

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

New Regal Liquor & Food Market,

Appellant,

v.

**Office of Retailer Operations
and Compliance,**

Respondent.

Case Number: C0217968

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 New Regal Liquor & Food Market (Appellant), by the Office of Retailer Operations and Compliance (Retailer Operations).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a), 7 CFR § 278.6(e)(1)(i) and 7 CFR § 278.6(i) in its administration of the SNAP when it imposed a permanent disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2021 and the implementing regulations at 7 CFR § 279.1 provide that a food retailer 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

By Charge letter dated December 4, 2019, Retailer Operations informed the owner that Appellant was charged with violating the terms and conditions of the SNAP regulations based on a USDA investigation conducted from August 29, 2019 through November 4, 2019. The record shows a written reply by counsel to the Charge letter dated December 12, 2019.

By Determination letter dated January 10, 2020, Retailer Operations informed Appellant that it was permanently disqualified from participation as a retail store in the SNAP, and that the store was not eligible for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) because the firm failed to submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

Counsel appealed Retailer Operations' determination and requested administrative review by letter dated January 21, 2020. The appeal was granted by letter dated February 3, 2020. Counsel provided additional information by letter dated February 24, 2020.

STANDARD OF REVIEW

In an appeal of an adverse action, 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 credible, relevant evidence which 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 not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is in the Food and Nutrition Act of 2008, as amended (the Act), 7 U.S.C. § 2021, and § 278 of Title 7 of the Code of Federal Regulations (CFR).

7 U.S.C. § 2021(b)(3)(B) states: "...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) states: "Coupons may be accepted by an authorized retail food store only from eligible households or the households' authorized representative, and only in exchange for eligible food."

7 CFR § 278.6(e)(1)(i) states: "FNS shall disqualify 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, 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, in complicity or collusion with others, or acting alone."

7 CFR § 278.6(b)(2)(ii) states: "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)."

7 CFR § 278.6(i) states: "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."

SUMMARY OF THE CHARGES

The USDA conducted an investigation of Appellant. The investigative report details the results of five compliance visits. Appellant was charged with trafficking in Exhibit D. The penalty for trafficking is permanent disqualification. On multiple visits, the Exhibits describe that different clerks at Appellant sold ineligible nonfood items in violation of Section 278.2(a) of the SNAP regulations. The items included: plastic cups, trash bags, tissue, sandwich bags, and lighters.

APPELLANT'S CONTENTIONS

In reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated.

- I am requesting that the sanctions for alleged trafficking violations resulting in permanent disqualification be discarded, and that a CMP be assessed.
- The owner has continuously operated the business since he was authorized to accept SNAP. SNAP sales are insignificant to the overall gross revenues. His average sales attributable to EBT/SNAP do not exceed 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- Over the past 19 years, the owner has had no criminal offenses whatsoever.
- The owner concurs that there were five minor violations. He also confirmed that his clerk on three occasions refused to provide cash in exchange for the use of the EBT card.
- The owner indicated that he instructs his clerk(s) regarding the rules and regulations pertaining to the use of EBT card(s). Nevertheless, mistakes are made and he admits responsibility as the owner of the store for said mistakes. He will endeavor, in the future, to instruct his employees as to the propriety of EBT transactions.
- He would testify that he has been asked on numerous occasions for cash which he vehemently refuses. The owner cannot explain the conduct of his employee who apparently did tender ten dollars to the investigator referenced in Exhibit D. This was in fact the first occasion in which an employee of the store was involved in a trafficking violation.
- In light of the history of no prior violations coupled with the monetary amount at issue it is the firm's position that a review is warranted necessitating a reversal of the adverse action taken by the Retailer Operations Division.
- The firm utilizes the training guide for retailers (attached). The firm displays a poster which provides in part: don't do it; and buying or selling SNAP benefits is a federal crime.

The guide is available to each of the employees as a means of training anyone and everyone who works at the store.

Counsel provided copies of card processing statements, copies of some 2019 monthly sales spreadsheets, a copy of the USDA training guide for retailers, and a sworn affidavit by the owner with five statements.

