

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

Mid City Mart,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0235065

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 the permanent disqualification of Mid City Mart (Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

ISSUE

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

AUTHORITY

7 USC § 2021 and the 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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period from October 3, 2020, through November 3, 2020. The investigation report documents that personnel at Mid City Mart exchanged cash for merchandise purchased with SNAP benefits. 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 the investigation, the Retailer Operations Division informed Appellant, in a letter dated February 2, 2021, that it was charged with violating the terms and conditions of the SNAP regulations. Appellant did not reply to the charge letter.

After considering the evidence, the Retailer Operations Division notified Appellant in a letter dated February 16, 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 further stated that Appellant was not eligible for a trafficking CMP because it failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

Appellant, through counsel, appealed the Retailer Operations Division's determination and requested an administrative review by letter dated February 25, 2021. The appeal was granted.

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, would 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 contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) and (e)(1) 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 SNAP benefits.

7 USC § 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, in part, 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 § 271.2 defines trafficking, in part, 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.
- (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 § 278.6(a) states:

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) reads, in part:

FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

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.]

INVESTIGATION DETAILS

A USDA investigator conducted six compliance visits at Mid City Mart from October 3, 2020, through November 3, 2020. The investigation report dated November 21, 2020, was provided to the Appellant as an attachment to the charge letter, and included Exhibits A through F which provide details on the results of each compliance visit. The investigation report documents that a SNAP violation was committed during one of the compliance visits.

The investigation reported that personnel exchanged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash for three cases of Red Bull that was purchased with 5 U.S.C. § 552 (b)(6) & (b)(7)(C) SNAP benefits (Exhibit D). Transactions of this nature are referred to in the regulations as “trafficking”. The investigator’s narrative in Exhibits D documents that the clerk was made aware that the beverages were purchased with SNAP benefits at another store. The narratives documented that the clerk told the investigator to purchase the Red Bull in order to receive cash off the EBT card.

APPELLANT’S CONTENTIONS

In its February 25, 2021, administrative review request, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- Appellant was out of town when the charge letter was delivered.
- Appellant never had any prior issues and this is the first offense.
- The owner has always stressed to the clerks that they should strictly follow SNAP regulations.
- While none of the clerks have recollection of this incident, the owner cannot outright deny that it actually occurred.
- Appellant would like to be considered for a civil money penalty in lieu of a permanent disqualification.

The preceding may represent only a brief summary of the Appellant’s contentions presented 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.

ANALYSIS AND FINDINGS

A full review of the case record shows that the charges of violations are based on the findings of a formal USDA investigation. A complete review of this documentation has yielded no error or discrepancy. The documentation presented by the Retailer Operations Division establishes by a preponderance of the evidence that the violation as reported occurred at Appellant. 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. The regulations do not allow for lesser period of disqualification for a trafficking violation.

Ownership Involvement

Appellant states that the owner was not involved with the transaction but that Appellant cannot deny that the transaction occurred. Although ownership was allegedly not involved in the violations, it cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. Regardless of whom the ownership of a store may utilize to handle store business, the ownership is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Ownership signed the FNS application to become a SNAP authorized retailer on July 2, 2017, which 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.”

No Previous Violations

Counsel contends that it is Appellant’s first program violation. A record of participation in the SNAP with no previously documented instance of violations does constitute grounds for dismissal of the current charges of violations for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduced a sanction based upon a lack of prior violations by a firm and its owners.

Civil Money Penalty

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR § 278.6(i). Appellant was informed that it would need to provide both the request and supporting evidence within ten calendar days of receiving the charge letter, and that no extension of time could be granted for making the request or for providing the required evidence. Appellant did not timely request a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i).

With its administrative review request, Appellant through counsel, requests a CMP. There was no evidence submitted that documents that Appellant had an effective written compliance policy

and training program at the time of the violations. 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 record supports the intentional violative exchange by store personnel of cash for items purchased with SNAP benefits that meet the regulatory definition of trafficking conducted during a USDA investigation. The denial of a trafficking CMP is in accordance with the applicable regulations. The permanent disqualification of Appellant as a SNAP retail food store is therefore sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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 the 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

April 16, 2021