

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

Shree J & D Deli Llc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0212601

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 Shree J & D Deli Llc (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 Shree J & D Deli Llc on January 13, 2020.

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 Shree J & D Deli Llc with Federal SNAP law and regulations during the period September 23, 2019 through November 12, 2019. The investigation report documents that personnel at the Appellant firm, in addition to accepting SNAP benefits in exchange for ineligible items on five 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 January 2, 2020, 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 January 3, 2020. 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 a letter to the Retailer Operations Division of January 9, 2020, the Appellant replied to the charges therein stating that since the owner became aware of the SNAP violations, including selling ineligible nonfood items with SNAP benefits and trafficking SNAP benefits on two occasions, he fired the employee who was working during the violative store visits. The owner has re-educated himself with the SNAP booklet. The owner knows that as a business owner, he is responsible for employees and their actions. The owner knows that he violated the SNAP regulations and because of trafficking in Exhibits E and F, the Appellant is permanently disqualified from participation in the SNAP. The owner’s behavior is inexcusable and ensures that this will not happen again. The owner has owned the firm for the past few years and has been working almost 20 years in the retail industry. Throughout his work experience the owner has never had or been in a situation like this, violating the regulations of USDA or any other agency for that matter. The owner apologizes for this behavior and requests that the Appellant be considered for a reasonable civil money penalty as this is his first offense.

After giving consideration to the Appellant’s reply and the evidence in this case, the Retailer Operations Division informed the Appellant, by letter dated January 13, 2020, that Shree J & D Deli Llc 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 January 23, 2020, the Appellant requested an administrative review of the permanent disqualification determination. FNS granted the Appellant’s request for administrative review by letter dated January 30, 2020.

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 23, 2019 through November 12, 2019, the USDA conducted six compliance visits at Shree J & D Deli Llc. A report of the investigation was provided to the Appellant as an attachment to the Charge Letter dated January 2, 2020. The investigation report included Exhibits A through F which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations occurred during five of the six compliance visits. During two of the compliance visits, a clerk exchanged cash for SNAP benefits as documented by Exhibits E and F.

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 reply to the Charge Letter and in the request for administrative review, the Appellant made the following summarized contentions, in relevant part:

- Since the owner became aware of the SNAP violations, including selling ineligible nonfood items with SNAP benefits and trafficking SNAP benefits on two occasions, he fired the employee who was working during the violative store visits. The owner knows that as a business owner, he is responsible for employees and their actions. The owner knows that he violated the SNAP regulations and because of trafficking in Exhibits E and F, the Appellant is permanently disqualified from participation in the SNAP. The owner's behavior is inexcusable and ensures that this will not happen again.
- The owner has re-educated himself with the SNAP booklet and website <https://www.fns.usda.gov/snap/retailer/training> which explains the guidelines on what products can and cannot be sold and penalties for failure to follow the guidelines. Also, to prevent future SNAP violations, the owner has placed a covered sign of listed items that cannot be sold with SNAP benefits such bleach, dish detergent, light bulbs, toothpaste, etc. and printed a copy of the Food and Nutrition Act of 2008 and placed it next to the cash register.
- The owner has owned the firm for the past few years and has been working almost 20 years in the retail industry. Throughout his work experience the owner has never had or been in a situation like this, violating the regulations of USDA or any other agency for that matter.
- The owner apologizes for this behavior and requests that the Appellant be considered for a reasonable civil money penalty as this is his first offense.

ANALYSIS AND FINDINGS

SNAP Violations

The Appellant contends that since the owner became aware of the SNAP violations, including selling ineligible nonfood items with SNAP benefits and trafficking SNAP benefits on two occasions, he fired the employee who was working during the violative store visits. The owner knows that as a business owner, he is responsible for employees and their actions. The owner knows that he violated the SNAP regulations and because of trafficking in Exhibits E and F, the Appellant is permanently disqualified from participation in the SNAP. The owner's behavior is inexcusable and ensures that this will not happen again.

These contentions cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. As owner of the store, the Appellant is liable for all violative transactions that occur at Shree J & D Deli Llc. Regardless of whom the ownership of

a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. Prior to becoming authorized to participate in the SNAP on February 13, 2015, the Appellant completed and submitted a SNAP Application for Retail Stores. The SNAP Application contained a section indicating that the person(s) signing the Application understood and agreed to ensure that store employees follow the SNAP rules and regulations and that the person(s) accepts responsibility for any SNAP violations that may occur at the store that were committed by any of the store's employees. The SNAP Application also included a section that contained a statement which acknowledged that the person(s) signing the Application was aware that violations of program rules could result in fines, legal sanctions, withdrawal, or disqualification of the store. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

The regulations establish that an authorized 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 Appellant did not disagree with the results of the investigation and that during two compliance visits, a store employee exchanged SNAP benefits for cash or consideration other than eligible food.

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. The Appellant's implied contention that the SNAP violations were committed by a store employee without its 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 since the owner became aware of the SNAP violations, including selling ineligible nonfood items with SNAP benefits and trafficking SNAP benefits on two occasions, he fired the employee who was working during the violative store visits. The owner has re-educated himself with the SNAP booklet and website <https://www.fns.usda.gov/snap/retailer/training> which explains the guidelines on what products can and cannot be sold and penalties for failure to follow the guidelines. Also, to prevent future SNAP violations, the owner has placed a covered sign of listed items that cannot be sold with

SNAP benefits such bleach, dish detergent, light bulbs, toothpaste, etc. and printed a copy of the Food and Nutrition Act of 2008 and placed it next to the cash register.

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.

First Time Violator

The Appellant contends that the owner has owned the firm for the past few years and has been working almost 20 years in the retail industry. Throughout his work experience the owner has never had or been in a situation like this, violating the regulations of USDA or any other agency for that matter.

With regard to the Appellant's contentions, 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.

CIVIL MONEY PENALTY

The Appellant contends that the owner apologizes for this behavior and requests that the Appellant be considered for a reasonable civil money penalty as this is his first offense.

In the January 2, 2020 Charge Letter the Appellant was informed by the Retailer Operations Division that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000 in lieu of permanent disqualification of a firm for trafficking. Per Section 278.6(i) of the SNAP regulations, four criteria must be met in order to be considered for a trafficking civil money penalty. If requesting a trafficking CMP, an Appellant must meet each of the four criteria listed and provide the documentation as specified within ten days of the Appellant's receipt of their Charge Letter. As specified in 7 CFR § 278.6(i), in determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following four criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in 7 CFR § 278.6(i)(1);

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violations(s) occurred prior to the occurrence of violations cited in the Charge Letter;

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in 7 CFR § 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.

If the Appellant's request for a trafficking CMP and the required documentation are not submitted on time, it will lose its right for any further consideration for a trafficking CMP. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) 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, the firm shall not be eligible for such a penalty". The regulations do not provide the agency discretion to extend the time within which documentation and evidence in support of a trafficking civil money penalty may be submitted.

In the Appellant's reply to the Charge Letter of January 9, 2020 and in the administrative review request of January 23, 2020, the Appellant requested consideration of a civil money penalty in lieu of permanent disqualification. However, the Appellant provided no supporting documentation in support of its request.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking civil money penalty in lieu of a disqualification under 7 CFR § 278.6(i) because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. **5 U.S.C. § 552 (b)(7)(E).**

Therefore, the Retailer Operations Division's decision not to impose a civil money penalty in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

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, Shree J & D Deli Llc, 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

March 11, 2020