

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

Lucky 7,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0244699

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS) finds there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification of Lucky 7 (“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 Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Lucky 7.

AUTHORITY

7 U.S.C. § 2023 and 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

Lucky 7 was initially authorized to participate in SNAP on December 18, 1998. Between August 11, 2021, and August 14, 2021, the USDA conducted an undercover investigation of Lucky 7 to ascertain the firm’s compliance with Federal SNAP law. Agency records show that during the investigation Appellant violated SNAP regulations by engaging in trafficking. Appellant exchanged SNAP benefits for cash on two occasions. The firm also reportedly allowed ineligible non-food items to be purchased with SNAP benefits on three occasions.

In a letter dated September 29, 2021, the Retailer Operations Division charged Appellant with trafficking, as defined in Section 271.2 of SNAP regulations. This charge letter also informed Appellant that the violations warranted a permanent disqualification from SNAP, as provided in 7 CFR § 278.6(e)(1). The letter further stated that under certain conditions, and in accordance with § 278.6(i), FNS may impose a civil money penalty (CMP) in lieu of a permanent disqualification. To be eligible, the firm would have to request the CMP and submit supporting documentation within 10 days of receipt of the charge letter.

Appellant responded to the trafficking charges, through an attorney, in a letter dated October 8, 2021. Appellant did not deny the trafficking charges, but rather requested a CMP in lieu of permanent disqualification. Appellant claimed to have implemented and established procedures of effective compliance policies to prevent SNAP violations and to have purchased a new software system that would curtail and eliminate mistakes in SNAP transactions.

After considering the Appellant's response and further evaluating the evidence in the case, the Retailer Operations Division issued a determination letter, dated November 17, 2021. This letter informed Appellant that the Retailer Operations Division found that the violations did occur as outlined in the charge letter and that a permanent disqualification penalty would be imposed, in accordance with 7 CFR § 278.6(c) and (e)(1). The determination letter also stated that a trafficking CMP was considered, but that the firm was ineligible for a 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 SNAP violations.

In a November 24, 2021, letter, Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

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. This 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 & REGULATIONS

The controlling law in this matter is found 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. 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 [SNAP benefits] or trafficking in [SNAP benefits] 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:

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....

Trafficking means: (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....

7 CFR § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food. [SNAP benefits] may not be accepted in exchange for cash....

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....** Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and **disqualification shall be permanent for a disqualification based on paragraph (e) (1) of this section.** [Emphasis added.]

7 CFR § 278.6(b)(2)(ii) states, in part:

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(b)(2)(iii) states:

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.

7 CFR § 278.6(e)(1)(i) states, in part:

[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 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 § 284.1 Pandemic Electronic Benefits Transfer (P-EBT) states in part:

(a) Overview. Section 1101 of the Families First Coronavirus Response Act (FFCRA; Pub. L. 116-127), as amended, authorized supplemental allotments to certain households. These benefits shall be referred to as Pandemic Electronic Benefits Transfer (P-EBT) benefits This section establishes the retailer integrity regulations for P-EBT for retailers in any State as defined in Section 3(r) of the Food and Nutrition Act.

(b) Definitions. For this section:

(1) Trafficking means the activities described in the definition of trafficking at § 271.2 of this chapter when

such activities involve P-EBT benefits.

(2) Firm's practice means the activities described in the definition of firm's practice at § 271.2 of this chapter when such activities involve P-EBT benefits.

(3) Involving P-EBT benefits or involve P-EBT benefits means activities involving PEBT benefits as well as supplemental nutrition assistance program (SNAP) benefits, or only P-EBT benefits.

