

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review
Alexandria, VA 22302**

Tulsa Food Mart,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0191646

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 Program¹ was properly imposed against Tulsa Food Mart (hereinafter “Tulsa Food Mart” or “Appellant”), and its owner of record, by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a Permanent Disqualification against Tulsa Food Mart in a letter dated October 20, 2017.

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.”

¹ Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

CASE CHRONOLOGY

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period between October 25, 2016 and June 27, 2017. As a result of the investigation a report titled USDA-FNS Report of Positive Investigation (hereinafter Investigative Report) number HO00281, dated August 31, 2017 was provided to the Retailer Operations Division for consideration.

The Investigative Report documents eight (8) visits to Appellant by a USDA Investigator and a Confidential Informant, working under the direct supervision and oversight of the USDA Investigator. During six (6) of the visits four (4) unidentified male clerks are documented to have exchanged non-food items, as defined in 7 CFR § 278.2(a), for SNAP. The non-food items included dishwashing liquid, trash bags, sandwich bags, bathroom tissue, foam plates, plastic spoons, bleach, softener sheets, and laundry detergent. (Exhibits A, C, E, F, G, H). During one (1) of the visits (Exhibit D) an unidentified male clerk refused to exchange non-food items including foam bowls, dishwashing liquid, and a roll of bathroom tissue. Most egregiously the Investigative Report documents that on one (1) of the visits (Exhibit G) an unidentified male clerk exchanged cash 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits, with the explanation that double was being charged for both the non-foods (bleach, softener sheets and laundry detergent) and the cash. The exchange of SNAP for cash is **trafficking** as defined in 7 CFR § 271.2.

In a letter dated October 2, 2017 the Retailer Operations Division informed Tulsa Food Mart that it was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 271 – 282, specifically 7 CFR § 271.2 and 7 CFR § 278.2(a). The letter of charges, which included a copy of the Investigative Report includes details of each visit as documented in Exhibits A through H. Appellant was specifically charged with trafficking in Exhibit G, therefore subject to permanent disqualification.

The letter of charges further provides Appellant information regarding the potential for the imposition of a civil money penalty (CMP) in lieu of permanent disqualification delineating the conditions for the consideration of that alternative sanction.

The Retailer Operations Division record indicates that counsel, on behalf of Appellant, discussed the issue with the Retailer Operations Division on October 4, 2017. That discussion is documented to have been duly considered by the Retailer Operations Division prior to their issuance of an October 20, 2017 letter wherein the Retailer Operations Division informed Tulsa Food Mart that it was permanently disqualified from participation as a retail store in the SNAP. The October 20, 2017 letter further advised Appellant that it was not eligible for

a civil money penalty (CMP) in lieu of the permanent disqualification because it failed to submit timely evidence to demonstrate that an effective compliance policy and program had been established to prevent violations of SNAP.

Appellant submitted a request for administrative review, appealing the Retailer Operations Division's assessment via letter postmarked November 2, 2017. The appeal was granted as affirmed in a letter dated November 9, 2017.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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 AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the "Act")², 7 USC § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR).³ Part 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 as defined in Part 271.2.

7 U.S.C. § 2021(b)(3)(B) states, in relevant 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..."

7 CFR § 278.2(a) specifies, in relevant part, that "Coupons [benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food." Further, the citation specifies that "Coupons [benefits] may not be accepted in exchange for cash...or for any other nonfood use."

7 CFR § 278.6(e) states, in relevant part, "Penalties. FNS shall take action as

² Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246, further amended through P.L. 113-79 effective February 7, 2014.

³ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

follows against any firm determined to have violated the Act or regulations...”

7 CFR § 278.6(e)(1)(i) reads, in relevant part, “FNS **shall** disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.” [Emphasis Added]

7 CFR § 271.2 specifies, in relevant part, that “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 or 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.
- (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 (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(f)(1) states, in relevant part, “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm is selling a substantial variety of staple food items, and the firm’s disqualification would cause hardship to SNAP households...A civil money penalty for hardship to

SNAP households **may not** be imposed in lieu of a permanent disqualification.”
[Emphasis added]

7 CFR § 278.6(i) states, in relevant 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**...In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in §278.6(i)(1); and

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred **prior** to the occurrence of violations cited in the charge letter sent to the firm; and

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in §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...” [Emphasis added]

APPELLANT’S CONTENTIONS

The November 2, 2017 request for administrative review indicates that:

- The determination not to impose a civil money penalty (CMP) in lieu of a permanent disqualification is arbitrary and capricious because:
- The Retailer Operations Division failed to take into consideration the circumstances of the small grocery store operating in an economically depressed area.
- Appellant has been unfairly held to a higher standard than other similarly situated businesses with respect to failure to submit sufficient evidence of effective compliance policy and program; and, that it should not be held to same standard as a large retail establishment with numerous employees.
- A single incident of trafficking should not result in such severe consequences to Appellant, its ownership, and the elderly, infirm and poor customers of the area.
- The fact that Appellant is a small retail establishment with very few employees, that had compliance policies in place to avert

SNAP Violations, was not given consideration.

- The letters provided by the Retailer Operations Division dated October 2, 2017 and October 20, 2017 did not provide sufficient guidance regarding the evidence needed to support a request for CMP in lieu of permanent disqualification.

A reversal of the Retailer Operations Division determination with the allowance of the payment of a CMP in lieu of disqualification is requested.

