

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

Daisy Groceries

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0224111

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 (hereinafter Retailer Operations) properly imposed a permanent disqualification of Daisy Groceries (hereinafter Appellant) from participating as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023, and its implementing regulations at 7 CFR § 279.1, provides that a food retailer 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

USDA conducted an undercover investigation of the compliance of Appellant with Federal SNAP law and regulations from December 18, 2019 through March 10, 2020. The Report of Investigation documents that Appellant personnel violated SNAP rules by allowing ineligible non-food items to be purchased with SNAP benefits on three occasions (Exhibits C, D, and E). Appellant also intentionally exchanged cash for major ineligibles purchased with SNAP benefits during two undercover compliance visits (Exhibits D and E).

As a result of the evidence compiled from this investigation, Retailer Operations charged Appellant with trafficking SNAP benefits in a letter dated April 7, 2020. The Charge Letter included a copy of the Report of Investigation dated March 31, 2020. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking within 10 days of receipt under the conditions specified in the SNAP Regulations at § 278.6(i).

The record reflects that Appellant, through Counsel, to the charges in a letter dated April 17, 2020, sent via email. An executed letter of representation was also provided with this response. In its response, Appellant admitted to the violations; however, requested a CMP in lieu of permanent disqualification for trafficking. Counsel's paralegal called Retailer Operations on April 28, 2020, to confirm the trafficking CMP amount. Retailer Operations explained that the trafficking CMP amount would be calculated by FNS and if approved, would be given at the appropriate time.

After giving consideration to Appellant's response and evidence in the case, Retailer Operations informed Appellant that it was permanently disqualified from SNAP participation, by letter dated June 5, 2020. The letter also stated that Appellant was not eligible for a trafficking CMP as Appellant did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter dated June 17, 2020, Appellant, through Counsel, requested an administrative review of the permanent disqualification determination. The request for administrative review was granted by letter dated June 26, 2020.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means Appellant has the burden of providing relevant, credible evidence that 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 untrue.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (the Act), 7 U.S.C. § 2021, and 7 CFR § 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

7 U.S.C. § 2021(b)(3)(B) states, in part: A disqualification under subsection (a) shall be permanent upon the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of Electronic Benefit Transfer (EBT) cards.

7 CFR § 271.2 defines Eligible foods, in part, as: 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 § 271.2(1) defines Trafficking, in part, as: The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via 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 § 278.6(a) states, in part: FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under EBT.

7 CFR § 278.6(b)(2) states, in part:

(ii) Firms that request consideration of a CMP 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 CMP 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 CMP 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(e)(1)(i) states: FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 278.6(i) states, in part: FNS may impose a CMP 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 INVESTIGATION

During an undercover investigation conducted December 18, 2019 through March 10, 2020, USDA completed five compliance visits at Appellant. The Report of Investigation was provided to Appellant as an attachment to the April 7, 2020 Charge Letter. The Report of Investigation, dated March 31, 2020, included Exhibits A through E which provided full details on the results of each compliance visit. SNAP violations were documented during three of the five visits and included trafficking violations as noted in Exhibits D and E. The report also noted that the

following ineligible non-food items were purchased by an investigator using SNAP benefits: aluminum foil, paper towels, a cast aluminum pot, a steel pot, and a chainsaw.

APPELLANT'S CONTENTIONS

In reaching a decision, full attention and consideration have been given to all contentions and submissions as presented by Appellant, through Counsel, including any not specifically recapitulated:

