

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

Quick Shop Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0212305

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 Quick Shop Inc. (Appellant) by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against Quick Shop Inc.

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

The USDA conducted an investigation of the compliance of Quick Shop Inc. with Federal SNAP law and regulations during the period September 26, 2018 through August 12, 2019. The investigation report documents that personnel at the Appellant firm, in addition to accepting SNAP benefits in exchange for ineligible items on three occasions, also exchanged SNAP benefits for cash during two undercover compliance visits. 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 this investigation, the Retailer Operations Division informed the Appellant, in a letter dated September 20, 2019, that it was charged with violating the terms and conditions of the SNAP regulations. The Charge Letter along with a copy of the investigation report was delivered by UPS to the Appellant on September 23, 2019. The Charge Letter stated, in relevant part, that:

“Your 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:

“...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”.

In responses to the Retailer Operations Division of September 27, 2019, October 18, 2019, and November 8, 2019, the Appellant replied to the charges therein stating that the store owner worked alone until June 22, 2019 when he hired 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The owner challenged the descriptions of both himself and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as noted in the investigative report. In support of its response, the owner submitted a photo identification card for himself as well as photos of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and himself. The owner also submitted paystubs (for himself and 5 U.S.C. § 552 (b)(6) & (b)(7)(C)) and a letter from an accountant attesting to the owner being the only paid employee in tax year 2018.

After giving consideration to the Appellant’s replies and the evidence in this case, the Retailer Operations Division informed the Appellant, by letter dated February 5, 2020, that Quick Shop Inc. was permanently disqualified from participation as a retail store in the SNAP. The letter also stated that the Appellant was not eligible for a trafficking civil money penalty as the Appellant did not 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 February 12, 2020, the Appellant, through counsel, requested an administrative review of the permanent disqualification determination. FNS granted the Appellant’s request for administrative review by letter dated February 21, 2020. In an email response of March 9, 2020, the Appellant, through counsel, provided additional information in support of the request for administrative review.

STANDARD OF REVIEW

In appeals of adverse actions, 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 relevant evidence which a reasonable mind, considering the record as a

whole, might 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 covered 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)(1)(i) establish the authority upon which a permanent 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 ...[Emphasis added.]

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.

7 CFR § 271.2 states, in part:

Trafficking means the buying or selling of coupons, ATP cards or other benefit instruments for cash or consideration other than eligible food ...

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(i) states, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 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 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; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm

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.]

SUMMARY OF CHARGES

During an investigation from September 26, 2018 through August 12, 2019, the USDA conducted eight compliance visits at Quick Shop Inc. A report of the investigation was provided to the Appellant as an attachment to the Charge Letter dated September 20, 2019. The investigative report included Exhibits A through H which provide full details on the results of each compliance visit. The investigative report documents that SNAP violations occurred during five of the eight compliance visits. During two of the compliance visits, a clerk exchanged cash for SNAP benefits as documented by Exhibits F and H.

The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR § 271.2. The acceptance of SNAP benefits in exchange for cash or consideration other than eligible food is in violation of Section 278.2(a) of the SNAP regulations. As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for the trafficking is permanent disqualification.

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the replies to the Charge Letter, in the request for administrative review, and in subsequent correspondence, the Appellant, through counsel, made the following summarized contentions, in relevant part:

- The store owner worked alone and was the only employee until June 22, 2019 when he hired 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The descriptions of both the owner and the employee as noted in the investigative report are inaccurate. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) has black hair and wears a hijab religious scarf at all times. The report describes the owner as being between 40 to 45 years of age and weighing between 135 to 140 pounds. However, the owner is 35 years old and weighs 190 pounds.
- The Appellant has taken the following measures to prevent any mishandling or misuse of SNAP benefits: (1) Gave training or a work shop to the owner and staff; (2) Read the owner manual regarding the SNAP off line and from the SNAP website at <http://www.fns.usda.gov/snap/retailers-store-training-information> (16 hours of training); (3) Installed new camera that only the owner has access to (almost 5 U.S.C. § 552 (b)(6) & (b)(7)(C) spent); (4) Posted a sign in front of the cash register visible to all to call the USDA hot line if there are any suspicious SNAP transactions and provided the owner's phone number with recording device; and (5) Added a special pass work on the credit card machine specific to SNAP.
- The Appellant has been participating in the SNAP for a long time.
- The Appellant is the owner's bread and butter. The owner would never knowingly jeopardize his livelihood or do any harm to the SNAP. The owner would never compromise its participation in the SNAP.
- The Appellant requests that it be allowed to accept SNAP to serve the area in which most of its customers are elderly or underserved.

