

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

**Omega Sea World Corp,**

**Appellant,**

**v.**

**Case Number: C0198794**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS) that the permanent disqualification from the Supplemental Nutrition Assistance Program (SNAP) imposed upon Omega Sea World Corp., hereinafter “Appellant”) by the Retailer Operations Division, Investigations and Analysis Branch, hereinafter “ROD Office” is hereby sustained.

**ISSUE**

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 271.2, 7 CFR § 278.6(a), 7 CFR § 278.6(e)(1) and 7 CFR § 278.6(i) in its administration of the SNAP when it imposed a permanent disqualification upon Appellant.

**AUTHORITY**

7 U.S.C. § 2023 and its implementing regulations at 7 C.F.R. § 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 Charge Letter dated January 18, 2018, the ROD Office informed Appellant that it was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 271 – 282. Appellant did not reply to the Charge Letter. By a letter dated February 7, 2018, Appellant was informed that it was permanently disqualified from participation as a retail store in the SNAP and was ordered upon receipt of the letter to cease accepting SNAP benefits; consequently, Appellant ceased to accept said benefits. On February 16, 2018, Appellant requested an administrative review of the ROD Office’s decision; the request was granted.

## STANDARD OF REVIEW

In appeals of adverse actions an appellant bears the burden of proving by a preponderance of the evidence that the administrative actions should be reversed. That means an 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 & Nutrition Act of 2008**, as amended, at 7 U.S.C. § 2021 and in Part 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.

7 U.S.C. § 2021(b)(3)(B) states, in part:

...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 § 271.2 states, in part, 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.

Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.

Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT)...for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.

7 CFR § 278.6(a) states, in part:

FNS may disqualify any authorized retail food store ... if the firm fails to comply with the **Food & 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.

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 § 278.6(e)(5) states:

Disqualify the firm for six months if it is to be the first sanction for the firm and the evidence shows that personnel of the firm have committed violations such as but not limited to the sale of common nonfood items due to carelessness or poor supervision by the firm's ownership or management.

7 CFR §278.6(i) states, in part:

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...

7 CFR §278.6(f) states, in part:

In the event any retail food store or wholesale food concern which has been disqualified is sold or the ownership thereof is otherwise transferred to a purchaser or transferee, the person or other legal entity who sells or otherwise transfers ownership of the retail food store or wholesale food concern shall be subject to and liable for a civil money penalty in an amount to reflect that portion of the disqualification period that has not expired.

### **SUMMARY OF THE CHARGES**

Among other documents, the record contains a Report of Positive Investigation, #TR39525, which indicates that investigative work was undertaken at Appellant's firm from December 6 through 19, 2017 and reflects that four investigative visits were made to Appellant's firm during which a store clerk accepted SNAP benefits in exchange for cash on two occasions, each instance of which is considered SNAP benefit trafficking and an egregious violation of the Act and the implementing regulations. When the extent of violations was determined, the investigation was halted and a report issued and assigned to the ROD Office for consideration of administrative action.

### **APPELLANT'S CONTENTIONS**

In its written request for review, dated February 16, 2018, Appellant provided information in which it was argued that:

1. The Owner of the Appellant store is not fluent in English.
2. The firm has never before been charged with SNAP violations. The firm has been in operation for 27 years. The firm has been owned jointly by 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and his wife. Until recently, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) ran the store on a daily basis.
3. The violations noted in the Investigation Report were isolated incidents.
4. The Confidential Informant had previously tried to induce the firm into trafficking on two separate occasions but was denied by the same employee.
5. The employee that committed the violations was later summarily terminated and all employees were retrained on SNAP rules.
6. Appellant notes that the employee is the son of the Store Owners and has been diagnosed with multiple learning and mental impairments (Appellant provides documentation dated March 15, 2018 in support thereof). The employee worked from 10 AM to 2 PM each day. Appellant argues that the noted disabilities prevented said employee from understanding the prohibition against SNAP-benefit trafficking.
7. Extenuating circumstances resulted in the firm's failure to reply to the Charge Letter; as a result the firm was permanently disqualified.
8. A disqualification will work a hardship upon Appellant. The firm will lose the building lease if Appellant loses its SNAP authorization. Appellant provides affidavits of the Store Owners in support thereof.
9. Appellant provides a copy of a letter of support from 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as well as photographs of what appears to be an award ceremony.

