

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

Oak Speed Check,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0205429

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 Oak Speed Check (hereinafter “Oak Speed Check” 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 Oak Speed Check.

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 Ohio Department of Public Safety, Akron District Office, conducted an investigation of the compliance of Oak Speed Check with Federal SNAP law and regulations. The investigation report documents that during the period March 30, 2018 through December 28, 2018, personnel at the Appellant firm exchanged SNAP benefits for cash during seven undercover compliance visits. 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 October 26, 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 October 28, 2021.

In a response to the Retailer Operations Division of November 5, 2021, 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.

After giving consideration to the Appellant's response and the evidence in this case, the Retailer Operations Division informed the Appellant, by letter dated November 24, 2021, that Oak Speed Check 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.

Via email correspondence of December 3, 2021, the Appellant, through counsel, requested an administrative review of the permanent disqualification determination. FNS granted the Appellant's request for administrative review by letter dated December 7, 2021. Via email correspondences of January 24, 2022 and January 26, 2022, 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

The Ohio Department of Public Safety, Akron District Office, conducted an investigation of the compliance of Oak Speed Check with Federal SNAP law and regulations. The investigation report documents that during the period March 30, 2018 through December 28, 2018, personnel at the Appellant firm exchanged 5 U.S.C. § 552 (b)(7)(E) in SNAP benefits for 5 U.S.C. § 552 (b)(7)(E) in cash during seven undercover compliance visits as noted below.

5 U.S.C. § 552 (b)(7)(E).

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 reply 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 owner and his wife own the Appellant and hire employees to manage the store.
- The events that transpired as described in the charge letter were regrettable, unfortunate, and embarrassing.
- The employee involved was immediately terminated.
- The owner cooperated fully with the investigation conducted by the Ohio Department of Public Safety.
- The owner paid the State of Ohio the sum of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as a penalty for the outlined activity and was able to keep his state licenses.
- A SNAP disqualification would impose a financial hardship on the Appellant and would force the owner to close the store and terminate employees.
- The owner has reviewed Section 278.6(i) of the SNAP regulations.
- The owner requests the imposition of a civil money penalty in lieu of a permanent SNAP disqualification.
- As a small store owner, the owner did not have a written program in place under SNAP regulation 278.6(i) to qualify for a CMP even though all employees were verbally cautioned not to violate the SNAP regulations.
- The owner now has a compliance policy and employee training program in place. Each current and future employee, as a condition of employment, will be: (1) Given and required to read the "SNAP Training Guide for Retailers"; (2) Required to watch both USDA training videos entitled "Basic Guidelines for SNAP Retailers" and "Information for Cashiers When Accepting SNAP Benefits"; (3) Required to read the SNAP Retailer Notices "Do Not Traffic SNAP Benefits" and "Only Accept SNAP Benefit Allowable Items"; (4) Required to read

USDA publications entitled “What Can SNAP Buy?”, “Store Eligibility Requirements”, and “How Can I Protect SNAP?”; and (5) Required to sign a statement stating that he/she has read and viewed the foregoing and said statement will be placed in the employees personal folders.

- In addition, the FNS-240 SNAP fraud poster will be posted in the employee break room and in public near the cash register.

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

- Signed and notarized affidavit of store owner dated November 5, 2021 (two pages);
- “Education and Compliance Policy of Oak Speed Check Youngstown, Ohio” (one page); Note: No employee names, no signatures, and no dates were included; and
- “Employee Confirmation” of SNAP training in compliance with employer’s Compliance Policy (one page); Note: No employee names, no signatures, and no dates were included.

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 owner contends that the events that transpired as described in the charge letter were regrettable, unfortunate, and embarrassing. The owner cooperated fully with the investigation conducted by the Ohio Department of Public Safety and paid the State of Ohio the sum of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as a penalty for the outlined activity and was able to keep his state licenses. The employee involved was immediately terminated.

These contentions cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. As owner of the store, the Appellant is liable for all violative transactions that occur at Oak Speed Check. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. Prior to becoming authorized to participate in the SNAP, the Appellant completed and submitted a SNAP Application for Retail Stores. The SNAP Application contained a section indicating that the person(s) signing the Application understood and agreed to ensure that store employees follow the SNAP rules and regulations and that the person(s) accepts responsibility for any SNAP violations that may occur at the store that were committed by any of the store’s employees. The SNAP Application also included a section that contained a statement which acknowledged that the person(s) signing the Application was aware that violations of program rules could result in fines, legal sanctions, withdrawal, or disqualification of the store. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

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 did not disagree with the

results of the investigation and that during seven compliance visits, store employees exchanged SNAP benefits for cash or consideration other than eligible food.

Trafficking is defined in 7 CFR § 271.2 of the SNAP regulations which states that 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... 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”.

In keeping with this legislative mandate, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. The Appellant’s implied contention that the SNAP violations were committed by a store employee cannot be accepted as a valid basis for diminishing the penalty. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of USDA.

Corrective Action

The owner contends that the employee involved was immediately terminated. In addition, the owner now has a compliance policy and employee training program in place to prevent future SNAP violations.

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant’s contention that it has taken or will take corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Financial Hardship

With regard to the Appellant’s contentions that a SNAP disqualification would 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 on the basis of 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

In the October 26, 2021 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. As specified in 7 CFR § 278.6(i), in determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following four criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in 7 CFR § 278.6(i)(1);

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violations(s) occurred prior to the occurrence of violations cited in the charge letter;

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in 7 CFR § 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.

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 Appellant's response to the charge letter and in the request for administrative review, the Appellant, through counsel, requested consideration for a civil money penalty in lieu of permanent disqualification. The Appellant contends that as a small store owner, the owner did not have a written program in place under SNAP regulation 278.6(i) to qualify for a CMP even though all employees were verbally cautioned not to violate the SNAP regulations. The owner now has a compliance policy and employee training program in place. In support thereof, the Appellant submitted a signed and notarized affidavit of store owner dated November 5, 2021; "Education and Compliance Policy of Oak Speed Check Youngstown, Ohio"; and "Employee Confirmation" of SNAP training in compliance with employer's Compliance Policy.

5 U.S.C. § 552 (b)(7)(E).

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. Therefore, 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 Oak Speed Check, the Appellant, as an authorized retailer in the Supplemental Nutrition Assistance Program. As such, the decision to impose a permanent disqualification against Oak Speed Check, 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

January 31, 2022