- Appellant previously provided documentation in its CMP Petition in response to the Charge Letter dated April 7, 2020, and requests review of these documents and a Hardship CMP be allowed, as was originally determined to be an alternative in the Charge Letter. Appellant's owner strongly feels that he qualifies for the CMP and has taken every precaution to deter and eliminate all trafficking issues.
- Appellant's owner readily admits that his employee did sell a few ineligible food items and gave an undercover USDA agent cash back on two separate occasions, but again maintains that he had a compliance policy in place to prevent the violations.
- Appellant's owner offers a humble and most sincere apology for the events that unfolded on three separate occasions by his employee due to a language barrier between him and his employee (listed on the ITR). The employee did not fully understand the SNAP rules; however this has been corrected. The employee was reprimanded, taken off the schedule, suspended without pay, and ordered to be re-trained. The employee now has a full and complete understanding of the SNAP rules.
- Appellant has had its compliance policy in place since it received its SNAP license in 2019. Appellant's training program is a combination of verbal, practical, and a group review of the SNAP manual. A photocopied booklet is provided to each employee and issues concerning EBT processing are addressed semi-annually, when updates are published, and upon employee hiring. The Training Log clearly shows that a compliance policy was in place prior to the alleged violations. Appellant has met its obligations to clearly prove that a compliance policy was already in place prior to the allegations. The USDA now has the burden of proof to justify that a compliance policy was not in place prior to the alleged trafficking charges.
- Appellant's owner successfully ran Appellant in accordance with SNAP law from 2019 to present. There were never any violations or reprimands for violations of USDA and SNAP law, and Appellant has never been under investigation by the USDA for SNAP trafficking charges.
- Appellant never intended to violate any laws, as is alleged in the USDA's Charge Letter dated April 7, 2020. Appellant's owner was not aware of, did not approve of, and did not benefit from trafficking.
- Appellant is a fully functioning grocery store, stocked with EBT qualified items, that has serviced its local population for over five years. A permanent disqualification would cause serious hardship to its customers who solely depend on this location to do their shopping, especially in light of the worldwide pandemic (COVID-19) and the uncertainty that the customers will be able to visit other locations to receive the same food items. Appellant is located in a low-income neighborhood, in a notorious subdivision for poverty, flanked by Section 8 housing where the majority of tenants use EBT for some of

their groceries. USDA has essentially prohibited many customers from getting food items that they desperately need which causes an extreme hardship to them.

- A permanent disqualification would cause serious financial hardship to Appellant, as it has a small volume of sales and Cost of Goods for both EBT and non-EBT sales and 35% of its income is based solely on EBT sales.

Appellant, through counsel, submitted the following documents in support of these contentions in its reply to the Charge Letter:

- Letter of Representation
- Owner Affidavit (Exhibit A)
- Employee Affidavit, Employee Agreement (Exhibit B)
- Training Log and Training Affidavits (Exhibit C)

Appellant, through counsel, submitted the following documents in support of these contentions in its request for administrative review:

- Letter of Representation
- Owner Affidavit (Exhibit A)
- Updated Store Training Log (Exhibit B)

ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the decision of Retailer Operations and is limited to the facts at the basis of Retailer Operations' determination at the time it was made. The regulations establish that an authorized retail food store may be disqualified from participating in SNAP 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. Two Charge Letter Exhibits recount the details of the violative trafficking exchanges by store personnel, who accessed SNAP benefits issued via an Electronic Benefit Transfer (EBT) card, obtained from a USDA investigator in exchange for cash.

Summary of Investigation

A USDA investigator conducted five compliance visits to Appellant from December 18, 2019 through March 10, 2020. The March 31, 2020 investigative report included Exhibits A through E. Appellant was charged with trafficking in Exhibits D and E, wherein store personnel, exchanged cash for use of the contractor's EBT card loaded with SNAP benefits. Common ineligible items and major ineligible items were also exchanged for benefits in Exhibits C, D, and E. Ineligible items violatively exchanged for benefits included: aluminum foil and paper towels. Major ineligible items violatively exchanged for benefits included: cast aluminum pot, steel pot, and a chainsaw. In relevant part the Exhibits read:

Exhibit C: I entered the subject store and attempted to purchase both eligible and ineligible items using an EBT card. I purchased all items using my EBT card. I received a receipt and left the store.

Exhibit D: I entered the subject store and spoke with a clerk concerning a steel pot with a dent on the bottom. The clerk stated a price for the steel pot and I stated that I would like to get the steel pot when I have some "money". The clerk stated "well you have an EBT card". I placed a separate pot and several eligible items on the counter. I purchased those items from a second store clerk and noticed the remaining balance on my EBT card. I picked up the original steel pot I spoke with the clerk about. The clerk stated that the second clerk would pour water in the steel pot, to show it does not have any leaks. I told the clerk the balance I had on my EBT, and that I would like to purchase the steel pot and get some "cash" for what is left on my EBT card. The clerk asked if I was the "police" and I had to lift my shirt to show there were no recording devices on my chest. The second clerk returned to pour water into the steel pot and I told the owner that I would purchase the steel pot. The clerk stated he would charge me \$20.00 for the pot and charged my EBT card \$25.71, and gave me a \$5.00 from the cash register. I thanked both the clerk and the second clerk, and told them I would return to the store when I had more money. The time listed on both receipts is incorrect."

