

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

7-Eleven #23192 D,

Appellant,

v.

Case Number: C0226722

Retailer Operations Division,

Respondent.

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 7-Eleven #23192 D (hereinafter “7-Eleven #23192 D” 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 7-Eleven #23192 D.

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 conducted an investigation of the compliance of 7-Eleven #23192 D with Federal SNAP law and regulations during the period June 16, 2020 through June 18, 2020. The investigation report documents that personnel at the Appellant firm exchanged SNAP benefits for cash during one undercover compliance visit. The buying or selling of SNAP benefits 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 August 14, 2020, 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 August 17, 2020.

In responses to the Retailer Operations Division of August 18, 2020 and August 26, 2020 the Appellant, through counsel, replied to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

The record reflects that in a letter received on August 28, 2020, the Appellant's counsel requested information and documents from FNS with regard to the agency's case against 7-Eleven #23192 D pursuant to the Freedom of Information Act (FOIA). In a letter dated August 26, 2022, FNS provided counsel with a response to the FOIA request. Counsel did not appeal the FOIA request. In a letter of August 29, 2022 (delivered to counsel via UPS on September 8, 2022), the Retailer Operations Division provided counsel 10 calendar days of receipt of the letter to present any additional information, explanation, or evidence regarding the charges. Neither counsel nor the Appellant submitted an additional response to the letter of charges.

After giving consideration to the Appellant's responses and the evidence in this case, the Retailer Operations Division informed the Appellant, by letter dated February 14, 2023, that 7-Eleven #23192 D was permanently disqualified from participation as a retail store in the SNAP. The determination 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 an email correspondence of February 21, 2023, the Appellant, through counsel, requested an administrative review of the permanent disqualification determination which included duplicate information that was previously provided with the responses to the letter of charges. FNS granted the Appellant's request for administrative review by letter dated March 1, 2023. In an email correspondence of March 21, 2023, 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 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 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. 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 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 states, in part:

Trafficking means the buying or selling of coupons, ATP cards or other benefit instruments for cash or consideration other than eligible food ...

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 on the basis of 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 conducted during the period June 16, 2020 through June 18, 2020, the USDA conducted three undercover compliance visits at 7-Eleven #23192 D. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated August 14, 2020. The investigation reports included Exhibits A through C which provide a narrative on the results of each compliance visit. The investigation reports document that personnel at the Appellant firm exchanged SNAP benefits for cash during one undercover compliance visit (Exhibit B).

The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR § 271.2. The acceptance of SNAP benefits in exchange for cash or consideration other than eligible food is in violation of Section 278.2(a) of the SNAP regulations. As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for the trafficking is permanent disqualification.

APPELLANT'S CONTENTIONS

The following represents a brief 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 computer systems in place at the Appellant are carefully programmed to restrict EBT sales. As the store has substantial hot foods selections (which are excluded from EBT), these distinctions are common at the counter and routinely made. It is impossible for an employee to mistakenly take SNAP benefits without stealing from the store.
- The extensive training in properly ringing up items, in conjunction with the register programming, makes it impossible for employees to wrongfully accept SNAP benefits for ineligible nonfood items. These systems have been in place since the owner purchased and commenced operations and were in place at the time of the alleged violation.
- The Appellant has been unable to identify the employee referred to in the investigative report because the report is missing key information that would allow the owner to identify the employee such as the name appearing on the name tag, the physical description is ambiguous and only partially matches two different employees, the employee is described at a time when only female employees were working, there are no times or approximate times of service, and the report was provided months after the conduct preventing a review of the video surveillance tapes and records as these are only kept 30 days.

