

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

Mikes Mini Mart,

Appellant,

v.

Case Number: C0164547

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 Mikes Mini Mart (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 May 31, 2018.

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

USDA FNS and the USDA Office of Inspector General (OIG) conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period July 2013 through April 2015. The investigation determined that personnel at the Appellant firm accepted a total of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash (trafficking) on six 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 May 9, 2018, 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 May 31, 2018, 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 June 15, 2018, Appellant, through counsel, appealed the Retailer Operations Division’s decision and requested an administrative review of this action. The appeal was granted. No subsequent correspondence was received.

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:

- Each violation was previously addressed during an investigation by the Alameda County District Attorney’s Office working with USDA. The store owner was notified of the investigation and cooperated fully with the District Attorney’s Office. After a period of more than one year with no evidence of any further violations, the matter was resolved by a negotiated civil resolution;
- A Stipulated Final Judgment was filed on September 13, 2017, that enjoined the store owner to “not directly or indirectly participate in EBT Trafficking;
- This Final Judgment also required the store owner to pay the aggregate sum of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as fines and penalties as punishment for the very acts referenced in the May 9, 2018, charge letter. The Alameda County District Attorney’s Office received 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as designated civil penalties. The USDA, Office of Inspector General received 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for the cost of the investigation and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as restitution. This sum was paid in full on September 21-22, 2017;
- The store owner assumed that his payment of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) satisfied the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) amount stated in the May 9, 2018, charge letter. The amount paid is only 5 U.S.C. § 552 (b)(6) & (b)(7)(C) less than the amount of the CMP listed in the charge letter and any shortcoming on the owner’s part would certainly appear to constitute excusable neglect given the underlying circumstances. The similarity between the amounts suggests that the owner has not been given credit for those amounts previously paid under the Stipulated Final Judgment;
- On October 9, 2015, the store owner and counsel met with a Deputy District Attorney to discuss the issue. In order to eliminate any future violations, the store owner promptly undertook remedial steps that included his personally reviewing SNAP rules and regulations, meeting with each employee to review the rules and regulations, and a detailed review with workers of items offered for sale at Mikes Mini Mart and their eligibility under SNAP. This procedure has continued for new and temporary employees. The owner also instituted a zero tolerance policy regarding SNAP transactions with immediate termination as the penalty;

- The firm had no history of violations prior to September 2015 and all of the violations listed in the charge letter occurred more than three years prior to the date of the letter showing that his actions successfully eliminated the past practices;
- Without any admission of guilt, the owner has already paid **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in penalties and costs from the very same incidents listed in the charge letter. It is noted that the proposed administrative action is being taken nearly five years later and after the owner voluntarily addressed these events, paid a significant monetary fine, and subsequently operated his business without any recurring violations for a significant period of time;
- The firm is in a distressed area and the only supermarket closed more than 30 years ago. The only stores in the area are small mini marts serving the local needs of residents. The action against the store owner denies SNAP recipients access to one of the few stores in the area and the reduction in competition could lead to higher prices for residents; and,
- It is requested that the decision be reversed and that the firm be eligible for a trafficking CMP with the owner's previous payments fully satisfying the CMP amount.

Appellant submitted copies of the Stipulation for Entry of Final Judgment, the Stipulated Final Judgment, and copies of the three checks for payment of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** 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 six 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. Additionally, there is evidence of involvement by the firm's owner in at least four of the violative transactions. 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. Store ownership does not dispute that violations occurred and that SNAP benefits were exchanged for cash.

It is highly improbable, based on the readiness of store personnel to exchange SNAP benefits for cash, that the only instances of SNAP violations were the six identified as part of the USDA 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 submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the timeframe specified in the charge letter. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

SNAP regulations are explicit in what constitutes substantial evidence. Specifically, 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 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...”

While Appellant did request a trafficking CMP in the request for administrative review, it was not submitted within the timeframe specified in the May 9, 2018, charge letter. The charge letter addresses the option to request a trafficking CMP as well as the requirements that must be met for such a request to be approved and the 10 day deadline for submitting a request. Appellant did not submit any documentation demonstrating that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations that was in effect prior to the violative transactions. On the contrary, Appellant’s request for administrative review states that the store owner did not implement a SNAP training program until after all of the violative transactions thereby showing the firm did not meet the regulatory requirements for a trafficking CMP. Accordingly, FNS determined the firm was not eligible for a trafficking CMP as stated in the May 31, 2018, permanent disqualification letter. Therefore the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) CMP amount specified in the charge letter is not being assessed against the firm.

Regarding Appellant’s contentions, there is no correlation between the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) paid as part of the Stipulated Final Judgment and the dollar amount of a trafficking CMP. As stated in the charge letter, the amount of the trafficking CMP is calculated in accordance with SNAP federal regulations at Section 278.6(j).

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 investigation. All transactions cited in the letter of charges were conducted by or under the direct supervision of a USDA 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

October 30, 2018