

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

Los Compadres Grocery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0197945

FINAL AGENCY DECISION

The record indicates that Los Compadres Grocery (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). 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 the permanent disqualification from participation as an authorized retailer in the program, as initially imposed by the Retailer Operations Division, (Retailer Operations) was appropriate.

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.6(a), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

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

By Charge letter dated March 23, 2017, Retailer Operations informed the owner that Appellant was in violation of the terms and conditions of the SNAP regulations based on EBT benefit transactions that “establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm.” The letter states, that “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.”

The owner, via counsel, replied to the Charge letter by letter dated April 1, 2017.

Retailer Operations considered the reply and issued a Determination letter dated June 1, 2017. This letter informed Appellant that it was permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. Retailer Operations considered Appellant's eligibility for a civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. Appellant was determined not eligible for the CMP because insufficient evidence was submitted timely to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP per the regulations cited.

By letter dated June 9, 2017, the owner, via counsel, appealed Retailer Operations' determination and requested administrative review of this action. The appeal was granted by letter dated June 19, 2017.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving, by a preponderance of the evidence, that the administrative action 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 argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 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(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 § 271.2 states in part that, "Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food products prepared for immediate consumption."

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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system..." (emphasis added)

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(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.”

SUMMARY OF THE CHARGES

The evidence that Appellant violated the SNAP regulations is furnished in the Charge letter Attachments. Each Attachment furnished with the Charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant during the review period. As patterns of unusual transactions appear across multiple Attachments the case of trafficking becomes more convincing.

The issue in this review is whether through a preponderance of evidence it is more likely true than not true that the questionable transactions were the result of trafficking. The charges on review were based on an analysis of SNAP electronic benefit transfer (EBT) transaction data for September 2016 through February 2017. This involved three patterns of EBT transaction characteristics which are indicative of trafficking:

1. There were an unusual number of transactions ending in a same cents value.
2. Multiple transactions made from individual benefit accounts within unusually short time frames.
3. Excessively large purchase transactions were made from recipient accounts.

APPELLANT’S CONTENTIONS

The following may represent a brief summary of the contentions in this matter however, in reaching a decision, attention has been given to all contentions presented, including any not specifically recapitulated or reference herein. The contentions are essentially:

- The retailer wishes to be considered for a CMP for \$34,260.00.
- They have been operating this business for almost 30 years. It has been operated by one or two family members with one employee and no violations with USDA for almost 30 years.
- We feel they meet the required criteria as outlined in Section 278.6(1) of the SNAP regulations but due to the small size of the business it is difficult to provide the required documentation. It appears that these criteria were designed for larger type business structures with personnel departments.

- They had an effective compliance policy in effect at the time of the violations and at present. The owner discussed and informed his family and employees who worked on the premises, of the SNAP regulations and instructed them as to what items they could and could not sell and what procedures needed to be followed.
- The personnel training program was the instructions and training the owner provided to each new employee of the SNAP regulations and how they must conduct the business in accordance with these regulations.
- The only reason for these violations was that the owner had retired from running the store in April 2016, and had entrusted the operation to a family member. Although he had instructed his family member in the SNAP protocol, he was not around to supervise the business and this family member engaged in these charged violations.
- If the CMP is accepted the owner will return to the store to supervise the business until it is sold.
- A denial and disqualification will make it difficult if not impossible to sell his business. He needs to sell the business to financially aid his retirement income. Denial of the CMP would end his chance of some type of financial security in his retirement years.
- We request that you consider the years of his operation and in full compliance with the SNAP regulations, and allow that to overweigh a few months of noncompliance caused when he was not available to supervise the operation of the business.

