

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

Friendly,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0228974

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is insufficient evidence to support the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against Friendly (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

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

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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 May 25, 2020, through May 28, 2020. The investigation determined that personnel at the Appellant firm accepted items purchased with 5 U.S.C. § 552 (b)(6) & (b)(7)(C) SNAP benefits in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash in Exhibit D as noted in the letter of charges. Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food is defined as trafficking under 7 CFR § 271.2. This transaction was deemed clearly violative and warrants a permanent disqualification. On one

occasion (Exhibit A), the clerk refused to allow the purchase of ineligible items using SNAP and only ran the transaction for the eligible items. No ineligible items were involved in any of the remaining three Exhibits. The investigative report shows that the same clerk was involved in all four Exhibits and was identified in subsequent correspondence from Appellant as being the store owner.

As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant, in a letter dated October 9, 2020, that the firm and its ownership were charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.6(e)(1). The letter of charges states, in relevant part, “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking . . . is permanent disqualification.” The letter also states that under certain conditions, FNS may impose a civil money penalty (CMP) in lieu of permanent disqualification of a firm for trafficking.

Appellant, through counsel, responded to the charges in a letter dated October 20, 2020, that did request, but did not include documentation to be considered in support of the CMP. After giving consideration to the evidence, the Office of Retailer Operations and Compliance notified Appellant in a letter dated January 13, 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 also states that Appellant’s eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated “. . . you are not eligible for the CMP because you failed to submit sufficient evidence to demonstrate that your firm had established and implemented an effective compliance policy and program to prevent violations of the Supplemental Nutrition Assistance Program.”

By letter dated January 21, 2021, Appellant, through new counsel, appealed the Office of Retailer Operations and Compliance decision and requested an administrative review of this action. The appeal was granted. No subsequent correspondence was received.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing 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 untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Section 278. In particular, Sections 278.6(a) and Part 278.6(e)(1)(i) 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 of SNAP benefits.

7 CFR § 271.2 states that: 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 § 278.2(a) states that: Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food. Further, the citation specifies that coupons may not be accepted in exchange for cash, in payment of interest on loans, or for any other nonfood use.

7 CFR § 278.6(a) states that: 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)(i) reads, in part, “FNS shall . . . [d]isqualify 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, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone . . .” Trafficking is further defined, in 7 CFR § 271.2, to include “(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.”

7 CFR § 278.6(f)(1) states in relevant part, “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm is selling a substantial variety of staple food items, and the firm’s disqualification would cause hardship to SNAP households. A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.”

7 CFR § 278.6(i) states, inter alia: “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)(ii) states, inter alia: “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).” Part 278.6(b)(2)(ii) further states that 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 Part 278.6(b)(1), the firm shall not be eligible for such a penalty.

In addition, 7 CFR § 278.6(i)(2) states in relevant part, “As specified in Criterion 3 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with this part 278 of current FNS regulations and

current FSP policy on the proper acceptance and handling of food coupons.” This section goes on to state, “As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation.” This section further states, “A firm which seeks a civil money penalty in lieu of permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted . . .”

APPELLANT’S CONTENTIONS

The following may represent a summary of Appellant’s contentions 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 herein:

- The investigator made four visits to the store and despite attempts to induce the clerk to commit a violation, no violation is alleged. It is only on the fourth visit that an alleged violation occurred which the clerk vigorously disputes. No violation is alleged for the first visit on May 28, 2020, but the investigator alleges that he spoke with the clerk about a scheme to get cash off his EBT card. The clerk adamantly denies that he agreed to participate in the alleged scheme;
- George Floyd died on May 25, 2020, the day the investigation commenced. Protests began near the store on May 26 and escalated over the next three days with rioting, arson, and looting. The clerk, fearing for his safety and for the store, closed it early on May 28 and was standing watch in the parking lot when the investigator approached him and asked if he remembered him from earlier that day. The clerk said that he did at which point the investigator went to his car which was parked on the street and returned with two cases of Red Bull. The clerk said he did not need it at the store and the investigator begged him to take it off his hands 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The clerk said “no”, but after much badgering and nuisance, gave-in and gave the investigator all the cash he had in his pocket to make him go away and the investigator then placed the Red Bull in the clerk’s car. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The store was looted after the clerk left the scene with damage to doors and windows and the theft of approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in stolen property, only half of which was insured;
- The clerk does not recall the investigator, during the first May 28 visit, saying he was going to purchase Red Bull with food stamps and that the clerk agreed to pay cash for it. The clerk also adamantly denies that the investigator told him during the second May 28 visit, that he had purchased the Red Bull with food stamps. The clerk simply thought he was doing the investigator a favor by giving him cash and that this would make the him leave the store before the rioting began;
- The clerk worked in a similar business prior to purchasing the business in 2015 and was well familiar with USDA rules and requirements for EBT and WIC. Upon purchasing the business he read the USDA documents and well knew the regulations and the consequences of failing to comply. He has worked seven days a week for over five years to grow and improve the business. The clerk is well aware that USDA investigators have checked on him many times over that five-year period to ensure he was correctly handling EBT and no prior violations have ever been alleged;

