

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

E&B Food Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0229525

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is not sufficient evidence to support a finding that the permanent disqualification of E&B Food Market (Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division. The permanent disqualification is reversed.

ISSUE

The issue accepted for review is whether the Retailer Operations Division 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 USC § 2021 and the 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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period from September 9, 2020, through September 14, 2020. The investigation report documents that personnel at Appellant exchanged cash for merchandise 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.

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As a result of evidence compiled from the investigation, the Retailer Operations Division informed Appellant, in a letter dated October 2, 2020, that it was charged with violating the terms and conditions of the SNAP regulations. Appellant replied to the charge letter on October 28, 2021. Appellant denied the charges and explained the investigator never explained that the Red Bull and Monster Energy drinks were purchased with SNAP benefits.

The Retailer Operations Division notified Appellant by letter dated February 24, 2021, that the firm was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6(c) and § 278.6(e)(1) for trafficking violations. This determination letter further stated that Appellant was not eligible for a trafficking CMP because it failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

Appellant appealed the Retailer Operations Division's determination and requested an administrative review by letter dated March 4, 2021. The appeal was granted.

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 as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) and (e)(1) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern if personnel of the firm have engaged in trafficking SNAP benefits.

7 USC § 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 ...

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 and hot food products prepared for immediate consumption.

7 CFR § 271.2 defines trafficking, in part, 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.
- (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 § 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.

INVESTIGATION DETAILS

One investigator conducted four compliance visits to Appellant from September 9, 2020, through September 14, 2020. The investigative report dated September 16, 2020, was provided to the Appellant as an attachment to the charge letter, and included Exhibits A through D which provide details on the results of each compliance visit. The investigation reported that personnel exchanged \$50.00 in cash for cases of two cases of Monster Energy and three cases of Red Bull that was purchased with \$174.95 in SNAP benefits (Exhibit B). Transactions of this nature are referred to in the regulations as “trafficking”.

APPELLANT’S CONTENTIONS

In its March 4, 2021, administrative review request, Appellant provided the following summarized contentions, in relevant part:

- The notice of charges did not specify the violations or actions which FNS believes

constitute the basis for the disqualification as required by 7 CFR 278.6.

- The account of events is different than what happened in the report.
- After the owner refused to sell non-food items several times, the investigator asked if he was “interested in buying cases of energy drinks.”
- The account of the investigator is not accurate and it did not happen the way he says.
- By refusing to sell the non-food items, Appellant demonstrates that it follows the rules.
- The retailer did not tell the investigator to purchase items with his EBT card and the investigator did not state that they would be purchased with this EBT card.
- The retailer was not with the investigator when he purchased the drinks and therefore the retailer has no idea how the drinks were purchased.
- The investigator may have had the drinks already in his house or got them from someone else.
- The investigator and the retailer had no prior discussion about the price to pay for the drinks or the amount of drinks.
- The investigator made a decision without reliance upon any promise made by the owner.
- The retailer denies that the investigator said “I paid \$174.95 in food stamps for the Red bull and the Energy drinks.” When the investigator entered the store, he only asked how many of the cases that the clerk wanted.
- The clerk said he would buy all for \$50.00.
- The inspector wanted more money and tried to show how much they were.
- It was the inspector who initially offered the clerk the energy drinks rather than the clerk asking him to purchase those drinks with EBT in exchange for financial benefits.
- There is no basis to justify that the store engaged in trafficking and therefore the findings should be reversed and dismissed.
- The nature and scope of the violation is very limited and the alleged violations demonstrate overall compliance of all regulations.
- The clerk refused all four times to purchase non-food items and receive cash back from the investigator.
- The lack of other violations, despite aggressive attempts made by the investigator, deems the scope and nature of the alleged trafficking violations to be relatively minimal.
- Despite having purchased the energy drinks and establishing a small relationship with the inspector, the clerk would not allow him to break the rules.
- There is no evidence of intent to violate the regulations.
- The clerk was diligent by consistently refusing to sell non-food items or give cash back to the investigator.
- Appellant requests a warning or a six-month disqualification.

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter.

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or to invalidate the decision of Retailer Operations. This review is limited to the facts at the basis of the Retailer Operations Division’s determination at the time it was made. A review of the case record, indicates that the

investigation report contains insufficient evidence to support a permanent disqualification for trafficking as defined under 7 CFR § 271.2 (5) , as “ ... Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.”

Because the disqualification determination is reversed, the Appellant’s contentions related to this action are moot and need not be addressed. This decision is based on the specific circumstances of this case as documented by the materials in the record. This administrative review decision does not establish policy or supersede Federal law and regulations.

CONCLUSION

The record does not support by a preponderance of the evidence, that the exchanges by store personnel of cash for items purchased with SNAP benefits, meet the definition of trafficking. The Retailer Operations Division’s determination to impose a permanent disqualification against E&B Food Market from participating as an authorized retailer in SNAP is reversed.

MARY KATE KARAGIORGOS
Administrative Review Officer

July 19, 2021