Exhibit E: I entered the subject store and spoke with the clerk about purchasing a chainsaw. I asked the price and was told \$100.00. I showed the clerk my EBT card and stated "can I get it with this?" The clerk stated "yes". I placed the item on the counter and also asked the clerk if I could get some "cash back". The clerk stated she would charge me \$19.00 for the cash, so the total would be \$119.00. I purchased the item, and received a \$10.00 bill from the cash register.

The Exhibits are documented with photographs, signed non-profit donation sheets of the eligible and non-eligible items to a community organization, EBT receipts, and data confirmation of the SNAP transactions cited at Appellant. A preponderance of the evidence supports that store personnel exchanged cash for the use of an investigator's EBT card loaded with SNAP benefits.

No Previous Violations

Appellant, through Counsel, contends there have never been any violations of USDA and/or SNAP law and have never been under investigation by the USDA for SNAP trafficking charges.

A record of participation in 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, regulations, or Agency policy that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees. Further, the regulations stipulate "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined, in part, at 7 CFR § 271.2, as "the buying or selling of SNAP benefits for cash or consideration other than eligible food."

Corrective Action

Appellant, through Counsel, contends the owner took every precaution to deter and eliminate all trafficking issues. The owner offers a humble and most sincere apology for the events that unfolded on three separate occasions by his employee due to a language barrier between the

owner and his employee. The employee did not fully understand the SNAP rules. The employee was reprimanded, taken off the schedule, suspended without pay, and ordered to be re-trained. The employee now has a full and complete understanding of the SNAP rules.

Although this is admirable, it does not change the fact that these violations have already occurred. It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of Retailer Operations. This review is limited to what circumstances were at the basis of Retailer Operations' 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 SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of Program violations. Therefore, 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.

Store owners are responsible for the proper training of store staff and the monitoring and handling of SNAP benefit transactions. To allow store owners to disclaim accountability for the acts of persons whom the owner chooses to utilize would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. Upon receipt of its license, the owner received an authorization package that included Program training materials (EBT Do's and Don'ts for Cashiers, and Penalties for Violations of SNAP: FNS-136; SNAP Training Guide for Retailers: FNS 330; Using SNAP Benefits Poster-What You Can and Cannot Buy: FNS 110; decals, etc.) for guidance and reference, and to assist in training store personnel. Retailers are encouraged to ensure all store employees are properly trained and are adhering to the SNAP rules and regulations at all times. In addition, the owner signed the SNAP Application for Stores (Form FNS-252) on April 4, 2019. That application included a certification and confirmation that the owner would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time."

Hardship to SNAP Recipients

Appellant, through Counsel, contends a permanent disqualification would cause serious hardship to its customers who solely depend on this location to do their shopping, especially in light of the worldwide pandemic (COVID-19), and the uncertainty that the customers will be able to visit other locations to receive the same food items. Appellant is located in a low-income neighborhood, in a notorious subdivision for poverty, flanked by Section 8 housing where the majority of tenants use EBT for some of their groceries. USDA has essentially prohibited many customers from getting food items that they desperately need which causes an extreme hardship to them.

It is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and a household is forced to use its benefits elsewhere. SNAP Regulations at § 278.6(f) does allow, in some circumstances, for a CMP to be imposed in

lieu of disqualification when there is an absence of other SNAP-authorized retailers in the area. Agency mapping shows there are seven other SNAP authorized retailers of a comparable store type or larger within one mile of Appellant, to include two small groceries, two medium groceries, two large groceries, two super markets, and one super store. The regulations are clear that a CMP for hardship to SNAP households may not be imposed in lieu of permanent disqualification for trafficking.

Financial Hardship

Appellant, through Counsel, contends a permanent disqualification would cause serious financial hardship to Appellant, as it has a small volume of sales and Cost of Goods for both EBT and non-EBT sales and 35% of its income is based solely on EBT sales.

Federal statute at 7 U.S.C. § 2021(b)(3)(B) makes it clear that disqualification for trafficking shall be permanent. 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 regulations for a 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 administrative penalties based on a purported economic hardship would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of 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.

