

As a result of evidence compiled from the investigation, the Retailer Operations Division informed Appellant, in a letter dated July 21, 2016, 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:

The SNAP regulations also provide 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.

Appellant, through counsel, replied to the charge letter on August 17, 2016, requesting that the charges be dismissed because the age of the evidentiary affidavit and that the confidential informant did not prepare the report. After considering the evidence and the retailer's reply, the Retailer Operations Division notified Appellant in a letter dated August 17, 2016, 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 further stated that Appellant was not eligible for a trafficking 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 violations of the SNAP.

In a letter postmarked August 31, 2016, Appellant, through counsel, appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted. On September 22, 2016, counsel requested case documentation from FNS through the Freedom of Information Act (FOIA). This administrative review was held in abeyance pending completion of an official response to the Appellant's FOIA request. FNS responded to counsel's FOIA request on November 3, 2016. Counsel was provided 21 days to provide additional documentation in support of its administrative review request. Counsel submitted its contentions and supporting documentation by letter dated November 28, 2016.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear 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, would 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 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) and (e)(1) 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 SNAP benefits.

7 CFR § 278.6(a) states, inter alia, 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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system . . . ”

7 CFR § 278.6(b)(2)(ii) states, inter alia, that “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(c) reads, in part, “Review of Evidence. 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) . . . 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 . . .”

7 CFR § 278.6(e)(1) 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.”

7 CFR § 278.6(i) states, inter alia, that “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.” [Emphasis added.]

APPELLANT’S CONTENTIONS

Appellant, through counsel, made the following summarized contentions in subsequent correspondence submitted on November 28, 2016, in relevant part:

- There are less than a handful of employees who are trained on SNAP regulations and what transactions are permissible.
- As noted in the Investigative Report, the store had a policy in place to refuse cash back

transactions and exchanging SNAP benefits for cash.

- On the same day that Appellant submitted its reply to the charge letter, the Retailer Operations Division prepared its determination.
- 7 CFR 286.6 states that the Department has to consider the information submitted by the accused retailer.
- Appellant did not receive the recommendation and evaluation in its response indicating that the review was not done or was done at an inappropriate time.
- A sworn statement by the confidential informant and not just the investigator must be required.
- Federal courts have previously determined that information gleaned from confidential informants who are relaying information to an investigator who subsequently testifies to the information that the confidential informant already told him, is not valid evidence.
- Even if the Division determines the disqualification process was proper, the information that the Department based its disqualification on was improper and insufficient.
- A confidential informant's statements, as relayed through an investigator and without documentary evidence to support this, is simply not enough to support the one allegation of trafficking.

The preceding may represent only a brief summary of the Appellant's contentions presented 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.

INVESTIGATION DETAILS

During an investigation conducted from July 16, 2014, through August 28, 2015, a confidential informant and an USDA investigator conducted seven compliance visits at Guy's Variety. The report of the investigation was provided to the Appellant as an attachment to the charge letter dated July 6, 2016, and included Exhibits A through G which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were committed during five of the seven compliance visits. The investigation reported that personnel at Guy's Variety exchanged \$15.00 of cash for \$30.00 in SNAP benefits during one visit. Transactions of this nature are referred to in regulatory terms as "trafficking". During five of the visits, Appellant also exchanged ineligible non-food items for SNAP benefits including sandwich bags, storage bags, paper towels, aluminum foil, feminine pads, dish liquid, and boxes of diapers.

ANALYSIS AND FINDINGS

Neither the Food and Nutrition Act of 2008, as amended, nor the regulations 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,

§ 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.

Due Process

Counsel contends that the argument and evidence presented by Appellant were not considered by the Retailer Operations Division because it issued its determination letter on the same day that the Retailer Operations Division received counsel's reply. Appellant replied to the charges in writing, denying the charge of trafficking and suggesting the evidence was not sufficient. The case record shows that the Retailer Operations Division did, in fact, consider counsel's August 17, 2016, prior to issuing the determination letter. However, after reviewing the evidence of the case and Appellant's reply, the Retailer Operations Division determined that a permanent disqualification was warranted. The action followed the agency's due process procedures which are two-fold in nature. First, the retailer is afforded an opportunity to reply to the charges as specified by the Retailer Operations Division; Appellant has availed itself of this first aspect of the due process procedures in the form of a written reply to the Retailer Operations Division.

