

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

Seoul Grocery Market,

Appellant,

v.

Case Number: C0198025

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 Seoul Grocery Market (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

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 Seoul Grocery Market.

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

Seoul Grocery Market was initially authorized to participate in SNAP on September 1, 2009. Between May 17, 2017, and August 10, 2017, the USDA conducted an undercover investigation of Seoul Grocery Market to ascertain the firm’s compliance with Federal SNAP law and regulations. It was reported that during the course of the investigation, the Appellant firm violated SNAP rules by allowing ineligible non-food items to be purchased with SNAP benefits on six separate occasions. The firm also reportedly committed the violation of trafficking by exchanging SNAP benefits for cash on two occasions.

In a letter dated October 16, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations. It also charged the Appellant with accepting SNAP benefits in exchange for ineligible non-food merchandise. The misuse of SNAP benefits, as described in the charge letter, is a violation of 7 CFR § 278.2(a). The charge letter informed the Appellant that the 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 response to the charge letter, the Appellant submitted a letter dated October 25, 2017. In this letter, the Appellant owner stated that he spoke with both women who were accused of committing violations, and both denied the allegations. The Appellant further stated that it has never had such problems before and if the investigator had notified the firm after the second incident, the situation could have been resolved.

In support of its response, the Appellant submitted two statements signed by store employees. The statements claim that the employees sold only food items on the dates listed on the report and did not sell ineligible items and did not give customers cash back, as this would be a violation of EBT policy.

After considering the Appellant's response and further analyzing the evidence in the case, the Retailer Operations Division issued a determination letter dated November 16, 2017. In most cases, the violation of exchanging ineligible items for SNAP benefits results in a firm's temporary disqualification from SNAP. However, trafficking in SNAP benefits is a more serious offense and warrants permanent disqualification. Since trafficking was alleged in this case, permanent disqualification was the determination made by the Retailer Operations Division.

The determination 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 determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP in accordance with paragraph § 278.6(i), but determined that the Appellant was not eligible for a CMP because it failed to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked November 20, 2017, the Appellant 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)(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...

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 § 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.... Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and **disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section.**[Emphasis added.]

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:

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:

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 § 271.2 states, in part:

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 § 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....

SUMMARY OF INVESTIGATION

During an undercover investigation conducted between May 17, 2017, and August 10, 2017, the USDA completed six compliance visits at Seoul Grocery Market. A report of the investigation was provided to the Appellant as an attachment to the October 16, 2017, charge letter. The investigation report included Exhibits A through F, which provided full details on the results of each compliance visit. SNAP violations were documented during every visit and included trafficking violations on the last two visits as noted in Exhibits E and F. The report noted that the following ineligible non-food items were purchased by an investigator using SNAP benefits:

- One 10-count package of chop sticks (*Toyo* brand), Exhibit A
- One plastic bowl (no brand indicated), Exhibit A
- One package (5 sets) of bamboo chopsticks (no brand indicated), Exhibit B
- One 6-count package of spoons (*Novel* brand), Exhibit B
- One plastic strainer (*Sunshine Friends* brand), Exhibit B
- One 10-piece package of chopsticks (no brand indicated), Exhibit C
- One set of wooden spoons (*Novel* brand), Exhibit C
- One 2.8-ounce can of air freshener (*My Shaldan* brand), Exhibit C
- One 28-centimeter wok pan (*Ace Cook* brand), Exhibit D
- One 10-piece package of bamboo chopsticks (*Novel* brand), Exhibit D
- One 30-centimeter wok pan, model KWP 301 (*Ace Cook* brand), Exhibit E
- One 2.8-ounce can of air freshener (*My Shaldan* brand), Exhibit E

- One square pan, model EDC-S24, (*Joycook* brand), Exhibit F
- One 2.8-ounce can of air freshener (*My Shaldan* brand), Exhibit F

Trafficking was reported during the last two compliance visits. The first trafficking violation occurred on July 13, 2017. In reporting this visit, the USDA investigator provided the following details, as noted in Exhibit E:

5 U.S.C. § 552 (b)(7)(E)

The report noted that the second trafficking incident occurred on August 10, 2017. The investigator made the following statement on the report, as noted in Exhibit F:

5 U.S.C. § 552 (b)(7)(E)

The report noted that two different clerks conducted the violative transactions during the investigation – one female clerk and one male clerk.

