

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

Stop N Shop,

Appellant,

v.

Case Number: C0211531

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 Stop N Shop (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. § 202, 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 FNS.

CASE CHRONOLOGY

By Charge letter dated October 26, 2018, Retailer Operations informed the owner that Appellant was charged with violating the terms and conditions of the SNAP regulations based on a USDA investigation conducted from September 11, 2018 through October 17, 2018.

The Determination letter references oral and written replies to the Charge letter on October 30, 2018, November 5, and 8, 2018.

By Determination letter dated November 30, 2018, Retailer Operations informed Appellant that it was permanently disqualified from participation as a retail store in the SNAP, and that the store was not eligible for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i). The firm failed to submit substantial evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

The file includes a handwritten letter from an owner dated December 10, 2018, requesting administrative review. The appeal was granted by letter dated February 4, 2019.

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 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, 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 U.S.C. § 2021(b)(3)(B) states: "...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 § 278.6(e)(1)(i) states: "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, 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;"

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. The investigative report details the results of six compliance visits. Appellant was charged with trafficking in Exhibits E and F. The penalty for trafficking is permanent disqualification. On multiple visits, the Exhibits show that Appellant also sold ineligible nonfood items and major items, including: shirts, wine, mouthwash, antiperspirant, bleach, and paper towels. These warrant a lesser penalty subsumed in the permanent disqualification.

APPELLANT’S CONTENTIONS

In reaching a decision, full attention and consideration have been given to all contentions presented, including any not specifically recapitulated.

- The owner denies any awareness of or involvement in the sales and cash back for SNAP benefits. He expressed that he is requesting to pay the civil money penalty in the amount of \$14,460.00. The owner meets Criterion 4. As to meeting the other 3 criteria, my client offers up his affidavit as well as the affidavits of both clerks involved in the trafficking, to sufficiently confirm that training was provided to the clerks who were fully aware of the rules of the program, prior to both of them handing **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** cash back to the investigator who posed as a SNAP customer.
- As to the charge of his employee selling ineligible food items, my client has expressed that he must accept the penalty of 6 month disqualification from the program, as he believes, that he cannot successfully meet the hardship criteria.
- The previous published Training Guide for Retailers (slightly revised April 2014) only stated to retailers on page 4 Part 1 Basic Guidelines, that “it is a good idea to document the training you provide for your employees.” Many retailers, particularly those operating smaller markets and convenience stores, typically will not think to read the Compilation of Rules and Regulations which (after sifting through many pages), does mention the requirement to document training in order to qualify for a money penalty in lieu of permanent disqualification when the retailer is faced with employee trafficking. Moreover, the latest revision (January 2018) of the Training Guide for Retailers now only states “document the training you provide to your employees.” However, even the revised training guide does not specifically reference the depth required for documenting the training of employees in order to qualify for a trafficking CMP.
- A language barrier occurred between my employee when the inspector arrived.

- The employee was not fully trained on the cash register because two of my employees were out sick. The employees do not work here.
- I have fully trained them and they are aware of the EBT and how to work the register.
- I have been a Snap retailer at this location for approximately 2 years without any prior incident or previous sanction.
- I received the letter which charges me with trafficking as a result of two of my employees giving the investigator, acting as a customer with SNAP benefits, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at his request from his SNAP benefits.
- I had no involvement or awareness of this situation until I received the charge letter, which greatly upset me as it has put my retailer license in jeopardy.
- I was confident, that my employees were trained properly in handling these type of sales to customers having food stamp benefits. They were trained when I first employed them before they were allowed to work for me at check out. Both were shown the retailer training book. Every couple of months, I made it a point to again make sure that both understood what items could and could not be sold and again went over no credit could be given to customers and what to do in the event a customer wanted cash back.
- I was never informed by either that they did not understand or could not handle these type of sales at check out, so I felt as comfortable in allowing them to continue to work for me at check out. I never saw any problems with the sales and I never felt or had any concerns over their abilities to follow the rules.
- I did everything possible that I would expect an owner would have done in the same position as me, operating a small scale convenience store, in trying to make sure that the store clerks followed the rules of the program at check out.
- All of the training was done in advance of the trafficking incidents. My only regret was that I did not to document each and every occasion when training occurred and getting the clerks to sign off on the training when it was provided to them. I really never thought, as a small scale, single owner of a convenience store with only 2 clerks, that such documentation would be important to me, if ever faced with a trafficking situation.
- I am not aware of anything that was given to me when I first became an authorized SNAP retailer, that would have informed me that training must be documented in order for me to qualify so that I could pay a money penalty for an employee-related trafficking event, in place of being permanently disqualified.
- I can only offer my statement as confirmation of the training I thought was sufficient to allow me to believe both clerks were competent in handling sales to those customers with SNAP benefits and that neither would exchange any cash if requested from the customer. I am in the process of obtaining statements from both clerks to confirm the training I am telling you I provided to them when they first were hired, and periodically throughout their employment.
- I would like the opportunity to pay the money penalty as I can assure you that no violations will ever occur again by any employee of mine at my food store.
- I was made aware of the letter and exhibits from the USDA that I was identified in Exhibit F as a clerk who handled this sale which shows the sale of a non-food item as well as me giving the customer/investigator 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash back. I know from my training that neither should have occurred. I have no reasonable explanation for doing so. The owner was not involved in this decision, on my part, to not follow the rules. I am confident that there is nothing further he could have done in

