

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

Citgo,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0227207

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 Citgo (hereinafter “Appellant”) from participation as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP) was improperly imposed by FNS’ Retailer Operations Division (hereinafter “Retailer Operations”). As such, the permanent disqualification action is reversed. Likewise, the associated fiscal claim **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** is dismissed.

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action when it imposed a permanent disqualification against Appellant, consistent with 7 U.S.C. § 2021, Title 7 of the Code of Federal Regulations (CFR) § 278.6(a) and (e)(1)(i)7, and 7 CFR § 271.2, in its administration of SNAP.

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer 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

Appellant was initially authorized as a SNAP retail food store on September 9, 2014. USDA conducted an undercover investigation at Appellant during the period of March 19, 2020 through April 1, 2020, to ascertain its compliance with Federal SNAP law and regulations. The

investigation report documented two instances where Appellant's personnel trafficked by exchanging cash for merchandise that had been originally purchased with SNAP benefits. As a result of the evidence compiled from this investigation, Retailer Operations informed Appellant, by letter dated May 7, 2020, that it was charged with trafficking, as defined in § 271.2 of the SNAP regulations. The Charge Letter informed Appellant that the trafficking violations warranted permanent disqualification from SNAP, as provided in 7 CFR § 278.6(e)(1). The Charge Letter also stated that 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).

The case record shows that on May 14, 2020, Appellant, through Counsel, emailed a Letter of Representation and request for a 10-day extension to respond to the charges which was approved by Retailer Operations. On May 27, 2020, Appellant, through Counsel, submitted its formal response to the Charge Letter by email. This response did not request a trafficking CMP or include supporting documentation to support this alternative penalty.

After considering Appellant's response and reviewing the evidence in the case, Retailer Operations concluded that trafficking had occurred as charged, and issued a Determination Letter dated June 8, 2020. This letter informed Appellant that it would be permanently disqualified from SNAP upon receipt of the letter, in accordance with § 278.6(c) and (e)(1) of the SNAP regulations. The letter also stated that Retailer Operations considered Appellant's eligibility for a trafficking CMP according to the terms of § 278.6(i) of the SNAP regulations, but determined that a CMP was not appropriate in this case because Appellant failed to submit sufficient evidence to demonstrate it had established and implemented an effective compliance policy and program to prevent SNAP violations. This letter further indicated that the trafficking violations resulted in a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) loss to the government, and a bill for collection was included, with full payment due within 30 calendar days. Agency records show that Appellant paid the fiscal claim in full on July 20, 2020.

Appellant, through Counsel, appealed Retailer Operations' determination and requested administrative review by certified letter dated June 12, 2020. The appeal was granted by letter dated June 23, 2020. Counsel emailed information and evidence on July 14, 2020, in support of the appeal.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means Appellant has the burden of providing credible, relevant evidence, that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (the Act), 7 U.S.C. § 2021, and 7 CFR § 278. In particular, 7 CFR § 278.6(e)(1)(i) establishes the authority upon which a permanent disqualification may be imposed against a retail food store in the event that personnel of the firm have engaged in trafficking of SNAP benefits.

7 U.S.C. § 2021(b)(3)(B) reads, 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) reads, 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.

7 CFR § 278.6(b)(2) reads, in part:

(ii) reads, in part: Firms that request consideration of a CMP 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 CMP 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) reads, in part: If a firm fails to request consideration for a CMP 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(c) reads, 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)(1)(i) 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 reads, in part: Trafficking means: (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; (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; (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food; (6) Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via EBT cards, card numbers and 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 § 278.6(i) reads, in part: FNS may impose a CMP 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 § 279.5(c) reads, in part: Review of disqualification or CMP or fine. When the action under review is disqualifying a firm from program participation or assessing a CMP or fine against a firm, the designated reviewer shall: Sustain the action under review; specify a shorter period of disqualification; specify a reduced money penalty or fine; direct that an official warning letter be issued to the firm in lieu of a disqualification, CMP or fine; or, direct that the action under review be reversed.

7 CFR § 279.7(d) reads, in part: If the disqualification action is reversed through administrative or judicial review, the Secretary shall not be liable for the value of any sales lost during the disqualification period.

SUMMARY OF THE CHARGES

A contracted investigator completed eight undercover compliance visits to Appellant during the period of March 19, 2020 through April 1, 2020. The Report of Investigation, dated April 23, 2020, includes Exhibits A through H and provides details on the results of each compliance visit. Trafficking violations were documented in Exhibits F and H.