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or to invalidate the decision of Retailer Operations. It is limited to the facts at the basis of Retailer Operations' determination at the time it was made. The regulations establish that an authorized retail food store may be disqualified from participating in SNAP when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner(s), manager(s), or someone acting on their behalf. Regardless of whom the owner(s) of a store may utilize to handle store business, the owner(s) is accountable for the proper handling of SNAP benefit transactions.

Exhibit D gives the details of the trafficking violation at Appellant wherein a firm employee exchanged cash for SNAP benefits. Violations of the sale of ineligible nonfood items by additional store personnel were cited in other Exhibits in the record. The sale of nonfood items carries a penalty of term disqualification, which is subsumed under the permanent disqualification penalty for trafficking. The investigative record is specific and accurate with regard to the dates of the violations.

A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations, or mitigate the impact of the violations upon which they are based. There is no provision in the Act or regulations, that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

As to the dollar value of the ineligible items sold, regardless of the cost, Appellant established a record of selling non-food items as defined by Section 271.2 on multiple occasions. No mention of minimum cost is cited in the SNAP regulations. As to the amount of cash exchanged for benefits, likewise the amount is not under consideration. The regulations are clear that FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2.

The owner's reply to the Charge letter did not refute the charge of trafficking nor was evidence advanced to refute the violations of exchanging ineligible items for benefits. Therefore, the preponderance of the evidence supports that the violations occurred as charged and sanctioned.

CIVIL MONEY PENALTY

The regulations at Section 278.6(i) specify the criteria for a firm's eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. A firm must submit a timely request

for a civil money penalty that shows substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

Contentions:

- The owner maintains that the store is operated in a manner consistent with Rule 278 of the current regulations. His employees are instructed relative to the applicable regulations. In the instant case, policy statements have been provided to the violating employees responsible for the alleged commission of the violation. As indicated, there have been no prior violations or irregularities committed by store personnel. Based on the number of employees, management conducts internal reviews of the employees to determine compliance with SNAP regulations. The violations which form the basis of the complaint are of a small dollar amount. The client agrees that the size of the violation does not justify the fact that on occasion ineligible products are sold.
- The store literally has four employees including the store owner/manager. Training is ongoing. The owner's father has been an employee of the store since 2000. The owner's brother also works at the store and is well versed in the eligibility for use of EBT cards.
- The owner is responsible for training its managers and employees whose work brings them into contact with SNAP benefits pursuant to Criteria 1. The owner is prepared to establish by way of Affidavit that he personally instructs his employees regarding the compliance policy relative to the use of EBT transactions.
- Based on the number of employees, the owner instructs each of his employees regarding the use of EBT cards and transactions. In light of the fact that there have been no violations of the program, the owner maintains that his method of communicating the rules and regulations to his employees has been successful in achieving compliance in the past.
- Based on the information contained in Exhibits A-H, the owner maintains that he did not approve and was not aware of any widespread violations of the SNAP regulations.

The record supports that Appellant did not submit substantial evidence to support that a trafficking CMP should be granted in lieu of permanent disqualification. No evidence of any employee training was provided. No evidence was presented to support actions taken relative to the violating employees. In this matter, multiple clerks committed SNAP violations and as such, the claims of achieving SNAP compliance lack credibility.

On review it is determined that insufficient evidence was advanced to demonstrate that Appellant met the regulatory criteria for a CMP. Retailer Operations properly applied the applicable regulations when it denied such.

CONCLUSION

The preponderance of the evidence supports that program violations did occur at Appellant. The owner of Appellant is liable for all violative transactions handled by either paid or unpaid store personnel. Regardless of whom the owner of a store may utilize to handle store business, the owner is accountable for the proper handling of SNAP transactions. To allow the store owner to disclaim accountability for the acts of persons whom the owner chooses to utilize to handle store

business, would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. 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 exchange by store personnel of cash for SNAP benefits is a violation of the regulations at 7 CFR § 271.2. Trafficking carries a sanction of permanent disqualification. The sale of ineligible items by various clerks at Appellant, on multiple visits, are SNAP violations which are subsumed in the trafficking sanction. The permanent disqualification of Appellant as a SNAP retail food store is herein sustained. The effective date of this decision is 30 after receipt of this decision by Appellant.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and to 7 CFR § 279.7 of the regulations with respect to applicable rights to judicial review of this determination. 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 where Appellant's owner resides or is 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.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

March 9, 2020