

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

Sims Grocery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0234676

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 Sims Grocery (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 FNS.

CASE CHRONOLOGY

By Charge letter dated March 5, 2021, Retailer Operations informed Appellant it was charged with violating the terms and conditions of the SNAP regulations determined by a USDA investigation. This was based on trafficking violations noted in Exhibits C and F. The investigation was conducted during the period of December 9, 2020, through January 4, 2021, and outlined in the investigative report dated February 1, 2021. Counsel replied to the Charge letter with a letter dated March 22, 2021.

By Determination letter dated March 29, 2021, 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 civil money penalty (CMP) according to the terms of Section 278.6(i) of the regulations. 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 postmarked March 24, 2021, counsel appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated April 8, 2021.

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 § 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 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; (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(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 conducting trafficking transactions as described in Exhibits C and F, provided with the Charge letter. The penalty for trafficking is permanent disqualification.

APPELLANT’S CONTENTIONS

Consideration has been given to all contentions and submissions as presented, including any not specifically recapitulated.

- Grocery wishes to prove that it had implemented a legitimate training program for its employees. Petitioner further wishes to prove that he implemented an effective compliance program to prevent violation of SNAP Section 271.2 of SNAP and meets the eligibility requirements for a CMP.
- The Retailer has been in business since 2018 and has been an authorized EBT vendor since 2019, in full compliance. The retailer has a compliance policy which states or includes: a photocopied booklet is provided to each of its employees; issues concerning EBT processing are addressed as issues arise; there is no exchange for cash for EBT card swipes; there is no store credit allowed for EBT transactions; only sell qualified EBT grocery items to your customers. The compliance policy was in effect PRIOR to the violations.
- Since the onset of opening this business, there were never any violations of USDA and SNAP law. Petitioner has never violated any laws related to Section 271.2 and 278.6(e)(1).
- The firm had developed and set up effective personnel training.
- The firm ownership was not aware of, did not approve of, and did not benefit from trafficking.
- The training program implemented by the Petitioner: Review the FNS Handbook with each new employee; Call the USDA or store owner if you have any questions.
- Petitioner has a training policy in place for its employees. Using the url: [http://www.fns.usda.gov/sites/default/files/Retailer Training Guide.pdf](http://www.fns.usda.gov/sites/default/files/Retailer%20Training%20Guide.pdf), Petitioner, has provided training, in-store training, and a copy the manual to all of the employees and store operators. The contents of the manual are discussed and reviewed with employees and partners of the business on a semi-annual basis. Each employee is reminded by the Petitioner to never engage in the following: Giving back cash in return for EBT purchases; Disallowing sales to known friends of the card user if it appears as though the card user is outright paying for the groceries of a person that is not a part of their household; To disallow sales on unqualified EBT items
- Petitioner did not purposely allow for illegal transactions to be made, the trafficking was for the benefit of the employee, and not the Petitioner.

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 store personnel, who intentionally purchased products originally purchased with SNAP benefits in exchange for cash. Counsel did not dispute the trafficking, and focused on a civil money penalty in lieu of permanent disqualification.

CIVIL MONEY PENALTY

The regulations at Section 278.6(i) specify the criteria for a firm's eligibility for a CMP 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 counsel submitted a reply dated March 22, 2021 that indicates "EXHIBITS ATTACHED." Retailer Operations determined that this response had no exhibits attached. The retailer received the Charge letter on March 8, 2021. Counsel's reply was not received within the ten day regulatory submission timeframe as specified in 7 CFR § 278.6(b)(1). As such the submission was not eligible for consideration. Retailer Operations noted the lack of any documentation that the stated compliance policy has been signed and acknowledged by any store employees, specifically store personnel involved with the trafficking violations in this case. Retailer Operations found that no documents were submitted to show the date and topic of the SNAP training covered, and no signed documents from employees showing that they received this training were advanced. Retailer Operations thus did not consider an unsupported assertion that SNAP training occurred as significant evidence to meet the regulations as specified.

Retailer Operations noted that the web link provided by counsel is no longer valid. No evidence of a training log documenting the SNAP training of employee(s) received in the first 30 days of employment, or evidence of annual training for store personnel was presented. Retailer Operations was not provided evidence to support counsel's assertion that a training program was effectively instituted at Appellant. Retailer Operations determined that Appellant met Criterion 4 however, the reply as previously stated, was not within the regulatory timeframe.

On review, counsel submitted the same CMP information, again with no exhibits presented. The record supports that Appellant did not submit timely substantial evidence, as required by the regulations, to meet the criteria for a trafficking CMP in lieu of permanent disqualification. A trafficking CMP was properly denied.

CONCLUSION

The preponderance of the evidence supports the intentional violative exchanges by Appellant's store personnel of cash for items purchased with SNAP benefits that meet the regulatory definition of trafficking. The denial of a trafficking CMP in lieu of a permanent disqualification is also 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 thirty (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 owners 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 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
ADMINISTRATIVE REVIEW OFFICER

May 12, 2021