APPELLANT’S CONTENTIONS

In its initial request for administrative review, and in a second letter dated December 21, 2017, the Appellant made the following summarized contentions, in relevant part:

- The allegations of trafficking are false except for the allegation regarding sales tax. The store owner questioned both women involved in the allegations, and again both deny selling anything other than food in exchange for SNAP benefits.
- The report indicates that there was only one female involved, but there were actually two women working on the dates in question.
- Owner also questioned the store manager, who was present, and the manager reports that only food items were sold.
- All employees who were questioned stated that they did not sell any nonfood items or give cash back to any customer using SNAP benefits. But they did admit to adding sales tax.
- The report says that the investigator only showed their EBT card and then was allowed to purchase non-food items with the EBT card. This would not have been possible since the EBT card reader and the regular credit card reader are behind the cash register and the employee scans the card into the system and then returns the card back to the customer.
- If there was an issue at the time of the sale, why didn’t the investigator identify themselves and resolve the issue on the spot?
- The only violation that the Appellant can see is the addition of sales tax to the SNAP sales. The tax issue was a misunderstanding. It did not realize that persons using EBT are tax exempt. If SNAP customers are tax exempt, the firm will not charge taxes on their purchases anymore.
- Store employees are familiar with the policy of not selling nonfood items in exchange for EBT and they would not sell such items unless it was authorized. If a customer tries to purchase nonfood items, they are asked to use another source of funding to pay for those items, such as cash or a personal credit card.

- Store employees have been retrained on the use of EBT and have once again been informed on what can and cannot be purchased with SNAP benefits.
- The older population that uses EBT cards at the Appellant firm would be inconvenienced if the firm were to lose its ability to accept SNAP.
- The other two Korean stores in the area have higher prices. The store's SNAP authorization helps the community because of its lower prices. If SNAP households had to shop at other locations, it would impact their finances.
- This is the first time such allegations have been brought to the Appellant's attention since the firm has been authorized.
- The claim of there being only one female cashier is false. There were two women working during that timeframe. Also, the descriptions in the report do not match either cashier.
- Giving cash back is illegal and the firm only gives cash back if the customer is using a debit card.
- If the Appellant is able to keep its SNAP machine, it will set up quarterly refresher trainings for the employees and the store manager.

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 herein.

ANALYSIS AND FINDINGS

As best as can be determined, the Appellant did not, at any point, offer any actual evidence that the violations did not occur as described in the report of investigations. The Appellant has disputed the allegations, but did not offer any proof that trafficking or the sale of ineligible items did not take place. Conversely, the Retailer Operations Division has submitted ample evidence to show that violations did occur as charged. For example, the investigator provided a detailed chronology of the investigation and listed the specific products that were purchased. Additionally, the investigator took photographs of each of the items and retained every transaction receipt. The receipts correspond directly to electronic transaction records maintained by FNS.

A review of the documentation in this case has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and appears to be accurate with regard to the dates of the violations, including the exchange of SNAP benefits for cash, and in all other critically pertinent details.

While the Appellant claims that the allegations of program violations are false, an assertion of innocence, by itself and without supporting evidence and rationale, does not constitute valid grounds for dismissal of the current charges. As such, this review finds that the violations did occur as charged.

Identification of Cashiers

The Appellant claims that there were two women cashiers on the dates of the transactions, while the investigator states that there was one man and just one woman involved in the violations.

Again, the Appellant has offered no evidence to counter the investigator's report.

5 U.S.C. § 552 (b)(7)(E). The Appellant has only stated that the descriptions do not match his employees, but provided no evidence to support this claim.

Use of EBT Card

The Appellant claims that the investigation report says that the investigator only showed their EBT card and then was allowed to purchase non-food items with it. The Appellant argues that this would not have been possible since the EBT card reader is behind the cash register and the employee scans the card into the system and then returns the card back to the customer.

Unfortunately, the Appellant's description of the investigator's statements is wholly inaccurate. The report did not, at any point, claim that the investigator simply showed the clerk an EBT card and a purchase was made. Of every single transaction, the investigator wrote:

5 U.S.C. § 552 (b)(7)(E).

No Warning

The Appellant has questioned why the investigator didn't identify themselves after the first incident or two. It claims that if this had happened, the firm could have addressed the situation immediately.

