

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

Corner Food Market #1,)	
)	
Appellant,)	
)	
v.)	Case Number: C0182562
)	
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 that a permanent disqualification of Corner Food Market #1 (hereinafter Corner Food Market) 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 took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of SNAP, when it imposed a permanent disqualification against Corner Food Market.

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

Corner Food Market was initially authorized to participate in SNAP as a convenience store on February 11, 2014. Between June 12, 2015 and November 13, 2015 the USDA conducted an undercover investigation of Corner Food Market 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 four separate occasions. The firm also reportedly engaged in trafficking violations by exchanging SNAP benefits for cash on two occasions.

In a letter dated April 19, 2016, 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 merchandise. The misuse of SNAP benefits, as described in the charge letter, is a violation of 7 CFR § 278.2(a). The letter of charges 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 charge letter under the conditions specified in 7 CFR § 278.6(i).

The record shows that the Appellant replied to the charges in a letter to the Retailer Operations Division dated April 26, 2016. In its response, the Appellant stated that the firm has been proactive in following the rules of SNAP through the monitoring of cashiers. The Appellant further argued that the owner cannot be in the store at all times, so there are rules in place to deter any wrongdoing by the cashiers. In its letter, the Appellant also claimed that it fired one of its cashiers in November 2015. The Appellant stated that it attached a copy of the store's daily procedures to the letter. However, the case record indicates that no attachments were included with the Appellant's letter.

Finally, the Appellant requested a civil money penalty in lieu of disqualification, "due to the fact that we are aware that all people are not honest and we are overall responsible for all activity at our store. We follow the rules and have preventative measures in place to help keep such unlawful activities from happening at our store."

After considering the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated May 3, 2016. While the violation of allowing ineligible items to be purchased with SNAP benefits typically results in a store's temporary disqualification from SNAP participation, trafficking in SNAP benefits warrants permanent disqualification. Since the Appellant was charged with trafficking, permanent disqualification was the determination made by the Retailer Operations Division. 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 according to the terms of Section 278.6(i) of the SNAP regulations. The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP because the Appellant failed to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked May 13, 2016, the Appellant appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted.

STANDARD OF REVIEW

In appeals 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 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

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, *inter alia*:

... 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, *inter alia*:

[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, *inter alia*:

*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, *inter alia*:

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)(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, *inter alia*:

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, *inter alia*:

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, *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).

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, *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... In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of 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 the 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...

SUMMARY OF INVESTIGATION

7 USC 2018 (b)(7)(e)

APPELLANT'S CONTENTIONS

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

- The Appellant has searched and did not find with certain clarity any procedures for an effective compliance policy for preventing SNAP violations. Appellant is trying to understand how it failed to submit sufficient evidence to demonstrate effective compliance, when there is no specific way of doing this.
- The Appellant sent to the Retailer Operations Division a copy of the store's policy for maintaining safe transactions for SNAP, and a copy of the store's "day to day procedures."
- The firm has been compliant with SNAP from the time that it was authorized and has made every effort to monitor suspicious activity and/or misuse of the program.
- Financial hardship will occur if the firm is disqualified.
- The firm has done everything it can to prevent these types of things from occurring.
- The clerk involved in the violations has been relieved of her employment.

In support of its contentions, the Appellant provided the following documentation:

- A blank, undated copy of a document entitled, "New Hire Training and Procedures." This included the following section related to SNAP:
 - Watch the SNAP video/DVD
 - Read the SNAP Training Guide
 - Review and learn the guide for eligible foods
 - Follow the day to day procedures in place for cashiers
- A copy of a document entitled "Daily Procedures for Store Opening" (as of December 31, 2014), which includes the following statement: "Verify all SNAP purchases for qualified merchandise."
- A copy of a State of Tennessee, Department of Labor and Workforce Development, Division of Employment Security, Separation Notice for a shift supervisor, who was discharged for "stealing from business and daily transaction were frequently coming up short or unaccounted for while performing duties as cashier." The separation notice is dated November 30, 2015.

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 recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

At no time has the Appellant disputed the violative transactions as described in the report of investigations, including the two occurrences of trafficking. Therefore, it is the determination of this review that the violations did occur as charged. Accordingly, this review will be limited to whether or not the Retailer Operations Division appropriately denied the firm's request for a civil money penalty in lieu of permanent disqualification. This review will also address the Appellant's remaining contentions.

Civil Money Penalty

In its response to the Retailer Operations Division's charge letter, the Appellant submitted a timely request for a civil money penalty in lieu of permanent disqualification. In accordance with regulation 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 the sanction of a CMP in lieu of permanent disqualification, but the firm must also submit appropriate documentation within designated timeframes as required by the regulation.

The Appellant contends that it has searched, but cannot find any procedures for an effective compliance policy for preventing SNAP violations. The Appellant claims that it does not understand how it failed to submit sufficient evidence to demonstrate effective compliance when there is no specific way of doing this. It further argues that it has been compliant with SNAP rules and has made every effort to monitor suspicious activity at the store and prevent violations from occurring.

