

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

Central Liquor Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0243343

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 that the Retailer Operations Division properly imposed a permanent disqualification of Central Liquor Market (hereinafter “Central Liquor Market” or “Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

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 Central Liquor 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

The USDA investigated the compliance of Central Liquor Market with Federal SNAP law and regulations during the period March 19, 2021, through April 7, 2021. The investigation report documents that store personnel at the Appellant firm committed SNAP violations on two out of seven compliance visits by intentionally exchanging cash for food purchased with SNAP benefits. Intentionally purchasing products originally purchased with SNAP benefits in exchange 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 charged the Appellant, in a letter dated May 12, 2021, with trafficking in SNAP benefits. The charge letter

noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated that the Appellant had the right to respond to the charges within 10 days of receipt. The letter also stated that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i). Per UPS confirmation of delivery, the charge letter was delivered to the Appellant at the store address of record on May 13, 2021.

In responses to the Retailer Operations Division of May 17, 2021, and May 21, 2021, the Appellant, through counsel, replied to the letter of charges. The responses included a request for the imposition of a civil money penalty in lieu of permanent SNAP disqualification pursuant to 7 CFR § 278.6(i). The record reflects that the Retailer Operations Division received and considered the information provided prior to deciding.

After considering the Appellant's responses and the evidence in this case, the Retailer Operations Division informed the Appellant, by letter dated June 11, 2021, that Central Liquor Market 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 according to the terms of Section 278.6(i) of the SNAP regulations 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 June 15, 2021, the Appellant, through counsel, requested an administrative review of the permanent disqualification determination. FNS granted the Appellant's request for administrative review by letter dated July 13, 2021. In an email correspondence of August 3, 2021, the Appellant, through counsel, submitted additional information in support of the request for administrative review.

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, 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. 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 § 271.2 states that the definition of "coupon" includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

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 defines trafficking as:

(1) 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.

(2) The exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code, for SNAP benefits.

(3) Purchasing a product with SNAP benefits that has a container requiring a return deposit with the intent of obtaining cash by discarding the product and returning the container for the deposit amount, intentionally discarding the product, and intentionally returning the container for the deposit amount.

(4) Purchasing a product with SNAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with SNAP benefits in exchange for cash or consideration other than eligible food; or

(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food. [Emphasis added.]

(6) Attempting to buy, sell, steal, or otherwise affect 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 signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.

7 CFR § 271.2 defines eligible food, in part, as:

Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption

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 based on 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(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.

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).

(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.

SUMMARY OF CHARGES

During an investigation from March 19, 2021, through April 7, 2021, the USDA conducted seven undercover compliance visits at Central Liquor Market. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated May 12, 2021. The investigation report included Exhibits A through G which provide full details on the results of each compliance visit. The investigation report documents that store personnel at the Appellant firm committed SNAP violations on two out of seven compliance visits. The charge letter noted that during two of the seven compliance visits, store personnel committed trafficking violations by intentionally exchanging cash for food purchased with SNAP benefits.

APPELLANT'S CONTENTIONS

The following represents a 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, in the request for administrative review, and in subsequent correspondence, the Appellant, through counsel, made the following summarized contentions, in relevant part:

- The Appellant has been in business since 2015 and an authorized SNAP retailer since 2016.
- The Appellant holds itself as a fully functioning grocery store.

