

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

Green Miles Convenience,

Appellant,

v.

Case Number: C0202457

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of Green Miles Convenience 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 Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against Green Miles 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

The USDA conducted an investigation of the compliance of Green Miles Convenience with Federal SNAP law and regulations from September 2017 through October 2017. The investigation report documents that a clerk at Green Miles Convenience exchanged SNAP benefits for cash during two (2) undercover compliance visits. The Retailer Operations Division determined that this clerk was the owner of the store based on identification contained in the store application casefile. The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR § 271.2.

As a result of the evidence compiled from this investigation, the Retailer Operations Division charged the Appellant, in a letter dated January 11, 2018, 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 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).

In response to the charge letter, the Appellant mailed a letter dated January 17, 2018 that was received by the Retailer Operations Division on January 23, 2018. The response letter stated that the Appellant store owner never intended to violate the regulations and would not have done so had he fully understood the SNAP rules. The Appellant did not request a trafficking CMP under 7 CFR § 278.6(i).

After giving consideration to the evidence and the Appellant's response, the Retailer Operations Division informed the Appellant, by letter dated February 13, 2018, that Green Miles Convenience was permanently disqualified from participation in the SNAP. The letter also stated that the Appellant was not eligible for a trafficking CMP 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 February 21, 2018, the Appellant requested an administrative review of the permanent disqualification determination. The request for administrative review was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means an 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 AND REGULATIONS

The controlling law in this matter is covered in the Food & 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 § 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, in part, as:

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 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\(b\)\(1\)](#).** [Emphasis added.]

(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. [Emphasis added.]

SUMMARY OF CHARGES

During an investigation from September 2017 through October 2017, the USDA conducted six compliance visits at Green Miles Convenience. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated January 11, 2018. The investigation report included Exhibits A through F which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations occurred during all six (6) compliance visits. During two (2) of the compliance visits, a person identified by the Retailer Operations Division as the store owner exchanged cash for SNAP benefits as documented by Exhibits E and F.

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its reply to the charge letter and its request for administrative review, in relevant part:

- The store owner stated he never intended to violate the regulations and would not have done so had he fully understood the SNAP rules.
- The store was never notified of the violations in advance of the permanent disqualification decision.
- The USDA failed to indicate any established pattern of abuse of SNAP benefits.
- The store has instituted a number of safeguards and procedures to insure strict compliance with SNAP regulations. These procedures include separate logging and verification of the eligibility of items submitted for purchase prior to the SNAP transaction.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Authorization History

The Food & Nutrition Service (FNS) authorized Green Miles Convenience for the SNAP on April 3, 2017. The store owner signed the SNAP application for the store on March 6, 2017 and acknowledged that the owner was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits for ineligible non-food items.

Investigation Report

The Appellant does not refute the findings of the investigation report. A full review of the case record shows that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted under the direction of a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no error or discrepancy. 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 documentation presented by the Retailer Operations Division establishes by a preponderance of the evidence that the violations as reported occurred at the Appellant store.

Prior Notice

The Appellant states that the store never received prior notice that SNAP violations were occurring. Regarding this contention, 7 CFR § 278.6(e)(7) states that FNS will “send the firm a warning letter if violations are too limited to warrant a disqualification.” However, trafficking transactions are not considered to be “violations that are too limited to warrant a disqualification.” Trafficking in SNAP benefits is an extremely serious violation and both 7 U.S.C. § 2021(b)(3)(B) and 7 CFR § 278.6(e)(1)(i) state that a **first time** violation warrants a permanent disqualification.

Pattern of Abuse

The Appellant states that the Retailer Operations Division failed to indicate any established pattern of abuse of SNAP benefits. Regarding this contention, a permanent disqualification for trafficking does not require a “pattern of abuse.” Even a **single** trafficking transaction warrants a permanent disqualification under both 7 U.S.C. § 2021(b)(3)(B) and 7 CFR § 278.6(e)(1)(i)

Intent to Violate

The Appellant contends that the firm or its employees did not intend to violate any SNAP regulations. In response to this contention, please note that the definition of trafficking contained in the SNAP regulations at 7 CFR § 271.2 does not require an element of intent on the part of the violator. Therefore, whether or not the Appellant firm or its employees intended to violate SNAP regulations by exchanging cash for SNAP benefits is irrelevant.

Corrective Action

The Appellant states that the store has instituted a number of safeguards and procedures to insure strict compliance with SNAP regulations. These procedures include separate logging and verification of the eligibility of items submitted for purchase prior to the SNAP transaction.

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is limited to what circumstances existed at the time that was the basis of the Retailer Operations Division's action. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that a store may 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 assessment 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 does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

The Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i) even though it was informed of the right to do so in the charge letter. SNAP regulations at 7 CFR § 278.6(b)(2)(iii) 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 7 CFR § 278.6(b)(1), the firm **shall not be eligible** for such a penalty." [Emphasis added.]

Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program prior to the violations. Therefore, the Retailer Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

The SNAP regulation at 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 “the buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits ... 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, there is no question that trafficking violations did occur during a USDA investigation. Based on the analysis above, the decision to impose a permanent disqualification against Green Miles Convenience, Appellant, is sustained.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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.

RONALD C. GWINN
Administrative Review Officer

April 12, 2018