

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

Sanford Friends Image, LLC,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0234467

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is insufficient evidence to support the determination by the Office of Retailer Operations and Compliance to impose a fiscal claim and permanent disqualification against Sanford Friends Image, LLC (“Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). The determination is modified to remove the fiscal claim.

ISSUE

The purpose of this review is to determine whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of Code of Federal Regulations (CFR) § 278.6(e)(1)(i) in its administration of SNAP when it imposed a Permanent Disqualification against Appellant on December 23, 2020.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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 Appellant’s compliance with federal SNAP law and regulations during the period of May 31, 2013 through July 12, 2013. The investigation reported that personnel at Appellant accepted a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) SNAP benefits in exchange for cash (trafficking) 5 U.S.C. § 552 (b)(6) & (b)(7)(C), as well as permitting the purchase of other non-food items with SNAP benefits. The investigation revealed that one unidentified clerk was involved in the impermissible transactions.

As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant, in a letter dated November 17, 2020, that its firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.6(e)(1). This letter stated, in part, “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking . . . is permanent disqualification.” The letter also states that “under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of a permanent disqualification of a firm for trafficking.”

Appellant replied to the charges in a subsequent letter to the Office of Retailer Operations and Compliance. The record reflects that the Office of Retailer Operations and Compliance received and considered this information prior to making a determination.

The Office of Retailer Operations and Compliance notified Appellant in a letter dated December 23, 2020 that the firm was being 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 also stated that Appellant’s eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated to Appellant that “. . . you are not eligible for the CMP because you failed to submit sufficient evidence to demonstrate that your firm had established and implemented an effective compliance policy and program to prevent violations of the Supplemental Nutrition Assistance Program.” The Office of Retailer Operations and Compliance also imposed a fiscal claim.

On January 19, 2021, Appellant appealed the Office of Retailer Operations and Compliance’s assessment and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing 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 untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(e)(1)(i) establishes 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 of SNAP benefits.

7 CFR § 278.6(e)(1)(i) reads, in part:

FNS shall . . . [d]isqualify 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] or other benefit instruments for cash or consideration other than eligible food.”

APPELLANT’S CONTENTIONS

Appellant’s responses regarding this matter are essentially as follows:

- Appellant requests a CMP. Appellant described its SNAP compliance policy and practice. Appellant provided a SNAP compliance poster, the SNAP Training Guide for Retailers, and eight pages of employee training documents dated November 24, 2020.
- During the investigative period, the owner was unavailable due to the severe illness and death of a family member. Appellant provided a death certificate, three pages of information regarding the funeral, two pages of a passport, and one page of medical documentation of the illness.
- The owner’s son refused non-food items during the September 9, 2020 transaction.
- The employee gave cash to the investigator from his own pocket without the owner’s knowledge.
- The employee who gave cash to the investigator was terminated.
- Appellant has not had any previous issues with SNAP compliance.
- There have not been any prior warnings given to Appellant.
- Employees have been retrained.

These explanations may represent only a brief summary of Appellant’s contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

A review of the evidence in the Office of Retailer Operations and Compliance’s case file does not support the determination to impose a fiscal claim against Appellant. Accordingly, it is unnecessary to address Appellant’s contentions regarding this matter.

Appellant contends that the owner was not at the store during any of the alleged violations, and that there have not been prior warnings given to Appellant. Appellant stated that during the investigative period the owner was unavailable due to the severe illness and death of a family member. While the owner’s circumstances are certainly deserving of sympathy, when ownership signed the FNS application to become an authorized SNAP retailer, this included a certification and confirmation that the owner(s) would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification document include trafficking. Regardless of whom the ownership of a store may utilize to operate the cash register and handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons chosen to handle store business, or requiring warnings of violations during an ongoing

investigation, would render the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA virtually meaningless.

First SNAP Violation

Appellant contends that this is the first time there has been an issue related to SNAP. A record of program participation with no documented previous violations, however, does not constitute valid grounds for mitigating the impact of the present serious determination of trafficking. In addition, the investigation report shows that both times that trafficking was attempted, it was permitted by store personnel.

This review is limited to considering the circumstances at the time the Office of Retailer Operations and Compliance's decision was made. It is not within this review's scope to consider actions that Appellant may have taken subsequent to this decision to begin to comply with program requirements. There is no provision in SNAP regulations for reducing an administrative penalty on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, Appellant's staff training and termination of the offending employee do not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Egregiousness of Trafficking Violation

Appellant stated the owner's son refused non-food items during the September 9, 2020 transaction and the employee gave cash to the investigator from his own pocket without the owner's knowledge. These statements are not supported by the investigative report. The report indicates that no non-food items were refused during the September 9, 2020 transaction. The report also stated the clerk provided money to the investigator from the register on two of the three occasions that the clerk paid the investigator.

Neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations 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 extremely serious, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. 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 must 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.

CIVIL MONEY PENALTY

Appellant requested a civil money penalty (CMP) contending that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

According to 7 CFR § 278.6(i) of the SNAP regulations, FNS may impose a CMP in lieu of permanent disqualification for trafficking.

7 CFR § 278.6(i) sets forth the eligibility requirements for a CMP:

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 Section 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 Section 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 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 . . .

..

In support of Appellant's contention that it is eligible for a CMP, it provided a SNAP compliance poster, 18 pages of the SNAP Training Guide for Retailers, and and eight pages of employee training documents dated November 24, 2020. In this regard, the various documentation provided by Appellant is not "substantial evidence" that fulfills each of the four criteria of 7 CFR § 278.6(i), demonstrating "that the firm had established and implemented an effective compliance policy and program to prevent violations." None of these documents have employee signatures or dates of when this training allegedly occurred.

The standards of eligibility for a trafficking CMP are high. They require substantial proof that a compliance policy and program was established and implemented prior to the occurrence of violations. These standards exist to thwart attempts to falsely present compliance policies and programs that were not actually implemented prior to violations. As Appellant did not provide the required supporting documentation, the Office of Retailer Operations and Compliance did not assess a CMP. According to the requirements stated in 7 CFR § 278.6(b)(1), § 278.6(b)(2)(ii and iii), and § 278.6(i), Appellant is not eligible for a CMP in lieu of a permanent disqualification from participation as an authorized retailer in SNAP. The determination by the Office of Retailer Operations and Compliance to deny Appellant a civil money penalty is sustained.

CONCLUSION

Based on a review of the evidence, it appears that the program violations at issue did, in fact, occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted under the supervision of a USDA investigator and all are fully 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, the specific exchanges of SNAP benefits for cash, and in all other critically pertinent detail.

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a fiscal claim of \$401.63 and permanent disqualification against Sanford Friends Image, LLC from participating as an authorized retailer in SNAP is modified to eliminate the fiscal claim. A paid fiscal claim should be refunded in full.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

RICH PROULX
ADMINISTRATIVE REVIEW OFFICER

April 5, 2021