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

Village Food Mart,

Appellant,

v.

Case Number: C0204566

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 Village Food Mart (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), in its administration of the SNAP when it imposed a permanent disqualification against Appellant on April 24, 2018.

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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period January 29, 2018, through February 8, 2018. The investigation determined that personnel at the Appellant firm accepted SNAP benefits in exchange for cash in the amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (trafficking) on two separate occasions as noted in the letter of charges.

Both transactions were deemed clearly violative and warrant a permanent disqualification. Additionally, the investigation determined that personnel at the firm accepted SNAP benefits in exchange for ineligible merchandise on five separate occasions. The items sold are best described in regulatory terms as common nonfood items such as toilet tissue and bar soap. The investigative report indicates that these violative transactions were handled by two different clerks.

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated April 2, 2018, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.6(e)(1). The letter of charges states, in relevant 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 responded to the charges in an undated letter received on April 13, 2018, that did not request a CMP, but included documentation to be considered in support of the CMP. After giving consideration to the evidence, the Retailer Operations Division notified Appellant in a letter dated April 24, 2018, that the firm was 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 states that Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated ". . . 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."

By letter dated May 1, 2018, Appellant, through counsel, appealed the Retailer Operations Division's decision and requested an administrative review of this action. The appeal was granted. Subsequent correspondence dated June 1, 2018, was received.

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 Section 278. In particular, Sections 278.6(a) and Part 278.6(e)(1)(i) establish 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 § 271.2 states that: Eligible foods means any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot food and hot food products prepared for immediate consumption.

7 CFR § 278.2(a) states that: Coupons [SNAP 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 may not be accepted in exchange for cash, in payment of interest on loans, or for any other nonfood use.

7 CFR § 278.6(a) states that: 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.

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, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone . . . ." Trafficking is further defined, in 7 CFR § 271.2, to include "(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food."

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, 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."

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)." Part 278.6(b)(2)(ii) further states 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 in Part 278.6(b)(1), the firm shall not be eligible for such a penalty.

In addition, 7 CFR § 278.6(i)(2) states in relevant part, "As specified in Criterion 3 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider **written and dated statements of firm policy** which reflect a commitment to ensure that the firm is operated in a manner consistent with this part 278 of current FNS regulations and current FSP policy on the proper acceptance and handling of food coupons." This section goes on to state, "As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation." This section further states, "A firm which seeks a civil money penalty in lieu of permanent disqualification shall document its training activity by submitting to FNS its **dated training curricula and records of dates training sessions were conducted** . . ." (Emphasis added).

APPELLANT'S CONTENTIONS

The following may represent a summary of Appellant's contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- Appellant apologizes and takes full responsibility for the unintentional incident that occurred. The matter is being taken very seriously and the company will not tolerate misuse of SNAP and are taking steps to ensure it doesn't happen again;
- Appellant requests a review of the decision to deny a TCMP;
  - Criterion 1: The store owner had a training program in effect at his store where the employees were informed of the SNAP regulations and the limits of SNAP use;
  - Criterion 2: Training was conducted annually in January and each employee read the rules/manual and discussed them with the owner on an individual basis for about one hour. At the end, each employee signed a log indicating that he had completed the training and understood the SNAP rules and regulations;
  - Criterion 3: The program was developed and instituted by the owner to meet the requirements of the SNAP Training Guide for Retailers. Each employee underwent the training on an individual basis and each signed the log prepared by the owner;
  - Criterion 4: The allegations have to do with a clerk giving cash back to a customer in the amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on two occasions. It is recognized that this is a serious issue, but neither the store nor the owner charged a fee or surcharge for the transactions and there was no malice or ill intent on the part of the store operator to defraud the program or otherwise violate SNAP regulations. There is nothing to show that the owner was aware of the situation or conduct, approved the conduct, was involved in the conduct, or benefitted from the conduct. The store employees did not understand the difference between SNAP benefits and those available from TANF which has a similar card;
- The store is in a poor community where many depend on it. Loss of SNAP would hurt them as there are few SNAP stores in the neighborhood and most are too far out of range; and,

- The owner appreciates the opportunity for a review so that he would be able to again accept SNAP. He also recognizes that if allowed to be reinstated that he will have to pay a CMP assessed by USDA.

Appellant submitted copies of all previous correspondence, an undated Retail Guide Line for Employment document, undated statements signed by the owner and two employees that they read and understood the rules and regulations in the SNAP Retailer Training Guide, copies of training sign-in sheets for 2014-2017, and a copy of the SNAP Training Guide for Retailers in support of these contentions.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. While store ownership may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, the ownership is accountable for the proper training of staff and for the monitoring and handling of SNAP benefit transactions. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time regardless of the amount of time the owner is present at the subject firm.

The investigative report shows that two employees working at the Appellant business during the period under review transacted SNAP benefits for ineligible items on five separate occasions and also exchanged SNAP benefits for cash during two of these five occasions (Exhibits D and E) indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The transactions from the investigative report have been matched to SNAP transactions posted by the Appellant business on the dates in question with no discrepancies and a review of the investigative report shows no errors or discrepancies. There was no indication of involvement by the firm's ownership or management. The acceptance of SNAP benefits for ineligible items or for cash are both violations of SNAP rules and regulations with the penalty for trafficking being permanent disqualification. There is no regulatory threshold for the exchange of SNAP benefits for cash or for the dollar value of the ineligible items purchased. Store ownership does not dispute that store employees accepted SNAP benefits in exchange for cash or ineligible merchandise.

