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

E & A Inc,

Appellant,

v.

Case Number: C0237855

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 there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of E & A Inc (hereinafter "E & A Inc" 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 E & A Inc.

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 USDA conducted an investigation of the compliance of E & A Inc with Federal SNAP law and regulations during the period October 26, 2020 through November 2, 2020. The investigation report documents that store personnel at the Appellant firm, in addition to accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items on one occasion, also intentionally exchanged cash for food purchased with SNAP benefits during two of the five 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.

As a result of evidence compiled from this investigation, the Retailer Operations Division charged the Appellant, in a letter dated January 15, 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 January 18, 2021.

The record indicates that via email correspondence of January 20, 2021, the Appellant requested an extension in time for providing a response to the letter of charges. By letter dated January 20, 2021, the Retailer Operations Division granted the Appellant's time extension request to March 1, 2021. The Appellant was informed in that letter that the time to request a civil money penalty in lieu of a permanent disqualification and to provide the documentation to support such a request could not be extended.

In responses to the Retailer Operations Division of January 20, 2021, February 24, 2021 and March 1, 2021, the Appellant, through counsel, replied to the charges therein denying that the transactions ever occurred and providing other various arguments with respect to the charges including a claim that the clerk was unaware that the Red Bull and Monster energy drinks and Gatorade were purchased with SNAP benefits at another store.

After giving consideration to the Appellant's replies and the evidence in this case, the Retailer Operations Division informed the Appellant, by letter dated March 25, 2021, that E & A Inc was permanently disqualified from participation as a retail store in the SNAP. The letter also stated that the Appellant was not eligible for a trafficking civil money penalty 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 April 8, 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 April 20, 2021. In an email correspondence of May 11, 2021, 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 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 from October 26, 2020 through November 2, 2020, the USDA conducted five undercover compliance visits at E & A Inc. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated January 15, 2021. The investigation report included Exhibits A through E which provide full details on the results of each compliance visit. The investigation report documents that store personnel at the Appellant firm, in addition to accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items on one occasion, also intentionally exchanged cash for food originally purchased with SNAP benefits during two of the five undercover compliance visits.

5 U.S.C. § 552 (b)(7)(E).

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.

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 replies 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:

- In the area in which the Appellant is located, approximately 6% of the households receive SNAP benefits.
- There are two affidavits in which trafficking is alleged—Exhibits B and C attached to the charge letter. The evidence is unsworn to by the investigator and contains no corroborating evidence.
- USDA must prove that store personnel knowingly and intentionally purchased items originally bought with SNAP benefits.
- The investigator did not mention where the Red Bull, Monster, and Gatorade drinks were purchased or that they were purchased with EBT. The investigator led the clerk to believe that she was a supplier or was part of a drink distribution company.
- The Appellant contests that the transactions ever occurred. The progression of the story told by the investigator is illogical, redundant and clearly the result of a confused investigation.
- The investigative report is worded to imply that the clerk came up with the idea of purchasing Red Bull, Monster, and Gatorade drinks. It is more likely that the investigator suggested the purchase of these items.
- This attributes intent to the clerk which was not actually there—the identification of a product he would like to purchase. The investigator goes from asking the clerk how to traffick, to suggesting a deal where the store received discounted inventory for cash, and

finally to simply following the clerk's instructions to buy Red Bull, Monster, and Gatorade on EBT that he would buy for cash.

- The other significant factual issue that exists is that all of these transactions where trafficking allegedly occurred, completely and utterly lack serial numbers for the bills that were trafficked. USDA lacks audio recordings to prove that the store clerks were actually notified of the nature of the purchase and lacks detailed records of the cash allegedly received. In the investigative records there are pictures of eligible food items and notes about the disposition of items, but the alleged cash that was received is completely absent from the records altogether.
- The investigator's affidavits are hearsay. Hearsay in administrative matters can only be relied upon if four conditions are met. The Appellant cannot subpoena or depose the investigator. The investigative report should not be relied upon. The Appellant cited U.S. Pipe & Foundry Co. v. Webb and J.A.M. Builders, Inc. v. Herman.
- On the face of the documents provided by USDA, there is no reasonable opportunity for the Appellant to subpoena or otherwise depose the witness because the Department has redacted all of that information prior to sending the charge letter. Therefore, the document cannot and should not be relied upon by USDA in determining whether or not trafficking has occurred.
- Given the mischaracterization, failure to document, and general lack of substantiating and supporting evidence, a permanent disqualification cannot be entered.
- Not holding the determinations in abeyance while a FOIA response is pending violates 7 CFR § 278.6(b)(1) according to Triple E Express vs. ROD, because the Appellant is not given a full opportunity to respond.
- Other similar ARB decisions have reversed the determinations.