(c) Participation of retail food stores and wholesale food concerns, and redemption of PEBT benefits. Requirements and restrictions on the participation of retail food stores and wholesale food concerns and the redemption of coupons described at §§ 278.2, 278.3 and 278.4 of this chapter, including the acceptance of coupons for eligible food at authorized firms, also apply to activities involving P-EBT benefits

(e) Penalties. For firms that commit certain violations described at §§ 278.6 and 278.2 of this chapter where such violations involve P-EBT benefits, FNS shall take the corresponding action prescribed at § 278.6 or § 278.2 for that violation. For the purposes of assigning a period of disqualification, a warning letter shall not be considered to be a sanction. Specifically, FNS shall:

(1) Disqualify a firm permanently, as described at § 278.6(e)(1)(i) of this chapter, for trafficking, as defined at § 284.1(b)(1) of this chapter, or impose a civil money penalty in lieu of permanent disqualification, as described at § 278.6(i) of this chapter, where such compliance policy and program is designed to prevent violations of regulations of this section

(6) Disqualify the firm for 1 year for credit account violations as described at §§ 278.6(e)(4)(ii) and 278.2(f) of this chapter, where such violations involve P-EBT benefits.... 5

(11) Impose a civil money penalty in lieu of permanent disqualification for trafficking as described at § 278.6(j) of this chapter in an amount calculated using the described formula at § 278.6(j), which shall also include the relevant amount of P-EBT redemptions when calculating the average monthly benefit redemptions....

(g) Administrative and Judicial review. Firms aggrieved

by administrative action under paragraphs (d), (e), and (f) of this section may request administrative review of the administrative action with FNS in accordance with part 279, subpart A, of this chapter. Firms aggrieved by the determination of such an administrative review may seek judicial review of the determination under 5 U.S.C. 702 through 706.

SUMMARY OF INVESTIGATION

During an undercover investigation conducted between August 11, 2021, and August 14, 2021, the USDA completed four compliance visits at Lucky 7. A Report of Positive Investigation was provided to Appellant as an attachment to the charge letter, dated September 29, 2021. The report included Exhibits A through D and provides full details on the results of each compliance visit. SNAP violations documented during each of the four visits included trafficking on two visits and the sale of ineligible items on three visits. The report shows the ineligible non-food items purchased by an investigator included antibacterial hand wipes, bathroom tissue, kitchen trash bags, sandwich bags, dishwashing liquid, and steel wool scrub pads.

Trafficking activities occurred during the third visit to the store, on August 14, 2021, as reported by the investigator in Exhibit C:

I entered the subject store, placed all items on the counter, and presented the EBT card to the clerk for purchase. The clerk made no mention of the non-food items being purchased using SNAP benefits and completed the transaction. I then asked the clerk for cash back off my EBT card, and the clerk agreed. The clerk asked me how much I wanted, and I said \$20.00. The clerk then completed a second transaction for the cash back and retrieved \$20.00 (1-\$20.00) from the register and handed it to me.

Exhibit C indicates that for the trafficking transaction, the store charged the investigator's EBT card a total of \$20.00.

Trafficking activities also occurred during the fourth visit to the store, on August 14, 2021, as reported by the investigator in Exhibit D:

I entered the subject store and spoke to the clerk. I asked the clerk for cash back off my EBT card, and the clerk agreed. The clerk asked me how much I wanted, and I said \$20.00. The clerk completed the transaction and retrieved \$20.00 (1-\$20.00) from the register and handed it to me.

Exhibit D indicates that for the trafficking transaction, the store charged the investigator's EBT card a total of \$20.00.

APPELLANT'S CONTENTIONS

Appellant, through counsel, made the following summarized contentions as part of its request for administrative review, in relevant part:

- Appellant submitted information to the USDA indicating it had established and implement an effective compliance policy by way of its Employee Handbook.
- Appellant also submitted information indicating that it was in the process of purchasing a software system that would be able to prevent SNAP violations at the point of sale.
- Therefore, we believe that the determination permanently disqualifying Appellant from SNAP was arbitrary and capricious.

In support of these contentions, Appellant submitted a copy of the store's employee handbook with policy and procedures.

The preceding may represent only a summary of Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or referenced herein.

