

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

**Charles Street Deli Convenience,**

**Appellant,**

**v.**

**Case Number: C0196777**

**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 a permanent disqualification of Charles Street Deli Convenience (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

**ISSUE**

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Charles Street Deli Convenience.

**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**

Charles Street Deli Convenience was initially authorized to participate in SNAP on June 1, 2010. Between October 12, 2017, and October 21, 2017, the USDA conducted an undercover investigation of Charles Street Deli Convenience to ascertain the firm’s compliance with Federal SNAP law and regulations. It was reported that during the course of the investigation, the Appellant firm violated SNAP rules by allowing ineligible non-food items to be purchased with SNAP benefits on five separate occasions. The firm also reportedly committed the violation of trafficking by exchanging SNAP benefits for cash on one occasion.

In a letter dated November 16, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations. It also charged the Appellant with accepting SNAP benefits in exchange for ineligible non-food merchandise. The misuse of SNAP benefits, as described in the charge letter, is a violation of 7 CFR § 278.2(a). The charge letter informed the Appellant that the violations warranted permanent disqualification from SNAP as provided in 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made within 10 days of receipt of the letter under the conditions specified in 7 CFR § 278.6(i).

In response to the charge letter, the Appellant submitted a letter dated November 25, 2017. In his reply, the Appellant owner acknowledged that the exchange of SNAP benefits for cash did occur, but argued that the investigator entrapped the cashier by creating a false narrative of her personal circumstances and using sexually provocative language and behavior. The owner stated that at the time that the trafficking violation occurred, he was responding to a family crisis and was unable to be at the store. The Appellant further stated that it has been authorized in SNAP for more than six years with no issues and has always followed SNAP guidelines.

After considering the Appellant's response and further analyzing the evidence in the case, the Retailer Operations Division issued a determination letter dated December 6, 2017. The determination letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP in accordance with paragraph § 278.6(i), but determined that the Appellant was not eligible for a CMP because it failed to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked December 15, 2017, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted. It is noted that the Appellant submitted an additional letter of explanation in a mailing postmarked January 12, 2018.

### **STANDARD OF REVIEW**

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 & REGULATIONS**

The controlling law in this matter is found 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...

7 CFR § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food.

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.... Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and **disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section.**[Emphasis added.]

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(e) states, in part:

The FNS regional office shall:

(1) Disqualify a firm permanently if:

(i) Personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, in part:

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...

7 CFR § 271.2 states, in part:

Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption.

7 CFR § 278.6(b)(2)(ii) states, in part:

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... 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).

7 CFR § 278.6(b)(2)(iii) states:

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.

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....

## SUMMARY OF INVESTIGATION

During an undercover investigation conducted between October 12, 2017, and October 21, 2017, the USDA completed five compliance visits at Charles Street Deli Convenience. A report of the investigation was provided to the Appellant as an attachment to the November 16, 2017, charge letter. The investigation report included Exhibits A through E, which provided full details on the results of each compliance visit. SNAP violations were documented during every visit and included a trafficking violation on the third visit as noted in Exhibit C. The report noted that the following ineligible non-food items were purchased by an investigator using SNAP benefits:

- One bamboo cleaning cloth (*Spic and Span* brand), Exhibit A
- One men's wallet (*Essential Image* brand), Exhibit A
- One 18-count box of antibacterial wet wipes (No brand indicated), Exhibit A
- One 160-count box of facial tissues (*Our Family* brand), Exhibit B
- One 8-ounce bottle of dish soap (*Dawn* brand), Exhibit B
- One 85-sheet roll of paper towels (*Boardwalk* brand), Exhibit B
- One blueberry tart candle (*Candle-lite* brand), Exhibit C
- One 8-count package of tealight candles (no brand indicated), Exhibit C
- One multi-use ceramic candle holder (*Tiki* brand), Exhibit C
- One 15-ounce bottle of body wash (*Suave* brand), Exhibit D
- One 85-sheet roll of paper towels (*Boardwalk* brand), Exhibit D
- One 15-count box of dryer sheets (*Bounce* brand), Exhibit D
- One 20-ounce bottle of styling gel (*LA Looks* brand), Exhibit E
- One 8-ounce bottle of dish soap (*Dawn* brand), Exhibit E
- One 7.66-ounce bag of dishwasher pods (*Cascade* brand), Exhibit E

Trafficking was reported during the third compliance visit, which took place on October 17, 2017. In reporting this visit, the USDA investigator provided the following details, as noted in Exhibit C:

**5 U.S.C. § 552 (b)(7)(E)**

The report noted that the investigator attempted to obtain cash on two other occasions, but both times, the attempts were refused by the clerks on duty. These refusals are documented in Exhibits D and E.

