

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

Sunrise Liquor,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0192685

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 Sunrise Liquor 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 Sunrise Liquor.

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 USDA conducted an investigation of the compliance of Sunrise Liquor with Federal SNAP law and regulations in September 2016 and October 2016. The investigation report documents that SNAP violations occurred during two (2) out of two (2) compliance visits. The investigation report also documents that personnel at Sunrise Liquor exchanged cash for SNAP benefits during both undercover compliance visits. The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR § 271.2.

As a result of the evidence compiled from this investigation, the Retailer Operations Division charged the Appellant, in a letter dated October 12, 2017, with trafficking in SNAP benefits. The charge letter noted that the penalty for trafficking is permanent disqualification as provided by 7

CFR § 278.6(e)(1). The 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 to the Appellant on October 13, 2017 by UPS.

The Appellant, through counsel, requested an extension of time to reply to the charges. In a letter dated October 30, 2017, the Retailer Operations Division granted an extension to November 13, 2017. However, the letter noted that an extension of time to request a trafficking CMP could not be extended.

Subsequently, in a letter dated November 13, 2017, the Appellant requested case file information under the Freedom of Information Act (FOIA). The agency issued its official FOIA response on December 13, 2017. The Appellant then filed a FOIA appeal on March 6, 2018. The agency issued its decision on the FOIA appeal on September 14, 2020. The Retailer Operations Division then sent a letter, dated September 17, 2020, that the Appellant had ten (10) days to respond to the charges.

The Appellant, through counsel, replied to the charges in a letter dated September 28, 2020. The Appellant denied trafficking in SNAP benefits. Among other contentions, the Appellant questioned the narrative in the investigation report and whether it was sufficient to establish that trafficking occurred during the undercover compliance visits.

After giving consideration to the Appellant's response and the evidence in the case, the Retailer Operations Division informed the Appellant, by letter dated December 21, 2020, that Sunrise Liquor 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.

In a letter postmarked December 31, 2020, the Appellant 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 (1) defines trafficking, in part, as:

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 § 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

During an investigation conducted in September 2016 and October 2016, the USDA conducted two (2) undercover compliance visits at Sunrise Liquor. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated October 12, 2017. The investigation report included Exhibits A and B which provide details on the results of each compliance visit. The investigation report documents that SNAP violations occurred during both compliance visits. During the compliance visit described in Exhibit A, the store clerk exchanged non-food items and cash for SNAP benefits. During the compliance visit described in Exhibit B, the same clerk exchanged cash for SNAP benefits.

APPELLANT'S CONTENTIONS

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

- The Department lacked sufficient evidence upon which to base a permanent disqualification of the Appellants. In pertinent part, the Appellants denied that trafficking had occurred at the store. Nevertheless, the Department rendered a decision in which it determined: (1) the violations cited had occurred at the Appellants' store, and (2) that the store did not qualify for a CMP.
- The Department's affidavits make no distinction between EBT cash, which is offered in California, and Federal EBT benefits, which are subject to the rules of the Department. Both sets of benefits are issued and expended to the same card, and accordingly, without verbal identification, it would be difficult to ascertain what the clerk's intentions were. Such information should have been made clearer in the investigator's statements.

- The first transaction, states that the clerk, out of the blue, asked the investigator if he needed cash. That seems unlikely that the clerk would poll customers for trafficking randomly.
- The second transaction, doesn't describe the transaction at all. It simply states that the clerk ran the transaction and pulled cash from the register. This is simply not sufficiently documented to adequately identify nature of the transaction, the clerk who allegedly conducted the transaction, or any of the details to indicate that this was an example of trafficking. We see no evidence of how or why the transaction would have benefited the clerk, begging the question why he would have suggested that the transaction be conducted. Accordingly, the allegations fail for lack of detailed explanations for the transactions which do not defy logic.
- All of the clerks at the store (during this time) were well known to the store owner and never had issues with theft, neglect or any other type of act that would indicate a propensity to violate regulations or laws. Furthermore, none of the clerks had an ownership interest in the store, nor would they stand to gain in any way for processing illegitimate transactions. Accordingly, they lack motivation to complete the transactions as set out in the charge letter.
- The Department appears not to have considered the Appellants' history of compliance when determining an appropriate sanction in this case, as is required by 7 CFR § 278.6(d).
- The investigator's affidavit, is "hearsay" by definition – an out of court statement offered to prove the truth of the matter asserted. More specifically: (1) the alleged trafficking is not corroborated by the submission of pictures of the dollar transaction(s); (2) or anything else verifying the statement; (3) there can be no reasonable opportunity for Appellate to subpoena or otherwise depose the witness because the Department redacted all of that information prior to sending the Charge Letter and in its' FOIA response, and (4) as a result of the Appellant store owners' inability to subpoena said witness, it is impossible to determine the witness's veracity or whether or not a statement is biased. As such, the uncorroborated documents should not be relied upon by this Department in determining whether or not trafficking has occurred.
- The Appellants deny the allegations of trafficking as the store has a policy against trafficking and the sale of ineligible items as a whole. The store's owners maintain a strict set of rules for the transactions to be run in compliance with SNAP regulations and have reviewed the regulations and have personal knowledge of the rules. There's no past compliance history to indicate that this store had ever been a compliance concern.
- In summary, the Appellant requests that the permanent disqualification be rescinded and that the store receive a warning letter as the charges come without credible information upon which the Department could possibly rely. Furthermore, the store has a policy of not trafficking. Therefore, the alleged trafficking did not occur.

