

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

Theresa Grocery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0187796

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Theresa Grocery (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the program, as initially imposed by the Retailer Operations Division was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against Appellant in a letter dated March 25, 2019.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provides 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 Texas Health & Human Services Commission, Office of Inspector General conducted an investigation of the compliance of Theresa Grocery with Federal SNAP law and regulations from February 1, 2016 through August 2, 2016. The investigation report documents the following:

1. On April 13, 2016, sales clerk 5 U.S.C. § 552 (b)(6) & (b)(7)(C) completed a transaction in which 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits were accepted in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash.
2. On May 11, 2016, sales clerk 5 U.S.C. § 552 (b)(6) & (b)(7)(C) completed a pair of transactions in which 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits were accepted in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash.

As a result of evidence compiled from this investigation, the Retailer Operations Division informed the Appellant, in a letter dated March 5, 2019, that it was charged with violating the terms and conditions of the SNAP regulations. The 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 facsimile dated March 15, 2019, Appellant, through counsel, replied to the charge letter and generally stated that Theresa Grocery implemented an effective compliance program to prevent violations of SNAP and wished to prove that it did not benefit, allow, and/or acquiesce to the actions taken by ex-employee 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant stated that it employed 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as a sales clerk. His duties were limited to the cash register and lottery terminal. In a typical transaction, the role of the store clerk is to separate items requiring the EBT terminal and non EBT items that are processed using the cash register for all other items and for those individual using EBT cards.

5 U.S.C. § 552 (b)(6) & (b)(7)(C) was fully trained on how to use the EBT card machine, he was aware of EBT qualified products, rules of trafficking SNAP benefits, and was fully trained on the EBT machine.

Although 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was aware as was the rest of the staff, he knowingly acted on his own volition for his personal gain. This incident could not have been prevented as much as a store clerk at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) stealing cash out of a register or inventory from the storage room. Appellant also stated that it had no knowledge of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) criminal activity and came to find out about the criminal act when the State of Texas charged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) with a felony. In a good faith effort to show compliance as an EBT vendor, Appellant provided the following in support of its position. Exhibit A-1: A conviction letter from Harris County Court of 5 U.S.C. § 552 (b)(6) & (b)(7)(C); Exhibit A: An Affidavit from the owner, Exhibit B: An affidavit from employees; Exhibit C: An affidavit from customers; Exhibit D: Transactions

from the Charge Letter; Exhibit E: Pictures of the store and Exhibit F: Invoices for EBT items purchased at wholesale.

After considering the Appellant's reply and the evidence in the case, the Retailer Operations Division issued a determination letter dated March 25, 2019. The determination letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations. The Retailer Operations Division determined that the Appellant was not eligible for the trafficking CMP 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 violations of the SNAP.

In a letter dated April 2, 2019, the Appellant requested an administrative review of the Retailer Operations Division's determination. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an 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 contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). In particular, 7 CFR § 278.6(a) and (e)(1)(i) establishes 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, inter alia: "... 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 § 271.2 states, inter alia: "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;..."

7 CFR § 278.6(e)(1)(i) states, in relevant part, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2."

7 CFR § 278.6(a) states, inter alia: “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]

7 CFR § 278.6(f)(1) states, inter alia: “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to [SNAP] households because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices... A civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a permanent disqualification.”

7 CFR § 278.6(b)(2)(ii) states, inter alia: “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, inter alia: “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

During an on-site investigation, the Texas Health & Human Services Commission, Office of Inspector General Agents conducted compliance visits at Appellant from February 1, 2016 through August 2, 2016. The investigation report documents the following:

1. On April 13, 2016, sales clerk 5 U.S.C. § 552 (b)(6) & (b)(7)(C) completed a transaction in which 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits were accepted in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash.
2. On May 11, 2016, sales clerk 5 U.S.C. § 552 (b)(6) & (b)(7)(C) completed a pair of transactions in which 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits were accepted in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash.

FOIA Request

In email correspondence dated May 14, 2019, Appellant, through counsel, submitted a Freedom of Information Act (FOIA) request. The FOIA request was processed on May 14, 2019, and Counsel received the requested documentation on June 6, 2019. In email correspondence dated June 26, 2019, Appellant, through counsel, submitted documentation in support of its position.

