

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

Puchus Grocery & Deli,

Appellant,

v.

Case Number: C0230725

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 a permanent disqualification of Puchus Grocery & Deli (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was improperly imposed by FNS’s Retailer Operations Division. As such, the permanent disqualification action is reversed. Likewise, the associated fiscal claim of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** is dismissed.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action consistent with Title 7 Code of Federal Regulations (CFR) Part 278 when it imposed a permanent disqualification against Puchus Grocery & Deli.

AUTHORITY

7 U.S.C. § 2023 and its 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

Puchus Grocery & Deli was initially authorized to participate as a retailer in SNAP on November 19, 1998. Between June 18, 2020 and June 28, 2020, a USDA investigator conducted an undercover investigation at Puchus Grocery & Deli to ascertain the firm’s compliance with Federal SNAP laws and regulations. It was reported that during the course of the investigation the Appellant firm twice trafficked in SNAP benefits by exchanging cash for merchandise that had been originally purchased with SNAP benefits.

In a letter dated August 25, 2020, the Retailer Operations Division charged the Appellant with trafficking as defined in Section 271.2 of the SNAP regulations. The letter informed the Appellant that the trafficking violations warranted permanent disqualification from SNAP as provided in 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made within 10 days of receipt of the letter under the conditions specified in 7 CFR § 278.6(i).

In a telephone call on August 28, 2020, the Appellant owner replied to the charges, claiming that the investigator never told him that the merchandise in question had been previously purchased with SNAP benefits. In a letter dated September 4, 2020, the Appellant, now through counsel, provided three sworn statements: one from the store owner and two from store employees. All three claimed to be present when the investigator took the merchandise into the store and all three insisted that the investigator never mentioned that it had been purchased with SNAP benefits before re-selling it to the Appellant. Two of the sworn statements also referred to one store visit in which the clerk refused to allow the sale of non-food items in exchange for SNAP benefits. The store owner also claimed that the firm has been authorized since 1998 and has never committed any program violations.

It is noted that the Appellant did not request a trafficking CMP and there is no evidence that it submitted any documentation to support this alternative penalty.

After considering the Appellant's response and further reviewing the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated January 27, 2021. This letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the regulations, but determined that a CMP was not appropriate in this case because the 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. The letter further indicated that the trafficking violations resulted in a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) loss to the government, and a bill for collection was included with the letter, with full payment due within 30 calendar days. Agency records show that the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) fiscal claim was paid in full by the Appellant on February 8, 2021.

In a letter postmarked February 8, 2021, the Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 & REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e) establish the authority upon which a disqualification may be imposed against 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 § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food.

7 CFR § 271.2 states, in part:

Eligible foods means: (1) Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption....

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 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(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(e) states, in part:

FNS shall take action as follows against any firm determined to have violated the Act or regulations...The FNS regional office shall:

(1) Disqualify a firm permanently if:

(i) Personnel of the firm have trafficked as defined in § 271.2...

7 CFR § 271.2 states, in part:

Trafficking 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...
- (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.

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(b)(2)(iii) states:

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.

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 § 279.5(c) states, in part:

Review of disqualification or civil money penalty or fine. When the action under review is disqualifying a firm from program participation or assessing a civil money penalty or fine against a firm, the designated reviewer shall: Sustain the action under review; specify a shorter period of disqualification; specify a reduced money penalty or fine; direct that an official warning letter be issued to the firm in lieu of a disqualification, civil money penalty or fine; or, direct that the action under review be reversed....

7 CFR § 279.7(d) states, in part:

...If the disqualification action is reversed through administrative or judicial review, the Secretary shall not be liable for the value of any sales lost during the disqualification period.

SUMMARY OF INVESTIGATION

During an undercover investigation conducted between June 18 and June 28, 2020, a contracted investigator completed five compliance visits at Puchus Grocery & Deli. A report of the investigation was provided to the Appellant as an attachment to the August 25, 2020 charge letter. The investigation report includes Exhibits A through E and provides details on the results of each compliance visit. Trafficking violations were documented in Exhibits C and D. The report provides the following details:

Exhibit A

Three SNAP-eligible items purchased. Two ineligible items (aluminum foil) were refused by the store clerk.

Exhibit B

Four SNAP-eligible items purchased. No other purchases were attempted. This exhibit also indicates that the investigator negotiated a future trafficking incident with the clerk. This is described by the investigator as follows:

5 U.S.C. § 552 (b)(7)(E)

Exhibit C

No items were purchased from the Appellant store. This exhibit also describes the purchase of Red Bull energy drink from BJ's, as noted in Exhibit B, as well as the alleged exchange of Red Bull for cash at Puchus Grocery & Deli. The investigator explains these events as follows:

5 U.S.C. § 552 (b)(7)(E)

Exhibit D

No items were purchased from the Appellant store. This exhibit also describes an additional purchase of Red Bull from BJ's and an alleged exchange of Red Bull for cash at Puchus Grocery & Deli. The investigator explains these events as follows:

5 U.S.C. § 552 (b)(7)(E)

Exhibit E

The investigator attempted to purchase two ineligible items (bags and napkins), but the store clerk refused, stating that they could not be purchased with SNAP benefits.

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- The Retailer Operations Division failed to provide the Appellant procedural due process, “such as notice and an opportunity to confront evidence, examine witness[es], and rebut any evidence of said charges...”
- The Retailer Operations Division failed to properly weigh and consider the two decades length of prior SNAP compliance. It also did not conduct a reasonable inquiry related to the firm’s absence of prior violations; the isolated nature of the current case; and the lack of any pattern of SNAP violations at the store.
- FNS failed to consider that the firm’s two decades of compliance meets the criteria for eligibility of a CMP in lieu of permanent disqualification.
- Appellant requests copies of “any documents, photographs, videotapes, audio tapes or other forms of electronic recording, sketches, reproductions, made with respect to 7 CFR Sec. 278.6(d)...”

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced in this document.

ANALYSIS AND FINDINGS

The type of trafficking alleged to have taken place in this case is described in the definition of *Trafficking* as found in 7 CFR § 271.2, paragraph 5, which states that trafficking includes “intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.” It is the finding of this review that the investigation report does not contain sufficient detail or evidence for this review to conclude that the Appellant likely intentionally purchased products that had originally been purchased with SNAP benefits. Accordingly, the determination to impose a permanent disqualification against Puchus Grocery & Deli for trafficking is reversed.

Because the disqualification determination is reversed, the Appellant’s contentions related to this action are moot and need not be addressed.

CONCLUSION

Based on a review of all available information in this case, this administrative review finds that there is insufficient evidence to support a permanent disqualification against the Appellant, Puchus Grocery & Deli. Accordingly, the permanent disqualification determination is reversed. The firm’s SNAP authorization shall be reinstated and the associated fiscal claim for **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, which has already been paid, must be refunded to the Appellant.

RELEASE OF INFORMATION

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.

JON YORGASON
Administrative Review Officer

April 1, 2021