- If occurred as alleged, the employee left the store, called the investigator back into the store and then proceeded to conduct the alleged transaction. There is no amount of training that would prevent an employee from stealing if that is their intent.
- The owner did not know about, take part in, did not benefit from, or had any knowledge of the SNAP violations.
- The Appellant has never been previously given a warning or accused of any violations.
- All employees are aware of the restrictions relating to EBT and that violations of the rules are grounds for termination.
- The owner personally trains and oversees all employees. During each and every employee's initial training, the SNAP rules and procedures and restrictions regarding the sale of ineligible nonfood items with SNAP benefits is discussed. At the conclusion of the training, the owner continues to monitor new employees to ensure they do not make mistakes.
- The Appellant requests consideration for the imposition of a civil money penalty in lieu of a permanent SNAP disqualification pursuant to 7 § CFR 278.6(i).
- Submitted is a photo of the front of the store with a SNAP anti-fraud poster (Don't Do It!) prominently displayed. This image portrays that the Appellant had an effective compliance policy in place to prevent violations, particularly with regard to SNAP trafficking. The poster clearly conveys that trafficking is illegal. The image demonstrates that the store is committed to preventing SNAP trafficking from occurring.
- Also submitted is a photo of the first two pages of the SNAP training binder. The image of the first page of the binder demonstrates that the firm had an effective personnel training program in place. The table of contents highlights that the Appellant has established comprehensive SNAP training guidelines and regulations that all employees are required to follow. It shows that the Appellant has taken significant steps to train its employees on SNAP compliance policies, rules, and regulations and that the training program was in place prior to the SNAP violation.
- The three dated training acknowledgement forms show that the compliance policy and program was in operation for an extended period of time and that employees were aware of the SNAP rules and were required to undergo training procedures. Each form is signed by both employees and management demonstrating that they are aware of the SNAP rules and are committed to following them. The training acknowledgements demonstrate that the Appellant's compliance policy and program were operational prior to the violations and that employees have been trained and understand the SNAP rules.
- The submitted SNAP Training Expectations List also demonstrates that an effective compliance policy is in place. The document reinforces that all owners are required to follow the SNAP rules and ensure that all employees and owners complete training. It also outlines the minimum requirements for an acceptable SNAP training program, which includes a thorough review of FNS training materials and program rules, documented SNAP training with information about each employee, and refresher training.
- The submitted SNAP Qualifying Purchase List shows that the Appellant's compliance policy and program were operational for an extended period of time. By providing a list of what items households can and cannot purchase with SNAP benefits, the Appellant demonstrates that it was following the SNAP regulations and provides accurate information to its employees and customers.
- The submitted image of the 7University's SNAP course shows that store ownership was not aware of, did not approve of, did not benefit from, and was not involved in the incident that led to the disqualification. By completing the SNAP course, the store owner demonstrates

that he was not only aware of the SNAP rules but he took steps to educate himself and ensure compliance with the SNAP rules.

- The submitted image of 7University's educational course demonstrates that the owner completed the necessary training to establish and implement an effective personnel training program. The training includes quiz questions in order to measure and confirms the owner's understanding of the covered materials.
- The submitted image of the Nevada SNAP Program: The Ultimate Guide demonstrates that the Appellant's compliance policy and program was operational for an extended period of time and that refresher trainings were conducted regularly. This binder is provided to employees and kept in the store, which indicates that the owner has taken the proactive steps to familiarize himself with the SNAP requirements, guidelines, and operations. It is also a reference guide for employees regarding the SNAP rules.
- The submitted EBT application checklist demonstrates that ownership was aware of the SNAP rules and procedures required to maintain eligibility to participate in the SNAP.
- The submitted 7University Instructions provides education and training on the SNAP procedures and policies. This information demonstrates that store ownership was not aware of, did not approve of, did not benefit from, and was not involved in the violations.
- The submitted photo of the SNAP binder present within the location indicates that it is readily available to employees to review and educate themselves regarding SNAP rules and eligibility. By providing this resource to employees, the owner has demonstrated his commitment to maintaining an effective personnel training program.

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

- SNAP training acknowledgments signed by three employees dated August 25, 2020 (two with this date) and October 10, 2020;
- SNAP Training Expectations List;
- SNAP Qualifying Purchase List;
- SNAP Course completed screenshot;
- SNAP course slide show;
- Photo of binder--Nevada SNAP Program: The Ultimate Guide;
- Screenshot of 7University Instructions;
- EBT Application Checklist;
- Screenshot of 7University's educational course;
- Affidavit of store owner;
- Photo of Don't Do It! poster posted on door of the store;
- Photos of the first two pages of the SNAP training binder; and
- Photo of SNAP binder located in office of Appellant.

