

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

Super Mercado Lupitas Inc,

Appellant,

v.

Case Number: C0236606

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 that the Retailer Operations Division properly imposed a permanent disqualification of Super Mercado Lupitas Inc (hereinafter “Super Mercado Lupitas Inc” or “Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). However, the decision is modified to remove the fiscal claim of \$202.82.

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 fiscal claim of \$202.82 and a permanent disqualification against Super Mercado Lupitas Inc.

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 Super Mercado Lupitas Inc with Federal SNAP law and regulations during the period October 26, 2020 through October 31, 2020. The investigation report documents that store personnel intentionally exchanged cash for food purchased with SNAP benefits during two of the five undercover compliance visits. Intentionally purchasing products originally purchased with SNAP benefits in exchange 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 charged the Appellant, in a letter dated December 17, 2020, with trafficking in SNAP benefits. The charge letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated that the Appellant had the right to respond to the charges within 10 days of receipt. The letter also stated that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i). Per UPS confirmation of delivery, the charge letter was delivered to the Appellant at the store address of record on December 19, 2020.

In responses to the Retailer Operations Division of December 19, 2020, December 23, 2020, December 29, 2020, January 4, 2021, January 6, 2021, and January 12, 2021, the Appellant, through counsel, replied to the charges therein stating that the business has been in operation for over twenty years and has not been subject to any previous SNAP violation charges. Due to health issues of one of the owners, both owners were out of town and away from the Appellant during the investigation period. The owners left management of the Appellant temporarily to their son who has relatively little experience in the business and have never managed any business before. While the investigation report documents two incidences of trafficking, no other violations of the SNAP rules were documented by the owners or any other employee of the Appellant. The owners' son did not have the express or implied consent from any authority at the Appellant to act as alleged and did so, without the knowledge, consent or participation of the owners. The owners became aware of the violations after receiving the charge letter and are satisfied that no other employees were aware or knowingly participated in the events. The Appellant requests consideration of the imposition of a civil money penalty in lieu of a SNAP disqualification as the record of the firm demonstrates a culture of compliance.

After giving consideration to the Appellant's responses and the evidence in this case, the Retailer Operations Division informed the Appellant, by letter dated January 14, 2021, that Super Mercado Lupitas Inc was permanently disqualified from participation as a retail store in the SNAP. In addition, the determination letter assessed a fiscal claim of \$202.82. The letter also stated that the Appellant was not eligible for a trafficking civil money penalty under 7 CFR § 278.6(i) 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 19, 2021, the Appellant, through counsel, requested an administrative review of the permanent disqualification and imposed fiscal claim determination. FNS granted the Appellant's request for administrative review by letter dated March 8, 2021.

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 § 271.2 states that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

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 defines trafficking as:

(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.

(2) The exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code, for SNAP benefits;

(3) Purchasing a product with SNAP benefits that has a container requiring a return deposit with the intent of obtaining cash by discarding the product and returning the container for the deposit amount, intentionally discarding the product, and intentionally returning the container for the deposit amount;

(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; or

(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food. [Emphasis added.]

(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 § 271.2 defines eligible food, in part, as:

Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption

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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system....

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.

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).

(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.

SUMMARY OF CHARGES

During an investigation from October 26, 2020 through October 31, 2020, the USDA conducted five undercover compliance visits at Super Mercado Lupitas Inc. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated December 17, 2020. The investigation report included Exhibits A through E which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations occurred during two of the five compliance visits as documented in Exhibits C and D. During two of the compliance visits (Exhibits B and E), the store employees refused to exchange ineligible nonfood items for SNAP benefits.

During the compliance visit described in Exhibit C, a store employee purchased five cases of 24 (16 ounce) Monster energy drinks valued at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash. During the compliance visit described in Exhibit D, a store employee purchased two cases of 24 (8.4 ounce) Red Bull energy drinks and two cases of 24 (12 ounce) Red Bull energy drinks valued at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash. The investigator's narratives in Exhibits B and C document that the store employee was made aware that the cases of Monster/Red Bull energy drinks were purchased with SNAP benefits at another store.

Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food is trafficking as defined under 7 CFR § 271.2(5). 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 replies to the charge letter and in the request for administrative review, the Appellant, through counsel, made the following summarized contentions, in relevant part:

- The business has been in operation for over twenty years and has participated in the SNAP for the entirety of its existence. The store owners have not been subject to any previous SNAP violation charges.
- Due to health issues of one of the owners, both owners were out of town and away from the Appellant during the investigation period. The owners left management of the Appellant temporarily to their 22-year old son who has relatively little experience in the business and has never managed any business before. Prior to their departure, the owners

told their son about regulated sales (alcohol, tobacco, and government programs, e.g., EBT and WIC).

- The owners' son did not have the express or implied consent from any authority at the Appellant to act as alleged and did so without the knowledge, consent or participation of the owners.
- The owners became aware of the violations after receiving the charge letter and are satisfied that no other employees were aware or knowingly participated in the events.
- While the investigation report documents two incidences of trafficking, no other violations of the SNAP rules were documented by the owners or any other employee of the Appellant. The regular employees of the Appellant fully complied with the SNAP regulations and refused the opportunity to violate the rules on multiple occasions (Exhibits B and E).
- The monetary benefit to the owners' son or the firm would have been negligible.
- It is reasonable and likely the son acted as he did not to disappoint the stranger and who asked him "for a favor".
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is an owner and general manager and at all other times when he could not manage the store, his wife or one of the two older children would manage the business operation.
- The operation of the cash registers is limited to a few employees, including family. All persons who will or may operate a cash register are personally trained by the owner with respect to the government assisted food and nutrition programs and regulations associated with such transactions. All employees are required to attend mandatory WIC training and do so as a policy of the firm. It is also policy that strict adherence be maintained to EBT and WIC regulations and employees are observed by the owners in the handling of transactions involving eligible and non-eligible items. All employees are advised and understand that failure to maintain strict adherence to regulations is an action that involves discipline up to termination.
- It is clear that the owners' son's activity is inconsistent with the policies and practices of the Appellant as the record of the firm demonstrates a culture of compliance. The owners accept the responsibility of putting their son in a position he is apparently incapable of handling but considers it unfair to allow his personal acts to replace twenty years of demonstrated compliance with the law. The charges do not reflect a systemic problem in the operation of the Appellant or its owners, but an aberration caused by a mixture of opportunity and immaturity. The actions of the owners' son consistent with his age, are his sole, self-directed actions and are contrary to the store's history and reputation.
- The proposed penalty of permanent SNAP disqualification is grossly disproportionate to the alleged violations.
- The Appellant requests consideration of the imposition of a civil money penalty in lieu of a SNAP disqualification. The absence of any prior allegation of violations and the willingness to comply with the SNAP regulations by the store's regular personnel support the development and effectiveness of a compliance policy as specified in the regulations.
- With regard to the amount of the civil money penalty, it should reflect the character of the violations. Pursuant to 7 CFR Section 3.91, *Adjusted civil*

monetary penalties, reads in pertinent part, “Moreover, the descriptions of the civil money penalties listed in paragraph (b) of this section do not necessarily contain a complete description of the circumstances (for example, requirements regarding the “state of mind” of the violator(s), requirements regarding the type of law or issuance violated, etc.) The specific regulatory reference with respect to civil penalties for trafficking (7 CFR Section 3.91(3)(ii)) indicates a “maximum” penalty. The clear interpretation of the rules is to allow a reasonable reduction from the maximum to reflect the circumstances of the violations.

In support of these contentions, the Appellant, through counsel, submitted a certification signed by both store owners and a notarized affidavit of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the determination made by the Retailer Operations Divisions; it is limited to the facts at the basis of the Retailer Operations Division’s determination at the time it was made. Prior to becoming authorized to participate in the SNAP on November 18, 2016, the Appellant completed and submitted a SNAP Application for Retail Stores. While the owners contend that they were not present at the store at the time of the violations and their son did not have the express or implied consent from any authority at the Appellant to act as alleged and did so without the knowledge, consent or participation of the owners, 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 individuals identified as male clerks in Exhibits C and D were found to be trafficking as defined under 7 CFR § 271.2 (5) (definition of *trafficking*) by “intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.” The evidence supports that the employee was made aware that the cases of Red Bull/Monster energy drinks were purchased with SNAP benefits at another store.