## ANALYSIS AND FINDINGS

In regard to contention 1 above, there are no provisions in the statute or regulations requiring/allowing the ROD Office to consider a retailer's language skills/preferences as a mitigating factor in sanctioning decisions.

Regarding contention 2 above, Appellant notes that this case represents the firm's first and only SNAP violation (or series of same); however, a record of program participation with no previously or subsequently documented violations does not constitute valid grounds for dismissing the present serious charges or for mitigating the impact of the violations upon which they are based. There is no provision in the Act and/or regulations that reverses or reduces a sanction based upon a lack of prior and/or subsequent violations or assurances of future compliance by a firm and its owners, managers and/or employees; likewise, sanctions for prior violations are not prerequisite to sanctions due to later violations. Moreover, prior sanctions may precipitate an increase in the severity of a later sanction (see §278.6(e)(6)). Further, as noted above, the **Food & Nutrition Act of 2008** provides that a store's disqualification "*shall be* (emphasis added) permanent upon ... the first occasion of... trafficking."

With regard to contention 3 above, **The Food & Nutrition Act of 2008** directs the agency to establish regulations which implement the provisions of the Act, including specifying the number and type of violations required to warrant specific sanctions. Sanctions for the sale of ineligible items vary from six-months to permanent disqualification; however, there is no discretion allowed in assigning a sanction for SNAP-benefit trafficking. Any amount of

trafficking warrants a permanent disqualification. In the present case, the record reflects that two instances of SNAP-benefit trafficking occurred at the Appellant firm and involved Appellant's store representatives (Exhibits C and D of the Investigation Report). Both instances involved not only trafficking but discounting, in which the amount of SNAP benefits charged exceeded the amount of cash given. When cash is exchanged for SNAP benefits at a discount it is very difficult to compellingly argue that the violation was unintentional. The amount of the discount is a tacit acknowledgement that the exchange is improper and illegal and thus a premium is charged to perform it. Additionally, even if a lack of intent to traffic can be compellingly demonstrated, this in no way mitigates the trafficking violation. Due to these trafficking violations, the ROD Office properly assigned a permanent disqualification. As noted above, the regulations at 7 CFR § 278.6(e)(1)(i) are specific in that the agency **shall** (emphasis added) disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2.

In regard to contention 4 above, there is no indication in the Investigation Report of any attempts to conduct a trafficking transaction at the Appellant firm that was denied by store personnel. Such denials are routinely documented in investigation reports and there is no such indication of any denials in the report at issue. Appellant provides no further detail or evidence regarding the purported denials. Nonetheless, had there been evidence of a one or more trafficking denials, such would not have countered other instances of trafficking, all other factors being equal.

Regarding contention 5 above, it is important to clarify for the record that there is no provision in the statute or regulations for waiver or reduction of an administrative penalty on the basis of corrective action implemented subsequent to findings of program violations. The purpose of this review is to determine if the earlier decision of the ROD Office was proper and in compliance with pertinent laws and regulations. Accordingly, this review is limited to considerations relevant at the time such decision was made. It is beyond the scope of this review to consider what subsequent remedial actions, such as changes in store management, procedures, internal controls, employee discipline/training or facility and/or inventory changes and improvements Appellant may propose to take or may have taken in order to comply with program requirements. Therefore, to the extent Appellant implies that it will, or has, implement(ed) corrective and/or remedial actions, though this would likely have been valuable in preventing program violations at an earlier time, such cannot now apply retroactively and does not provide a valid basis for dismissing the charges or for mitigating the serious impact of the violations upon which they are based. It is further added for the record that, although Appellant claims corrective action has been taken, it offers no documentary evidence of same. As such, the claim carries little weight, and as noted above, corrective action following findings of violations is not relevant in ROD Office sanction decisions.

