

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

Georges Grocery USA LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0195486

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that a permanent disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Georges Grocery USA LLC (Appellant) by the Retailer Operations Division (Retailer Operations).

ISSUE

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

AUTHORITY

7 U.S.C. § 2021 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

By Charge letter dated September 27, 2017, Retailer Operations informed the owner that Appellant was charged with violating the terms and conditions of the SNAP regulations based on a USDA investigation conducted from May 30, 2017 through June 15, 2017. Counsel replied to the Charge letter October 4, 2017.

By Determination letter dated January 10, 2018, Retailer Operations informed Appellant that it was permanently disqualified from participation as a retail store in the SNAP, and that the store was not eligible for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) because the firm failed to submit evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

Counsel appealed Retailer Operations' determination and requested administrative review by letter dated January 18, 2018. The appeal was granted by letter dated January 25, 2018. By letter dated February 9, 2018, counsel provided a one page affidavit signed by the owner dated February 8, 2018.

STANDARD OF REVIEW

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

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the Act), 7 U.S.C. § 2021, and § 278 of Title 7 of the Code of Federal Regulations (CFR).

7 U.S.C. § 2021(b)(3)(B) states: "...a disqualification under subsection (a) shall be...permanent upon...the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards..."

7 CFR § 278.6(e)(1)(i) states: "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, 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; or (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food."

7 CFR § 278.6(b)(2)(ii) states: “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(i) states: “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 THE CHARGES

The USDA conducted a compliance investigation of Appellant. The investigative report gives details the results of five compliance visits. Appellant was charged with trafficking in Exhibits C and E. The penalty for trafficking is permanent disqualification.

APPELLANT’S CONTENTIONS

The following may represent a summary of the contentions presented. However, in reaching a decision, full attention and consideration have been given to all contentions presented, including any not specifically recapitulated.

- Exhibit A was a clear attempt to entrap the store keeper to violate the program. No violation.
- Exhibit B he said he could use red bull, he in no way suggest the investigation do anything illegal. No violation.
- Exhibit C Clerk allegedly purchased red bull from the “investigator.” No purchase was made and food stamps were not involved in the transaction. The clerk did not ask for the source of the red bull, whether it was purchased, stolen or provided to the seller as a gift. Purchasing red bull is not a violation of the program. The paperwork suggests that **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of benefits were transferred. If that is true the violation should be against Stop & Shop the alleged vendor who knew or should have known that an excessive amount of such a product is inappropriate. No violation.
- Exhibit D Another attempt to entrap the vendor was refused. No violation.
- Exhibit E No use of the food stamp program by the clerk. He refuses to purchase stamps and an individual wants to sell him a legal product. How he acquired is never disclosed or discussed. No violation.
- There is nothing in the regulations that forbids the purchase of any product. Never did the “investigator” discuss the source of the product purchased and never did the clerk suggest to him to violate the program. The store clerk is unaware of how the investigator obtained the red bull. If the investigator would have revealed he obtained the Red Bull with SNAP benefits, my client would have refused to buy it. My client has not violated

the SNAP and the Exhibits show he adhered to the regulations. In order to take his license you must show a knowing violation of the program.

- While the USDA has some discretion in such matters, a clear attempt to set up a vendor as has clearly occurred here would never stand up to court scrutiny.

The retailer submitted an affidavit stating he has a strict policy regarding compliance with SNAP. The affidavit also: denies the purchase of stamps or their use for an unauthorized purchase; at no time was he or an employee made aware of anything purchased in violation of program; I pointed to the machine and said “I don’t do it here;” and, I in no way suggested he commit a violation to benefit my store. Another signed and notarized affidavit stated the owner and his brother would not do anything to violate program rules and would never buy stamps which is why the investigator was repeatedly refused when he tried to sell stamps.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of Retailer Operations. This review is limited to what circumstances were at the basis of Retailer Operations’ determination at the time it was made. The regulations establish that an authorized retail food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. Regardless of whom the owner of a store may utilize to handle store business, the owner is accountable for the proper handling of SNAP benefit transactions. Exhibits C and E give the details of two trafficking violations at Appellant when the same firm employee exchanged cash for Red Bull purchased with SNAP benefits. No violations were cited in any other Exhibits.

