense sticks, household items, etc.

On review, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed.

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Based on this empirical data, and in the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the most likely explanation for “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges is trafficking. Transactions having such characteristics sometimes do have valid explanations that support that they were the result of legitimate purchases of eligible food items. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, the Retailer Operations Division determined that the Appellant’s contentions did not outweigh the evidence. The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Appellant Unaware of SNAP Violations

The Appellant contends that the store manager trafficked SNAP benefits at M & F Grocery without his knowledge, consent, or approval. This contention cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. As owner of the store, the Appellant is liable for all violative transactions that occur at M & F Grocery.

Regardless of whom the ownership of a store may utilize to handle store business (i.e., regardless of whether a store owner, store manager, store clerk, family member, etc. was involved in the violative transactions), ownership is accountable for the proper handling of SNAP benefit transactions. Prior to becoming authorized to participate in the SNAP on March 6, 2014, the Appellant completed and submitted a SNAP Application for Retail Stores. The SNAP Application contained a section indicating that the person(s) signing the Application understood and agreed to ensure that store employees follow the SNAP rules and regulations and that the person(s) accepts responsibility for any SNAP violations that may occur at the store that were committed by any of the store’s employees---paid, unpaid, new, temporary, full-time, part-time, etc. The SNAP Application also included a section that contained a statement which

acknowledged that the person(s) signing the Application was aware that violations of Program rules could result in fines, legal sanctions, withdrawal, or disqualification of the store. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

The regulations establish that an authorized 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, manager, or someone acting on their behalf. The Appellant admitted to FNS that the store manager exchanged SNAP benefits for cash without his knowledge, consent, or approval. Trafficking is defined in 7 CFR § 271.2 of the SNAP regulations which states that 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... 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 “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, 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. The Appellant’s implied contention that the SNAP violations were committed by the store manager without his knowledge, consent, or approval cannot be accepted as a valid basis for diminishing the penalty. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of USDA.

Corrective Actions Implemented

The Appellant contends that in order to prevent future SNAP violations from occurring at M & F Grocery, he: (1) Replaced all employees who worked at the store prior to the Appellant’s receipt of the Charge Letter; (2) Has downloaded the “Training Guide for Retailers”, posted the “Using SNAP Benefits” poster in the store, and posted a warning in the store that trafficking is not allowed; and (3) Has instituted a training program for all store employees on the do’s and don’ts of the SNAP and required each employee to sign a statement that they have received said training which will be kept on file.

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 he has taken 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.

Second Chance Requested

The Appellant is requesting that FNS give him a second chance and allow M & F Grocery to continue to participate in the SNAP. 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

As previously indicated, the May 18, 2017 Determination Letter advised the Appellant of the ineligibility for consideration for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. The letter of charges dated March 30, 2017 advised the Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The regulations specify that such documentation must, in part, establish that there was an effective compliance policy and training program and that both were in effect and implemented prior to the occurrence of violations. The letter indicates that no information was provided by the Appellant for consideration; therefore, on review the Retailer Operations Division's determination that the Appellant firm is ineligible for the imposition of civil money penalties in lieu of disqualification is affirmed.

CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record, upon which charges of violations are based, together with observations made during the store visit and an analysis of customer shopping behaviors, provide substantial evidence that questionable transactions during the focus period have characteristics and display patterns that are not consistent with legitimate sales of eligible food to SNAP benefit customers at a store of this type, size and makeup. Rather, the characteristics are indicative of illegal trafficking in program benefits. The Appellant's contentions do not outweigh this evidence.

The record has yielded no indication of error or discrepancy in the reported findings by the Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged.

Therefore, the decision to impose a permanent disqualification from participation in the SNAP against M & F Grocery 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, 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.

LORIE L. CONNEEN
Administrative Review Officer

March 6, 2018