

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

**Bailey Express,
Appellant,**

v.

**Retailer Operations Division,
Respondent.**

Case Number: C0201535

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Bailey Express (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). 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 was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against Appellant in a letter dated July 26, 2021.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provides 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 State of New York, Office of the Welfare Inspector General (OWIG) conducted an investigation of the compliance of Bailey Express with Federal SNAP law and regulations from August 22, 2017, through August 23, 2017. The investigation report documents the following:

1. On August 23, 2017, a clerk identified as Pops gave a CI \$70 cash from the store register in exchange for \$193.00 in EBT benefits.

As a result of evidence compiled from this investigation, the Retailer Operations Division informed the Appellant, in a letter dated August 6, 2018, that it was charged with violating the terms and conditions of the SNAP regulations. The letter stated, in relevant part, that:

Your firm is charged with trafficking, as defined in Section 271.2 of the SNAP regulations. As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for the trafficking violation(s) ... is permanent disqualification.

The charge letter also stated 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.

In email correspondence dated August 14, 2018, Appellant, through counsel, responded to the charge letter and generally stated that there was no violations whatsoever that took place in my store. There are three (3) employees working in the store including myself. Every employee hired has gone through the training. I do not have anyone working in my store by the name of Pops. Appellant submitted a Freedom of Information Act request for additional information. No additional information was provided as a response to the charge letter.

After considering the Appellant's reply and the evidence in the case, the Retailer Operations Division issued a determination letter dated July 26, 2021. The determination letter informed the Appellant it was permanently disqualified from the SNAP 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 the trafficking CMP 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 violations of the SNAP.

In a letter dated August 4, 2021, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, 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 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). In particular, 7 CFR § 278.6(a) and (e)(1)(i) establishes 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 § 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 § 278.6(e)(1)(i) states, in relevant part, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2."

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*...." [Emphasis added]

7 CFR § 278.6(f)(1) states, inter alia: "FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm's disqualification would cause hardship to [SNAP] households because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices... A civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a permanent disqualification."

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

During an on-site investigation, the State of New York, Office of the Welfare Inspector General (OWIG) conducted compliance visits at Appellant from August 22, 2017, through August 23, 2017. The investigation report documents the following:

1. On August 23, 2017, a clerk identified as Pops gave a CI \$70 cash from the store register in exchange for \$193.00 in EBT benefits.

FOIA Request

The record reflects that Appellant, through counsel, submitted a Freedom of Information Act (FOIA) request on August 14, 2018. The FOIA request was completed on August 31, 2018, and counsel submitted an appeal on November 19, 2018. The Appeal was answered on December 15, 2020, and Appellant was notified that it had 10 days to provide a response to the August 6, 2018, charge letter. The record reflects that Appellant did not provide any additional responses to the charge letter.

APPELLANT'S CONTENTIONS

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

1. I was unable to pull the individual transaction records from the copy who owns the credit card machine.
2. Attached is the bank statement for Baily Express from the month of August of 2017. The sustained violate in this case was a onetime trafficking allegation from August 23, 2017.
3. None of the employees at Bailey Express acknowledge such a transaction or any trafficking taking place. As far as the records show, the transaction did not take place. As there should be an electronic record of the transaction taking place, without the same existing, the violation finding should be reversed.

Appellant provided a copy of the bank statement for August 2017, in support of its position. The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, 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

Appellant, through counsel, contends that none of the employees at Bailey Express acknowledge that trafficking took place and as far as the records show, the transaction did not take place. Regarding Appellant's contentions, the investigative record reflects that on August 22, 2017, Appellant took possession of the EBT card and pin number from the Confidential Informant (CI) in exchange for \$70 cash. The record also reflects that on August 22, 2017, the Appellant utilized the EBT card at another SNAP authorized retailer in the amount of \$193.

The Appellant then returned the EBT card to the CI on August 23, 2017. This transaction would not show up on the Appellant's bank statement as a deposit because the SNAP funds were utilized at another retailer in exchange for cash, previously paid to the CI, which is a violation of SNAP regulations and defined as trafficking. It is important to note that there was an audio recording device utilized during this investigation. Based on a review of the evidence in this case, there is no question that program violations did occur and as such, the contentions presented do not constitute valid grounds for dismissal of the current charges of violations, or for mitigating the impact of those charges.

CIVIL MONEY PENALTY

The Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i) even though it was informed of the right to do so in the charge letter. Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy to prevent SNAP violations. Appellant was advised of this provision in the charge letter of August 6, 2018, which also advised that documentation of eligibility for that alternative sanction had to be provided within a specific time limit. Such documentation must establish that there was an effective compliance policy and training program and that both were in effect and implemented prior to the occurrence of violations. In the absence of any such documentation, Retailer Operations Division did not impose a civil money penalty in lieu of permanent disqualification.

Therefore, the Retailer Operations Division's decision not to impose a trafficking CMP 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 "the buying or selling of SNAP benefits 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 review of the evidence in this case, there is no question that program violations did occur during a State of New York, Office of the Welfare Inspector General (OWIG) investigation. All transactions cited in the letter of charges were conducted or supervised by an Agent with the OWIG 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 cash for the unauthorized use of the EBT card, and in all other critically pertinent details. The decision to impose a permanent disqualification against Bailey Express is sustained.

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 Title 7, Code of Federal Regulations, Part 279.7 (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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If the USDA receives such a request, it will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

Monique Brooks
ADMINISTRATIVE REVIEW OFFICER

May 25, 2022