

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

Richway International,

Appellant,

v.

Case Number: C0199429

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 Richway International (Richway International 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 November 20, 2017, through February 7, 2018. The investigation report documents that personnel at Richway International exchanged SNAP benefits for cash during two 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 March 21, 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, through its previous counsel, replied to the charges by letter dated March 29, 2018, and requested an exception to the penalty imposed. Appellant did not request a CMP. After considering the evidence, the Retailer Operations Division notified Appellant in a letter dated April 4, 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 submitted by fax on April 16, 2018, Appellant, through its current counsel, 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 November 20, 2017, through February 7, 2018, a USDA investigator conducted six compliance visits at Richway International. The investigation report dated March 12, 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 Richway International exchanged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash for an unknown amount of SNAP benefits on one occasion and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash for an unknown amount of SNAP benefits during another transaction. Transactions of this nature are referred to in regulatory terms as “trafficking”. During four of the visits, Appellant also exchanged ineligible non-food items including cooking pots, a slow cooker, and calling cards, for SNAP benefits.

APPELLANT’S CONTENTIONS

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

- Appellant did not engage in any illegal acts stemming from an undercover report which includes the observation of a previous employee.
- The business is located in a low-income neighborhood in a notorious subdivision for

poverty which yields a higher than normal amount of EBT customers.

- Most of the customers buy groceries for their entire household as would a customer at a fully-fledged grocery store.
- Appellant is flanked by Section 8 housing where the majority of individuals use EBT for nearly all of their groceries.
- The average family consists of three to ten children and a single parent which require a higher than usual consumption of qualified EBT items.
- Each household card can be used numerous times throughout the day for the reason that there are numerous individuals in each large family.
- Appellant has a high volume of both EBT and non-EBT sales.
- Appellant has never had any violations or been under investigation for trafficking.
- Appellant and its employees review the SNAP user's manual on a regular basis.
- Appellant sells a high volume of meat and authentic African groceries.
- Appellant is fully stocked with EBT qualified items.
- Appellant believed that the pots were part and parcel of the food purchase itself.
- Appellant had an effective compliance program to prevent SNAP violations.
- The compliance policy was in effect prior to the violations.
- The firm had developed and set up effective personnel training.
- Appellant has been authorized since 2014.
- A photocopied booklet made in-house by Appellant is provided to each of its employees.
- Appellant's training program is a combination of practical training and a review of the SNAP manual.
- Ownership attests that it never benefited from any allegedly illegal transactions.

Appellant, through counsel, provided the following documents in support of its request:

- Three Affidavits from customers regarding what they purchase from Appellant;
- Eighteen invoices from vendors;
- Two inventory mark-ups; and
- Sixteen photographs of store stock.

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.

Household Hardship

Counsel contends that the business is located in a low-income neighborhood in a notorious subdivision for poverty which yields a higher than normal amount of EBT customers. The available evidence shows that there are eight other SNAP authorized stores within a one-mile radius of Appellant including a supermarket located a half-mile from 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.

No Previous Violations

Appellant explains that it has been authorized since 2014 without any previous 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 for mitigating 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.

CIVIL MONEY PENALTY

Appellant did not timely request consideration for a trafficking CMP under 7 CFR § 278.6(i) even though it was informed of the right to do so in the charge letter. SNAP regulations at 7 CFR § 278.6(b)(2)(iii) states 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 in § 278.6(b)(1), the firm **shall not be eligible** for such a penalty.” [Emphasis added.]

Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program **prior** to the violations as required in 7 CFR § 278.6(i). Regarding compliance policy standards, 7 CFR § 278.6(i)(1) states, in part:

... in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written **and dated** statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with this part 278 of current SNAP regulations [Emphasis added.]

Regarding training program standards, 7 CFR § 278.6(i)(2) states, in part:

A firm which seeks a civil money penalty in lieu of a permanent disqualification **shall document its training activity** by submitting to FNS its **dated training curricula and records of dates training sessions were conducted**; a record of dates of employment of firm personnel; and **contemporaneous documentation** of the participation of the 11 violating employee(s) in initial and any follow-up training held prior to the violation(s). [Emphasis added.]

Appellant did not submit any such documentation. Based on the above analysis, the Retailer Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

SNAP regulations at 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. Therefore, the decision to impose a permanent disqualification against Appellant, Richway International is 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 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

July 24, 2018