The second level of due process involves an administrative review, of which Appellant has likewise availed itself. The purpose of the administrative review process is to ensure that firms aggrieved by FNS's adverse actions have the opportunity to have their position fairly considered by an impartial reviewing authority prior to that adverse action becoming final. Appellant has been duly given, and has taken, the opportunity to present to USDA through the administrative review process whatever evidence and information it deems as pertinent in support of its position that the Retailer Operations Division's adverse action should be reversed. Therefore, any evidence and information that Appellant presented to the Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to Appellant's right to a fair and thorough review. Appellant has exercised its opportunity to reply to the charge letter and its administrative review rights, and by doing so has availed itself of the full complement of the agency's statutory obligations.

Hearsay Evidence

Appellant, through counsel, contends that information from the confidential informant is hearsay. The administrative review of FNS determinations against SNAP retailers is authorized under Section 14(a)(5) of the Food and Nutrition Act of 2008. The SNAP rules at 7 CFR Part 279 have been promulgated pursuant to the Food and Nutrition Act of 2008, and the administrative review adheres to the process provided for in these regulations. It is important to clarify that the rules of evidence in administrative proceedings differ from those used in judicial proceedings generally and differ specifically with regard to the admissibility of hearsay: any oral or documentary evidence may be received. It excludes only irrelevant, immaterial, or unduly repetitious evidence, primarily for the sake of expedience. Therefore the test for admissibility is relevance: hearsay is admissible, like other evidence, if it is relevant. In the present case, the statements of

the Confidential Informant, made to the Investigator regarding the violative transactions, are corroborated by additional and substantial physical evidence, impart probative value and are closely connected to the issues at hand, indicating materiality. Thus, they are clearly relevant, even if they may be seen as hearsay. Nonetheless, both investigators and cooperating informants are typically available to testify at trial, in which case eye-witness accounts of the events described in the report could be presented, thus dispensing with the issue of the admissibility of hearsay.

With regard to this contention, based on a review of the evidence in this case, there is no question that program violations did occur. As noted previously, the charges of violations are based on a USDA investigation. All transactions cited in the letter of charges were 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, the exchange of SNAP benefits for cash, and in all other critically pertinent detail. As such, Appellants' contentions, through counsel, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

As such, the regulations are very specific with regard to the action required for violations involving trafficking. The Food and Nutrition Act, reads, in relevant 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.

Court Cases Cited

As to the court cases cited by counsel, the administrative review process is to determine whether FNS followed the Food and Nutrition Act and the regulations issued under the Act when it took action against the retailer. The administrative review officer is not responsible for determining whether any court cases cited by counsel apply to Appellant's situation. If this final agency decision is appealed to the federal district court, the judge is responsible for determining whether the court cases cited by counsel are on point and applicable to the case presently under review.

CIVIL MONEY PENALTY

The case record documents that the Retailer Operations Division determined there was insufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations prior to the violations in this case.

The criteria for a trafficking CMP in lieu of a permanent disqualification is defined under 7 CFR § 278.6(i) which reads, *inter alia*:

*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** [emphasis added] 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** [emphasis added] cited in the charge letter sent to the firm; and*

*Criterion 3. The firm had developed and instituted an **effective** [emphasis added] 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 violation . . .

The charge letter dated July 21, 2016, clearly states:

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. No extension of time can be granted for making a request for a CMP or for providing the required documentation.

The record shows that Appellant did not timely request a CMP. However, Appellant, through counsel, contends that the fact that the firm refused to traffick during two of the transactions conducted at Appellant verify that the firm has a training program in place. Appellant did not submit any documentation to support this statement. Therefore, Appellant fell short of the regulatory standard for a trafficking CMP as it did not timely request a CMP and it did not provide **substantial** evidence that it met all four criteria required by 7 CFR § 278.6(i). 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

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 under the direction and supervision of a USDA investigator and all are thoroughly documented. A review of the investigative documentation 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 exchanges 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 CMP was also found to be correct.

The determination by the Retailer Operations Division to impose a permanent disqualification against Guy's Variety 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 USC § 2023 and 7 CFR § 279.7. 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's owner resides or is 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 such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

MARY KATE KARAGIORGOS
ADMINISTRATIVE REVIEW OFFICER

December 6, 2016
DATE