

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

**Sunoco Gas,**

**Appellant,**

**v.**

**Case Number: C0206419**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification against Sunoco Gas (hereinafter Appellant) from participating 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 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), in its administration of the SNAP when it imposed a permanent disqualification against Appellant on August 14, 2018.

**AUTHORITY**

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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 USDA Office of Inspector General (OIG) conducted a joint investigation with the Summit County Sheriff’s Department and the Ohio Department of Public Safety Enforcement Agents of the compliance of Appellant with federal SNAP law and regulations during the period January 2017 through June 2018. The undercover portion of the investigation determined that personnel at the Appellant firm accepted SNAP benefits in exchange for **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**

cash (trafficking) and other ineligible items including gasoline and tobacco on four occasions as noted in the letter of charges. These transactions were conducted by the owner and one other clerk and were deemed clearly violative and warrant a permanent disqualification. During subsequent interviews on March 19, 2018, both the owner and clerk admitted to credit accounts and to trafficking.

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated August 2, 2018, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.6(e)(1). The letter of charges states, in relevant part, “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking . . . is permanent disqualification.” The letter also states that “under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of a permanent disqualification of a firm for trafficking.”

Store ownership did not respond in writing to the charge letter and no evidence was submitted to be considered in support of the CMP. Ownership did call the Retailer Operations Division on August 10, 2018, to inform them that a settlement was reached in the criminal case with him agreeing to give up SNAP participation and that he had already turned in his EBT machine.

After giving consideration to the evidence, the Retailer Operations Division notified Appellant in a letter dated August 14, 2018, 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 also states that Appellant’s eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated “. . . you are not eligible for the CMP because you failed to submit sufficient evidence to demonstrate that your firm had established and implemented an effective compliance policy and program to prevent violations of the Supplemental Nutrition Assistance Program.”

In separate actions, the store owner and the clerk were indicted by the Summit County District Attorney’s Office on April 3, 2018, and charged with 15 counts including illegal use of SNAP benefits, telecommunications fraud, and theft. On August 19, 2018, the store owner pled guilty to Food Stamp/SNAP Fraud and was sentenced.

By letter postmarked August 21, 2018, Appellant appealed the Retailer Operations Division’s decision and requested an administrative review of this action. The appeal was granted. Subsequent correspondence dated October 8, 2018, was received from Appellant.

## **STANDARD OF REVIEW**

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

## CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Section 278. In particular, Sections 278.6(a) and Part 278.6(e)(1)(i) 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 of SNAP benefits.

7 CFR § 271.2 states 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 § 278.2(a) states that: Coupons [SNAP 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 may not be accepted in exchange for cash, in payment of interest on loans, or for any other nonfood use.

7 CFR § 278.2(f) states that: “Coupons [SNAP benefits] shall not be accepted by an authorized retail food store in payment for items sold to a household on credit.”

7 CFR § 278.6(a) states that: 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)(i) reads, in part, “FNS shall . . . [d]isqualify 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, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone . . .” Trafficking is further defined, in 7 CFR § 271.2, to include “(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.”

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.”

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.”

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).” Part 278.6(b)(2)(ii) further 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 Part 278.6(b)(1), the firm shall not be eligible for such a penalty.

In addition, 7 CFR § 278.6(i)(2) states in relevant part, “As specified in Criterion 3 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 FNS regulations and current FSP policy on the proper acceptance and handling of food coupons.” This section goes on to state, “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.” This section further states, “A firm which seeks a civil money penalty in lieu of permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted . . .”