training me over the course of my employment at the food store that would have stopped me from inadvertently deciding to not follow the rules of the program on this occasion.

- I was a clerk identified in the sale of items which should not have been sold using SNAP benefits. I told the man who came into the store to buy these items that were not food that they were not allowed on SNAP benefits, but he really confused me when he told me what was stated in Exhibit A “that sometimes they charged me extra allowing me to use benefits to purchase ineligible items.” I should not have listened to him and just followed the rules as I known them to be.
- I also see that I was a clerk identified as giving this man **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** back, when he requested it from me out of his SNAP benefits. I can’t tell you why I gave him the cash back he requested. He seemed like a nice man who took an interest in knowing my name and I just did it without realizing what I had done. The owner had always told me not to give back any cash, and I knew better, but still I did it.
- I am sorry for not following the rules when I allowed items that were not food to be purchased by this man and when I gave him back cash when he requested it upon his return to the store. It was my fault for not following the rules, even though the owner did his best to make sure over the time I was employed, that I followed all of the rules. I pray he is able to pay the money penalty and not lose his license over the improper sales I did.

The owner provided an affidavit. Two employee affidavits signed November 8, 2018, were provided.

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or to invalidate the decision of Retailer Operations. It 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(s), manager(s), or someone acting on their behalf. Regardless of whom the owner(s) of a store may utilize to handle store business, the owner(s) is accountable for the proper handling of SNAP benefit transactions.

Exhibits E and F provide the details of the trafficking violation at Appellant when two different firm employees exchanged cash for SNAP benefits. Violations of the sale of ineligible nonfood items were cited in other Exhibits in the record. The sale of nonfood items carries a penalty of term disqualification which is subsumed under the permanent disqualification penalty for trafficking.

The firm did not provide a written compliance policy statement in its initial Charge letter reply or for administrative review. No evidence of Appellant’s written compliance policy or training program were provided. Without a copy of the written curricula and contemporaneous records of SNAP training sessions Retailer Operations could not evaluate the training program. The submission of two employee affidavits and the owner affidavit, with no corroborating

employment records or other evidence of a training program are not sufficient to determine that an effective personnel training program had been developed and instituted at Appellant.

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. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees. The regulations stipulate “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2.” The responding owner did not dispute that the trafficking took place nor was evidence advanced to refute the charges. The owner insisted he was not aware of or involved. Nevertheless, the employees have affirmed that they did commit the violations charged.

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 record supports that Retailer Operations found that Appellant did not submit substantial evidence for a CMP in lieu of trafficking. Upon review, Retailer Operations properly applied the regulations, and denied the CMP as Appellant did not meet the four applicable criteria.

CONCLUSION

The preponderance of the evidence supports that program violations did occur at Appellant. The investigative record is specific and accurate with regard to the dates of the violations. The exchange by store personnel of cash for SNAP benefits is a violation of the regulations at 7 CFR § 271.2. Trafficking carries a sanction of permanent disqualification. The sale of ineligible items at Appellant on multiple visits is subsumed in the trafficking violation. The permanent disqualification of Appellant as a SNAP retail food store is herein sustained.

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 determination. 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 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.

M. Viens
Administrative Review Officer

March 8, 2019