ANALYSIS AND FINDINGS

The charged owner was given the opportunity to provide evidence of the legitimacy of the transactions listed. The owner did not contest the violations. As to the contentions presented, regardless of who the owner 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, the owner completed and submitted a SNAP Application for Retail Stores. The SNAP certification and signature page includes a statement by which the owner acknowledged by his signing the application that he was aware that violations of program rules could result in fines, sanctions, withdrawal or disqualification from the SNAP. The owner signed the SNAP application certification indicating that he confirmed, understood and agreed to ensure that firm's employees follow the SNAP rules and regulations, and that he accepted responsibility for any SNAP violations including those committed by any of the firm's employees, paid or unpaid, new, temporary, full-time or part-time.

In addition, the owner was provided with program training and reference materials which reinforced the statements included on the SNAP application form. The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Food and Nutrition Act of 2008, as amended Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable and liable for the proper handling of SNAP benefit transactions. To allow the owner to disclaim accountability for the acts of persons whom he choose to handle store business would render virtually meaningless the enforcement provisions of the Act and the enforcement efforts of the USDA.

A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owner(s), managers and/or employees. Further, the regulations stipulate the FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2.

The owner contends that a SNAP disqualification will have a negative financial impact on his financial security. 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 statute or SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the owner resulting from imposition of such penalty. Furthermore, giving special consideration to economic hardship to the owner 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 owner's contention that he 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

Retailer Operations determined that according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations Appellant was not eligible for a trafficking civil money penalty in lieu of permanent disqualification. The criteria listed in the regulations as a whole, are identified as a minimum standard that firms must meet in order to be eligible for such a penalty. It is clear that the statute and the regulations allow no flexibility below the level of this stated standard.

The owner did not submit documentation within the timeframe specified in the Charge letter to prove that Appellant met the trafficking CMP requirements. Accordingly, Retailer Operations determined that Appellant did not qualify for a civil money penalty in lieu of a permanent disqualification.

In his June 9, 2017 letter counsel contends:

- We feel we meet the required criteria for a CMP and have implemented an effective compliance policy and program to prevent violations of the SNAP.
- However, due to the small size of the business there is no way to provide the required documentation. The documentation required does not make sense for a small family business and has the effect of denying a small business the equal opportunity to request a CMP in the event they have violated the provisions of the SNAP.

The regulations specify at Section 278.6(b)(2)(iii) that if a firm fails to request consideration for a CMP in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in Section 276.6(b)(1), that the firm shall not be eligible for such a penalty. The statute and regulations do not limit the scope of the

required compliance policy and program to violations other than those caused by error, inadvertence, oversight or lack of management supervision, but rather direct that the policy and program be structured to prevent all violations, regardless of cause.

The regulatory standard of substantial evidence is difficult to meet if such policy and program are not implemented and documented prior to the violations. Nevertheless, such is the standard to which Appellant is held. Additionally, the size of an organization, or number of personnel, is not a consideration in determining the eligibility of a firm for a civil money penalty in lieu of permanent disqualification for trafficking. Moreover, while significant effort may be required to develop and maintain a compliance policy and program, if such fails to meet the requirements, that level of effort, even if substantial, does not mitigate the insufficiency. Appellant made a timely request for a CMP, however insufficient evidence as described in the regulations, was provided to meet the regulations. Therefore, Retailer Operations' denial of the CMP is sustained.

In the event that the owner sells or transfer ownership of Appellant subsequent to this disqualification, the owner will be subject to and liable for a transfer of ownership CMP as provided by SNAP regulations, Sections 278.6(f) (2),(3) and (4). The amount of this transfer of ownership CMP is calculated based on the SNAP regulations at Section 278.6(g). Any questions regarding the transfer of ownership CMP amount should be directed to the New York Retailer Operations office that charged and sanctioned Appellant.

CONCLUSION

Retailer Operations' analysis of Appellant's SNAP transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. By a preponderance of the evidence under review in this case, it is more likely true than not true that SNAP violations did occur as charged by Retailer Operations. Therefore, the decision to impose a permanent disqualification against Appellant is sustained.

Retailer Operations also determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations. Under review, the denial of a trafficking CMP is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 and to Section 279.7 of the regulations (7 CFR § 279.7) with respect to applicable rights 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 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, 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.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

July 27, 2017