

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

Red Devils Drive-Thru,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0214405

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Red Devils Drive-Thru (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the program, 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 Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against Appellant in a letter dated July 8, 2020.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provides 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 Ohio Department of Public Safety Enforcement Agents conducted an investigation of the compliance of Red Devils Drive-Thru with Federal SNAP law and regulations from January 17, 2019 through January 22, 2019. The investigation report documents the following:

1. On January 17, 2019, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), provided 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash to a confidential informant (CI) in exchange for a SNAP EBT card with a balance 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The CI provided the PIN Number to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at the time of the exchange. Later that day, an unknown individual used the EBT card and PIN Number provided to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to process a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at Red Devils Drive-thru.
2. On January 18, 2019, an unknown individual used the EBT card and PIN Number provided to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to process a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
3. On January 19, 2019, an unknown individual used the EBT card and PIN Number provided to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to process a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at Red Devils Drive-thru.
4. On January 20, 2019, an unknown individual used the EBT card and PIN Number provided to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to process a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at Red Devils Drive-thru.
5. On January 20, 2019, an unknown individual used the EBT card and PIN Number provided to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to process a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
6. On January 20, 2019, an unknown individual used the EBT card and PIN Number provided to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to process a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
7. On January 20, 2019, an unknown individual used the EBT card and PIN Number provided to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to process a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
8. On January 22, 2019, an unknown individual used the EBT card and PIN Number provided to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to process a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at Red Devils Drive-thru, which depleted the card's entire balance.

As a result of evidence compiled from this investigation, the Retailer Operations Division informed the Appellant, in a letter dated June 18, 2020, that it was charged with violating the terms and conditions of the SNAP regulations. The letter stated, in relevant part, that:

Your firm is charged with trafficking, as defined in Section 271.2 of the SNAP regulations. As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for the trafficking violation(s) ... is permanent disqualification.

The charge letter also stated that:

The SNAP regulations also provide that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$32,000.00 in lieu of permanent disqualification of a firm for trafficking. The SNAP regulations, Section 278.6(i), list the criteria that you must meet in order to be considered for a CMP. If you request a CMP, you must meet each of the four criteria listed and provide the documentation as specified within 10 calendar days of your receipt of this letter.

In email correspondence dated June 27, 2020, Appellant replied to the charge letter and generally stated that agents from the Ohio Investigative Unit/Ohio Department of Public Safety Enforcement notified them about improper usage of an EBT card. They claimed I purchased a SNAP card from someone and used it. This did not occur and I have been fighting to clear my name since. I hired an attorney and I am in the process of clearing this false accusation. On the first court date set, my lawyer was present but the Ohio Investigative Unit could not proceed as their supposed “witness” was not there and they had no evidence against me. I later found out their “witness” was an anonymous phone call from a disgruntled customer who attempted to sell me her food stamps but I immediately rejected. Please do not make any decisions regarding my SNAP permit until my court case is over because I am confident that it will be dismissed.

After considering the Appellant’s replies and the evidence in the case, the Retailer Operations Division issued a determination letter dated July 8, 2020. The determination letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that the Retailer Operations Division considered the Appellant’s eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations. The Retailer Operations Division determined that the Appellant was not eligible for the trafficking CMP because the Appellant 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.

In a letter dated July 16, 2020, the Appellant requested an administrative review of the Retailer Operations Division’s determination. The appeal 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 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, might 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 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). In particular, 7 CFR § 278.6(a) and (e)(1)(i) establishes 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, inter alia: “... 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, inter alia: “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, in complicity or collusion with others, or acting alone;...”

7 CFR § 278.6(e)(1)(i) states, 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(a) states, inter alia: “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*...” [Emphasis added]

7 CFR § 278.6(f)(1) states, inter alia: “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to [SNAP] households because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices... A civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a permanent disqualification.”

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).”

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.”