- Many of the firm's customers buy groceries for their entire household as would a customer at a grocery store.
- The owner has never violated any laws related to Section 271.2 and 278.6(e)(1) of the SNAP regulations.
- The Appellant and/or its employees have not violated SNAP law. Their transactions are based on the sale of qualified merchandise.
- The Appellant implemented a legitimate training program for its employees.
- The act of an employee who has since been suspended resulted in the charges.
- The Appellant hired a local individual from the neighborhood that catered to his friends and family at the detriment to the Appellant that resulted in said charges.
- Unfortunately, the owner contracted COVID and had to leave employees to manage the store until he could get better. The employee took advantage of this time and acted carelessly.
- The employee was not fully aware of what form of payment the investigator used but he still purchased the Red Bull with his own money.
- Exhibits B and C indicate that the employees denied the purchase of ineligible items with SNAP benefits indicating that they understood how to handle EBT transactions.
- Since the onset of this business, there have never been any violations of the SNAP regulations.
- A SNAP disqualification would impose a financial hardship on the Appellant as it depends heavily on SNAP sales.
- Many locals depend heavily on their use of EBT to provide food for their families. A SNAP disqualification would impose a significant loss to the local community. Many people in the community will suffer because of having to travel further distances and spend more money on expensive EBT goods at the closest competitor.
- The Appellant shows no intentions on allowing such violations to happen again. As such, the Appellant requests the imposition of a civil money penalty with a six-month SNAP disqualification.
- The Appellant implemented an effective compliance program to prevent violations of SNAP Section 278.6(e)(1) and meets the eligibility requirements for a CMP under Section 278.6(i).
- Regarding Criterion 1, since being authorized as a SNAP retailer the owner has been active in ensuring full compliance with his employees and their obligations to FNS. A photocopied booklet is provided to each employee and issues and concerns regarding EBT processing are addressed as questions and issues arise. The Appellant's compliance policy states the following: (1) There is no exchange for cash for EBT card swipes; and (2) and only sell qualified EBT grocery items to your customers.
- Regarding 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.
- Regarding Criterion 3, the firm developed and instituted an effective training program as specified in Section 278.6(i)(2) The training program implemented by the Appellant includes: A review of the FNS handbook with each new employee and instructions to call USDA or the store owner if employees have any questions.
- Regarding Criterion 4, 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 the 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.

- The Appellant is a victim of employee theft by way of SNAP trafficking as well as cash and other goods that were stolen from him during the term of employment.
- The Appellant has a training policy in place for its employees. Using the url: [http://www.fns.usda.gov/sites/default/files/Retailer Training Guide.pdf](http://www.fns.usda.gov/sites/default/files/Retailer_Training_Guide.pdf), the Appellant has provided in-store training and a copy of the manual to all employees and store operators. The contents of the manual are discussed and reviewed with employees and partners of the business on a semi-annual basis. Each employee is reminded by the Appellant to never engage in the following: (a) Giving back cash in return for EBT purchases; (b) Disallowing sales to known friends of the card user if it appears as though the card user is outright paying for the groceries of a person that is not part of their household; and (c) Disallow sales on unqualified EBT items.

In support of these contentions, the Appellant, through counsel, submitted the following documents for review:

- A & C Urgent Care positive COVID-19 results for store owner, dated April 2, 2021.
- A one-page statement of the store owner dated May 21, 2021, attesting to providing SNAP training to employees and testing positive for COVID at the time of the investigation.
- A one-page statement from employee 5 U.S.C. § 552 (b)(6) & (b)(7)(C), dated May 21, 2021, attesting to receipt of SNAP training by the owner.
- A one-page statement from employee 5 U.S.C. § 552 (b)(6) & (b)(7)(C), dated May 21, 2021, attesting to receipt of SNAP training by the owner as well as purchasing the energy drinks noted in the investigation report for his own personal use; and
- Numerous customer statements of support for Appellant and claims of imposed hardship if the Appellant is disqualified from the SNAP.

ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the determination made by the Retailer Operations Division; it is limited to the facts at the basis of the Retailer Operations Division's determination at the time it was made.

The owner contends that he has never violated any laws related to Section 271.2 and 278.6(e)(1) of the SNAP regulations. The transactions are based on the sale of qualified merchandise. The act of an employee who has since been suspended resulted in the charges. The Appellant hired a local individual from the neighborhood that catered to his friends and family at the detriment to the Appellant that resulted in said charges. Unfortunately, the owner contracted COVID and had to leave employees to manage the store until he could get better. The employee took advantage of this time and acted carelessly.

However, prior to becoming authorized to participate in the SNAP, the Appellant completed and submitted a SNAP Application for Retail Stores. When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. In

addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

Regardless of who the store owner utilizes to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. 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 charges of violations are based on the findings of a formal Department of Agriculture investigation. The transactions cited in the letter of charges were conducted by a USDA investigator and are thoroughly documented. Investigators sign, under penalty of perjury, that investigative reports are true and correct. All transactions are fully documented, and a complete review of this documentation has yielded no known error or discrepancy in the reported findings. The investigation report is specific and thorough regarding the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions.