Exhibit B of the investigation report documents that the employee specifically told the investigator to purchase five cases of 24 (16 ounce) Monster energy drinks in order to receive cash off the EBT card for \$15.00 per case. Exhibit B states, in part:

“**5 U.S.C. § 552 (b)(7)(E)**.”

Exhibit C of the investigation report, states, in part:

“5 U.S.C. § 552 (b)(7)(E).”

Exhibit D of the investigation report, states, in part:

“5 U.S.C. § 552 (b)(7)(E).”

The Appellant contends that it is reasonable and likely the owners’ son acted as he did not to disappoint the stranger and who asked him “for a favor”. With regard to this contention, the investigation report documents that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted by a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no known error or discrepancy. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. While the Appellant is correct in that in Exhibits B and E the store employees fully complied with the SNAP regulations by refusing to allow ineligible nonfood items to be purchased with SNAP benefits, the investigation report documents by a preponderance of the evidence that the store employees committed trafficking violations by intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.

The Appellant contends that the business has been in operation for over twenty years and has participated in the SNAP for the entirety of its existence. The store owners have not been subject to any previous SNAP violation charges. However, 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.

The Appellant contends that the monetary benefit of the violations to the owners’ son or the firm would have been negligible. The proposed penalty of permanent SNAP disqualification is grossly disproportionate to the alleged violations.

However, trafficking is defined in part, in 7 CFR § 271.2 (5) as “ ... Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.” 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 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 law and regulations do not provide for a lesser period of disqualification for this violation. Additionally, the Act noted herein and the regulations pursuant thereto do not stipulate a minimum dollar amount of SNAP benefits trafficked in order to meet the definition of “trafficking” at 7 CFR § 271.2.

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. The Appellant did not provide any evidence that the violations cited in the charge letter did not occur. The preponderance of the evidence in the record supports that trafficking, as defined in the regulations, did occur at the Appellant and that the permanent disqualification was properly applied. However, the determination is modified in that the fiscal claim assessed at \$202.82 is dismissed/removed.

CIVIL MONEY PENALTY

In the December 17, 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 replies to the charge letter, the Appellant, through counsel, requested consideration of the imposition of a civil money penalty in lieu of permanent SNAP disqualification. The Appellant contends that the operation of the cash registers is limited to a few employees, including family. All persons who will or may operate a cash register are personally trained by the owner with respect to the government assisted food and nutrition programs and regulations associated with

such transactions. All employees are required to attend mandatory WIC training and do so as a policy of the firm. It is also policy that strict adherence be maintained to EBT and WIC regulations and employees are observed by the owners in the handling of transactions involving eligible and non-eligible items. All employees are advised and understand that failure to maintain strict adherence to regulations is an action that involves discipline up to termination. It is clear that the owners' son's activity is inconsistent with the policies and practices of the Appellant as the record of the firm demonstrates a culture of compliance. The absence of any prior allegation of violations and the willingness to comply with the SNAP regulations by the store's regular personnel support the development and effectiveness of a compliance policy as specified in the regulations.

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).

With regard to the Appellant's contentions with respect to the amount of the trafficking civil money penalty, the formula for the computation of the amount of civil money penalty in lieu of permanent disqualification for trafficking is specific per 7 CFR § 278.6(j) and does not allow for any reductions or modifications. As 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), the amount of the civil money penalty is not germane to this administrative review.

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 ". . . Intentionally purchasing products originally purchased with SNAP benefits in exchange 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 full review of the evidence in this case, the Retailer Operations Division properly imposed a permanent disqualification of Super Mercado Lupitas Inc, the Appellant, as an authorized retailer in the Supplemental Nutrition Assistance Program. However, the determination is **modified** to remove the fiscal claim of \$202.82.

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

April 26, 2021