

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

R&R Chevron,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0191579

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 Program¹ (SNAP) was properly imposed against R&R Chevron (hereinafter “R&R Chevron” or “Appellant”), and its owners of record, by the Retailer Operations Division.

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 SNAP when it imposed a Permanent Disqualification against R&R Chevron in a letter dated September 25, 2017.

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

¹ 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

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period between October 25, 2016 and January 24, 2017. As a result of the investigation a report titled “USDA-FNS Report of Positive Investigation” (hereinafter Investigative Report) number LA08914, dated January 25, 2017 was provided to the Retailer Operations Division for consideration.

The Investigative Report documents three (3) visits to Appellant by a USDA Investigator.

- In Exhibit A, dated October 25, 2016, an unidentified female clerk is reported to have refused to allow the exchange of SNAP benefits for a tire repair kit or cash.
- In Exhibit B, dated November 15, 2016, the same unidentified female clerk from Exhibit A is reported to have refused to allow the exchange of SNAP benefits for a lighter or cash. However, in continuing conversation that same unidentified female clerk is reported to have offered to conduct a “60/40 split” with the USDA Investigator, describing a scheme involving the purchase of SNAP eligible foods at an alternate SNAP retailer, to be exchanged for cash. The report documents the USDA Investigator took a handwritten document from the clerk listing three (3) items: “Milk gal whole; Hamburger; helper beef pasta”; he then made the arranged SNAP purchase 5 U.S.C. § 552 (b)(6) & (b)(7)(C); and, returned to the clerk. The clerk is then reported to have given the USDA Investigator 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash; and, divulged that her name was 5 U.S.C. § 552 (b)(6) & (b)(7)(C). She is also documented to have conveyed to the USDA Investigator that there was another employee that would conduct the same kind of exchange. The charge letter identified the exchange of food items purchased with SNAP with a value of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash by the clerk, as trafficking as described in 7 CFR § 271.2(5).
- In Exhibit C, dated January 24, 2017, the clerk, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (same as in Exhibits A and B) was observed by the USDA Investigator walking “to the other side of the store”. The USDA Investigator approached her, revealing availability of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) SNAP for cash exchange. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is reported to have indicated she would exchange 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash for the benefits, and, to have proceeded to have made telephonic arrangements for “her sister to go with me to pick things up”. The arrangements involved an hour’s wait for the sister to arrive . The report indicates the USDA Investigator stated he “might not be able to make it back but would try, and left the premises.”

In a letter dated August 11, 2017 the Retailer Operations Division informed R&R Chevron that it was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 271 – 282, specifically 7 CFR § 271.2 and 7 CFR § 278.6(e)(1).

The letter of charges, which included a redacted copy of the Investigative Report includes details of each visit as documented in Exhibits A through C. Appellant was charged with trafficking and subject to permanent disqualification.

The letter of charges further provides Appellant information regarding the potential for the imposition of a trafficking civil money penalty (CMP) in lieu of permanent disqualification, delineating the conditions for the consideration of that alternative sanction.

The Retailer Operations Division record indicates that in written response to the letter of charges Appellant, through counsel, bifurcated the request for a trafficking CMP in lieu of permanent disqualification from the issue of trafficking as it related to the Investigative Report.

The record indicates that a request for Freedom of Information Act (FOIA) was made on April 7, 2017, and fulfilled with a letter to counsel dated May 16, 2017. Appellant, through counsel, provided written response to the Retailer Operations Division dated August 11, 2017. The record documents Retailer Operation Division's consideration of Appellant's responses.

In a letter dated September 25, 2017, the Retailer Operations Division informed R&R Chevron, through counsel, that it was permanently disqualified from participation as a retail store in the SNAP; and, that it was not eligible for a trafficking CMP in lieu of the permanent disqualification because it failed to submit sufficient evidence to demonstrate that an effective compliance policy and program had been established to prevent violations of SNAP.

Appellant, through counsel, submitted a request for administrative review, appealing the Retailer Operations Division's assessment via letter dated September 29, 2017. The appeal was granted as affirmed in a letter dated October 5, 2017.

In materials dated October 31, 2017 Appellant, through counsel, submitted a second FOIA request. The administrative review was pended to allow for response to the FOIA request; and, an extension was granted for the presentation of final contentions.

In a "Brief in Support of Appellant's Request for Review of Permanent Disqualification" dated January 4, 2018, counsel, on behalf of Appellant, provided its contentions for consideration in the administrative review. That material was forwarded to the Retailer Operations for consideration.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)², 7 USC § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR).³ 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 relative 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 § 278.2(a) specifies, in relevant part, that “Coupons [benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food.” Further, the citation specifies that “Coupons [benefits] may not be accepted in exchange for cash...or for any other nonfood use.”

7 CFR § 278.6(e) states, in relevant part, “Penalties. FNS shall take action as follows against any firm determined to have violated the Act or regulations...”

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.” {Emphasis Added}

7 CFR § 271.2 specifies, in relevant part, that “Trafficking 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 or 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 othe 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

² 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, further amended through P.L. 113-79 effective February 7, 2014.

³ 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

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 (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...”

APPELLANT’S CONTENTIONS

In a “Brief in Support of Appellant’s Request For Review of Permanent Disqualification” dated January 4, 2018 Appellant:

- Seeks a reversal of the September 25, 2017 decision to permanently disqualify R&R Chrvron and its principals.

