

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

**Suave House, LLC,**

**Appellant,**

**v.**

**Case Number: C0197265**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification against Suave House, LLC (“Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The purpose of this review is to determine whether the Retailer Operations Division 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 August 8, 2019.

**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 January 10, 2017 through January 25, 2017. The investigation reported that personnel at Appellant accepted a total 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in exchange for cash (trafficking) in the amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on one occasion and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on another occasion, as well as permitting the purchase of other major non-food items with SNAP benefits. The investigation revealed that the owner and one unidentified clerk were involved in the impermissible transactions.

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated May 8, 2019, 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 Retailer Operations Division. The record reflects that the Retailer Operations Division received and considered this information prior to making a determination.

The Retailer Operations Division notified Appellant in a letter dated August 8, 2019 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.”

On August 16, 2019, Appellant appealed the Retailer Operations Division’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:

- There was no proof given to Appellant of the alleged violations.
- The alleged violations occurred two years ago in 2017. Appellant does not recall the incidents.
- Appellant was not given a warning or probation period.
- Appellant has retrained staff.
- Appellant has not had any previous issues with SNAP compliance.
- A permanent disqualification would force the store to be closed.

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**

Appellant contends that there have not been prior warnings given to Appellant. 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 the owner and another store employees were involved in the trafficking violations. Further, the report indicates 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 Retailer Operations Division'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 does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Penalty Appropriate**

It is Appellant's contention that it was not given a probationary period. 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.

### **No Undue Hardship to Appellant**

Appellant maintains that disqualification would pose an extreme hardship to the firm. Economic hardship is a likely consequence whenever a store is permanently disqualified from SNAP participation. However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from such a penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

Moreover, giving special consideration to the firm for economic hardship would forsake fairness and equity to competing stores and other participating retailers who are complying fully with program regulations, and also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that it will incur economic hardship due to an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the imposed penalty.

### **No Statute of Limitations**

Appellant contends the alleged violations occurred two years ago in 2017, and the owner does not recall the incidents. There is no statute of limitations with regards to an administrative action against a firm, although the agency does strive to take such actions as promptly as possible. When the Retailer Operations Division charges a firm for violation uncovered during a covert investigation is dependent primarily on when the investigative agency releases their report and gives approval for USDA to pursue administrative action. An investigation may be escalated from the administrative level to the criminal level, and after some time a decision might be made not to pursue criminal charges after all. In addition, undercover operations often involve multiple

stores, and no arrests or charges are made until after all store investigations are complete. Administrative actions may be taken only after criminal actions against firms are resolved. The time elapsed between the SNAP violations and the charge letter does not have any effect on the potency or validity of the charges.

### **Evidence of Violation**

Appellant contends it was not given proof of the alleged violations. As previously stated, 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** . . . . (Emphasis added.)

Appellant was provided with details about each occasion during which violations occurred, their dates and the amount of cash provided in exchange for SNAP benefits. Appellant has also received all file information requested under the Freedom of Information Act except information that is specifically exempt from disclosure by law. In contrast to Appellant's assertions, there is substantial evidence that the violations occurred.

### **CIVIL MONEY PENALTY**

For a firm to have the opportunity to be considered for a civil money penalty (CMP), it must request that FNS consider a CMP in lieu of permanent disqualification and submit supporting documentation within ten days of receipt of the charge letter. Appellant was advised of these provisions in the charge letter of May 8, 2019. The regulations specify that such supporting documentation must demonstrate that the firm had established and implemented an effective SNAP compliance policy and training program prior to the occurrence of violations. A review of the administrative record indicates Appellant did not, at any time, request a CMP. Appellant also did not submit any documentation to support its eligibility for this alternative sanction, before or after the deadline.

In the absence of a request for a CMP and any supporting documentation, a CMP was not assessed by the Retailer Operations Division. 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 Retailer Operations Division 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 Retailer Operations Division to impose a permanent disqualification against Suave House, LLC from participating as an authorized retailer in SNAP is sustained.

### **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

October 28, 2019