

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

Ashbury Food Deal,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0203154

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of Ashbury Food Deal 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 Ashbury Food Deal.

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 under a State Law Enforcement Bureau (SLEB) agreement with the Food & Nutrition Service (FNS) conducted an investigation of the compliance of Ashbury Food Deal with Federal SNAP law and regulations from October 2017 through February 2018. The SLEB Retail Case Summary Report dated March 5, 2020 documents that store personnel, including one identified as the store owner, intentionally exchanged cash for food purchased with SNAP benefits during five (5) 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(5)

As a result of the evidence compiled from this investigation, the Retailer Operations Division charged the Appellant, in a letter dated May 20, 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 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). The charge letter was delivered to the Appellant by UPS on May 21, 2020.

The Appellant, through counsel, replied to the charges in an email dated May 28, 2020. The Appellant denied that the actions of the store personnel amounted to trafficking under 7 CFR 271.2(5) as there was no intent to purchase products originally purchased with SNAP. Furthermore, because the Appellant store owner was not involved whatsoever in the securing of the Red Bull or meat, he would not have had the requisite knowledge of the prior transactions to have been in violation of the regulation.

After giving consideration to the Appellant's response and the evidence in the case, the Retailer Operations Division informed the Appellant, by letter dated July 2, 2020, that Ashbury Food Deal was permanently disqualified from participation in the SNAP. The letter also stated that the Appellant was not eligible for a trafficking CMP 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 July 8, 2020, the Appellant, through counsel, requested an administrative review of the permanent disqualification determination. The request for administrative review was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is covered in the Food & 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

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 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 from October 2017 through February 2018, the Ohio SLEB agency conducted undercover compliance visits at Ashbury Food Deal. The charge letter dated May 20, 2020 described the results of those visits as follows:

- On October 20th, 2017, employees at Ashbury Food Deal ... provided 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash to undercover officers in exchange for twelve (12) – four (4) packs of the 8.4 oz. cans and five (5) – twelve (12) packs of the 8.4 oz. cans of Red Bull purchased with EBT SNAP benefits.
- On December 7th, 2017, an employee at Ashbury Food Deal ... provided 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash to undercover officers in exchange for fourteen (14) – four (4) packs of the 8.4 oz. cans and five (5) – twelve (12) packs of 8.4 oz. cans of Red Bull purchased with EBT SNAP benefits.
- On January 4th, 2018, an employee at Ashbury Food Deal ... provided 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash to undercover officers in exchange for eleven (11) – twelve (12) packs and sixteen (16) – four (4) packs of 8.4 oz. cans of Red Bull purchased with EBT SNAP benefits.

- On January 4th, 2018, an employee at Ashbury Food Deal ... provided 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash to undercover officers in exchange for seven (7) packs of porterhouse steaks and four (4) packs of filet mignon purchased with EBT SNAP benefits.
- On February 15th, 2018, an employee at Ashbury Food Deal, who was subsequently identified as the store owner, provided 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash to undercover officers in exchange for ten (10)-twelve (12) packs of the 8.4 oz. cans, seven (7) – four (4) packs of the 8.4 ounce cans and five (5) – four (4) packs of the orange flavored 8.4 oz. cans of Red Bull purchased with SNAP EBT benefits.

APPELLANT’S CONTENTIONS

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

- The firm takes great exception to the conclusion that it violated the SNAP regulations by engaging in trafficking as set forth in the charge letter dated May 20, 2020
- At no time did a firm representative ever engage in a transaction involving the illegal use of SNAP benefits. It is claimed that the items purchased with cash by the firm's agents had been secured with SNAP benefits. In response, no agent of the firm has, or had, any personal knowledge of such transactions nor any personal participation in such transactions. In point of fact, if any such inappropriate transaction took place, it was committed by USDA agents using EBT cards issued to them. In other words, the agents themselves would have been the only individuals involved in such a transaction, not anyone associated with the firm.
- This factual scenario reeks immediately of entrapment by the Government who sought out a firm that had no prior infractions. Under such circumstances, it is unfair and appears to be tantamount to a "reverse sting" predicated on no real need to investigate the firm.
- To sanction the firm with a permanent disqualification when no member of the firm was convicted of food stamp trafficking in criminal court is grossly disproportional to the acts of the firm's agents.

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Investigation Report

The owner and store employees who conducted the transactions described in the charge letter were found to be trafficking as defined under 7 CFR § 271.2 (5) by “intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.” The Appellant’s contention that these individuals could not have

intentionally purchased products originally purchased with SNAP benefits because they did not have knowledge of the prior purchases is not supported by the evidence in the case record.