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

1. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is the sole culprit and in his own words, took full and sole responsibility for his actions in defrauding the SNAP system.
2. In Tort Law it is a common affirmative defense to liability when the conduct of a third-party is the superseding cause of the action. Therese Grocery should not be held accountable for the actions of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) because they did their best to train and supervise him.
3. Please pay close attention to the numerous affidavits from Therese Grocery's customers that are representative of how the community feels about the store and its owners. If it is permanently barred from using the SNAP benefits, it will effectively have to close down.
4. We ask that you give Theresa Grocery another chance by considering civil money penalties rather than permanent SNAP disqualifications.

Appellant referenced all previously submitted documentation under separate counsel as well as letters from ownership signed and notarized on April 2, 2019 and June 25, 2019, and four documents in support of employee training for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in 2005, 2006, 2007 and 2009.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Appellant does not dispute that trafficking violations occurred in its store. Instead, Appellant contends that an ex-employee was responsible and took full and sole responsibility for his actions in defrauding the SNAP system. Appellant, through counsel, contends that it should not be held accountable for the actions of the ex-employee because they did their best to train and supervise him. With regard to these contentions, it is important to note that as owner of the store, Appellant is liable for all volatile transactions handled by either paid or unpaid store personnel. 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. 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 Stamp Act and the enforcement efforts of the USDA.

Additionally, it must be noted that in the initial Supplemental Nutrition Assistance Program Application for Stores, annotated as received by FNS on July 24, 2006, the signature of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) affirms that:

“I accept responsibility on behalf of the firm for violations of the Supplemental Nutrition Assistance Program regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time. These include violations such as, but not limited to:

- Trading cash for Supplemental Nutrition Assistance Program benefits (i.e. trafficking);
- Accepting Supplemental Nutrition Assistance Program benefits as payment for ineligible items;
- Accepting Supplemental Nutrition Assistance Program benefits as payment on credit accounts or loans;
- Knowingly accepting Supplemental Nutritional Assistance Program benefits from people not authorized to use them;”

Therefore, Appellant’s contentions do not constitute valid grounds for dismissal of the current charges of trafficking or for mitigating the impact of those charges.

CIVIL MONEY PENALTY

The Appellant, through counsel, requested consideration of a civil money penalty rather than permanent SNAP disqualification. The store owner(s) submitted documentation titled Theresa Grocery EBT Training Guide and Regulation. There were three documents specifically for the ex-employee dated December 5, 2006, June 20, 2007, March 15, 2008 and January 20, 2009, indicating that training was completed. It was noted that the last training was dated seven (7) years prior to the investigation and violations. It is also noted that Appellant did not provide these documents to Retailer Operations Division when required which brings into question their validity.

Upon review of the submitted training documents, it is the determination of this review that Appellant did not meet the specific Criterion requirements for a Trafficking CMP as outlined in SNAP regulations at 278.6(i). While the attorney did mention the firm’s SNAP policy and training and provided the four documents for training of one employee, the attorney did not provide a copy of the firm’s SNAP policy to show that it was in place prior to their employee’s trafficking activities identified in the Texas Department of Health Services Investigation Report. The attorney did not provide the firm’s employee records to include names of employees, dates of hire, employment dates, continued SNAP training records (as the ones provided ended in 2009), dates of continued SNAP training, or any documents showing that an effective SNAP training program was in place prior to the SNAP violations identified in the Investigation Report. Also, the firm’s ownership did in fact benefit from the trafficking activities of their employee by the EBT settlements made to the firm’s bank account.

In the absence of any such documentation, Retailer Operations Division did not impose a civil money penalty in lieu of permanent disqualification. Therefore, the Retailer Operations Division’s decision not to impose a trafficking CMP 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 Texas Health & Human Services Commission, Office of the Inspector General investigation. All transactions cited in the letter of charges were conducted or supervised by an Agent with the Texas Health & Human Services Commission, Office of the Inspector General 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 cash for food products previously purchased with SNAP benefits, and in all other critically pertinent details. The decision to impose a permanent disqualification against Theresa Grocery 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 Title 7, Code of Federal Regulations, Part 279.7 (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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If the USDA receives such a request, it will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

Monique Brooks
ADMINISTRATIVE REVIEW OFFICER

October 17, 2019