Appellant was charged with trafficking on two of these visits, wherein store personnel exchanged cash with the investigator for energy drinks purchased with SNAP benefits.

APPELLANT'S CONTENTIONS

In reaching a decision, full consideration has been given to all contentions presented through Counsel, including any not recapitulated here.

- The owner is a first generation citizen of the United States, loves this country and the opportunities it has provided for him and his family, is very sympathetic to those less fortunate, and unfortunately some people have taken advantage of that innate kindness that he has for others. He is a law abiding citizen, is very alarmed by the allegations made by USDA, and the questionable investigation tactics used.
- The Investigative Report clearly sets out that the owner, time and time again, refused to violate SNAP regulations. Only upon harassment and entrapment by the undercover agent did the owner agree to help the agent.
- Exhibit A.
 - 1) First encounter the owner had with the agent. The agent stood near the checkout and explained that he was having a difficult time with his girlfriend at the time and had no food at home to eat. The agent began using emotional tactics to lure him into a sense of need and urgency to help aid the agent.
 - 2) Only 9 days prior to this first encounter, Broward County, Florida was declared in a State of Emergency due to the Covid-19 Pandemic. During this first encounter, the agent told the owner that he needed cleaning supplies such as bleach and disinfectants, begging the owner to break the laws and let him buy the supplies with his EBT card. Even so, the owner refused and only allowed the agent to purchase the food items with the EBT card.
- Exhibit B.
 - 1) Interactions were fairly identical to those that happened four days prior.
 - 2) Again, the agent begged and hounded the owner to break the laws and let him buy other product with the EBT card such as cleaning supplies, like bleach, or to allow him to get cash back from his EBT card to buy medicine he needed due to being released from the hospital. The owner once again only allowed the agent to buy food items, despite the protests.
- Exhibit C.
 - 1) When the agent asked the owner if non-food items could be purchased with the EBT card, he refused. He also refused to allow the agent to receive cash back on the EBT card. The owner even offered the agent cash from his personal wallet because he felt empathy for this agent who continually visited his store (third time in seven days) who was clearly in need during a state of emergency.
 - 2) The owner rejects the accusation that he ever told the agent that, “he did not know him well enough to do something illegal with the EBT card. The owner has never had any charges against him from the USDA for violations and fully complies with the rules and regulations. He takes his business very seriously and would never risk his ability to operate fully, including servicing those in need of food with SNAP benefits. As such, the owner never, and would never, tell someone he needed to know them better in order to cheat the system.
 - 3) During this third encounter, the agent further elaborated his storytelling about his home life with his girlfriend and his need for food and supplies. During this conversation, the agent said he would go to **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** with a gift card and buy food items for the owner to buy and sell in his store. Despite the fact that the owner did not need any stock and that he could get such items for much less from one of his wholesale distributors, he agreed to buy products the agent was going to buy with a gift card from

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The owner was never informed that the items were going to be bought with the EBT card. The owner was told there was only a gift card being used.

- 4) Neither the owner nor his clerk were handed a receipt by the undercover agent nor were either of them informed by the undercover agent that an EBT card was used to purchase the goods.
- During these first three encounters between the owner and agent, the agent was begging for cleaning supplies and cash, etc. The owner had a line of customer waiting behind the agent to checkout with their items. These interactions, where the owner fully complied with the laws surrounding SNAP benefits, impeded on his ability to service other customers and run his business.
 - Exhibit D: No contentions addressed.
 - Exhibit E: Again, the agent stated he would use a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) gift card to buy food that the owner could then buy from him. No mention of purchasing with an EBT card was ever made by the agent.
 - Exhibit F.
 - 1) As stated in the store clerk's affidavit, the undercover agent never told him that the purchases were made with an EBT card.
 - 2) Neither the owner nor the clerk were handed a receipt by the agent.
 - 3) The owner not only bought these goods from the undercover agent for the exact retail price when he could obtain the items for a much lower price from one of his wholesale distributors, but, he could not even resell many products, such as the "Great Value" brand milk, so the owner gave these away to employees and family members. The owner was not profiting off of these purchases, but was trying to aid the undercover agent in obtaining money since the undercover agent claimed to be in dire need at the time. The owner's understanding per the representation made by the undercover agent was that he was paying cash for goods bought at a major retail store (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) with a gift card. This was used as a mechanism for the undercover agent to turn a gift card into cash. This was the pretense under which the owner was operating.
 - 4) Additionally, during this encounter when the undercover agent discussed going to 5 U.S.C. § 552 (b)(6) & (b)(7)(C), there was no mention of using an EBT card to purchase goods.
 - Exhibit G.
 - 1) The agent never stated that he was going to use an EBT card at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to purchase items. Instead, the owner was told that there was a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) card or gift card involved in the purchase.
 - 2) The owner already had a good supply of energy drinks in stock but after constant harassment and out of the goodness of his heart he wanted to help this agent in need obtain cash during a worldwide pandemic and crisis. Only because of the harassment and desire to help another person in a time of dire need, the owner agreed to buy 1-2 cases of energy drinks, and no more.
 - Exhibit H.
 - 1) When the agent returned to the store with the energy drinks, despite the owner asking for only 1 or 2 cases, as the store did not need any more energy drinks, the agent