The report noted that three different clerks conducted the violative transactions during the investigation – one female clerk and two male clerks.

**APPELLANT'S CONTENTIONS**

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

- As a working owner, the Appellant owner did not directly or indirectly benefit from the SNAP violations.
- There was no warning given to the possibility that violations were occurring.
- Appellant apologizes and takes full responsibility for what occurred in the store.
- Appellant had no intention of violating the rules and regulations of SNAP.
- Appellant is a small business owner and cannot afford a civil money penalty.
- Appellant believes that an injustice was perpetrated at its store. It believes that the administrative review should focus on the integrity component of FNS's quality control system because deceitfulness and trickery is no way to conduct quality control audits.
- The investigator came to the store with premeditated scenarios to entrap the firm. The investigator begged, claimed she had no money, and used sexy, flirtatious gestures to set up the SNAP crime scene.
- Appellant owner had someone filling in for him the week that the trafficking violation occurred. That person is mortified that he fell prey to the investigator's persuasions. He was unaware of such sinister plots.
- Appellant contends that it is very unprofessional for field inspections to occur in this manner.
- By terminating SNAP benefits at the Appellant firm, FNS has negatively impacted the neighborhood. Because of the holiday season and record cold, SNAP households were placed in a humanitarian crisis. Since the time of the disqualification, the Appellant has been turning away low-income families, the elderly, and the disabled.
- Due to its proximity to impoverished neighborhoods, the loss of SNAP at the Appellant firm will negatively impact the quality of life in the community.
- In addition to regular training, the Appellant will add agents posed as customers that will taunt and beg clerks into breaking the rules.
- The Appellant treats all customers with kindness, care, and respect.

In support of its contentions, the Appellant submitted a copy of its “Compliance Training Program,” which was updated in December 2017.

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

## **ANALYSIS AND FINDINGS**

As best as can be determined, the Appellant did not, at any point, offer any evidence or contentions to counter the claim that SNAP violations, including trafficking, occurred. In its request for administrative review, the Appellant freely acknowledged that the violations occurred and even apologized for the transactions, stating that it takes full responsibility for what took place.

Because the violations themselves do not appear to be in dispute, it is the determination of this review that program violations, including trafficking, did occur as charged by the Retailer Operations Division and warrants permanent disqualification from SNAP participation. The balance of this review will address the Appellant’s remaining contentions.

### **Entrapment**

The chief argument presented by the Appellant is a claim that the undercover investigator entrapped the cashier into committing a trafficking violation. The Appellant argued that the investigator’s actions were deceitful, inappropriate, and unprofessional. In making this contention, the Appellant implies that without the investigator’s trickery, the cashier would not have committed the trafficking violation.

With regard to the Appellant’s claim that the investigator engaged in entrapment, this review does not agree. The presence of entrapment depends upon whether or not the government’s actions leading up to the violations amounted to inducing violative activity in persons who otherwise had no inclination to violate.

It should be noted that in single every visit the investigator made to the store, the clerks on duty permitted obviously ineligible, non-food items to be purchased with SNAP benefits. This is a clear violation of the law. From all indications, the clerk were willing participants in the violations, as they never refused to sell ineligible items and did not exhibit a reluctance to allow such transactions to take place. It is not a stretch, therefore, to imagine a clerk who engages in such violations to go a step further and commit a trafficking violation.

### **5 U.S.C. § 552 (b)(7)(E)**

During an undercover investigation, some level of deception is required on the part of the investigator. Specifically, it is his or her job to behave like a SNAP recipient who is inclined to commit program violations. In this case, the investigator, whose identity was not disclosed in the investigation report, merely provided an opportunity for a suspected violator to engage in

violations, and the store clerks readily participated. Such conduct on the part of the investigator does not constitute entrapment and does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Appellant Owner Not Involved in Violations**

The Appellant owner contends that it was not involved in the violations and did not profit or benefit from the trafficking incident. The Appellant claims that he was responding to a family emergency and was not in the store at the time the trafficking violation occurred.

