

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

**Speedy Harvard Gas,**

**Appellant,**

**v.**

**Case Number: C0195956**

**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 Speedy Harvard Gas 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, when it imposed a permanent disqualification against Speedy Harvard Gas.

**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 Ohio Department of Public Safety conducted an investigation of the compliance of Speedy Harvard Gas with Federal SNAP law and regulations from January 2017 through April 2017. As a result of violations uncovered during the investigation, the Retailer Operations Division charged the Appellant store in a letter dated June 19, 2018 with trafficking in SNAP benefits, as defined in 7 CFR § 271.2(5) of the SNAP regulations. As provided by 7 CFR § 278.6(e)(1) of the SNAP regulations, the sanction for the trafficking violations noted in the charge letter is a permanent disqualification from the SNAP.

The charge 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). The charge letter was delivered via UPS on June 20, 2018. The Appellant did not respond to the charge letter.

After giving consideration to the evidence, the Retailer Operations Division informed the Appellant, by letter dated July 6, 2018, that Speedy Harvard Gas 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. The Appellant received the determination letter on July 9, 2018.

In a letter postmarked July 16, 2018, the Appellant, through counsel, 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:

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

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**

The Ohio Department of Public Safety conducted an undercover investigation at Speedy Harvard Gas from January 2017 through April 2017. The investigation report documents that:

- On April 6th, 2017, a store clerk knowingly exchanged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in food products previously purchased with SNAP benefits.
- On April 11th, 2017, the same clerk knowingly exchanged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in food products previously purchased with SNAP benefits.

As provided by 7 CFR § 278.6(e)(1) of the SNAP regulations, the sanction for the trafficking violations noted above is a permanent disqualification from the SNAP.

### **APPELLANT'S CONTENTIONS**

The Appellant, through counsel, made the following summarized contentions in request for administrative review, in relevant part:

- The firm has had no prior violations and the store owner was unaware of the employee's unauthorized conduct
- The store employee who committed the violations was fired.
- The store owner was out of the country from June 24, 2018 through July 9, 2018 and the employees failed to realize the critical nature of the charge letter and failed to inform the store owner. For this reason, the store owner failed to respond to the charge letter.
- But for this failure to respond, the store owner would clearly have been entitled to a CMP. The firm had instructed every employee as to the essential requirements of the SNAP. The business was unaware of the conduct, did not benefit from the conduct, did not authorize the conduct, was not involved in the conduct, and this is the first violation of the SNAP. Therefore a CMP should be available as an option.

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**

#### **Investigation Report**

A full review of the case record shows that the charges of violations are based on the findings of a formal State of Ohio investigation under a State Law Enforcement Bureau agreement with the USDA. The transactions cited in the letter of charges were conducted under the direction of a state investigator and are thoroughly documented. A complete review of this documentation has yielded no known 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.

## **Owner Accountability**

The Appellant store owner states she was not involved in the violations and was unaware of the violations. 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 owner of a store may utilize to handle store business, the owner is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store owners to disclaim accountability for the acts of persons whom the owners choose 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.

In addition, the owner signed the SNAP authorization application for the store on October 15, 2014 and acknowledged that she was aware of the SNAP regulations and understood those regulations. That application also 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.”

## **First Violation**

The Appellant notes that this is the firm’s first SNAP violation. With regard to this contention, 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 those charges. 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.

## **Corrective Action**

The Appellant states that the store has fired the employee who conducting the trafficking violations. With regard to this contention, 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 of the violations which form the basis of the Retailer Operations Division’s adverse 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 or will take place does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

## CIVIL MONEY PENALTY

The Appellant states it should be eligible for a trafficking CMP in lieu of a permanent disqualification. However, the Appellant did not 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.] There are no exceptions to this regulatory timeframe for requesting a trafficking CMP and providing the necessary supporting documentation.

Also, contrary to the Appellant’s assertion, 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. The criteria for a trafficking CMP in lieu of disqualification is defined under 7 CFR § 278.6(i) which reads, with emphasis added, in part:

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; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm ....

Regarding compliance policy standards, 7 CFR 278.6(i)(1) further states, with emphasis added, in part:

As specified in Criterion 1 above, in determining whether a firm has established an effective policy to prevent violations, **FNS shall consider written and dated statements** of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with this part 278 of current [SNAP] regulations .... As required by Criterion 2, **such policy statements shall be considered only if documentation is supplied** which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation. In addition, in evaluating the effectiveness of the firm's

policy and program to ensure FSP compliance and to prevent FSP violations, FNS may consider the following:

- (i) Documentation reflecting the development and/or operation of a policy to terminate the employment of any firm employee found violating FSP regulations;
- (ii) Documentation of the development and/or continued operation of firm policy and procedures resulting in appropriate corrective action following complaints of FSP violations or irregularities committed by firm personnel;
- (iii) Documentation of the development and/or continued operation of procedures for internal review of firm employees' compliance with FSP regulations ....

Regarding training program standards, 7 CFR 278.6(i)(2) further states, with emphasis in part:

A firm which seeks a civil money penalty in lieu of a permanent disqualification **shall document its training activity** by submitting to FNS its dated training curricula and records of dates training sessions were conducted; a record of dates of employment of firm personnel; and contemporaneous documentation of the participation of the violating employee(s) in initial and any follow-up training held prior to the violation(s).

Even if the Appellant had timely requested a trafficking CMP, the Appellant has not provided the above documentation required by regulations to support such a request. 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**

Trafficking is defined, in part, in 7 CFR § 271.2, as “intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food ....” 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.” 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 personnel at Speedy Harvard Gas conducted trafficking violations on two (2) separate occasions during a State of Ohio investigation. Based on the analysis above, the decision to impose a permanent disqualification against Speedy Harvard Gas, 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

September 14, 2018