SUMMARY OF THE CHARGES

During an on-site investigation, the Ohio Department of Public Safety Enforcement Agents conducted compliance visits at Appellant from January 17, 2019 through January 22, 2019. The investigation report documents the following:

1. On January 17, 2019, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), provided 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash to a confidential informant (CI) in exchange for a SNAP EBT card with a balance 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The CI provided the PIN Number to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at the time of the exchange. Later that day, an unknown individual used the EBT card and PIN Number provided to

- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to process a transaction
5 U.S.C. § 552 (b)(6) & (b)(7)(C) at Red Devils Drive-thur.
2. On January 18, 2019, an unknown individual used the EBT card and PIN Number provided to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to process a transaction
5 U.S.C. § 552 (b)(6) & (b)(7)(C).
 3. On January 19, 2019, an unknown individual used the EBT card and PIN Number provided to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to process a transaction
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5 U.S.C. § 552 (b)(6) & (b)(7)(C).
 7. On January 20, 2019, an unknown individual used the EBT card and PIN Number provided to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to process a transaction
5 U.S.C. § 552 (b)(6) & (b)(7)(C).
 8. On January 22, 2019, an unknown individual used the EBT card and PIN Number provided to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to process a transaction
5 U.S.C. § 552 (b)(6) & (b)(7)(C) at Red Devils Drive-thur, which depleted the card's entire balance.

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review and in subsequent correspondence dated, in relevant part:

1. To date no judgement has been determined in a court of law that the accusations against my business are valid and true.
2. I believe that the confidential informant is likely a disgruntled former customer trying to slander my name and my place of business.
3. The charges made on the times in question were not generated falsely, but were created by valid store purchases made by the SNAP recipient. No evidence of illegal transactions occurring has been submitted for myself to disapprove otherwise. I know this to be true because I do not receive SNAP pins from my customers. The terminal used has a long enough cable for customers to place his or her pin in the machine themselves as they should be doing according to the rule and regulations instituted by the program.
4. The other four charges of trafficking made at other locations were not made by me or any of my employees.

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

With regard Appellant's contentions, it is important to note that a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. There is no provision in the Act, regulations, or agency policy that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees. Moreover, as owner of the store, Appellant is liable for all violative transactions handled by either paid or unpaid store personnel. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper 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 Stamp Act and the enforcement efforts of the USDA. Therefore, Appellant's contentions do not constitute valid grounds for dismissal of the current charges of trafficking or for mitigating the impact of those charges.

The investigative record identifies ownership as participating in the purchase of the SNAP EBT card in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash. This transaction is defined in SNAP regulations as trafficking. Additionally, it is important to note that since the EBT card was purchased by the owner, as documented by the investigative report, all documented transactions completed with the purchased EBT card are identified as trafficking transactions. It is irrelevant as to who had possession of the card during the subsequent seven transactions after purchase, Appellant is still held liable as he illegally purchased the EBT card from the confidential information.

It is also important to note that the administrative sanctions at issue in this case are not contingent upon the success or failure of the criminal case in Ohio State court. Appellant claims the criminal case has been delayed due to the COVID-19 pandemic, and that the witness for the prosecution failed to appear in court. Neither issue is relevant to this administrative determination process. FNS has the authority to proceed with administrative action based on the available evidence. It is the determination of this review that the Ohio Public Safety investigative report is credible evidence that trafficking occurred at Red Devils Drive-thru. The store owner has provided no evidence to convincingly refute these charges. The penalty for trafficking SNAP benefits is permanent disqualification.

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. 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 compliance policy to prevent SNAP violations. Appellant was advised of this provision in the charge letter of June 18, 2020, which also advised that documentation of eligibility for that alternative sanction had to be provided within a specific time limit. Such documentation must establish that there was an effective compliance policy and training program and that both were in effect and implemented *prior* to the occurrence of violations. In the absence of any such documentation, Retailer Operations Division did not impose a civil money penalty in lieu of permanent disqualification.

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

As previously stated, 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 or selling 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 review of the evidence in this case, there is no question that program violations did occur during an Ohio Department of Public Safety Enforcement investigation. All transactions cited in the letter of charges were conducted or supervised by an Agent with the Ohio Department of Public Safety Enforcement and all are thoroughly documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and accurate with regard to the dates of the SNAP violations and in all other critically pertinent details. The decision to impose a permanent disqualification against Red Devils Drive-Thru is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to 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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If the USDA receives such a request, it will

seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

Monique Brooks
ADMINISTRATIVE REVIEW OFFICER

November 23, 2020