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

Sam Cafe and Market,

Appellant,

v.

Case Number: C0199669

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 a permanent disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Sam Cafe and Market (Appellant), by the Retailer Operations Division (Retailer Operations).

ISSUE

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

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7, may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

CASE CHRONOLOGY

By Charge letter dated August 28, 2017, Retailer Operations informed Appellant it was charged with violating the terms and conditions of the SNAP regulations based on trafficking violations noted in Exhibits C and D, determined by a USDA investigation. The investigation was conducted from May19, 2017 through June 12, 2017, and outlined in an investigative report dated August 9, 2017.

Counsel filed a FOIA request by letter dated September 20, 2017. The FOIA office provided a FOIA reply dated November 22, 2017. On February 19, 2018, counsel appealed the FOIA reply.

The FOIA office provided the reply to the appeal dated September 25, 2020. Retailer Operations noticed counsel by letter dated September 29, 2020, that he had ten days to reply to the Charge letter. Counsel replied to the Charge letter with information dated October 13, 2020.

By Determination letter dated December 8, 2020, Retailer Operations informed Appellant that it was permanently disqualified from participation as a retail food store in the SNAP in accordance with Section 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter states that the store was not eligible for a trafficking CMP according to the terms of Section 278.6(i) because the firm failed to submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

By letter dated December 18, 2020, counsel appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated January 8, 2021. Counsel emailed a January 29, 2021 brief to this office.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing credible, relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the Act), 7 U.S.C. § 2021, and § 278 of Title 7 of the Code of Federal Regulations (CFR).

7 CFR § 271.2 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;"… (4) Purchasing a product with SNAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with SNAP benefits in exchange for cash or consideration other than eligible food; or (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food;" (6) Attempting to buy, sell, steal, or otherwise affect 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 signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone."

7 CFR § 278.6(b)(2)(ii) states: "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)(i) states: FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 278.6(i) states: "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."

SUMMARY OF THE CHARGES

The USDA conducted a compliance investigation of Appellant. Appellant was charged with conducing trafficking transactions as described in Exhibits C and D provided with the Charge letter. All four Exhibits were conducted between the investigator and the same store personnel as described. The penalty for trafficking is permanent disqualification. Major ineligible items were also exchanged for SNAP benefits by this same store clerk. The sanction for these violations is subsumed within the permanent disqualification for trafficking.

APPELLANT'S CONTENTIONS

The following may represent a summary of the contentions presented. In reaching a decision, full attention and consideration have been given to all contentions presented, including any not specifically recapitulated.

- The USDA lacked sufficient evidence upon which to base a permanent disqualification of the Appellants. In pertinent part, the Appellants denied that trafficking had occurred at the Store.
- All of the clerks at the store (during this time) were well known to the store owner and never had issues with theft, neglect or any other type of act that would indicate a propensity to violate regulations or laws. Furthermore, the affidavits do not allege that any of the clerks had an ownership or managerial interest in the store, nor would they stand to gain in any way for processing illegitimate transactions. Accordingly, they lack motivation to complete the transactions as set out in the Charge Letter.
- The Department appears not to have considered the Appellants' history of compliance when determining an appropriate sanction in this case, as is required by 7 C.F.R. §278.6(d): the FNS regional office making a disqualification or penalty determination shall consider: The nature and scope of the violations committed by the personnel of the firm; Any prior action taken by FNS to warn the firm about the possibility that violations are occurring; and Any other evidence that shows the firm's intent to violate regulations. Furthermore, in order for the Department to issue a Permanent Disqualification, it must prove that trafficking as defined by 7 C.F.R. §271.2 occurred. In the absence of evidence, the Department may not issue a permanent disqualification of the retailer.
- None of the affidavits adequately identify the clerks in this case, lack material details, and cannot be taken at face value. Instances of trafficking allegations like this should be supported by corroborating evidence so as to avoid a "he-said, she-said" evidentiary

presentation. Given that the Department bore the burden of proof in this matter at the initial stages, it's clear that the case should not have resulted in a permanent disqualification. There are no recordings of the interaction with the clerk, nor any other supporting affidavits from witnesses. As such, it is little more than a coin toss to decide who is correct, not enough to satisfy the preponderance of the evidence claim initially. The affidavits are fundamentally flawed. These Investigator's affidavits, which is "hearsay" by definition, an out of court statement offered to prove the truth of the matter asserted.

- The alleged trafficking is not corroborated by the submission of pictures of the dollar transaction(s); or anything else verifying the statement; there can be no reasonable opportunity for Appellate to subpoena or depose the witness because the USDA redacted all of that information prior to sending the Charge Letter and in its FOIA response; as a result of the owner's inability to subpoena said witness, it is impossible to determine the witness's veracity or whether or not a statement is biased. The uncorroborated documents should not be relied upon by the USDA in determining whether or not trafficking has occurred.
- In the event the Department chooses to consider the impermissible affidavits, the owner contests that the transactions occurred as relayed by the investigator. The Appellants deny the allegations of trafficking as the Store has a policy against trafficking and the sale of ineligible items as a whole. The owner maintains a strict set of rules for the transactions to be run in compliance with SNAP regulations, have reviewed the regulations and have personal knowledge of the rules.
- There's no past compliance history to indicate that this store had ever been a compliance concern. The Department's allegation is wholly without merit and is insufficient to support a finding of "trafficking" under the circumstances, any such finding would be little more than a violation of the Appellants' 4th Amendment rights. It is the Appellants' belief and request that the Charge Letter be rescinded and that a warning letter be issued.