ANALYSIS AND FINDINGS

SNAP Violations

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

The Appellant contends that the computer systems in place at the store are carefully programmed to restrict EBT sales. As the store has substantial hot foods selections (which are excluded from EBT), these distinctions are common at the counter and routinely made. It is impossible for an employee to mistakenly take SNAP benefits without stealing from the store. If occurred as alleged, the employee left the store, called the investigator back into the store and then proceeded to conduct the alleged transaction. There is no amount of training that would prevent an employee from stealing if that is their intent. The owner did not know about, take part in, did not benefit from, or had any knowledge of the SNAP violations.

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 transactions cited in the letter of charges were conducted by a USDA investigator and are thoroughly documented. Investigators are trained thoroughly before entering any retail establishment and all protocols, including but not limited to what can and cannot be said. 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 with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. The investigation report documents by a preponderance of the evidence that the store employee(s) committed trafficking violations by buying or selling SNAP benefits for cash or consideration other than eligible food.

The documentation on record includes EBT receipts and photos showing that four (4) eligible food items were purchased by the investigator with SNAP benefits during the investigation. Also on record is documentation that confirms that the eligible food items 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. Also, photos of the bills provided to the investigator in exchange for SNAP benefits which includes each bill's series year and serial number are also included in the case record. 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.

The evidence supports that SNAP violations occurred at the Appellant firm. The store employee identified in Exhibit B was found to be trafficking as defined under 7 CFR § 271.2 by buying or selling of SNAP benefits for cash or consideration other than eligible food. The investigation report documents that on June 17, 2020 (Exhibit B), a male employee accepted \$58.64 in SNAP EBT benefits in exchange for \$30.00 in cash.

Exhibit B of the investigation report states, in part:

“5 U.S.C. § 552 (b)(7)(E).”

The Appellant is correct that the firm has not been cited for prior 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 contends that it has been unable to identify the employee allegedly referred to in the investigative report because the report is missing key information that would allow the owner to identify the employee. The physical description is ambiguous and only partially matches two different employees, the employee is described at a time when only female employees were working. However, no statutory or regulatory requirements exist for investigative personnel to positively identify store employees that have committed violations of SNAP rules and regulations. The descriptions contained in the Report of Positive Investigation are provided only to assist store ownership in identifying those employees responsible for the violative transactions. Many variables can affect the description of an employee (e.g. whether the employee was sitting or standing or on a platform, the fit of their clothing, changing hair styles/lengths/colors, etc.) so these descriptions may not be one hundred percent accurate which does not mean that the violations did not occur.

Neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be extremely serious, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a nonmanagerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store.” In keeping with this legislative mandate, § 278.6(e)(1)(i) of the SNAP regulations states that FNS must disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved.

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, 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.

CIVIL MONEY PENALTY

In the August 14, 2020 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 in order 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.

If the Appellant's request for a trafficking CMP and the required documentation are not submitted on time, it will lose its right for any further consideration for a trafficking CMP. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) that "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, the firm shall not be eligible for such a penalty". The regulations do not provide the agency discretion to extend the time within which documentation and evidence in support of a trafficking civil money penalty may be submitted.

In the August 26, 2020 response to the letter of charges and in the March 21, 2023 response in support of the request for administrative review (Note: This response is not within the 10-day required timeframe of receipt of the charge letter), the Appellant, through counsel, requested consideration for the imposition of a trafficking civil money penalty in lieu of permanent disqualification. The Appellant contends that the firm implemented a legitimate training program for its employees and an effective compliance policy and program to prevent violations of the SNAP prior to the occurrence of the SNAP violations.

However, the record supports that the Appellant did not submit timely substantial evidence, as required by the regulations, to meet the criteria for a trafficking CMP in lieu of permanent disqualification. **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 and timely submission of said 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 "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 full review of the evidence in this case, the Retailer Operations Division properly imposed a permanent disqualification of 7-Eleven #23192 D, the Appellant, as an authorized retailer

in the Supplemental Nutrition Assistance Program. As such, the decision to impose a permanent disqualification against 7-Eleven #23192 D, the Appellant, 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 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

April 26, 2023