

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

B and E Food Mart,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0228445

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 a finding that the permanent disqualification of B and E Food Mart (Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate. However, the decision is modified to remove the fiscal claim of \$235.66.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

AUTHORITY

7 USC § 2021 and the 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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period from October 3, 2020, through October 11, 2020. The investigation report documents that personnel at B and E Food Mart exchanged cash for merchandise purchased with SNAP benefits. 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 the investigation, the Retailer Operations Division informed Appellant, in a letter dated December 16, 2020, that it was charged with violating the terms and conditions of the SNAP regulations. Appellant, through counsel, replied to the charge letter on December 28, 2020. Appellant requested a civil money penalty (CMP).

After considering the evidence, the Retailer Operations Division notified Appellant in a letter dated January 6, 2021, that the firm was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6(c) and § 278.6(e)(1) for trafficking violations. This determination letter further stated that Appellant was not eligible for a trafficking CMP because it failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

Appellant, through counsel, appealed the Retailer Operations Division's determination and requested an administrative review by letter dated January 19, 2021. The appeal was granted.

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, would 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 contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) and (e)(1) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 USC § 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 § 278.6(a) states:

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...

7 CFR § 278.6(e)(1) reads, in part:

FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 defines trafficking, in part, 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.
- (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.

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).** [Emphasis added.]

(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. [Emphasis added.]

7 CFR § 278.7(a) states:

FNS may establish and pursue claims against firms or other entities which have accepted or redeemed coupons in violation of the Food and Nutrition Act of 2008 or this part regardless of whether the firms or entities are authorized to accept food stamps. If a firm fails to pay a claim, FNS may collect the claim by offsetting against amounts due the firm on redemption of other coupons or by deducting the amounts due from bonds posted by firms in compliance with the provisions of § 278.1(b)(4). FNS shall deny an application for authorization or reauthorization by a firm which has failed to pay a claim.

INVESTIGATION DETAILS

A USDA investigator conducted six compliance visits at B and E Food Mart from October 3, 2020, through October 11, 2020. The investigation report dated November 9, 2020, was provided to the Appellant as an attachment to the charge letter, and included Exhibits A through F which provide details on the results of each compliance visit. The investigation report documents that SNAP violations were committed during five of the compliance visits. During three of the visits, Appellant sold ineligible non-food items including heavy duty forks, toilet tissue, plastic cups, heavy duty spoons, laundry detergent, leaf bags, and aluminum foil, in exchange for SNAP benefits.

The investigation reported that personnel exchanged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash for four cases of Red Bull that was purchased with 5 U.S.C. § 552 (b)(6) & (b)(7)(C) SNAP benefits (Exhibit C) and then exchanged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash for five cases of Red Bull that was purchased with 5 U.S.C. § 552 (b)(6) & (b)(7)(C) SNAP benefits on a separate occasion (Exhibit D). Transactions of this nature are referred to in the regulations as “trafficking”. The investigator’s narrative in Exhibits C and D documents that the clerk was made aware that the beverages were purchased with SNAP benefits at another store. The narratives documented that the clerk specifically told the investigator to purchase the Red Bull in order to receive cash.

APPELLANT’S CONTENTIONS

In its January 19, 2021, administrative review request, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- Appellant requests suspension in lieu of permanent disqualification.
- Appellant has operated the store since October 2016 and has never had any other violations.
- The owner is the primary manager and cash register operator.
- The fact that in four years the firm has not committed a violation is very compelling evidence.
- It is untenable to require evidence of a robust training system and to treat him in the same manner as a corporation that must implement compliance sessions in order to train many people at once.
- A permanent disqualification would be a severe burden and a disproportionate punishment for the offense charged.
- The investigator pressured the cashier to do something that was illegal.
- There has never been an allegation of any other employee therefore whatever training was in place at the time was clearly working.
- The investigator uses despair and hopelessness to gain sympathy and manipulate the clerk who would have never committed these offense.
- Appellant now has a robust training program that includes manual distributed to all employees’ the SNAP training video is watch monthly and logged; and SNAP updates are distributed to employees upon receipt.

The preceding may represent only a brief summary of Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced.

ANALYSIS AND FINDINGS

A full review of the case record shows that the charges of violations are based on the findings of a formal USDA investigation. A complete review of this documentation has yielded no error or discrepancy. The documentation presented by the Retailer Operations Division establishes by a preponderance of the evidence that the violations as reported occurred at Appellant. A preponderance of the evidence indicates that the violations described in Exhibits C and D of the investigation report meet the definition of trafficking. Trafficking in SNAP benefits is an extremely serious violation and both 7 USC §2021(b)(3)(B) and 7 CFR §278.6(e)(1)(i) state that a first time violation warrants a permanent disqualification.

Ownership Involvement

Appellant states that an employee was responsible for the transactions. Although ownership was allegedly not involved in the violations, it cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. Regardless of whom the ownership of a store may utilize to handle store business, the ownership is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. 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 of 2008 and the enforcement efforts of the USDA.

Ownership signed the FNS application to become a SNAP authorized retailer on October 13, 2015, which 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."

No Previous Violations

Counsel contends that a permanent disqualification is an unfair penalty given that it is Appellant's first program violation. A record of participation in the SNAP with no previously documented instance of violations does constitute grounds for dismissal of the current charges of violations for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduced a sanction based upon a lack of prior violations by a firm and its owners.

Corrective Action

Appellant states that the owner has implemented a more effective training program. Regarding this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is limited to what circumstances existed at the time that was the basis of the Retailer

Operations Division's action. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that a store may begin to comply with program requirements.

In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations. Therefore, Appellant's contention that corrective action has taken place does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Civil Money Penalty

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR § 278.6(i). Appellant was informed that it would need to provide both the request and supporting evidence within ten calendar days of receiving the charge letter, and that no extension of time could be granted for making the request or for providing the required evidence. The criteria for a trafficking civil money penalty in lieu of disqualification is established under 7 CFR § 278.6(i) which reads, inter alia:

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

Criterion 1. The firm shall have developed an effective compliance policy as specified in §2 78.6(i)(1); and

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

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in § 278.6(i)(2); and

Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations ...”

Appellant, through counsel, requested a CMP. However, no documentation or other evidence of any kind was submitted by Appellant in support of a trafficking CMP. Therefore, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division's decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

Counsel contends that it is not fair to hold a small store to the same standard as a larger retailer. As indicated previously, when applying for SNAP authorization, retailers must confirm their understanding and agreement with SNAP retailer requirements in order to complete the application process. Additionally, this information is contained in the “SNAP Retailer Training

Guide” and the “SNAP Training Expectations” notice that is provided to all retailers upon their authorization; both documents also address having an operational compliance policy and program.

Counsel further contends that the fact that Appellant has no previous violations is evidence of an effective training program. However, the lack of violations is not sufficient evidence of an effective training program as it does not necessarily mean that the firm was not conducting violative transactions prior to the start of the undercover investigation.

CONCLUSION

A review of the evidence in this case, supports by a preponderance that program violations did occur during a USDA investigation. Therefore, the decision to impose a permanent disqualification against Appellant is sustained. The determination that Appellant is not eligible for a CMP is also sustained. However, the determination is modified to remove the fiscal claim of \$235.66

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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 the Appellant’s owner resides or is 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, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

MARY KATE KARAGIORGOS
Administrative Review Officer

April 20, 2021