In support of these arguments, the Appellant claims that as part of its initial response to the charge letter, it sent to the Retailer Operations Division a copy of the store's policy for maintaining safe transactions for SNAP, and a copy of the store's "day to day procedures." However, the Retailer Operations Division has indicated that these documents were not included in or attached to the Appellant's response. It should be noted that these two documents were submitted as part of the Appellant's request for administrative review. The documents are described on page 6, above.

While there may be a dispute about whether or not the Appellant initially submitted any documentation to support its request for a civil money penalty, it is the determination of this review that the Retailer Operations Division correctly determined that the Appellant was not eligible for this alternative penalty.

In determining whether or not a CMP should be assessed instead of permanent disqualification, a firm must, in accordance with 7 CFR § 278.6(i), provide substantial evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations. Standards of evidence in this regard are found in 7 CFR § 278.6(i)(1). This regulation states that FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a matter consistent with SNAP regulations and agency policy on the proper acceptance and handling of SNAP benefits. The regulation further states that a store's compliance 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. The firm must also provide evidence of documented training activities, including dated training curricula and records showing the dates that training sessions were conducted. The evidence must also include a record of dates of the employment of firm personnel, and documentation of the participation of the violating employee(s) in initial and follow-up trainings held prior to the current violations.

While the Appellant has argued that it could not locate any procedures for demonstrating an effective compliance policy, the regulations cited in the previous paragraph were clearly communicated to the Appellant in the charge letter, which states:

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.

Training expectations and training materials are also readily available and easily found on the FNS public website at <http://www.fns.usda.gov/snap/retailers-store-training-information>.

Even if the two documents that the Appellant provided to the Administrative Review Officer had been submitted to the Retailer Operations Division within appropriate timeframes, the documentation does not meet the minimum standards required by the regulation at 7 CFR § 278.6(i)(1). The firm has not provided any evidence at all that training of employees was ever conducted or that violating employees took part in such training. Assertions that the firm has met compliance and training standards, by themselves and without supporting evidence as required in the regulation cited above, do not constitute valid grounds for dismissal of the current charges or for mitigating their impact.

Additionally, pursuant to 7 CFR § 278.6(i), the Appellant did not provide any evidence that it met each of the four criteria required before a CMP in lieu of permanent disqualification can be considered. Among these criteria, the Appellant must provide evidence that firm ownership was not aware of, did not approve of, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations. As noted earlier, the second trafficking transaction was conducted by a clerk named “[7 USC 2018 (b)(6)&(b)(7)(c)].” The Appellant provided no evidence that this “[7 USC 2018 (b)(6)&(b)(7)(c)]” is not the same [7 USC 2018 (b)(6)&(b)(7)(c)] who owns the store. The Appellant has submitted evidence that one clerk was fired for her involvement in the violations, but there is no evidence that [7 USC 2018 (b)(6)&(b)(7)(c)] was disciplined in any way. While it cannot be definitely confirmed, the evidence strongly suggests that the Appellant owner was directly involved in the trafficking violations.

In light of this analysis, it is the determination of this review that the Appellant does not meet the eligibility requirements for a civil money penalty in lieu of permanent disqualification.

Hardship to the Appellant

The Appellant contends that a permanent disqualification decision would cause financial hardship to the firm.

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 is no provision 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.

To allow store ownership to be excused from being assessed administrative penalties based on a purported economic hardship to the Appellant would render virtually meaningless the 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 has incurred or may incur economic hardship based on the assessment of an administrative penalty does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Remedial Actions

The Appellant has stated that one of the employees who were involved in the violations has been fired and replaced by someone more honest. In support of this contention, the Appellant provided a copy of a Separation Notice, which indicates that a female shift supervisor was discharged on November 30, 2015.

Regarding these steps that have been taken by the Appellant, it is important to clarify for the record 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 what circumstances existed at the time of the investigation and at the time the Retailer Operations Division made its determination. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that a store may enhance, or begin to comply with, program requirements. In addition, there are no provisions in the SNAP regulations or internal agency policy directives for a waiver or reduction of an administrative penalty assessment on the basis of alleged or planned after-the-fact 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 any valid basis for dismissing the charges or for mitigating the penalty imposed.

CONCLUSION

As previously cited, 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."

Additionally, pursuant to regulations at 7 CFR § 278.6(e)(1)(i), “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.” 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, and in all other critically pertinent details. Therefore, the decision to impose a permanent disqualification against the Appellant, Corner Food Market, is sustained. As noted earlier, it is also the decision of this review that a civil money penalty in lieu of permanent disqualification is not appropriate in this case.

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 (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.

/S/

JON YORGASON
ADMINISTRATIVE REVIEW OFFICER

October 5, 2016
DATE