

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

Nely's Discount,

Appellant,

v.

Case Number: C0163013

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 Nely's Discount ("Appellant") from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of Code of Federal Regulations (CFR) § 278.6(e)(1)(i) in its administration of SNAP when it imposed a Permanent Disqualification against Appellant on March 18, 2019.

AUTHORITY

According to 7 U.S.C. § 2023 and its 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 conducted an investigation Appellant's compliance with federal SNAP law and regulations during the period of March 26, 2013 through June 12, 2013. The investigation reported that personnel at Appellant accepted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in exchange for cash (trafficking) in the amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on one occasion and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on another occasion, as well as permitting the purchase of other non-food items with SNAP benefits. The investigation revealed that two unidentified clerks were involved in the impermissible transactions.

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated February 26, 2019, that its firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.6(e)(1). This letter stated, in 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.”

Although afforded the opportunity to do so, Appellant did not reply to the charges. Appellant said it was because the owner does not understand English. The record reflects that the Retailer Operations Division received and considered this information prior to making a determination.

The Retailer Operations Division notified Appellant in a letter dated March 18, 2019 that the firm was being 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 stated that Appellant’s eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated to Appellant that “. . . 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.”

On March 20, 2019, Appellant appealed the Retailer Operations Division’s assessment and requested an administrative review of this action. The appeal was granted.

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 Part 278. In particular, 7 CFR § 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.

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 or selling of [SNAP benefits] or other benefit instruments for cash or consideration other than eligible food.

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- The owner was out of the country and had someone else oversee the store.
- That person had not been trained and ended up stealing from the firm.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

Appellant contends that the owner was not at the store during any of the alleged violations. Appellant stated an untrained person selected by the owner's husband oversaw the store. When ownership signed the FNS application to become an authorized SNAP retailer, this included a certification and confirmation that the owner(s) would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time." The violations listed on this certification document include trafficking. Regardless of whom the ownership of a store may utilize to operate the cash register and 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 chosen to handle store business, would render the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA virtually meaningless.

CIVIL MONEY PENALTY

For a firm to have the opportunity to be considered for a civil money penalty (CMP), it must request that FNS consider a CMP in lieu of permanent disqualification and submit supporting documentation within ten days of receipt of the charge letter. Appellant was advised of these provisions in the charge letter of February 26, 2019. The regulations specify that such supporting documentation must demonstrate that the firm had established and implemented an effective SNAP compliance policy and training program prior to the occurrence of violations. A review of the administrative record indicates Appellant did not, at any time, request a CMP. Appellant also did not submit any documentation to support its eligibility for this alternative sanction, before or after the deadline.

In the absence of a request for a CMP and any supporting documentation, a CMP was not assessed by the Retailer Operations Division. According to the requirements stated in 7 CFR § 278.6(b)(1), § 278.6(b)(2)(ii and iii), and § 278.6(i), Appellant is not eligible for a CMP in lieu of a permanent disqualification from participation as an authorized retailer in SNAP. The determination by the Retailer Operations Division to deny Appellant a civil money penalty is sustained.

CONCLUSION

Based on a review of the evidence, 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 a formal USDA investigation. All transactions cited in the letter of charges were conducted under the supervision of a USDA investigator and all are fully 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 exchanges of SNAP benefits for cash, and in all other critically pertinent detail.

Based on the discussion above, the determination by the Retailer Operations Division to impose a permanent disqualification against Nely's Discount 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 Appellant desires a judicial review, 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.

RICH PROULX
Administrative Review Officer

May 27, 2019