ANALYSIS AND FINDINGS

Trafficking is defined in SNAP regulations, at 7 CFR§ 271.2, as "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..." Trafficking is an extremely serious violation and both 7 U.S.C. §2021(b)(3)(B) and 7 CFR §278.6(e)(1)(i) provide that even one trafficking violation warrants a permanent disqualification.

This review examines the relevant information regarding the Retailer Operation Division's determination. Once the Retailer Operations Division establishes a violation occurred, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that the disqualification should be reversed. If this is not demonstrated, the case will be sustained. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

In this case, the Report of Investigation, signed by the investigator under penalty of perjury, documents that the charges of violations are based on the findings of a formal USDA investigation. A complete review of this documentation has yielded no known error or discrepancy. The investigation report is specific and thorough regarding the dates of the violations, the critical facts related thereto, and is supported by documentation that confirms details of the transactions. The Retailer Operations Division has thoroughly documented the transactions in which personnel at the trafficked SNAP benefits.

In response to the charge letter and on administrative review, Appellant did not offer any evidence or alternative theories to counter the agency's investigative report. In fact, Appellant does not deny that trafficking occurred at the store. Because the violations themselves do not appear to be in dispute, this review finds that the preponderance of the evidence shows program violations did occur as charged by the Retailer Operations Division and a permanent disqualification is warranted. The Retailer Operation's Division's decision not to impose a trafficking CMP is also sustained as Appellant failed to submit substantial evidence showing that it maintained an effective compliance policy and program prior to the occurrence of the trafficking violations.

CIVIL MONEY PENALTY (CMP)

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR §278.6(i). Appellant was informed that it would need to provide both the request and supporting evidence within 10 calendar days of receiving the charge letter and that no extension of time could be granted for making the request or for providing the required evidence.

The criteria for a trafficking CMP in lieu of disqualification is defined under 7 CFR §278.6(i) which reads, *inter alia*:

In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by **substantial evidence** [emphasis added] its fulfillment of each of the following criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in §278.6(i)(1); and

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 violations cited in the charge letter sent to the firm; and

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in §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; 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 Retailer Operations Division found the firm was ineligible for a trafficking CMP in lieu of disqualification under 7 CFR § 278.6(i) because Appellant failed to submit, within

the specified timeframe, substantial evidence of an effective compliance policy and program to prevent SNAP violations. This review agrees.

The only evidence submitted by Appellant of its SNAP compliance policy and program is an undated copy of an employee handbook. While the handbook does address SNAP violations, Appellant provided no evidence to show that the policy was in place, or that a compliance program had been established, prior to the trafficking violations, as required under Criterion 2 above. The handbook contained an acknowledgement of receipt form which includes a place for employees to sign and date, indicating receipt of the handbook. However, the handbook submitted by Appellant had no signature on the form. There is no evidence that employees received the handbook or were trained on SNAP violations. Given that the store trafficked SNAP benefits on two occasions, it is unlikely that any policy or personnel training program was effective, as required under Criteria 1 and 3 above.

Additionally, although Appellant claims to have been in the process of purchasing a software system to prevent SNAP violations, Appellant has provided no evidence of this. Regardless, Appellant's purchase of a new software system does not negate the fact that the trafficking violations had already occurred. There are no provisions in SNAP regulations for a waiver or reduction of an administrative penalty based on alleged or planned corrective actions.

Based on the analysis above, the Retailer Operation's 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

This review finds, by a preponderance of the evidence, that program violations of 7 CFR § 278.2(a) did occur at Lucky 7 during a USDA investigation. Accordingly, the determination by the Retailer Operations Division to impose a permanent disqualification against Lucky 7, under the ownership of Elizabeth Berry, is sustained. The determination that Appellant is ineligible for a trafficking CMP is also sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this determination are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in SNAP regulations, at 7 CFR § 279.7. If 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 the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a Complaint is filed, it must be filed within 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.

MICHELLE WATERS
ADMINISTRATIVE REVIEW OFFICER

May 13, 2022