It is highly improbable, based on the readiness of the store employees to exchange SNAP benefits for ineligible items and for cash, that the only instances of SNAP violations were the five identified as part of the FNS undercover investigation and more likely than not that this represented an ongoing pattern of SNAP violations, that included trafficking, at the Appellant firm. As previously stated, store ownership is responsible for all SNAP transactions at the firm and therefore a certain minimal level of oversight and training on the part of ownership to ensure employees, especially new employees, are not violating SNAP laws or regulations is expected.

It would be unusual and irresponsible for store ownership to not have a program of ongoing supervision of employee performance and conduct to ensure store employees were not stealing from the firm or conducting other activities that would jeopardize the licenses and income that the firm is dependent upon.

SNAP benefits, in general, are only authorized to be used for the purchase of foods for the household to eat as well as seeds and plants which produce food for the household to eat. The common nonfood items purchased (toilet tissue and bar soap) during the investigation of the Appellant firm are clearly not edible foods and are not plants or seeds, so one has to question the level of training these two employees received by store ownership and/or management. The basic concept of "if you can't eat it, you can't buy it using SNAP" is not a difficult one for employees to grasp, yet these two employees allowed the purchase of multiple ineligible items using SNAP benefits on five separate occasions and exchanged SNAP benefits for cash. That these two, allegedly well trained, employees were both confused over the sale of nonfood items and how to use a SNAP EBT card is unbelievable. Had an effective compliance policy and program truly been in effect at the firm as alleged by Appellant, it is unlikely that these employees would have made such obvious mistakes. The more likely explanation is that store ownership and/or management failed to properly train and subsequently supervise these two employees. Additionally, had store ownership and/or management been supervising these employees through occasionally monitoring them using videotape, if available, or in person, they would have readily noticed that both were regularly accepting SNAP benefits in exchange for cash and for ineligible nonfood items. It also would have been immediately evident to store ownership and/or management that both employees were deficient in their knowledge of SNAP rules and regulations had they periodically spot checked their knowledge and abilities by asking questions about SNAP eligible/ineligible items and how to correctly process transactions using a SNAP EBT card. Either of these basic supervisory techniques would have provided a no cost method for store ownership and/or management to ensure that store employees were not putting the store's SNAP license at risk. These are clear signs of poor or no supervision by store ownership and/or management and the lack of an effective training program.

Neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto 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 the most serious violation, 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 shall 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 and second chances are not an authorized option.

Based on the discussion above, there is not any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because 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 within the specified timeframe. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

The charge letter specifically states 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." While the documents submitted in the initial response to the charges were received in a timely manner, those provided by counsel in its June 1, 2018, correspondence were not received within the required timeframe.

To be considered eligible for a trafficking CMP a firm must 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 Section 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 violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm.
- Criterion 3: The firm had developed and instituted an effective personnel training program as specified in Section 278.6(i)(2).
- 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. Or it is the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm.

SNAP regulations are explicit in what constitutes substantial evidence. Specifically, 7 CFR § 278.6(i)(2) states in relevant part, "As specified in Criterion 3 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider **written and dated statements of firm policy** which reflect a commitment to ensure that the firm is operated in a manner consistent with part 278 of current FNS regulations and current FSP policy on the proper acceptance and handling of food coupons." This section goes on to state, "As required by

Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation." This section further states, "A firm which seeks a civil money penalty in lieu of permanent disqualification **shall document** its training activity by submitting to FNS its **dated training curricula and records of dates training sessions were conducted**…" (Emphasis added).

Appellant did not submit a copy of the firm's SNAP compliance policy or personnel training program. The undated Retail Guide Line for Employment document submitted by Appellant in its initial response only has three sentences on SNAP that solely discuss how SNAP and TANF EBT cards are similar. Therefore, this document is insufficient and inadequate and does not constitute an effective compliance policy and program as it lacks substance and detail. Furthermore, it is not dated, does not address the termination of an employee found violating SNAP regulations, does not address corrective actions for complaints of SNAP violations or irregularities, and does not include procedures for internal review of compliance by firm employees. The document also does not address initial training and refresher training. The only training documentation submitted were undated statements signed by the owner and two employees stating that they read and understood the rules and regulations in the SNAP Retailer Training Guide and copies of four training sign-in sheets for 2014-2017. Both SNAP regulations at § 278.6(i)(2) and the "SNAP Training Expectations Notice" issued to all SNAP retailers by FNS clearly state that documented SNAP training for all store owners and new employees must occur within 30 days of the date of the policy implementation or within 30 days of the start of employment. No documentation was provided showing the completion of SNAP training within a 30 day window for any employee. Additionally, an examination of the FNS store visit documentation contained in the firm's record for the two most recent FNS store visits shows that the authorization forms were signed by two cashiers whose names are not listed in any of the training documentation provided by Appellant.

As previously stated, the copies of four training sign-in sheets for 2014-2017 submitted by counsel in the June 1, 2018, were not received within the specified timeframe. However, a review of these documents shows that they did not provide any evidence that would have affected the outcome of the trafficking CMP review.

Based on the above discussion and the evidence under review, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division's decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did 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 by or under the direct supervision of a USDA investigator, signed under penalty of perjury, 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, the specific exchange of SNAP benefits for cash, and in all other critically pertinent detail. Additionally, the decision by the Retailer Operations Division that Appellant was not eligible for a trafficking CMP is also found to be correct.

Based on the discussion above, the determination by the Retailer Operations Division to impose a permanent disqualification against the Appellant business 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 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.

ROBERT T. DEEGAN August 17, 2018
Administrative Review Officer