

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

Harolds Grocery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0240756

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 Harolds Grocery (hereinafter “Harolds Grocery” 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 Harolds Grocery.

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 investigated of the compliance of Harolds Grocery with Federal SNAP law and regulations during the period February 5, 2021, through February 28, 2021. The investigation report documents that store personnel at the Appellant firm intentionally exchanged cash for food purchased with SNAP benefits during two of the six undercover compliance visits. 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.

As a result of evidence compiled from this investigation, the Retailer Operations Division charged the Appellant, in a letter dated April 16, 2021, 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 April 21, 2021.

In written responses to the Retailer Operations Division of April 21, 2021, and April 22, 2021, the Appellant replied to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to deciding.

After considering the Appellant's responses and the evidence in this case, the Retailer Operations Division informed the Appellant, by letter dated May 21, 2021, that Harolds Grocery was permanently disqualified from participation as a retail store in the SNAP. The 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 a letter postmarked May 26, 2021, the Appellant requested an administrative review of the permanent disqualification determination. FNS granted the Appellant's request for administrative review by letter dated July 1, 2021.

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, 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. 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 defines trafficking 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. [Emphasis added.]

(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 § 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 based on 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 from February 5, 2021, through February 28, 2021, the USDA conducted six undercover compliance visits at Harolds Grocery. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated April 16, 2021. The investigation report included Exhibits A through F which provide full details on the results of each compliance visit. The investigation report documents that during two (Exhibits D and F) of the six compliance visits, store personnel committed trafficking violations by intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.

APPELLANT'S CONTENTIONS

The following represents a 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 and in the request for administrative review, the Appellant made the following summarized contentions, in relevant part:

- To the owner's knowledge there has been no misconduct regarding the SNAP rules.
- The transactions on February 5, 2021, for \$14.98, February 18, 2021, for \$15.98, February 24, 2021, for \$18.98, and February 28, 2021, for \$15.98 were legitimate SNAP purchases.
- The owner has stopped accepting SNAP benefits since receipt of the charge letter.
- The owner runs a very small neighborhood grocery store.
- The owner is not able to pay such a large penalty as noted in the charge letter. The Appellant, like all other small businesses, is struggling due to the pandemic.
- On February 24, 2021, the investigator wanted to sell Red Bull to the owner. However, the owner did not need Red Bull, but he told the investigator that if he had Monster energy drink to sell, he would purchase it.
- The investigator brought five cases of 12 pack Monster energy drink at \$18.98 each (5 x \$18.98 = \$94.90). The owner did not use the firm's EBT terminal to make the purchase; he purchased the grocery items with cash.
- On February 28, 2021, the investigator stated he was out of gas and wanted to meet his girlfriend and needed cash.
- The owner told the investigator that if he purchased grocery items, he could help the investigator.
- The investigator purchased \$76.03 worth of groceries while the owner was with him.
- However, the owner did not use the firm's EBT terminal to make the purchase; he purchased the items with cash. The items were purchased "at cost" from the investigator.
- The investigator wanted to give the owner his food stamp card and PIN, but the owner told him "No" as this is illegal.
- The owner is very concerned about following the SNAP rules.
- The Appellant requests reconsideration of the SNAP disqualification.

In support of these contentions, the Appellant submitted the following documents for review:

- EBT receipt dated February 5, 2021, for \$14.98.
- EBT receipt dated February 18, 2021, for \$15.98.
- EBT receipt dated February 24, 2021, for \$18.98.
- EBT receipt dated February 28, 2021, for \$15.98; and
- Walmart receipt showing EBT/SNAP purchase for \$76.03.

ANALYSIS AND FINDINGS

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

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 Appellant contends that to the owner's knowledge there has been no misconduct about the SNAP rules. The transactions on February 5, 2021, for \$14.98, February 18, 2021, for \$15.98, February 24, 2021, for \$18.98, and February 28, 2021, for \$15.98 were legitimate SNAP purchases. The owner did not use the firm's EBT terminal to make the Monster energy drink purchase on February 24, 2021, or to make the purchase of groceries on February 28, 2021; he purchased these grocery items with cash on both occasions.

The charges of violations are based on the findings of a formal Department of Agriculture investigation. 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, are met and affirmed. 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 regarding the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions.

The documentation on record includes EBT receipts and photos showing that eight eligible food items (purchased by the investigator at the Appellant firm), five cases (12-16 ounces) of Monster energy drinks, and numerous food items (purchased from Walmart by the investigator with the assistance of the owner) were purchased with SNAP benefits by the investigator. The Walmart receipt and four EBT receipts provided by the Appellant also confirm the purchase of the eight eligible food items and numerous food items purchased for the Appellant firm from Walmart.

The photos on record show the cash/bills (with serial numbers) that were given to the investigator by the employee(s) in exchange for the energy drinks and other food items that were purchased with SNAP benefits. Also on record is documentation that confirms that the eight

eligible food items previously noted 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. 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 store personnel at the Appellant firm committed SNAP violations on two out of six compliance visits. An employee identified as the owner working at the firm in Exhibits D and F was found to be trafficking as defined under 7 CFR § 271.2 (5) (definition of *trafficking*) by “intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.” The evidence supports that the employee/owner was made aware that the cases of Monster energy drinks and other food items were purchased with SNAP benefits at another store.

Exhibit C of the investigation report documents that the employee/owner specifically told the investigator to purchase Monster energy drinks to receive cash off the EBT card for \$15.00 per case. Exhibit C states, in part:

“5 U.S.C. § 552 (b)(7)(E).”

Exhibit D of the investigation report states, in part:

“5 U.S.C. § 552 (b)(7)(E).”

Exhibit E of the investigation report documents that the employee/owner specifically told the investigator to purchase numerous food items for the Appellant store to receive cash off the EBT card for \$0.75 on the dollar for all the items purchased. Exhibit E of the investigation report states, in part:

“5 U.S.C. § 552 (b)(7)(E).”

Exhibit F of the investigation report states, in part:

“5 U.S.C. § 552 (b)(7)(E).”

The Appellant requests reconsideration of the imposed permanent SNAP disqualification. However, 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 “. . . Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.” The Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that “Disqualification . . . shall be permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store”. The law and regulations do not provide for a lesser period of disqualification for this violation. Additionally,

the Act noted herein and the regulations pursuant thereto do not stipulate a minimum dollar amount of SNAP benefits trafficked to meet the definition of “trafficking” at 7 CFR § 271.2.

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, 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.

Financial Hardship

Regarding the Appellant’s contentions that a SNAP disqualification will impose a financial hardship on the firm, there is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment based on possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the 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. Therefore, the Appellant’s contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

As previously indicated, the May 21, 2021, determination letter advised the Appellant of the ineligibility for consideration for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations. The letter of charges dated April 16, 2021, advised the Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The regulations specify that such documentation must, in part, 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. The letter indicates that no information was provided by the Appellant for consideration; therefore, on review the Retailer Operations Division’s determination that the Appellant firm is ineligible for the imposition of civil money penalties in lieu of disqualification is affirmed.

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 “. . . Intentionally purchasing products originally purchased with SNAP benefits in exchange 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 Harolds Grocery, the Appellant, as an authorized retailer in the Supplemental Nutrition Assistance Program.

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

August 11, 2021