With regard to this contention, the record shows that the Appellant owner signed an application to participate as a SNAP retailer on May 12, 2010. The Appellant also signed a reauthorization application on February 26, 2015. By signing these applications, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. The record clearly establishes that the Appellant owner agreed to abide by program rules, including taking responsibility for violations committed by any of the firm's employees, whether paid or unpaid, new, full-time or part-time. An owner or manager is not free of responsibility simply because he or she was not in the vicinity at the time the violations occurred or because he or she was uninvolved in the violations. Regardless of which clerks are operating the cash register at a given time or whom firm ownership authorizes to handle store business, the ownership of the firm is ultimately responsible 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 its employees would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA. Therefore, the Appellant's insinuation that the violations were not the fault of the owner does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

### **No Warning**

The Appellant contends that there was no warning given to the firm of the possibility that violations were occurring.

With regard to this contention, it should be noted that USDA is under no obligation to warn retailers when SNAP violations are occurring or to end an investigation after just a few transactions. An undercover investigation takes place in an effort to discover a firm's willingness to violate program rules. In this case, violations, including one incident of trafficking, took place during every visit the investigator made to the store. This shows either a willful disregard of program rules or very poor supervision by the firm's owner or managers. As such, permanent disqualification is appropriate.

### **Remedial Actions Taken**

The Appellant has stated that it is now more aware, and will take actions to ensure that the firm is in compliance with program rules. The Appellant states that in addition to regular training, it will add agents to pose as customers to taunt and beg clerks into breaking the rules. In support of

these statements, the Appellant submitted a copy of its newly updated compliance training policy.

With regard to these contentions, it must be noted that the purpose of this review is to either validate or invalidate the earlier determination of the Retailer Operations Division. This review is limited to the circumstances that existed at the time the violations were committed. It is not the authority of this review to consider any subsequent remedial actions that may have been taken or that will take place so that a store may enhance or 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 on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations.

Therefore, the Appellant's contention that corrective action has taken place or that further remedial actions are planned does not provide a valid basis for dismissing the charges.

### **No Prior Violations**

The Appellant contends that it has been authorized in SNAP for more than six years with no issues and has always followed SNAP guidelines. This contention implies that because the firm does not have a history of program violations, the permanent disqualification determination should be overturned or reduced.

With regard to this contention, SNAP regulations at 7 CFR § 278.6(e) require that when serious violations, such as trafficking, occur, permanent disqualification is the necessary penalty, even on the first occasion, regardless of a firm's prior compliance with program rules. As stated earlier, the issue under review is whether or not the Retailer Operations Division took appropriate action, consistent with SNAP regulations, in its imposition of a permanent disqualification against Charles Street Deli Convenience. As long as the administrative action taken by the agency fully conforms to SNAP regulations, this review has no authority to dismiss or reduce a period of disqualification.

In this case, the sanction imposed by the Retailer Operations Division is in wholly line with SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations.

### **Hardship to SNAP Recipients**

The Appellant has stated that a disqualification of the firm would negatively impact the quality of life in the neighborhood. It further stated that since the time of the disqualification, the Appellant has been turning away low-income families, the elderly, and the disabled.

With regard to the claim that members of the community have experienced or would experience hardship if the firm was disqualified, it is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and households are forced to use their benefits elsewhere. Regulations at 7 CFR § 278.6(f) do allow, in some circumstances, for a civil money penalty to be imposed in lieu of disqualification when there is



an absence of other SNAP-authorized retailers in the area. However, the regulations are clear that a civil money penalty for hardship to SNAP households may not be imposed in lieu of permanent disqualification for trafficking.

Therefore, the Appellant's contention that the community will be adversely affected as a result of the firm's disqualification does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Civil Money Penalty**

As noted earlier, the Retailer Operations Division determined that the Appellant firm was not eligible for a civil money penalty in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and training program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a civil money penalty to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate documentation within designated timeframes. The case record shows that the Appellant did not request a trafficking CMP when it initially responded to the charge letter. The updated compliance and training documentation that was provided later on was not submitted within required timeframes. Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

### **CONCLUSION**

Trafficking is defined in Section 271.2 of the SNAP regulations as "the buying or selling of SNAP benefits for cash or consideration other than eligible food." Pursuant to regulations at 7 CFR § 278.6(e)(1)(i), permanent disqualification is the required penalty for such violations. The law and regulations do not provide for a lesser penalty for this violation.

Based on a review of the evidence in this case, there is little question that trafficking violations did occur at Charles Street Deli Convenience during a USDA investigation. All transactions cited in the letter of charges were conducted or supervised by a USDA investigator and all are thoroughly documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and appears to be accurate with regard to the dates of the violations, including the exchange of SNAP benefits for cash, and in all other critically pertinent details. Therefore, the decision to impose a permanent disqualification against the Appellant, Charles Street Deli Convenience, under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is sustained.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON  
Administrative Review Officer

June 21, 2018