- In addition to a denial of the alleged violation, the potential consequences of the violation are well disproportionate to the alleged violation itself. First, as alleged, the value of the product at issue 5 U.S.C. § 552 (b)(6) & (b)(7)(C), for which it is alleged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was paid. Disqualification of SNAP is extremely disproportionate to the value of the violation; essentially shutting down the business 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is unconscionable;
- The owner believes that he has well met the regulations that would justify the imposition of a CMP in lieu of permanent disqualification if it is determined that a violation occurred. The criteria set forth in the regulations that are to be considered for a CMP have been met as described above. The contemplated and threatened CMP, however, is also well disproportionate to the violation. A penalty of \$32,000.00, as proposed, for a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) violation is unreasonable and unfair;
 - The investigator's statements of the alleged violation are inconsistent with other evidence, not corroborated, and are the product of a biased operation that was intended to generate allegations of a violation even when such evidence was not initially produced. Because the statements are not sufficiently reliable to support the severe sanction of disqualification, it is requested that the disqualification be reversed. Further, the alleged conduct of the clerk did not occur within Friendly Grocery and did not use Friendly Grocery resources to effectuate the scheme. Because the clerk was not acting on behalf of Friendly Grocery at the time of the alleged scheme, Friendly Grocery seeks reversal of the disqualification;
 - First, the allegations of trafficking are unreliable because they are inconsistent with other interactions with the store clerk, and documented transactions that show the clerk followed SNAP rules by refusing to violate them during transactions involving the investigator despite attempts by the investigator to induce violations. This pattern of compliance is inconsistent with the investigator's claim that the clerk suddenly desired to engage in a conspiracy to defraud SNAP with a newly-met stranger. It is not credible to believe that the clerk would have engaged in the alleged scheme given the substantial legal risks to which it would expose the store and himself. The alleged scheme to purchase two Red Bull cases "for the store" would have provided no meaningful benefit as the store can already purchase Red Bull at cost. Purchasing a trivial quantity of Red Bull at no meaningful discount does not make sense to justify the clerk's participation in the alleged scheme, especially on behalf of the business. The clerk's affidavit is more credible than the allegations that he sought to defraud SNAP with a stranger with a transaction that provided no meaningful benefit. The evidence is more consistent with the clerk's claim that he provided cash to the investigator as a goodwill gesture during civil unrest. It is likely that he gave the investigator an uneven amount of money, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), because that was the amount of cash in his pocket. It is undisputed that the store was closed due to civil unrest in the area, and the clerk's prior good intentions, such as refusing to participate in SNAP violations at the store, are consistent with providing 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as a goodwill gesture to someone that he perceived needed cash during an emergency. Like 5 U.S.C. § 552 (b)(6) & (b)(7)(C), the two cases of Red Bull appeared to the clerk to be random items offered in return for the goodwill gesture of giving 5 U.S.C. § 552 (b)(6) & (b)(7)(C), rather than a misguided and ineffective attempt to defraud SNAP with a stranger;

- Second, the alleged violation is not corroborated by objective evidence. For the alleged transaction to be a violation, the clerk had to know that the Red Bull was purchased with SNAP and had to offer cash for the Red Bull as part of a scheme to defraud SNAP. The mere exchange 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for two cases of Red Bull without such knowledge does not suggest improper activity, especially when viewed in the context of the civil emergency described in the clerk's affidavit. There is no evidence corroborating the allegations that the clerk knew the Red Bull was purchased with SNAP or that he intended to defraud SNAP. There appear to be no recordings or additional witnesses to confirm the alleged discussion of the scheme at the store, no recordings of the discussions when the clerk met the investigator outside the store later that day, and no photos showing that the clerk, in fact, saw the receipt showing that the Red Bull had been purchased with food stamps. In fact, even the money provided, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), does not divide squarely between the two cases of Red Bull, suggesting that it was given for some other purpose and not as part of a deliberate scheme. Because there is no corroborating evidence, the investigator's statements may be the product of falsification or exaggeration to support a conclusion that violations occurred. Despite three transactions showing no violations, the investigator continued attempts until a violation could be alleged, culminating in the unusual fourth interaction that occurred outside of the store. The investigator's pattern of conduct showed a purpose to continue efforts until a violation was established, rather than a neutral, impartial investigation to determine whether violations were present. Unlike the investigator's claims, the two affidavits are consistent with the objective evidence and provide a rational explanation for the exchange 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for two cases of Red Bull outside of the store. Because the investigator's allegations lack credibility, it is requested that the disqualification be reversed;
- As an additional basis for reversing the disqualification, Friendly Grocery notes that the clerk was not acting on behalf of the store when the alleged violation occurred. When the money was exchanged for Red Bull, the clerk was neither working nor within the store; instead, he was standing outside the store while it was closed. He gave the investigator his personal money, not money obtained from the store. He received the Red Bull personally and consumed it personally. It was never received by the store or used by the store. Because the alleged violation concerned a personal transaction between the clerk and the investigator and had no involvement from the store itself, the business should not be disqualified from SNAP; and,
- Even if the disqualification is sustained, the business should be afforded an opportunity to pay a CMP. During the relevant period, the business employed two clerks who were trained on SNAP rules using the SNAP Training Guide for Retailers. The attached training log shows that the employees received training before this incident. The training and procedures proved effective because no employee processed an improper transaction at the business or using the business's property or resources. As such, it is requested that a CMP be permitted if disqualification is upheld.

Appellant submitted two signed affidavits and a one-page training document in support of these contentions.

ANALYSIS AND FINDINGS

A review of the case record indicates that the investigative report contains insufficient evidence to support a permanent disqualification for trafficking as defined under 7 CFR § 271.2. Accordingly, it is unnecessary to fully address the Appellant's contentions in this matter or the merits of each individual contention.

Please note that this administrative review decision is not precedent setting as the decision is based on the specific circumstances of this case as documented by materials provided by both the Appellant and the Office of Retailer Operations and Compliance. In addition, this administrative review decision does not establish policy or supersede Federal law, regulations, or policy guidance.

CONCLUSION

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against the Appellant business from participating as an authorized retailer in SNAP is reversed.

RIGHTS AND REMEDIES

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.

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

April 1, 2021