With regard to contention 6 above, Appellant has implied that the Owner of the firm had no knowledge of violations of the SNAP regulations, did not personally commit violations thereof and notes that an employee, who also happened to be a family member, committed the violations. This contention cannot be accepted as a valid basis for dismissing any of the charges or for mitigating the impact of the violations upon which they are based. Appellant is liable for all violative transactions handled by full or part-time, paid or unpaid store personnel, whether or not ownership is aware of such transactions. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP

benefit transactions. To allow store ownership to disclaim accountability for persons to whom it delegates responsibility to act on behalf of the firm would render virtually meaningless the enforcement provisions of the **Food & Nutrition Act of 2008** and the enforcement efforts of the USDA. Additionally, ownership of the Appellant firm signed an FNS-252, SNAP Application for Stores, on September 26, 1997 (as well as additional certification statements during routine reauthorization activities since the firm was initially authorized), by means of which Appellant acknowledged and agreed to accept responsibility to prevent violations of the program by any and all employees of the firm. Owners may indeed be held accountable for the actions of employees, sanctions may be imposed for trafficking regardless of the owner's lack of knowledge of violations and permanent disqualification of even an "innocent owner" is consistent with the legislative history of the statute and regulations. Furthermore, culpability need not be imputed to an owner through the actions of an employee if the owner was involved in the violative activity, whether accidental or otherwise. Again, to allow store ownership to disclaim accountability for the acts of persons to whom the responsibility to handle store business has been assigned would render inert the enforcement provisions of the **Food and Nutrition Act of 2008** and corresponding provisions of the regulations.

It is noted for the record that two of the five transactions conducted during the investigation occurred outside the employee's stated work hours of 10 AM to 2 PM. Moreover, as noted above, trafficking at a discounted rate tends strongly to reflect intent to violate as well as some level of sophistication regarding, and some familiarity with, the street SNAP-trafficking discount rate.

In regard to contention 7 above, it is not at all clear from the record that Appellant would not have been disqualified had it replied to the Charge Letter; nonetheless, Appellant has now, presumably, provided in support of its review request any information and evidence it would have provided in reply to the Charge Letter, and this information/evidence has been duly and fully considered in the course of this review. No further findings are rendered in this regard.

Regarding contention 8 above, the issue of hardship worked upon retailers or SNAP clients is not a consideration under the statute or regulations in decisions to disqualify firms due to SNAP-benefit trafficking. The only alternative to permanent disqualification, once trafficking is established, is to impose a trafficking civil money penalty. Appellant was advised of this provision in the ROD Office's Charge Letter, which also advised that documentation of eligibility for that alternative sanction was to have been provided within a specific time limit. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) in 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 (postmarked within 10 days of receiving the letter of charges), the firm shall not be eligible for such a penalty. As Appellant did not reply to the Charge Letter, did not request such consideration and provided no evidence or information in support thereof, the SNAP Office's decision not to impose a civil money penalty was appropriate pursuant to 7 CFR §278.6(b)(1), §278.6(b)(2)(ii), §278.6(b)(2)(iii) and §278.6(i). It is further noted that said provisions specify that no extensions to this time period, in which a firm may provide evidence in support of its request for a civil money penalty, may be granted.

With regard to contention 9 above, a record of community service and/or leadership, even if verified, does not constitute valid grounds for dismissing the present serious charges of trafficking or for mitigating the impact of the violations upon which they are based. There is no provision in the Act and/or regulations that reduces a trafficking sanction based upon such considerations. Further, as noted above, the Food & Nutrition Act of 2008 provides that a store's disqualification "*shall be* (emphasis added) permanent upon ... the first occasion of a disqualification based on ... trafficking."

### **CONCLUSION**

In view of the above, the decision of the ROD Office to permanently disqualify Omega Sea World Corp. from participation in the SNAP is hereby sustained and will become final upon the 30<sup>th</sup> day following your firm's receipt of this document.

### **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 provisions of the Freedom of Information Act (FOIA), 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.

DANIEL S. LAY  
Administrative Review Officer

August 28, 2018