In materials received by the Administrative Review Officer on December 16, 2017 Appellant provided additional information for consideration including:

- A petition signed by 120 customers requesting “to get EBT back”;
- Eight (8) photos of the interior and exterior of Appellant; and,
- Net profit information indicating in summary that Appellant had a net profit in 2016 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

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

ANALYSIS AND FINDINGS

Arbitrary and Capricious Determination:

As indicated Appellant contends that the determination of the Retailer Operations Division to impose a permanent disqualification instead of allowing a CMP is arbitrary and capricious citing three (5) distinct points including:

- 1) That the Retailer Operations Division failed to take into consideration the circumstances of a small grocery store in an economically depressed area;
- 2) That Appellant has been held to a higher standard than other similarly situated businesses with respect to requirement for the submission of proof of the establishment and implementation of an effective compliance policy and program to prevent SNAP violations; and,

- 3) That the single incident of trafficking, while certainly falling within the definition of such offense, should not result in such severe consequences with an impact to Appellant, ownership and associated family, as well as Appellant's elderly, infirm and poor customers.
- 4) Appellant's small operation, with few employees, and a compliance policy in place to avert SNAP Violations, was not given consideration.
- 5) The letters provided by the Retailer Operations Division dated October 2, 2017 and October 20, 2017 did not provide sufficient guidance regarding the evidence needed to support a request for CMP in lieu of permanent disqualification.

The Retailer Operations Division record documents that Appellant is classified, under SNAP definitions, as a convenience store and not a small grocery store. Notwithstanding the store classification, it is noted that the permanent disqualification being imposed upon Appellant results from an instance of trafficking, which is the most egregious of SNAP violations and specifically subject to the imposition of permanent disqualification on the **first offense** as indicated in the Food and Nutrition Act of 2008 (Act). 7 U.S.C. § 2021(b)(3)(B) states, in relevant 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..." The Act is further supported with SNAP regulations at 7 CFR § 278.6(e)(1)(i) which reads, in relevant part, "FNS **shall** disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." [Emphasis Added].

Neither the Act or the SNAP regulations allow consideration of the size, location, or other factors that might be offered as a basis to mitigate or reverse the permanent disqualification as imposed. Each and every retailer is held to the same standard with regard to the establishment of SNAP training and compliance policies and programs to prevent SNAP violations.

In the instant case the record indicates Appellant was authorized as a SNAP retailer effective February 18, 2014 under the authority and signature of Appellant's recorded ownership. Within the authorization materials provided for Appellant at that time was information describing the compliance policies and programs as well as the training that was recommended for Appellant to avert SNAP violations. The Retailer Operations Division was not required to provide specific instructions on the requirements for materials supporting the imposition of a CMP in lieu of permanent disqualification in either the letter of charges or the determination letter. The responsibility to define materials for response to the letter of charges falls to Appellant's ownership. It is notable that despite

documented discussion with counsel regarding the time limits for the CMP request there was no response received from Appellant until the November 2, 2017 request for administrative review, which is well beyond the 10 day time limits established in the October 2, 2017 letter of charges.

Although Appellant has provided a petition signed by 120 identified customers requesting that Appellant “get EBT back”; eight (8) photographs of Appellant’s interior and exterior; and evidence of the 2016 net profit for Appellant; none of these materials serve to provide a basis to mitigate or reverse the current permanent disqualification.

Civil Money Penalty

7 CFR §278.6(f)(1) of the SNAP regulations provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP households because of the unavailability of a comparable SNAP authorized firm in the area to meet their needs. However, this regulation also sets forth the following specific exception to assessments: “**A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.**” Therefore, because the matter at hand involves a permanent disqualification, this civil money penalty provision is not applicable in the present case, and there is no comparison of similar firms made.

The October 20, 2017 determination letter advised Appellant of its ineligibility for the imposition of a trafficking civil money penalty in lieu of permanent disqualification as allowed in 7 CFR § 278.6(i) based on failure to submit substantial evidence in a timely manner to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of SNAP. The request for administrative review, postmarked on November 2, 2017, does not meet the 10 day time limit as cited in the October 2, 2017 letter of charges; nor, does the explanation provided constitute “substantial” evidence that an effective compliance policy and program was in place at the time of the charged violations. That Appellant has initiated the development of materials to avert future SNAP violations is not a mitigating factor for consideration.

Based on a review of the record, the decision of Retailer Operations Division not to impose a civil money penalty in lieu of permanent disqualification is sustained as appropriate pursuant to 7 CFR §278.6(b)(1), 7 CFR §§278.6(b)(2)(ii), and 7 CFR §278.6(i).

It is further noted that, at a minimum, a six-month period of disqualification or a civil money penalty in lieu thereof would have resulted in the absence of SNAP benefit trafficking in the present case, in accordance with & CFR § 278.6(e); however, though Appellant is likewise liable for this lesser

sanction, it is merely subsumed under the precedent sanction of permanent disqualification.

CONCLUSION

Based on a review of the evidence in this case, 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 an official USDA investigation and the evidence gathered as a result of that investigation.

The materials recount trafficking that is clearly a violation of the SNAP regulations. Notably the official Investigative Report includes a statement introducing each of the Details of the Transaction/Visit affirming that the USDA Investigator makes the statements included “freely and voluntarily, knowing that this statement may be used in evidence.”

The decision to impose a permanent disqualification against Tulsa Food Mart 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 a judicial review is desired, 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.

NANCY BACA-STEPAN
Administrative Review Officer

January 31, 2018