In support of its contentions, the Appellant submitted the following documents for review:

- Photo identification card of store owner;
- Photo of store owner;
- Photo of female employee;
- Pay stubs for store owner and 5 U.S.C. § 552 (b)(6) & (b)(7)(C);
- Letter from Appellant's accountant stating that per financial records for tax year 2018, the owner was the only employee of the Appellant firm; and
- Invoice dated September 30, 2019 for Norex 8 channel system display TV monitor.

ANALYSIS AND FINDINGS

SNAP Violations

The Appellant contends that the store owner worked alone and was the only employee until June 22, 2019 when he hired 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The descriptions of both the owner and the employee as noted in the investigative report are inaccurate. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) has black hair and wears a hijab religious scarf at all times. The report describes the

owner as being between 40 to 45 years of age and weighing between 135 to 140 pounds. However, the owner is 35 years old and weighs 190 pounds. In support of its contentions, the Appellant submitted a photo identification card of store owner; photo of store owner; photo of female employee; pay stubs for store owner and 5 U.S.C. § 552 (b)(6) & (b)(7)(C); and a letter from Appellant's accountant stating that per financial records for tax year 2018, the owner was the only employee of the Appellant firm.

This review is to either validate or to invalidate the determination made by the Retailer Operations Divisions; it is limited to the facts at the basis of the Retailer Operations Division's determination at the time it was made. Upon review, the evidence supports that SNAP violations occurred at the Appellant firm during five of the eight compliance visits conducted. During two of the compliance visits, a clerk exchanged cash for SNAP benefits as documented by Exhibits F and H in the investigative report. The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR § 271.2. The acceptance of SNAP benefits in exchange for cash or consideration other than eligible food is in violation of Section 278.2(a) of the SNAP regulations. As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for the trafficking is permanent disqualification.

The charges of violations are based on the findings of a formal Department of Agriculture investigation; all transactions cited were conducted under the direct supervision of a Department investigator. All such transactions are fully documented and a review of this documentation has yielded no indication of substantial error or discrepancy in the reported findings; the investigative record is specific and thorough with regard to the dates and other specifics of the violations and in all other critically pertinent detail. The investigative report clearly identifies the serial number of the cash received in exchange for SNAP benefits in Exhibits F and H.

Additionally, investigative results are routinely supported by documentation that confirms items purchased at a retail firm in the course of an investigation are donated to and signed for by a charitable organization following transactions. Such documentation includes the signature and title of the official of the charitable organization accepting the donated item, the name and address of the organization, the date the donation was made and the official's certification that the items described were in fact received. The record also includes photographs of the items purchased at the store during the investigation, along with the dated receipts clearly showing that they were obtained at the Appellant store. The purchase cost of each of the transactions involved in the investigation are documented on SNAP terminal receipts obtained during each transaction. Moreover, transaction data generated by each investigative purchase at the Appellant firm is stored in agency data systems.

With regard to the discrepancies proposed by the Appellant between the clerk descriptions identified in the investigative report and those given by the Appellant, the matter of descriptions is often subjective in nature and may involve descriptive features that are relative with respect to the point of view of the observer. For example, a short investigator may view taller clerks as being much taller than they really are and a young investigator may believe older clerks are much older than they really are.