Violation Warrants a Permanent Disqualification

Appellant's owner admits to the violations of selling ineligible items with SNAP benefits and exchanging SNAP benefits for cash (trafficking).

The exchange of cash by store personnel for SNAP benefits accessed via an EBT card, as documented in Exhibits D and E, meets the definition of trafficking at 7 CFR § 271.2(1). The regulations at 7 U.S.C. § 2021(b)(3)(B) and 7 CFR § 278.6(e)(1)(i) confirm that a trafficking violation warrants permanent disqualification.

CIVIL MONEY PENALTY (CMP)

SNAP Regulations at § 278.6(i) specify the criteria for a firm's eligibility for a CMP in lieu of permanent disqualification for trafficking. A firm must submit a timely request for a CMP that shows substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. The record supports that Appellant did submit evidence to attempt to demonstrate that it met the criteria for a trafficking CMP in lieu of permanent disqualification. Retailer Operations assessed the submission and

determined that Appellant did not meet each of the four Criterion as detailed in the regulations. As such, Retailer Operations denied Appellant a trafficking CMP.

Upon review, Appellant claims that a “photo copied booklet made in house” was created and provided to each employee. There is mention in the employee agreement that states, “employee must abide and adhere to the following regarding SNAP: SNAP (Food Stamps) sales are only meant for food grocery sales”. No manual, training booklet, written and dated policy, standard operating procedures or guidelines was submitted as proof of Appellant’s commitment to operating in a manner consistent with SNAP regulations and policy. There was no documentation of the development of a policy to terminate violating employees. There was no documentation of the development of procedures for internal review of employees’ compliance. There was no documentation of procedures or policy to implement corrective actions when violations were identified. This review finds Appellant has not met Criterion 1.

Appellant claimed that it had a compliance policy and program in place. Upon review, a copy of this compliance policy was not submitted, as proof that this policy was in place prior to the violations. The Employee Agreement submitted was for a single employee. Based on the Report of Investigation, it is clear Appellant had four employees at the time of the violations. The Employee Agreement does not address Appellant’s policy on how to deal with any violations, how to deal with any complaints, and how internal reviews of employees will be performed. Therefore, this review finds Appellant has not met Criterion 2.

Appellant’s personnel training program is described as a combination of verbal and practical training and a review of the SNAP manual. Appellant provided an owner and employee training affidavit and training log. There is no written and dated curricula or material for its training program that reflects a level of competence that assures compliance with SNAP regulations. Training documentation must include a record of the materials reviewed, the name of the owner(s) and employee(s), dates of employment for all personnel, and the signature of the owner(s) and employee(s) attesting to their SNAP training. There is no indication on the training log submitted of what the dates represent, and only lists the owner and one employee. Again, the Report of Investigation identifies three employees working together in Exhibit D. It appears that all employees have not received training. Therefore, this review finds Appellant has not met Criterion 3.

With regards to Criterion 4, Appellant contends there was never any intent to ignore or purposely violate SNAP rules or laws or to defraud the USDA. Appellant’s owner contends he was unaware of, did not approve of, and did not benefit from trafficking. The Report of Investigation identified the owner as the clerk in Exhibits B and C. Exhibit C shows ineligible items were sold by the owner which shows the owner was involved during this violation and benefited from this transaction. Furthermore, all SNAP transactions go directly into the owner’s bank account, which means that the owner benefited from these ineligible items sold at his store.

Upon review of all the evidence in this case, this review finds Retailer Operations properly denied Appellant a CMP in lieu of a permanent disqualification for trafficking.

CONCLUSION

The preponderance of the evidence supports that trafficking, as cited in the regulations at 7 CFR § 271.2 (1), occurred at Appellant. 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. Upon review, it is decided that Retailer Operations' denial of a trafficking CMP was in accordance with the applicable regulations. The permanent disqualification of Appellant as a SNAP retail food store is sustained. The effective date of this Decision is 30 days after delivery of this Decision to Appellant or its appointed representative.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and 7 CFR § 279.7 address your right to a judicial review of this determination. 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 where 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 30 days of delivery of this Decision. Please note that the judicial filing timeframe is specified in the Act, and this office cannot grant an extension.

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.

KIM DAMERON
Administrative Review Officer

September 2, 2021