In support of these contentions, the Appellant, through counsel, submitted Profile of SNAP Households in 2018—Maryland and Maryland Congressional District 8, USDA FNS.

ANALYSIS AND FINDINGS

SNAP Violations

This review is to either validate or to invalidate the determination made by the Retailer Operations Division; it is limited to the facts at the basis of the Retailer Operations Division's determination at the time it was made.

Prior to becoming authorized to participate in the SNAP, the Appellant completed and submitted a SNAP Application for Retail Stores. When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

The Appellant contests that the transactions ever occurred. The progression of the story told by the investigator is illogical, redundant and clearly the result of a confused investigation. The evidence is unsworn to by the investigator and contains no corroborating evidence. The investigator did not mention where the Red Bull, Monster, and Gatorade drinks were purchased or that they were purchased with EBT. The investigator led the clerk to believe that she was a supplier or was part of a drink distribution company.

The charges of violations are based on the findings of a formal USDA investigation conducted of the compliance of E & A Inc with Federal SNAP law and regulations during the period October 26, 2020 through November 2, 2020. The transactions cited in the letter of charges were conducted by USDA investigators and are thoroughly documented. Investigators sign, under penalty of perjury, that investigative reports are true and correct. All transactions are fully documented and a complete review of this documentation has yielded no known error or discrepancy in the reported findings. 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 the store employee(s) committed trafficking violations by intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.

The Appellant contends that there was a lack of serial numbers for the bills that were trafficked. USDA lacks audio recordings to prove that the store clerks were actually notified of the nature of the purchase and lacks detailed records of the cash allegedly received. In the investigative records there are pictures of eligible food items and notes about the disposition of items, but the alleged cash that was received is completely absent from the records altogether.

The documentation on record includes EBT receipts and photos showing that 1 ineligible nonfood item, 7 eligible food items, 6 cases (24-8.4 ounces) of Red Bull energy drinks, 6 cases (24-12 ounces) of Red Bull energy drinks, 6 cases (24-16 ounces) of Monster energy drinks, and 5 cases (24-20 ounces) of Gatorade were purchased with SNAP benefits by the investigator. The photos on record also show the 6 eligible food items given to the investigator for free/no charge by the employee as well as the cash/bills with serial numbers that were given to the investigator by the employee in exchange for the energy drinks and Gatorade that were purchased with SNAP benefits. Also on record is documentation that confirms that the 1 ineligible nonfood item and the 13 eligible food items (7 purchased with SNAP benefits and 6 given to investigator for free) previously noted were donated to and signed for by a charitable organization following the transaction. Such documentation includes the signature and title of the official of the charitable organization accepting the donated item, the name and address of the organization, the date the donation was made, and the official's initials next to the items donated. Moreover, the total purchase costs of each of the transactions involved in the investigation is documented on SNAP terminal receipts obtained during each transaction and matches the reported purchase totals indicated in the investigation report.

Upon review, the evidence supports that SNAP violations occurred at the Appellant firm. The store employee(s) identified in Exhibits B and C was found to be trafficking as defined under 7

CFR § 271.2 (5) (definition of *trafficking*) by "intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food." The evidence supports that the employee(s) was made aware that the cases of Red Bull and Monster energy drinks and Gatorade were purchased with SNAP benefits at another store.

Exhibit A of the investigation report documents that the employee specifically told the investigator to purchase Red Bull and Monster energy drinks and Gatorade in order to receive cash off the EBT card. Exhibit A states, in part:

> "5 U.S.C. § 552 (b)(7)(E)."

Exhibit B of the investigation report, states, in part:

> "5 U.S.C. § 552 (b)(7)(E)."

As noted above, Exhibit B of the investigation report documents that the employee specifically told the investigator to purchase Red Bull energy drinks and Gatorade in order to receive cash off the EBT card.

Exhibit C of the investigation report, states, in part:

> "5 U.S.C. § 552 (b)(7)(E)."

The Appellant argues the investigative report is worded to imply that the clerk came up with the idea of purchasing Red Bull/Monster energy drinks and Gatorade and that it is more likely that the investigator suggested the purchase of these items. This attributes intent to the clerk which was not actually there—the identification of a product he would like to purchase. The investigator goes from asking the clerk how to traffick, to suggesting a deal where the store received discounted inventory for cash, and finally to simply following the clerk's instructions to buy Red Bull, Monster, and Gatorade on EBT that he would buy for cash.