While the Appellant claims that he was the only employee at the Appellant firm until hiring **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** on or about June 22, 2019, the evidence provided by the Appellant and in the investigative report indicates that **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**/a female employee was working at the Appellant firm during the period that the trafficking violations occurred on August 8, 2019 (Exhibit F) and August 12, 2019 (Exhibit H). The Appellant has provided no evidence that trafficking of SNAP benefits did not occur during the investigation period/on those dates. The issue here is whether or not, through a preponderance of evidence, it is more likely true than not true that the investigation did, in fact, take place at the Appellant firm as reported. The Appellant has the burden to provide relevant evidence to rebut the trafficking charges. This burden has not been met.

Trafficking is defined in 7 CFR § 271.2 of the SNAP regulations which states that 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... The Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement 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, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. Whether or not the SNAP violations were committed by a store employee without the owner’s knowledge, consent, or approval cannot be accepted as a valid basis for diminishing the penalty. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of USDA.

Corrective Action

The Appellant contends that it has taken the following measures to prevent any mishandling or misuse of SNAP benefits: (1) Gave training or a work shop to the owner and staff; (2) Read the owner manual regarding the SNAP off line and from the SNAP website at <http://www.fns.usda.gov/snap/retailers-store-training-information> (16 hours of training); (3) Installed new camera that only the owner has access to (almost **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** spent); (4) Posted a sign in front of the cash register visible to all to call the USDA hot line if there are any suspicious SNAP transactions and provided the owner’s phone number with recording device; and (5) Added a special pass work on the credit card machine specific to SNAP. In support of its contentions, the Appellant submitted an invoice dated September 30, 2019 for Norex 8 channel system display TV monitor.

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 the authority of this review to consider what subsequent remedial actions

may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that it has taken or will take corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

No Prior Violations

With regard to the Appellant's contention that it has been participating in the SNAP for a long time, 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 for mitigating the impact of those charges. Trafficking in SNAP benefits is an extremely serious violation and both 7 U.S.C. § 2021(b)(3)(B) and 7 CFR § 278.6(e)(1)(i) state that a first time violation warrants a permanent disqualification.

Financial Hardship

The Appellant contends that the firm is the owner's bread and butter. The owner would never knowingly jeopardize his livelihood or do any harm to the SNAP. The owner would never compromise its participation in the SNAP. However, there is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, the Appellant's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Customer Hardship

The Appellant requests that it be allowed to accept SNAP to serve the area in which most of its customers are elderly or underserved. 7 CFR § 278.6(f) of the SNAP regulations provides for civil money penalty assessments in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs. However, this regulations also sets forth the following specific exception to such assessments there under: "A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification." Therefore, since this case involves a

permanent disqualification action, the civil money penalty provision is not applicable to the present case.

CIVIL MONEY PENALTY

As previously indicated, the February 5, 2020 Determination Letter advised the Appellant of the ineligibility for consideration for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations. The letter of charges dated September 20, 2019 advised the Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The regulations specify that such documentation must, in part, establish that there was an effective compliance policy and training program and that both were in effect and implemented prior to the occurrence of violations. The letter indicates that no information was provided by the Appellant for consideration; therefore, on review the Retailer Operations Division's determination that the Appellant firm is ineligible for the imposition of civil money penalties in lieu of disqualification is affirmed.

CONCLUSION

As previously stated, 7 CFR § 278.6(e)(1)(i) reads, in part, "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, as "the buying or selling of SNAP benefits for cash or consideration other than eligible food." The law and regulations do not provide for a lesser period of disqualification for this violation.

Based on a review of the evidence in this case, there is no question that program violations did occur during a USDA investigation. All transactions cited in the letter of charges were conducted or supervised by a USDA investigator and all are thoroughly 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, including the exchange of SNAP benefits for cash or consideration other than eligible food, and in all other critically pertinent details. Therefore, the decision to impose a permanent disqualification against the Appellant, Quick Shop Inc., is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that 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 you reside 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, FNS is 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

April 13, 2020