- Explains that Appellant has operated as a “Retail Food Market” for 18 years, with a handful of employees for which a training was established to support compliance with SNAP regulations.
- Explains that the geographic area where Appellant operates has a high poverty rate with a significant population participating in SNAP.
- Denies the allegations of trafficking asserting that Appellant has a policy against SNAP violations which is affirmed with two (2) of the three (3) investigative transactions involving refusal to exchange SNAP for cash or ineligible items.
- Indicates that the ALERT system has incorrectly flagged transactions as the result of a difference in business operations.
- Contends that trafficking, as described in the letter of charges and Investigative Report, were conducted by an employee that was not acting within the scope of her employment when she took money from her purse to buy the groceries from the USDA Investigator. Therefore, Appellant should not be held liable for the actions of said employee despite the occurrence of the violations on Appellant premises.
- Contends that the SNAP training materials, signed and dated by the accused violating clerk on March 20, 2015, are published by the USDA and therefore must be considered to meet the four (4) criterion required for the imposition of a CMP in lieu of a permanent disqualification.

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

ANALYSIS AND FINDINGS

Appellant’s having operated as a SNAP authorized retailer since August 2, 2010⁴ without incidence of recorded SNAP violation does not serve to mitigate or reverse the decision by the Retailer Operations Division to impose a permanent disqualification based on the available evidence of trafficking.

Trafficking is the most egregious of SNAP violations. The Food and Nutrition Act of 2008 at 7 U.S.C. § 2021(b)(3)(B) states, in relative part, “...a disqualification under subsection (a) shall be...**permanent** upon...the **first occasion** ... of ...**trafficking** ...” [Emphasis Added]

⁴ The official FNS records indicate that Appellant was initially authorized on August 2, 2010.

This is then supported in relevant SNAP regulation 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”.

Although it is understood that Appellant operates with only a handful of employees, in a high poverty area, these considerations are not a basis for mitigation or reversal of the current charges. The SNAP regulations at 7 CFR §278.6(f)(1) provide 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.

Denial of Allegations:

Appellant asserts that trafficking did not occur at Appellant because a policy against SNAP violations is in place, evidenced with the refusal by the clerk to exchange cash as recounted in Exhibits A and B of the Investigative Report and by the initialed and signed copy of the “Training Guide for Retailers” provided with the trafficking CMP request.

Notwithstanding the documented denial of the clerk to exchange cash for SNAP in Exhibit A, and initially in Exhibit B, the record recounts a continuing discussion between the clerk and the USDA Investigator in which the clerk defines a scheme to exchange cash for articles purchased at an alternative SNAP authorized firm with SNAP benefits, this is trafficking. The clerk was clearly on duty at the time of the arrangements, and the USDA Investigator returned to Appellant to complete the trafficking transaction. The clerk is a representative of the store irrespective of where it is reported she obtained the money to provide to the USDA Investigator. The arrangement and exchange of food items known to have been purchased with SNAP for cash was clearly made on store premises, and the clerk who conducted the SNAP trafficking was working at the time of the transaction thus she was a representative of the firm. If a representative of the firm commits trafficking on store premises while she is working there is a SNAP trafficking violation in accordance with 7 CFR § 271.2(5).

As a reminder the SNAP “Training Guide for Retailers”, page 20, of the materials provided with your request for review annotated by the employee who committed the trafficking states, in part, that:

As a store owner or operator, you are legally responsible not only for your own actions but for those of everyone who works in your store, whether or not they are paid. If you, your staff, your employees, or relatives redeem more SNAP benefits than your total food sales, sell ineligible items, accept SNAP benefits in payment for food sold to a SNAP household on credit, or buy or sell SNAP benefits, you will be disqualified from the Program and/or assessed a monetary penalty, and you may face criminal prosecution.

ALERT Flagging:

Appellant contends that the ALERT system has incorrectly flagged transactions as a result of a difference in business operation. This contention is discounted because the issue in the instant case relates to a USDA Investigation in which on-site in-person transactions are conducted. The ALERT system played no role in the determination by the Retailer Operations Division in the instant case.

Civil Money Penalty

The October 10, 2017 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 submit **sufficient** evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of SNAP.

In support of its request for a trafficking CMP Appellant, through counsel, provided a copy of the SNAP “Training Guide for Retailers” slightly revised April 2014, annotated with the initials “CA” from the page 1 Introduction through a 28th page wherein an employee signature is affixed.

Notably that material references a training DVD that was included in the authorization package addressed to the firm at initial SNAP retailer authorization; and, a website address where the training can be found on the Internet <http://www.fns.usda.gov/snap> .

The materials provided for consideration of the trafficking CMP did not reference or provide any compliance policy (Criterion 1); identifying its existence prior to the trafficking violations (Criterion 2). The materials identified as training (Criterion 3) in Appellant’s submission consist of the “Training Guide for Retailers” previously cited, which does not evidence any training provided to employees beyond the one (1) who initialed a document intended and addressed to Appellant ownership, not to the employees. directly. The materials provided do not evidence that Appellant 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 (Criterion 4). Therefore, the decision of Retailer Operations Division not to impose a civil money penalty in lieu of permanent disqualification is sustained as appropriate pursuant to 7 CFR §278.6(b)(1), 7 CFR §§278.6(b)(2)(ii), and 7 CFR §278.6(i).

CONCLUSION

Based on a review of the evidence in this case, it appears that the program violation occurred as charged. As noted previously, the charges of violations are based on the findings of an official USDA investigation and the evidence gathered as a result of that investigation.

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

January 26, 2018