The Appellant is correct in that in Exhibits B and C, the employees denied the purchase of ineligible items with SNAP benefits. However, the documentation on record includes EBT receipts and photos showing that 23 eligible food items, one case (24-8.4 ounces) of Red Bull energy drinks, and four cases (24-16 ounces) of Monster energy drinks were purchased with SNAP benefits by the investigator. The photos on record show the cash/bills (and serial numbers) that were given to the investigator by the employee in exchange for the energy drinks that were purchased with SNAP benefits. Also on record is documentation that confirms that the 23 eligible food items previously noted were donated to and signed for by a charitable organization following the transaction. Such documentation includes the signature and title of the official of the charitable organization accepting the donated item, the name and address of the organization, the date the donation was made, and the official's initials next to the items donated. Moreover, the total purchase costs of each of the transactions involved in the investigation is documented on SNAP terminal receipts obtained during each transaction and matches the reported purchase totals indicated in the investigation report.

Exhibit E of the investigation report documents that the employee specifically told the investigator to purchase one case of Red Bull energy drinks and one case of Monster energy drinks to receive cash off the EBT card for \$20.00 per case. Exhibit E states, in part:

“5 U.S.C. § 552 (b)(7)(E).”

Exhibit F of the investigation report, states, in part:

“5 U.S.C. § 552 (b)(7)(E).”

Both the signed statement provided from employee 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and Exhibit F of the investigation report note that the employee purchased the Red Bull and Monster energy drinks with his own money which he removed from his pocket. As such, the Appellant's contention that he purchased the energy drinks in Exhibit F for his own personal use more likely than not is true. As such, trafficking of SNAP benefits for this Exhibit is not substantiated.

However, the male employee in Exhibit G was found to be trafficking as defined under 7 CFR § 271.2(5) (definition of *trafficking*) by “intentionally purchasing products originally purchased with

SNAP benefits in exchange for cash or consideration other than eligible food.” The evidence supports that the employee was made aware that the energy drinks were purchased with SNAP benefits at another store and that they were purchased with money obtained from the Appellant’s cash register.

Exhibit G of the investigation report, states, in part:

“5 U.S.C. § 552 (b)(7)(E).”

The Appellant is correct in that the firm has not been cited for prior SNAP violations. However, 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 those charges.

The Appellant requests the imposition of a six-month SNAP disqualification in lieu of permanent SNAP disqualification. However, 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 “. . . Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.” 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”. The law and regulations do not provide for a lesser period of disqualification for this violation. Additionally, the Act noted herein and the regulations pursuant thereto do not stipulate a minimum dollar amount of SNAP benefits trafficked to meet the definition of “trafficking” at 7 CFR § 271.2.

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, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. The Appellant did not provide any evidence that the violations cited in the charge letter did not occur. The preponderance of the evidence in the record supports that trafficking, as defined in the regulations, did occur at the Appellant and that the permanent disqualification was properly applied.

Corrective Action

Regarding the Appellant’s contentions that the employee has since been suspended, as noted previously, 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 based on after-the-fact corrective action implemented after 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.

Financial Hardship

Regarding the Appellant's contentions that a SNAP disqualification would impose a financial hardship on the firm, there is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment based on 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.

Customer Hardship

The Appellant contends that a SNAP disqualification would impose a hardship on area SNAP customers and submitted customer statements of support in support thereof.

However, 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.

CIVIL MONEY PENALTY

In the May 12, 2021, 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 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.

In the replies to the charge letter and in the administrative review request, the Appellant contended that the owner had implemented an effective compliance program to prevent violations of the SNAP per Section 278.6(e)(1) and the firm meets the eligibility requirements for a CMP under Section 278.6(i). The record supports that the Appellant submitted a one-page statement of the store owner dated May 21, 2021, attesting to providing SNAP training to employees as well as one-page statements from two employees, each dated May 21, 2021, attesting to receipt of SNAP training by the owner.

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).**

The standards of eligibility for a trafficking CMP are high. They require substantial proof that a compliance policy and program was established and implemented prior to the occurrence of violations. These standards exist to thwart attempts to falsely present compliance policies and programs that were not actually implemented prior to violations. As the Appellant did not provide the required supporting documentation, 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 ". . . Intentionally purchasing products originally purchased with SNAP benefits in exchange 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 full review of the evidence in this case, the Retailer Operations Division properly imposed a permanent disqualification of Central Liquor Market, the Appellant, as an authorized retailer in the Supplemental Nutrition Assistance Program.

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

August 19, 2021