The investigation was conducted by an experienced USDA investigator who is aware that any action that would threaten, intimidate, pressure, invoke sympathy or any other act that could be considered entrapment is not permissible. 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 had no such inclination to violate. However, mere solicitation to commit a violative act is not inducement. In this regard, the investigative record does not contain any evidence indicating activity characteristic of entrapment, nor has counsel provided evidence by a preponderance to support this claim.

Exhibit B supports that the investigator engaged the clerk in a discussion regarding what the clerk needed so that he could “burn up” his stamps. The clerk stated he could use Red Bull, regular size. The investigator asked if the clerk wanted cases and the store employee indicated he would take whatever the investigator could get. The investigative report states the investigator told the clerk he would go and get the items. Later the same date in Exhibit C, the investigative report indicates the “Clerk went from sales floor to behind counter. I placed cases of Red Bull on counter. Clerk opened register and took money from register drawer. Clerk handed me cash from register drawer. I said thanks and left without further conversation. Clerk exchanged Three (3) 12-pack cases [36 total - 8.4 oz. cans] of Red Bull for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash. Red Bull + bottle deposits totaled

5 U.S.C. § 552 (b)(6) & (b)(7)(C) which were purchased with SNAP benefits.” Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash is a clear violation of the regulations at 7 CFR § 271.2.

In Exhibit D, the USDA investigator again asked the store clerk what he needed and stated that he had “stamps still and never use them all.” The report stated the clerk stated “I’ll take Red Bull.” The clerk also reminded the clerk of the prior deal in Exhibit C. The clerk indicated he was aware the Red Bull would be exchanged for SNAP benefits and cash when he stated “yeah...I just don’t do it on here (pointing to EBT terminal), but I’ll always do Red Bull.” The investigator then advised that he would go get Red Bull and left. Exhibit E states: “I placed cases of Red Bull on counter. Clerk opened register and took money from register drawer. Clerk handed me cash from register drawer. Particularly, the clerk took the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) bills from under the change tray in the register drawer and the other bills from their respective slots in the cash drawer. I told clerk to “stay cool” and left. Clerk exchanged Four (4) 12-pack cases [48 total - 8.4 Oz. cans] of Red Bull for 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Red Bull + bottle deposits totaled 5 U.S.C. § 552 (b)(6) & (b)(7)(C) which were purchased with SNAP benefits.”

While the owner’s affidavit maintains the clerk refused to traffic, the record supports that the store clerk did intentionally purchase products originally purchased with SNAP benefits in exchange for cash, a regulatory violation. The record supports that the investigator stated the Red Bull would be purchased with SNAP benefits, and that he would return with the Red Bull to be exchanged for cash by the store employee. The record supports that Red Bull products acquired with SNAP benefits valued at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were exchanged by store personnel for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash. This meets the definition of trafficking. A review of the documentation in this matter has yielded no indication of error or discrepancy in the report findings. The investigative record is specific and thorough with regard to the dates of the violations, the specific facts related to the trafficking incidents, and in all other critically pertinent detail.

CIVIL MONEY PENALTY

The regulations at Section 278.6(i) specify the four criteria for a firm’s eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. A firm must submit a timely request for a civil money penalty that shows substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. The record supports that Appellant did not submit evidence for a CMP in lieu of trafficking, and that Retailer Operations properly applied the applicable regulations.

CONCLUSION

The review of the evidence supports that program violations did occur at Appellant. The investigative record is specific and accurate with regard to the dates of the violations. The intentional purchase by store personnel of products originally purchased with SNAP benefits in

exchange for cash is a violation of the regulations at 7 CFR § 271.2. The contentions advanced do not constitute by a preponderance of the evidence grounds for dismissal of the trafficking charges. The permanent disqualification of Appellant as a SNAP retail food store is sustained.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and to 7 CFR § 279.7 of the regulations with respect to applicable rights to judicial review of this determination. 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 where Appellant's owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

M. Viens
Administrative Review Officer

February 23, 2018