### **APPELLANT’S CONTENTIONS**

The following may represent a 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:

- The owner is not educated and has supported his family for 20 years by working in a gas station. He and his son manage the business 90 percent of the time and hired a part time person for a few hours. This employee was given strict guidance regarding SNAP and selling alcohol to minors and was not supposed to sell anything except food for SNAP. Without the owner’s knowledge, this clerk sold ineligible items using SNAP;
- The owner hired an attorney who told him there would be a penalty for violating SNAP rules, but when the owner pled guilty he never expected he would lose EBT completely. The business has not had any violations after all these years and the owner expected a penalty, but not removing EBT;
- The owner requests FNS reconsider reinstating EBT because:
  - He owns the property, the business, and has an agreement with an oil company to supply gas.
  - The business is owned and operated by only family members whose livelihood depends on the business.
  - Family members work 95 percent of the time and whenever any temporary employees are hired, the owner posts a strict order to follow the rules of operation.

- The liquor and other licenses are in the family's name; and,
- The employee responsible for the violations has been fired.

Appellant submitted copies of a store notice not to sell anything other than food on EBT, a sales agreement with an oil company, a vendor's tax license, a HUD loan settlement statement, and various income and sales tax-related forms in support of these contentions.

## ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division and is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. In this case, the store owner has not denied that store personnel conducted violative transactions that included the trafficking of SNAP benefits.

Both the FNS SNAP retailer application and retailer reauthorization application contain a certification page whereby applicants must confirm their understanding of, and agreement with, SNAP retailer requirements in order to complete the application/reauthorization process. These requirements include the prohibition against exchanging cash for SNAP benefits (i.e., trafficking), using SNAP to purchase ineligible items including gasoline and tobacco, and accepting SNAP benefits as payment on credit accounts or loans. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. The certification also includes the requirement for owners to train themselves and their employees on SNAP rules and regulations upon authorization as a SNAP retailer. Store ownership certified his understanding and agreement to abide by program rules and regulatory provisions when he applied for authorization as a SNAP retailer and again when he applied for reauthorization in April 2017. Despite agreeing to abide by SNAP rules and regulations, during the March 19, 2018, interview with law enforcement officers, the owner admitted that he allowed credit accounts to be repaid using SNAP benefits and that he personally exchanged SNAP benefits for cash and for ineligible items that included gasoline, a clear violation of SNAP regulations and rules. The owner also stated that he did not read the training materials provided by FNS since he did not care what they were saying and that he signed off on knowing the rules only because he wanted the EBT machine.

Both the store owner and the clerk were indicted by the Summit County District Attorney's Office on April 3, 2018, and charged with 15 counts that included illegal use of SNAP benefits, telecommunications fraud, and theft. The record shows that the store owner pled guilty to Food Stamp/SNAP Fraud on August 9, 2018, and was sentenced.

The investigative reports show that personnel at the Appellant firm transacted SNAP benefits for ineligible items on four separate occasions and for cash on one occasion indicating an ongoing pattern of SNAP violations as defined by Section 271.2 of the SNAP regulations. The transactions from the investigative report have been matched to SNAP transactions posted on the dates in question with no disagreements and a review of the investigative reports show no errors

or discrepancies. The acceptance of SNAP benefits for cash violates SNAP rules and regulations with the penalty for trafficking being permanent disqualification. There is no regulatory threshold for the exchange of SNAP benefits for cash nor do the regulations not cite any time frames that must be adhered to between the instance(s) of trafficking and the issuance of a charge letter.

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store.” In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option under existing regulations.

Based on the discussion above, there is not any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **CIVIL MONEY PENALTY**

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because Appellant failed to request a CMP or to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

Based on the above discussion and the evidence under review, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division’s decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

### **CONCLUSION**

A review of the evidence in this case supports that the program violations at issue did occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA OIG investigation. All transactions cited in the letter of charges were conducted by or under the direct supervision of a USDA OIG investigator, signed under penalty of perjury, 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 violations, the specific exchange of SNAP benefits for cash, and in all other critically pertinent detail. Additionally, the decision by the Retailer Operations Division that Appellant was not eligible for a trafficking CMP is also found to be correct.

Based on the discussion above, the determination by the Retailer Operations Division to impose a permanent disqualification against the Appellant business from participating as an authorized retailer in SNAP 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.

ROBERT T. DEEGAN  
Administrative Review Officer

February 22, 2019