With regard to this contention, it should be noted that USDA is under no obligation to warn retailers when SNAP violations are occurring or to end an investigation after just one or two transactions. An undercover investigation takes place in an effort to discover a firm's willingness to violate program rules. In this case, violations took place during every visit the investigator made to the store. This shows either a willful disregard of program rules or very poor supervision by the firm's owner or managers. As such, permanent disqualification is appropriate.

Sales Tax

The Appellant has contended that the only violation it committed was charging sales tax on SNAP purchases. Even then, the Appellant claims that it was not aware that EBT transactions were tax exempt.

This contention shows either indifference to or a lack of understanding of program rules. When the firm was initially authorized to accept SNAP benefits, it received a SNAP Training Guide for Retailers. This training manual outlines, in plain language, the responsibilities that each retailer has as a participant in SNAP. Among the guidelines listed is a paragraph explaining that sales tax may not be charged on purchases made with SNAP benefits. This rule is also found in SNAP regulations at 7 CFR § 278.2(b).

The Appellant's claim that it was unaware of sales tax rules does not provide a valid basis for dismissing the charges or for modifying the penalty imposed.

Remedial Actions Taken

The Appellant has stated that its employees have been retrained on what can and cannot be purchased with SNAP benefits, and states that if it is able to maintain its SNAP authorization, it will conduct quarterly training sessions with each employee to ensure that there are no future violations.

With regard to these contentions, it must be noted that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. This review is limited to the circumstances that existed at the time the violations were committed. It is not the authority of this review to consider any subsequent remedial actions that may have been taken or will take place so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations.

Therefore, the Appellant's contention that corrective action has taken place or that further remedial actions are planned does not provide a valid basis for dismissing the charges or for modifying the penalty imposed.

No Prior Violations

The Appellant contends that this is the first time such allegations have been brought to the Appellant's attention since the firm has been authorized. This contention implies that because the firm does not have a history of program violations, the permanent disqualification determination should be overturned or reduced.

With regard to this contention, SNAP regulations at 7 CFR § 278.6(e) require that when serious violations, such as trafficking, occur, permanent disqualification is the necessary penalty, even on the first occasion, regardless of a firm's prior compliance with program rules. As stated earlier, the issue under review is whether or not the Retailer Operations Division took appropriate action, consistent with SNAP regulations, in its imposition of a permanent disqualification against Seoul Grocery Market. As long as the administrative action taken by the agency fully conforms to SNAP regulations, this review has no authority to dismiss or reduce a period of disqualification.

In this case, the sanction imposed by the Retailer Operations Division is in wholly line with SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations.

Hardship to SNAP Recipients

The Appellant has stated that a disqualification of the firm would cause inconvenience for the community's older population who use SNAP benefits at the Appellant firm. The Appellant argues that there are two other Korean stores in the area, but those other stores have higher prices. A disqualification of Seoul Grocery Market would hurt those who rely on the store to obtain fresh food items at lower prices.

With regard to the claim that members of the community would experience hardship if the firm was disqualified, it is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and households are forced to use their benefits elsewhere. Regulations at 7 CFR § 278.6(f) do allow, in some circumstances, for a civil money penalty to be imposed in lieu of disqualification when there is an absence of other SNAP-authorized retailers in the area. However, the regulations are clear that a civil money penalty for hardship to SNAP households may not be imposed in lieu of permanent disqualification for trafficking.

Therefore, the Appellant's contention that the community will be adversely affected as a result of the firm's disqualification does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Civil Money Penalty

As noted earlier, the Retailer Operations Division determined that the Appellant firm was not eligible for a civil money penalty in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and training program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a civil money penalty to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate documentation within designated timeframes. The case record shows that the Appellant did not request a trafficking CMP when it responded to the charge letter and there is no evidence that the Appellant submitted any documentation that would indicate that the firm had a compliance policy or training program of any kind.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

Trafficking is defined in Section 271.2 of the SNAP regulations as "the buying or selling of SNAP benefits for cash or consideration other than eligible food." Pursuant to regulations at 7 CFR § 278.6(e)(1)(i), permanent disqualification is the required penalty for such violations. The law and regulations do not provide for a lesser penalty for this violation.

Based on a review of the evidence in this case, there is little question that trafficking violations did occur at Seoul Grocery Market 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 appears to be accurate with regard to the dates of the violations, including the exchange of SNAP benefits for cash, and in all other critically pertinent details. Therefore, the decision to impose a permanent disqualification against the Appellant, Seoul Grocery Market, under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

May 30, 2018