

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

Washington Shell,

Appellant,

v.

Case Number: C0195892

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 a permanent disqualification of Washington Shell (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Washington Shell.

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

Washington Shell was initially authorized to participate in SNAP as a convenience store on March 31, 2015. Between September 12, 2017, and October 3, 2017, the USDA conducted an undercover investigation of Washington Shell to ascertain the firm’s compliance with Federal SNAP law and regulations. It was reported that during the course of the investigation, the Appellant firm violated SNAP rules by allowing ineligible non-food items to be purchased with SNAP benefits on six separate occasions. The firm also reportedly committed the violation of trafficking by exchanging SNAP benefits for cash on two occasions.

In a letter dated December 20, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations. It also charged the Appellant with accepting SNAP benefits in exchange for ineligible non-food merchandise. The misuse of SNAP benefits, as described in the charge letter, is a violation of 7 CFR § 278.2(a). The charge letter informed the Appellant that the violations warranted permanent disqualification from SNAP as provided in 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made within 10 days of receipt of the letter under the conditions specified in 7 CFR § 278.6(i).

In response to the charge letter, the Appellant submitted a letter dated January 4, 2018. In this letter, the Appellant accepted full responsibility for the trafficking offense, but stated that the transactions were done by a new employee who did not follow the training guidance established by the firm. Appellant further stated that the firm has never had high volume SNAP redemptions, and has had steady sales projections and that this was an unfortunate event caused by a careless new employee. The Appellant asks that a penalty of \$10,500 not be charged to the firm because he is experiencing difficult economic times.

After considering the Appellant's response and further analyzing the evidence in the case, the Retailer Operations Division issued a determination letter dated January 25, 2018. The determination letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter 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 in accordance with paragraph § 278.6(i), but determined that the Appellant was not eligible for a CMP because it failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked February 8, 2018, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request for review was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW & REGULATIONS

The controlling law in this matter is found 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...

7 CFR § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food.

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.... Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and **disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section.**[Emphasis added.]

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(e) states, in part:

The FNS regional office shall:

(1) Disqualify a firm permanently if:

(i) Personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, in part:

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 § 271.2 states, in part:

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 § 278.6(b)(2)(ii) states, in part:

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(b)(2)(iii) states:

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.

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....

SUMMARY OF INVESTIGATION

During an undercover investigation conducted between September 12, 2017, and October 3, 2017, the USDA completed six compliance visits at Washington Shell. A report of the investigation was provided to the Appellant as an attachment to the December 20, 2017, charge letter. The investigation report included Exhibits A through F, which provided full details on the results of each compliance visit. SNAP violations were documented during every visit and included trafficking violations on the last two visits. The report noted that the following ineligible non-food items were purchased by the investigator using SNAP benefits:

- One 10 ounce bottle of laundry detergent (*Tide* brand), Exhibit A
- One box of magic eraser sponges (*Mr. Clean* brand), Exhibit A
- One hand spinner with wireless speaker (no brand indicated), Exhibit B
- One hand spinner (*Foco* brand), Exhibit B
- One 2 pack bar soap (*Tone 2* brand), Exhibit B
- One 10 ounce bottle liquid dish soap (*Palmolive* brand), Exhibit B
- One 150 count box fold top sandwich bags (*GoodSense* brand), Exhibit C
- One 15 count bag plastic cups (*Home Store* brand), Exhibit C
- One 24 ounce bottle liquid cleaner (*Mr. Clean* brand), Exhibit D
- One pack of cigarettes (*Newport* brand), Exhibit D
- One pack of paper towels (*Bounty* brand), Exhibit D
- One pack of cigarettes (*Newport* brand), Exhibit E
- One pack of cigarettes (*Newport* brand), Exhibit F
- One pack of cigarettes (*Marlboro* brand), Exhibit F

Trafficking was reported during the last two compliance visits, which took place on September 29, 2017, and October 3, 2017.

In reporting the September, 29, 2017, visit, the USDA investigator provided the following details, as noted in exhibit E:

5 U.S.C. 2018 (b)(7)(e)

In reporting the October 3, 2017, visit, the USDA investigator provided the following details, as noted in exhibit F:

5 U.S.C. 2018 (b)(7)(e)

The report noted that the investigator attempted to obtain cash on two other occasions, but both times, the attempts were refused by the clerks on duty. These refusals are documented in Exhibits B and D. The report noted that one clerk conducted the violative transactions during the investigation.