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or to invalidate the decision of Retailer Operations. This review is limited to the facts at the basis of Retailer Operations' determination at the time it was made. The regulations establish that an authorized retail food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. The Charge letter Exhibits recount the details of the two violative trafficking exchanges by one store personnel, who engaged in the exchange of cash for SNAP benefits with a USDA investigator. While the individual who conducted the trafficking is identified by description, the date of the owner's birth, as seen in the record, puts him within the 60-65 age range stated in the investigative report.

The FOIA reply provided to counsel included photos of the items acquired at Appellant, and the EBT receipts for the SNAP transactions conducted. Photographs of the currency trafficked for benefits were also included with the FOIA reply, as were the donation sheets to organizations of the items acquired by the USDA. The record also includes a December 18, 2017, memo from detective with the Montgomery County Department of Police which alleged that the "writer obtained information about a possible EBT fraud case." The memo noted that a CI stated that Appellant's owner "is involved in a scam. The scam is as follows. A person goes in to the store

and picks up a small post it note and writes what they want on it. For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), then the owner will ring up 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of fake products and then give the person 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash." This memo was referred as a complaint to the FNS on December 22, 2017, after Appellant had been charged with trafficking by the USDA.

A review of the entirety of the case evidence has yielded no indication of error or discrepancy in the investigative report. The record is specific and accurate with regard to the dates of the violations, the exchange of ineligible nonfood items, and the exchange of cash by the store personnel for SNAP benefits. The violations documented in the investigative report do warrant a permanent disqualification, not a warning letter. A denial of the charge against Appellant is not evidence that trafficking did not occur. It is the Appellant's burden to demonstrate that it has not engaged in SNAP benefit trafficking by presenting a preponderance of evidence of same. As such, a contention that the Department has not proven its case is an ineffective means to demonstrate that Appellant has not engaged in violative activity.

The contention that pursuant to the SNAP regulations at 7 CFR § 278.6(d), that FNS did not take any prior action to warn the firm about the possibility that violations were occurring, or find any evidence that shows that the firm intended to violate the regulations, is an incorrect reading of the regulatory citation. The citation requires FNS to consider any prior warnings and evidence of a firm's intent to violate when determining a sanction. It does not require FNS to give such warnings or, in this case, to prove a firm's intent to violate. FNS did not consider prior actions to warn Appellant about the possibility that violations were occurring because there were no prior warnings. The evidence considered by the Retailer Operations included the information obtained during the aforementioned store investigation by a USDA investigator.

Only one store personnel was identified to have participated in all four Exhibits. Counsel contends that the investigative report is hearsay, and refers to court cases dealing with administrative hearings. Revisions to parts 278 and 279 of the SNAP regulations effective September 8, 2003, eliminated FNS administrative hearings. Accordingly, arguments presented relative to hearsay do not appear to be relevant. The administrative review officer is not responsible for determining whether any legal cases cited by counsel apply to Appellant's situation, and are more appropriately the province of judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

The administrative review process does not include an assessment of the constitutionality of the laws and regulations under which the agency imposed an adverse action. The review process is to decide whether the undertaken agency actions were proper pursuant to the applicable laws and regulations, and are sustainable by a preponderance of evidence. The Constitution, through the fourth amendment, protects people from unreasonable searches and seizures by the government. It is not clear how Appellant's fourth amendment rights have been violated as contended. SNAP authorization is an administratively-granted privilege subject to the terms and conditions for participation detailed in the Act and the regulations. Thus, if a firm does not conform to the applicable statutes and regulations, the same provide for the firm's removal from the program in accordance with the provisions detailed therein.

The preponderance of evidence in the record supports that trafficking, as described in the regulations at 7 CFR § 271.2, did occur at Appellant. The regulations stipulate the FNS shall disqualify a firm permanently if firm personnel have trafficked. The preponderance of the evidence supports that the permanent disqualification was properly applied.

CIVIL MONEY PENALTY

The regulations at Section 278.6(i) specify the criteria for a firm's eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. A firm must submit a timely request for a CMP that shows substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. The standard of substantial evidence is difficult to meet, nevertheless, such is the standard required by the regulations, and to which Appellant is held during the course of this review.

The record supports that Appellant did not submit substantial evidence to support the criteria for a trafficking CMP in lieu of permanent disqualification. On review of all the evidence in the record, it is determined that Retailer Operations properly applied the applicable regulations, and correctly denied a trafficking CMP.

CONCLUSION

The record supports the intentional exchange by store personnel of cash for SNAP benefits. This is trafficking. The preponderance of the evidence supports that SNAP violations did occur at Appellant. The denial of a trafficking CMP is also properly documented, and in accordance with the applicable regulations. The permanent disqualification of Appellant as a SNAP retail food store is therefore sustained. The effective date of this decision is 30 days after delivery of the decision to Appellant.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023), and to 7 CFR § 279.7 of the regulations with respect to applicable rights to judicial review of this decision. 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 where 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 delivery 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.

M. Viens March 3, 2021
ADMINISTRATIVE REVIEW OFFICER