The Ohio SLEB agency documented in its SLEB Retail Case Summary Report dated March 5, 2020 that store personnel, including on one occasion the store owner, discussed and negotiated the exchange of cash for food products purchased with SNAP benefits at a discounted price. The narrative supports that Ohio state agents and a confidential informant (CI) visited the store on multiple occasions and the CI informed (and showed) store personnel that he had EBT cards with benefits 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and that he would purchase whatever the store needed.

In response to these offers from the CI, store personnel specifically instructed the CI what to purchase and in what amounts. Store personnel also reviewed the purchase receipts and counted the products purchased (mostly consisting of cans of Red Bull) and paid the CI cash approximately half the value of the product purchased. In one visit, a store employee paid the CI for Red Bull and then asked him to buy porterhouse steaks and filet mignon at a specific store. In that case, the store employee again reviewed the purchase receipts and paid for the steaks for a discounted price with cash taken from the store register.

During the last compliance visit on February 15, 2018, an individual later identified as the store owner gave the CI 5 U.S.C. § 552 (b)(6) & (b)(7)(C) from the store cash register in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of Red Bull and Orange Red Bull purchased from a 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The owner instructed the CI to “get some more if you can” while another store employee instructed the CI to make the purchases at a different place and not at the same 5 U.S.C. § 552 (b)(6) & (b)(7)(C) store.

The narrative in the investigation report documents that store personnel including the store owner instructed the CI what to purchase and in some cases where to make the purchases and also set the dollar exchange rate. These facts are not consistent with the actions of innocent store personnel who were not predisposed to trafficking. There is no indication that store personnel were forced, coerced or intimidated into conducting the transactions.

There is no evidence to support that the investigators entrapped the clerks as stated by the Appellant. In addition, the Ohio SLEB agency’s actions were not improper as the investigators were merely doing what SNAP recipients will sometimes attempt to do in real life situations. Store owners are required to train their employees in order to respond to these real life situations and not to violate SNAP rules and regulations under any circumstances. The investigation report and narrative does not reveal any evidence that the Ohio SLEB agency did not follow acceptable procedures for an undercover compliance buy.

In summary, the investigation report documents that the charges of violations are based on the findings of a formal Ohio SLEB investigation. The transactions cited in the letter of charges were conducted by a CI who was supervised by Ohio state investigators and are thoroughly documented. 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 store personnel, including the store owner, committed trafficking violations by

intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.

Owner Accountability

Contrary to the Appellant's contentions, the investigation report indicates that the store owner, on at least one occasion, intentionally purchased products originally purchased with SNAP benefits in exchange for cash. However, even if the store owner had not been a participant in any trafficking transactions, the owner is accountable for the violations committed by his employees. Store owners are responsible for the proper training of store staff and the monitoring and handling of SNAP benefit transactions. To allow store owners to disclaim accountability for the acts of persons whom the owner chooses to utilize would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. In addition, the owner signed the most recent SNAP reauthorization application on April 27, 2017. That application included a certification and confirmation that the owner would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time."

Criminal Case

The Appellant contends that to sanction the firm with a permanent disqualification when no member of the firm was convicted of food stamp trafficking in criminal court is grossly disproportional to the acts of the firm's agents. Regarding this contention, the present administrative case is a separate action which has an entirely different standard of review from a criminal action. Therefore, the outcome of a criminal case is not relevant to this administrative action. In any event, the case record indicates that the criminal case was not dismissed for lack of merit, but was subject to a court ordered diversion agreement where the defendants were ordered to pay restitution **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, joint and severable between all defendants, to the USDA.

Permanent Disqualification is Appropriate Penalty

Trafficking in SNAP benefits is an extremely serious violation and both 7 U.S.C. §2021(b)(3)(B) and 7 CFR §278.6(e)(1)(i) state that a first time violation warrants a permanent disqualification. A preponderance of the evidence indicates that the violations described in the investigation report meet the definition of trafficking and warrant a permanent disqualification.

TRAFFICKING CIVIL MONEY PENALTY

The Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i) even though it was informed of the right to do so in the charge letter dated May 20, 2020. Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program **prior** to the violations. Therefore, the Retailer

Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is **sustained** as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

Trafficking is defined, in part, in 7 CFR § 271.2(5) as “ ... Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.” The SNAP regulation at 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.” 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, a preponderance of the evidence supports that trafficking violations did occur during an Ohio SLEB investigation. Based on the analysis above, the decision to impose a permanent disqualification against Ashbury Food Deal, Appellant, is **sustained**.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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. Please note that the judicial filing timeframe is specified in the Act, and this office cannot grant an extension.

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.

RONALD C. GWINN
Administrative Review Officer

September 15, 2020