APPELLANT'S CONTENTIONS

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

- Appellant requests reconsideration of the permanent disqualification;
- Appellant contends that the violations occurred because of a new employee error;
- Appellant is an honorable businessman, as demonstrated by the firm's business history;
- Appellant states that the firm trains its employees to exceed customer expectations in a positive manner;
- Appellant's firm is undergoing challenging times and any negative sanction will impact the business; and
- Appellant assures that in the future, careless and irresponsible actions by the owner or the firm's employees will not occur again.

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

ANALYSIS AND FINDINGS

As best as can be determined, the Appellant did not, at any point, offer any evidence that the violations did not take place as described in the charge letter. In fact, in the January 4, 2018, letter sent in response to the charge letter, the Appellant concedes that the violations occurred and accepts full responsibility for the conduct, while attributing it to a new employee. And again, in the request for administrative review, the Appellant says that the violations were the due to a new employee error.

Because the violations themselves do not appear to be in dispute, it is the determination of this review that program violations, including trafficking, did occur as charged by the Retailer

Operations Division and warrant permanent disqualification from SNAP participation. The balance of this review will address the Appellant's remaining contentions.

Business History of the Firm

The Appellant owner contends that he is an honorable businessman, as demonstrated by the firm's business history. This contention implies that because the firm does not have a history of program violations, the permanent disqualification determination should be overturned or reduced.

With regard to this contention, SNAP regulations at 7 CFR § 278.6(e) require that when serious violations, such as trafficking, occur, permanent disqualification is the necessary penalty, even on the first occasion, regardless of a firm's prior compliance with program rules. As stated earlier, the issue under review is whether or not the Retailer Operations Division took appropriate action, consistent with SNAP regulations, in its imposition of a permanent disqualification against Washington Shell. As long as the administrative action taken by the agency fully conforms to SNAP regulations, this review has no authority to dismiss or reduce a period of disqualification. In this case, the sanction imposed by the Retailer Operations Division is wholly in line with SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations.

Violations Committed Because of New Employee Error

The Appellant contends that the violations occurred because of a new employee error. With regard to this contention, the record shows the Appellant owner signed an application to participate as a retailer in SNAP on March 13, 2015. By signing this application, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. The record clearly establishes that the Appellant owner agreed to abide by program rules, including taking responsibility for violations committed by any of the firm's employees, whether paid or unpaid, new, full-time or part-time. An owner or manager is not free of responsibility simply because he or she was not in the vicinity at the time the violations occurred or because he or she was uninvolved in the violations. Regardless of which employees are operating the cash register at a given time or whom firm ownership authorizes to handle store business, the ownership of the firm is ultimately responsible for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of its employees would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA.

Therefore, the Appellant's claim that the violations were the fault of a new employee does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Negative Impact to Business

The Appellant has stated that a permanent disqualification would have a negative impact on his business. With regard to this contention, it is recognized that some degree of economic hardship

is a likely consequence whenever a store is disqualified from participation in SNAP. However, there are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty.

Alternative Penalty

As noted earlier, the Retailer Operations Division determined that the Appellant firm was not eligible for a civil money penalty in lieu of permanent disqualification for trafficking because the Appellant did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a civil money penalty to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate documentation within designated timeframes. In the initial response to the charge letter, rather than request a trafficking CMP, the Appellant sought to have a penalty of \$10,500 removed, though no such penalty had been established against the firm. Regardless, given that the firm did not request a trafficking CMP in its response to the charge letter, and since the Appellant never submitted any documentation that would indicate the firm had a compliance policy or training program of any kind, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

Remedial Actions Taken

The Appellant has stated that in the future, careless and irresponsible actions by the owner or the firm's employees will not occur again.

With regard to this contention, it must be noted that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. This review is limited to the circumstances that existed at the time the violations were committed. It is not the authority of this review to consider any subsequent remedial actions that may have been taken or will take place so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations.

Therefore, the Appellant's contention that corrective action has taken place or that further remedial actions are planned does not provide a valid basis for dismissing the charges or for modifying the penalty imposed.

CONCLUSION

Trafficking is defined in Section 271.2 of the SNAP regulations as "the buying or selling of SNAP benefits for cash or consideration other than eligible food." Pursuant to regulations at

7 CFR § 278.6(e)(1)(i), permanent disqualification is the required penalty for such violations. The law and regulations do not provide for a lesser penalty for this violation.

Based on a review of the evidence in this case, there is little question that trafficking violations did occur at Washington Shell during a USDA investigation. All transactions cited in the letter of charges were conducted or supervised by a USDA investigator 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 appears to be accurate with regard to the dates of the violations, including the exchange of SNAP benefits for cash, and in all other critically pertinent details. Therefore, the decision to impose a permanent disqualification against the Appellant, Washington Shell, under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

August 6, 2018