The Appellant may be correct in that it is likely that the investigator proposed the purchase of Red Bull/Monster energy drinks and Gatorade in this case. However, the Appellant's contention that, rather than just verifying violations, the investigator offered and persuaded employees to violate seems to imply that the investigator engaged in activity commonly referred to as *entrapment*. Generally, the entrapment that is forbidden by law depends on whether or not the activity leading up to the violation amounted to putting the activity in the mind of a person who had no prior inclination to violate, and leading him/her to do so for the first time. The U.S. Department of Agriculture's Office of General Counsel maintains that if investigators merely provide an opportunity for a suspected violator to continue on a course of criminal conduct, such activity would not constitute entrapment. In this regard, the investigation record does not contain any evidence indicating activity characteristic of entrapment, nor has the Appellant provided substantial evidence to support its claim of entrapment.

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 ". . . Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food." 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". The law and regulations do not provide for a lesser period of disqualification for this violation.

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. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. The Appellant did not provide any evidence that the violations cited in the charge letter did not occur. The preponderance of the evidence in the record supports that trafficking, as defined in the regulations, did occur at the Appellant and that the permanent disqualification was properly applied.

FOIA

The Appellant contends that not holding determinations in abeyance while FOIA responses are pending violates 7 CFR §278.6(b)(1) according to Triple E Express vs. ROD, because the Appellant is not given a full opportunity to respond. With regard to this contention, effective October 26, 2020, the changes to 7 CFR § 278.6 and 7 CFR § 279.4 went into effect. These changes prohibit holding determinations and administrative reviews in abeyance while FOIA responses are pending. The finding in Triple E Express was based on outdated regulations.

Hearsay in Administrative Hearings

The Appellant contends that the investigative report is hearsay. Hearsay in administrative matters can only be relied upon if four conditions are met. The Appellant cannot subpoena or depose the investigator. The investigative report should not be relied upon. The Appellant cited U.S. Pipe & Foundry Co. v. Webb and J.A.M. Builders, Inc. v. Herman.

The Appellant's contentions with regard to hearsay are duly noted. However, the cases cited by the Appellant refer to criteria for documents submitted into evidence in lieu of witness testimony in administrative hearings. Revisions to parts 278 and 279 of the SNAP regulations eliminated administrative hearings. The revisions became effective September 8, 2003. Accordingly, these case citations are not relevant to this administrative review.

No Opportunity to Depose Witness

The Appellant contends that on the face of the documents provided by USDA, there is no reasonable opportunity for the Appellant to subpoena or otherwise depose the witness because the Department has redacted all of that information prior to sending the charge letter. However, neither the Food and Nutrition Act of 2008 nor the SNAP regulations pursuant thereto provide

for evidentiary proceedings at the administrative level of review, and therefore such proceedings are not included in the administrative review process. Rather, the Act and Regulations provide that any firm aggrieved by an administrative review determination may seek judicial review of the determination in Federal court or a state court of record having competent jurisdiction. In such event, trial de novo proceedings ensure the firm of a full evidentiary hearing on the agency action at issue.

Administrative Reviews Not Precedent Setting

The Appellant contends that the determination should be reversed based on the Final Agency Decisions in other cases. Prior administrative review decisions, as well as this decision, are not precedent setting as they are based on the specific circumstances of each case as documented by materials provided by the Appellant and the Retailer Operations Division. Administrative review decisions do not establish policy or supersede Federal law, regulations or policy guidance. The determination in this case conforms to SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations.

CIVIL MONEY PENALTY

As previously indicated, the March 25, 2021 determination letter advised the Appellant of the ineligibility for consideration for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations. The letter of charges dated January 15, 2021 advised the Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The regulations specify that such documentation must, in part, establish that there was an effective compliance policy and training program and that both were in effect and implemented prior to the occurrence of violations. The letter indicates that no information was provided by the Appellant for consideration; therefore, on review the Retailer Operations Division's determination that the Appellant firm is ineligible for the imposition of civil money penalties in lieu of disqualification is affirmed.

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 ". . . Intentionally purchasing products originally purchased with SNAP benefits in exchange 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 E & A Inc, the Appellant, as an authorized retailer in the Supplemental Nutrition Assistance Program. As such, the decision to impose a permanent disqualification against E & A Inc, 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 June 7, 2021
ADMINISTRATIVE REVIEW OFFICER