

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

Poor Boy’s Produce Market,

Appellant,

v.

Case Number: C0205246

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 the permanent disqualification of Poor Boy’s Produce Market (Poor Boy’s Produce Market or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

ISSUE

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

AUTHORITY

7 USC § 2021 and the 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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period from February 26, 2018, through June 11, 2018. The investigation report documents that personnel at Poor Boy’s Produce Market exchanged SNAP benefits for cash during one of the compliance visits. The store employees also sold ineligible non-food items in exchange for SNAP benefits. The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR §271.2.

As a result of evidence compiled from the investigation, the Retailer Operations Division informed Appellant, in a letter dated June 26, 2018, that it was charged with violating the terms and conditions of the SNAP regulations. The letter stated, in relevant part, that:

...[Y]our firm is charged with trafficking, as defined in Section 271.2 of the SNAP regulations. As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for the trafficking violation(s) . . . is permanent disqualification.

The charge letter also stated that:

The SNAP regulations also provide that under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000.00 in lieu of permanent disqualification of a firm for trafficking. The SNAP regulations, Section 278.6(i), list the criteria that you must meet in order to be considered for a CMP. If you request a CMP, you must meet each of the four criteria listed and provide the documentation as specified within 10 calendar days of your receipt of this letter.

Appellant replied to the charges by fax on July 2, 2018, and apologized for the transactions. After considering the evidence, the Retailer Operations Division notified Appellant in a letter dated July 10, 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 further stated that Appellant was not eligible for a trafficking CMP because it failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked July 16, 2018, Appellant appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear 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, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) and (e)(1) 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 SNAP benefits.

7 USC § 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 that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

7 CFR § 271.2 states, in part, 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 § 271.2 defines trafficking, in part, as:

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(a) states:

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(b)(2)(ii) states, in part:

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(e)(1) reads, in part:

FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

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 of the Program.

7 CFR § 278.6(b)(2) states, in part:

(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 a penalty. [Emphasis added.]

INVESTIGATION DETAILS

During an investigation conducted from February 26, 2018, through June 11, 2018, a USDA investigator conducted six compliance visits at Poor Boy's Produce Market. The investigation report dated June 18, 2018, was provided to the Appellant as an attachment to the charge letter, and included Exhibits A through F which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were committed during five of the compliance visits. The investigation reported that personnel at Poor Boy's Produce Market exchanged **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in cash for **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits during one of the visits. Transactions of this nature are referred to in regulatory terms as "trafficking". During five of the visits, Appellant also exchanged ineligible non-food items, including body lotion, shampoo, conditioner, fragrance warmer, and candles for SNAP benefits.

APPELLANT'S CONTENTIONS

In its July 16, 2018, administrative review request, Appellant provided the following summarized contentions, in relevant part:

- Appellant does not remember giving anyone cash.
- Appellant may have hit the SNAP button on the terminal instead of CASH which was on accident.

- Appellant does not trade SNAP for cash, if it did it would have charged extra and from the report it just covered what was bought.
- It is very easy to make mistakes on the terminal because it is touchscreen and it has hit the wrong button before.
- Appellant is sorry and will be paying more attention to the terminal.
- Appellant requests a CMP instead of a permanent disqualification.
- Most people in the community depend on SNAP and Appellant tries to have a different selection for them to choose from.

The preceding may represent only a brief summary of the Appellant’s contentions presented 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.

ANALYSIS AND FINDINGS

A full review of the case record shows that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted by a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no error or discrepancy. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. The documentation presented by the Retailer Operations Division establishes by a preponderance of the evidence that the violations as reported occurred at the Appellant store.

Reconsideration

Appellant requests reconsideration and it explains that it was a mistake. Neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto 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. 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.

Corrective Action

Appellant apologizes and states that it will pay more attention to the terminal. 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 within the authority of this review to consider what subsequent remedial actions may have been taken or will be taken in the future so that a store may begin to comply with program

requirements. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, Appellant's contention that it will take corrective action to prevent the violations does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Household Hardship

Appellant states most people in the community depend on SNAP and Appellant tries to have a different selection for them to choose from. The Retailer Operations Division determined that there are two other authorized establishments within a three-mile radius of Appellant. Moreover, where there is a hardship to SNAP households, FNS may impose a hardship CMP on a firm in lieu of a disqualification where there is a lack of authorized stores in the area. However, the regulations at 7 CFR § 278.6(f)(1) clearly state that "a civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a permanent disqualification." Because the Retailer Operations Division has taken action to permanently disqualify Appellant's firm, a hardship CMP in lieu of disqualification cannot be granted.

Civil Money Penalty

In the charge letter, Retailer Operations informed Appellant of its right to request a trafficking CMP under 7 CFR §278.6(i). Appellant was informed that it would need to provide both the request and supporting evidence within 10 calendar days of receiving the charge letter and that no extension of time could be granted for making the request or for providing the required evidence. Appellant verbally requested a CMP but did not provide any evidence in support of its request.

The criteria for a trafficking civil money penalty in lieu of disqualification is defined under 7 CFR §278.6(i) which reads, inter alia:

In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in §278.6(i)(1); and

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in §278.6(i)(2); and

Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations"

The Retailer Operations Division determined that Appellant was not eligible for a CMP because there was insufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program prior to the SNAP violations in this case.

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is limited to what circumstances existed at the time that was the basis of the Retailer Operations Division's action. Thus, the determination by the Retailer Operations Division that Appellant did not meet the standards for a trafficking CMP under 7 CFR §278.6(i) is sustained.

CONCLUSION

Based on a review of the evidence in this case, there is no question that program violations did occur during a USDA investigation. Therefore, the decision to impose a permanent disqualification against Appellant, Poor Boy's Produce Market, is sustained. The determination that Appellant is not eligible for a CMP is also sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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 the Appellant's owners resides 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

November 15, 2018