

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

**Zip N Liquor,**

**Appellant,**

**v.**

**Case Number: C0212579**

**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 a finding that a permanent disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Zip N Liquor (Appellant) by the Retailer Operations Division of FNS.

**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 permanent disqualification against Zip N Liquor on July 2, 2019.

**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 Zip N Liquor with Federal SNAP law and regulations during the period October 26, 2018 through February 13, 2019. The investigation report documents that personnel at Zip N Liquor, in addition to accepting SNAP benefits in exchange for ineligible nonfood items on four occasions, also exchanged SNAP benefits for cash during one undercover compliance visit. The buying or selling of SNAP benefits 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 informed the Appellant, in a letter dated June 13, 2019, that it was charged with violating the terms and conditions of the SNAP regulations. The Charge Letter along with a copy of the investigation report was delivered to the Appellant on June 14, 2019 and signed for by “5 U.S.C. § 552 (b)(6) & (b)(7)(C)”. The Charge 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 replies to the Retailer Operations Division of June 19, 2019 and June 25, 2019, the Appellant replied to the charges therein stating that the owner apologizes on behalf of his employees for neglecting their job responsibilities and not following the owner’s instructions. The Appellant had no control at the time the incident happened. The SNAP violations were unintentional mistakes. The Appellant will keep store employees up to date on the SNAP rules and how they should handle SNAP transactions. The Appellant does not disagree with the findings of the store investigation. As a permanent SNAP disqualification will impose a financial hardship, the Appellant is requesting that a civil money penalty be imposed.

After giving consideration to the Appellant’s replies and the evidence in this case, the Retailer Operations Division informed the Appellant, by letter dated July 2, 2019, that Zip N Liquor was permanently disqualified from participation as a retail store in the SNAP. The letter also stated that the Appellant was not eligible for a trafficking civil money penalty 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 July 10, 2019, the Appellant requested an administrative review of the permanent disqualification determination. FNS granted the Appellant’s request for administrative review by letter dated July 25, 2019.

### **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 § 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 states, in part:

Trafficking means the buying or selling of coupons, ATP cards or other benefit instruments for cash or consideration other than 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 ...

7 CFR §278.6(i) states, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 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 ....

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; or it is only 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 ....

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). [Emphasis added.]

(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. [Emphasis added.]

## **SUMMARY OF CHARGES**

**5 U.S.C. § 552 (b)(7)(E).**

## **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 administrative review request, the Appellant made the following summarized contentions, in relevant part:

- The owner apologizes on behalf of his employees for neglecting their job responsibilities and not following the owner's instructions. The Appellant had no control at the time the incident happened. The SNAP violations were unintentional mistakes. The Appellant does not disagree with the findings of the store investigation.
- The Appellant will keep store employees up to date on the SNAP rules and how they should handle SNAP transactions. The Appellant will stay on top of it like always trying to take care of customers, the community, and the business to avoid any other SNAP violations.

- A permanent SNAP disqualification will impose a hardship on area SNAP customers.
- A permanent SNAP disqualification will impose a financial hardship on the Appellant.
- The Appellant requests that a civil money penalty be imposed in lieu of a permanent SNAP disqualification.

In support of these contentions, the Appellant submitted the following documents to FNS for review:

- A copy of the store owner's driver's license;
- A letter dated May 21, 2019 from the Downey Police Department regarding a decoy operation at the subject firm; and
- A letter dated June 13, 2019 from the California Lottery regarding an underage investigation compliance visit at the subject firm.

## **ANALYSIS AND FINDINGS**

### **SNAP Violations**

The Appellant contends that the owner apologizes on behalf of his employees for neglecting their job responsibilities and not following the owner's instructions. The Appellant had no control at the time the incident happened. The SNAP violations were unintentional mistakes. The Appellant does not disagree with the findings of the store investigation.

These contentions cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. As owner of the store, the Appellant is liable for all violative transactions that occur at Zip N Liquor. 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. Prior to becoming authorized to participate in the SNAP on September 14, 2015, the Appellant completed and submitted a SNAP Application for Retail Stores. 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 regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. The Appellant did not disagree with the results of the investigation and that during one of the compliance visits, a clerk exchanged SNAP benefits for cash.

Trafficking is defined in 7 CFR § 271.2 of the SNAP regulations which states that 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... 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 a 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 Appellant’s implied contention that the SNAP violations were unintentionally committed by store employees without its knowledge, consent, or approval cannot be accepted as a valid basis for diminishing the penalty. 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 and Nutrition Act and the enforcement efforts of USDA.

### **Corrective Action**

The Appellant contends that it will keep store employees up to date on the SNAP rules and how they should handle SNAP transactions. The Appellant will stay on top of it like always trying to take care of customers, the community, and the business to avoid any other SNAP violations. In support of its contentions, the Appellant submitted the following documents for review: (1) A copy of the store owner’s driver’s license; (2) A letter dated May 21, 2019 from the Downey Police Department regarding a decoy operation at the subject firm; and (3) A letter dated June 13, 2019 from the California Lottery regarding an underage investigation compliance visit at the subject firm.

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. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant’s contention that it has taken or will take corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Customer Hardship**

The Appellant contends that a permanent SNAP disqualification will impose a hardship on area SNAP customers. 7 CFR § 278.6(f) of the SNAP regulations provides for civil money penalty assessments in cases where disqualification would cause “hardship” to SNAP households because of the unavailability of a comparable participating food store in the area to meet their

needs. However, this regulation also sets forth the following specific exception to such assessments there under: “A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification”. Therefore, since this case involves a permanent disqualification action, the civil money penalty provision is not applicable to the present case.

### **Financial Hardship**

The Appellant contends that a permanent SNAP disqualification will impose a financial hardship on the firm. However, there is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, the Appellant’s contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **CIVIL MONEY PENALTY**

The Appellant requests that a civil money penalty be imposed in lieu of a permanent SNAP disqualification.

In the June 13, 2019 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 responses to the Charge Letter, the Appellant requested consideration of a civil money penalty in lieu of permanent disqualification. However, the Appellant provided no supporting documentation in support of its request.

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).

## **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 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 accurate with regard to the dates of the violations, including the exchange of SNAP benefits for cash or consideration other than eligible food, and in all other critically pertinent details. Therefore, the decision to impose a permanent disqualification against the Appellant, Zip N Liquor, 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 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

September 5, 2019