

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

**Lucky 7 Discount Store,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0162012**

**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<sup>1</sup> was properly imposed against Lucky 7 Discount Store (hereinafter “Lucky 7 Discount Store” and/or “Appellant”) and its owners of record, by the Retailer Operations Division of the FNS.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a permanent disqualification against Lucky 7 Discount Store in a letter dated March 16, 2018, further denying the imposition of a civil money penalty (CMP) in lieu of that permanent disqualification.

**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.

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<sup>1</sup> Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

## CASE CHRONOLOGY

In a letter dated February 21, 2018, the Retailer Operations Division informed Lucky 7 Discount Store that it was charged with violating the terms and conditions of the SNAP regulations based on a report titled “Lucky 7 Discount Store Investigative Report/Findings/Transactions”. The report recounts details of an investigation conducted by the Texas (TX) Health & Human Services Commission, Office of Inspector General wherein SNAP violations are detailed to have occurred at Lucky 7 Discount Store with the exchange of SNAP benefits for items ineligible to be purchased with SNAP benefits. The specific items exchanged included a controlled substance, identified as K-2 Diablo and Platinum Botanical Incense (K-2), cartons of cigarettes, and rolling papers.

The exchange of K-2 reported to have occurred twice on February 20, 2013, and once on May 13, 2013 constitutes the exchange of a controlled substance for SNAP benefits which is defined in the SNAP regulations as **trafficking**. The exchange of tobacco products and rolling papers represent the exchange of ineligible items.

The Retailer Operations record reveals that no reply was received following delivery of the letter of charges on February 23, 2018, therefore the Retailer Operations Division advanced a letter dated March 16, 2018 permanently disqualifying Appellant from participation as a SNAP authorized retailer and denying the imposition of a CMP in lieu of that permanent disqualification.

In a letter dated March 27, 2018, received in the offices of the Administrative Review Branch on April 2, 2018, Appellant, through a self-identified son<sup>2</sup> of the owner requested an administrative review of the permanent disqualification imposed by the Retailer Operations Division. The appeal was granted as affirmed in a letter dated April 6, 2018, evidenced to have been signed for by “Flores” at Appellant’s address of record on April 9, 2018.

## STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an 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 matter asserted is more likely to be true than not true.

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<sup>2</sup> The record does not include an authorization of representation document supporting the allowance of the exchange of information directly with the requestor therefore the Final Agency Decision is being addressed to the owners of record only. Attempts to contact the self-identified son through electronic mail and telephone to obtain appropriate representation materials were unsuccessful.

## CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)<sup>3</sup>, 7 USC 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR).<sup>4</sup> Part 278.6(e)(1)(i) establishes 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 as defined in Part 271.2.

7 U.S.C. § 2021(b)(3)(B) states, in relevant 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 § 278.2(a) “Use of Coupons [Benefits]”, states, in relevant part, “Coupons may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food.” [Emphasis Added]

7 CFR §278.6(a) “Authority to disqualify or subject to a civil money penalty.” reads, in relevant part, FNS may disqualify any authorized retail food store or authorized wholesale food concern from further participation in the program if the firm fails to comply with the Food Stamp Act of 1977, 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 investigation, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system, or the disqualification of a firm from the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), as specified in paragraph (8) of this section...”

7 CFR §278.6(e)(1)(i) reads, in relevant part, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2.”

7 CFR §278.6(e)(3) reads, in relevant part, Disqualify the firm for 3 years if it is to be the first sanction for the firm and the evidence shows that; ... (ii) Any of the situation described in paragraph (2) of this section occurred and FNS had not previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating the regulations,...

7 CFR §278.6(e)(2)(i) reads, in relevant part, “Disqualify the firm for 5 years if it is to be the firm’s first sanction...and the evidence shows that: (i) It is the firm’s practice to sell expensive or conspicuous nonfood items, cartons of cigarettes, or alcoholic beverages in exchange for food coupons;...”

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<sup>3</sup> Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment through P.L. 113-79, enacted February 7, 2014.

<sup>4</sup> Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at [https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab\\_02.tpl](https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl)

7 CFR §278.6(e)(5) reads, in relevant part, “Disqualify the firm for 6 months if it is to be the first sanction for the firm and the evidence shows that personnel of the firm have committed violation such as but not limited to the sale of common nonfood items due to carelessness or poor supervision by the firm’s ownership or management.”

Trafficking is defined, in part, in 7 CFR §271.2, as:

7 CFR § 271.2 specifies, in relevant part, that “Trafficking means: ...

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 or in complicity or collusion with others, or acting alone:

The exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code, for SNAP benefits; [Emphasis added]

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;

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

Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.

Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card 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 § 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.” [Emphasis added]

7 CFR § 278.6(i) states, in relevant 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...In determining the minimum standards of

eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in §278.6(i)(1); and

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in §278.6(i)(2); and

Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations...

[Emphasis added]

### **APPELLANT'S CONTENTIONS**

In the letter dated March 27, 2018, Appellant, through a self-identified son, provides that he would "request an opportunity to explain the incident" referring to the February 21, 2018 letter of charges as a "questionnaire", and describing discussion with "a gentleman that requested the questionnaires" ... [wherein] "he explained that it is simply a procedure that take[s] place in a timely manner and if I wanted to object the current result of misunderstanding then I should write a letter appealing the result".

The preceding represents only a brief 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.

### **SUMMARY OF THE CHARGES**

USDA, in cooperation with State Agencies enter into State Law Enforcement Bureau (SLEB) agreements supporting investigations of the compliance of retail food stores, in part, to ascertain the nature and extent of SNAP violations that may be occurring. In the instant case the TX Health & Human Services Commission reports that an employee of Appellant named 5 U.S.C. § 552 (b)(6) & (b)(7)(C), exchanged SNAP benefits for a controlled substance identified as K-2 Diablo and Platinum Botanical Incense on three (3) separate occasions specifically recounted as twice on February 20, 2013 and once on May 13, 2013. The administrative record also includes an "Investigative Report" OIG case number 17675-16 wherein details of Search and Arrest Warrants substantiate violation of TX Human Resource Code, Section 33.011, Prohibited Activities, citing a total fraud 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at Lucky 7 Discount Store.

### **ANALYSIS AND FINDINGS**

That SNAP benefits are not for the purchase of non-food items is clear in the "Act" and in the SNAP regulations, with noted exceptions, such as seeds used to grow food, and hunting

equipment in remote areas of Alaska. This and other rules governing SNAP were provided to Appellant upon initial SNAP authorization in May of 2012, and have been restated in reauthorization materials and various retailer notifications routinely provided to all SNAP authorized retailers.

The permanent disqualification being imposed upon Appellant results from three (3) reported instances of trafficking. Trafficking is the most egregious of SNAP violations and specifically subject to the imposition of permanent disqualification on the **first offense** as indicated in the Food and Nutrition Act of 2008 (Act). 7 U.S.C. § 2021(b)(3)(B) states, in relevant 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..." The Act is further supported with SNAP regulations at 7 CFR § 278.6(e)(1)(i) which reads, in relevant part, "FNS **shall** disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." [Emphasis Added].

The administrative record evidences three (3) instances of trafficking, conducted by the one (1) employee at Lucky 7 Discount Store, who was subsequently arrested and signed a Pre-Trial Diversion Contract on October 8, 2015.

It is further noted that, at a minimum, a six-month period of disqualification or a civil money penalty in lieu thereof would have resulted in the absence of SNAP benefit trafficking in the present case, in accordance with & CFR § 278.6(e); however, though Appellant is likewise liable for this lesser sanction, it is merely subsumed under the precedent sanction of permanent disqualification.

**No Further Information or Materials Presented for Consideration:**

As of June 28, 2018 there has been no further contact or submission of materials for consideration in the instant case by either the owners of record or the self-identified son who filed the request for appeal.

**Hardship Civil Money Penalty:**

7 CFR §278.6(f)(1) of the SNAP regulations provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable SNAP authorized firm in the area to meet their needs. However, this regulation also sets forth the following specific exception to assessments: "**A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.**" Therefore, because the matter at hand involves a permanent disqualification, this civil money penalty provision is not applicable in the present case, and there is no comparison of similar firms made.

### **Trafficking Civil Money Penalty:**

The March 16, 2018 determination letter advised Appellant of its ineligibility for the imposition of a trafficking civil money penalty in lieu of permanent disqualification as allowed in 7 CFR § 278.6(i) based on failure to either request such a penalty; or, submit **sufficient evidence in a timely manner** to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of SNAP.

On review it is agreed that the Retailer Operations appropriately found Appellant ineligible for the imposition of a CMP in lieu of permanent disqualification as the record includes no reference to the alternative sanction or materials referencing the establishment and implementation of an effective compliance policy to prevent violations of SNAP.

### **CONCLUSION**

Based on a review of the evidence in this case, it appears that the program violations at issue did, in fact, occur as charged. As noted previously, the charges of violations are based on the findings of an official TX Health & Human Services Commission investigation and the evidence gathered as a result of that investigation. A full review of the materials reveals no errors or discrepancies.

The materials recount trafficking (the exchange of a controlled substance) that is clearly a violation of the SNAP regulations. The decision to impose a permanent disqualification against Lucky 7 Discount Store is sustained.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

NANCY BACA-STEPAN  
Administrative Review Officer

June 28, 2018