opened a trunk full of energy drinks. These cases were priced at \$4 more than the owner pays for these goods from one of his wholesale distributors. The invoice depicts the owner pays \$30.99 for a case of Monster Energy Drinks. Again, no mention of using an EBT card to purchase the drinks was made at this time.

2) The owner only had half of the money requested by the agent in his cash register at the time due to a shift change. Therefore, he paid the agent

5 U.S.C. § 552 (b)(6) & (b)(7)(C) and said to return for the rest, which, the agent never did because this was their final interaction.

- As evidenced by the above statements and affidavits, there was no knowledge or intent to buy goods that were being bought elsewhere with an EBT card in an attempt to defraud.
- The events that occurred between the agent and owner began on March 19, 2020, 9 days after Broward County, Florida declared a state of Emergency due to the COVID-19 Pandemic. The final transaction on April 1, 2020, occurred only 2 days after the Governor of Florida issued an Executive Order requiring Broward County residents to stay home. The public was buying all of the bleach, cleaning supplies, toilet paper and such that were available. The agent used the pandemic to enhance his storyline that ultimately entrapped the owner. The agent not only relayed issues of his personal relationships to the owner, but also begged and harassed the owner to allow him to buy products so that he could clean his home and could buy medicine.
- The owner refused to allow the agent to buy any nonfood items in his store with the EBT card. He was often held up for long periods of time by the agent as he would plead and beg him to break the rules because he needed these products. Yet, the owner was steadfast in his stance that he would not break the law. He was in a position where he had a customer in need, during an intense time of need – a global pandemic – and he wanted to make sure this agent could be fed and stay sanitary and healthy.
- The encounters between the owner and agent are a prime example of a miscarriage of justice. The wrongful conduct that occurred by harassing a store owner who continually refused to break the law, USDA targets a good person who clearly had no intent to defraud SNAP. Upon review of the Investigative Report, the charges against the owner should have never been brought due to this wrongful conduct by the agent.
- Due to the actions of the government and its undercover agent's use of a false story utilized to entrap the owner, he has been forced to hire counsel. As such, USDA should compensate him or the monies he incurred in defending his innocence and good name. USDA should deny this investigation due to the agent's use of entrapment and wrongful conduct.

Counsel submitted the following in support of Appellant's contentions:

- An email dated May 14, 2020, requesting and receiving approval for an extension to respond to the charges by May 27, 2020
- Photograph of Appellant's milk refrigerator, showing the brand of milk sold
- Three employee affidavits
- Copy of a vendor invoice, showing Monster Energy Drink prices

ANALYSIS AND FINDINGS

This review is to either validate or to invalidate the determination made by Retailer Operations. The regulations establish that an authorized retail food store may be disqualified from SNAP participation when it fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. Exhibits F and H document two exchanges of cash by Appellant personnel, for items purchased with SNAP benefits.

Upon review of all evidence presented, it is decided that there is insufficient evidence to support a permanent disqualification for trafficking, as defined under 7 CFR § 271.2 (5). The permanent disqualification determination and associated fiscal claim imposed, is herein reversed. Accordingly, it is unnecessary to address Appellant's contentions in this matter.

This decision does not establish a precedent, as it is based on the specific circumstances of this case, as documented by materials in the case file. In addition, this Final Agency Decision does not establish policy or supersede Federal law and regulations.

CONCLUSION

The record does not support, by a preponderance of the evidence, that the exchanges by store personnel of cash for products purchased with SNAP benefits, meet the definition of trafficking. The determination to impose a fiscal claim and permanent disqualification against Appellant is reversed. As Appellant has paid the fiscal claim in full, the amount **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** should be refunded.

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.

KIM DAMERON
Administrative Review Officer

May 28, 2021