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

The action taken by the Retailer Operations Division to permanently disqualify Sunrise Liquor is supported by an investigation report provided to the Appellant in the charge letter dated October 12, 2017. The clerk who conducted the transactions in Exhibits A and B of the investigation report was found to be trafficking as defined under 7 CFR § 271.2 (1).

5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(7)(E)

The investigator's Exhibit A narrative [edited to remove all caps] states in part:

5 U.S.C. § 552 (b)(7)(E)

5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(7)(E)

The investigator's Exhibit B narrative [edited to remove all caps] states in part:

5 U.S.C. § 552 (b)(7)(E)

The Appellant contends that the investigator's narrative makes no distinction between EBT cash (CalWorks) and Federal SNAP benefits and the Appellant's narrative could have been clearer on this point. While this review agrees that the investigator's narrative could have been better written, there is no question that the transactions cited in the investigation report are SNAP transactions not TANF transactions. First, the transactions appear as SNAP transactions in the agency's EBT system. Second, the store clerk exchanged SNAP benefits for cash at a 50 percent discount. There would have been no need to discount the cash if this was legitimate cash taken from CalWorks benefits.

The Appellant speculates that the clerk lacked motivation to conduct the transactions cited in the investigation report; however, intent or motivation is not relevant under these circumstances. The investigation report and other documents in the case record clearly indicate that the clerk at the Appellant store exchanged cash for SNAP benefits in violation of 7 CFR § 271.2 (1).

The Appellant denies the allegations of trafficking as the store allegedly has a policy against trafficking and the sale of ineligible items as a whole. It is noteworthy that the Appellant did not provide a copy of this policy; nevertheless, whether the store had such a policy is not relevant as the investigation report documents that SNAP violations occurred during both compliance visits and encompassed the exchange of ineligible items and cash for SNAP benefits in Exhibit A and cash for SNAP benefits in Exhibit B. If the store had a policy against trafficking and the sale of ineligible items it was apparently not a very effective policy.

The investigation report documents that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted under the direction of a USDA 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. A preponderance of the evidence indicates that personnel at the store exchanged cash for SNAP benefits during both compliance visits.

Owner Accountability

Store owners are 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 chosen 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.

An Appellant store owner signed the SNAP authorization application for the store on November 23, 2008 and the most recent SNAP reauthorization application on May 9, 2014. In both applications, a store owner acknowledged that the owner(s) were aware of the SNAP regulations and understood those regulations. Both applications also included a certification and confirmation that the owner(s) 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.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits for ineligible non-food items or as repayment on credit accounts.

Basis of Determination under 7 CFR § 278.6(d)

The Appellant contends that the Retailer Operations Division did not properly apply the three factors under 7 CFR § 278.6(d) before imposing a permanent disqualification on the firm. The SNAP regulations at 7 CFR §278.6(d) states, in part, that in making a disqualification determination FNS shall consider:

- (1) The nature and scope of the violations committed by personnel of the firm,
- (2) Any prior action taken by FNS to warn the firm about the possibility that violations are occurring, and
- (3) Any other evidence that shows the firm's intent to violate the regulations.

This review finds that the Retailer Operations Division properly followed 7 CFR § 278.6(d) as required. With regard to the nature and scope of the violations, 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. Therefore, it is not relevant whether a store had any prior violations or not.

The regulation also does not require that a warning letter be sent before a store is permanently disqualified for trafficking in SNAP benefits. It is true that SNAP regulations allows for the issuance of warning letters in some less serious cases. Specifically, 7 CFR § 278.6(e)(7) states “send the firm a warning letter if violations are too limited to warrant a disqualification.” However, trafficking in SNAP benefits is not a violation that is considered “too limited to warrant a disqualification.”

Lastly, intent or motivation is not relevant in this trafficking case as the definition of trafficking at 7 CFR §271.2(1) does not require an element of intent.

The Administrative Review Process

The Appellant states that the investigation report is “hearsay” by definition – an out of court statement offered to prove the truth of the matter asserted. More specifically: (1) the alleged trafficking is not corroborated by the submission of pictures of the dollar transaction(s); (2) or anything else verifying the statement; (3) there can be no reasonable opportunity for Appellant to subpoena or otherwise depose the witness because the Department redacted all of that information prior to sending the Charge Letter and in the FOIA response, and (4) as a result of the Appellant store owners’ inability to subpoena said witness, it is impossible to determine the witness’s veracity or whether or not a statement is biased. As such, the uncorroborated documents should not be relied upon by this Department in determining whether or not trafficking has occurred.

In response to the above arguments, the purpose of the administrative review is to give retailers aggrieved by administrative action the opportunity to request one final review at the agency level. The administrative review process allows an aggrieved retailer to respond, explain, provide contentions, or provide evidence that it should not be subject to the proposed administration action. However, the administrative review process does not provide an opportunity for the Appellant store to subpoena witnesses or take depositions. In addition, the administrative review process and administrative determinations made by the SNAP Administrative Review Branch are not subject to the Federal Rules of Evidence, Federal Rules of Civil Procedure or the Administrative Procedures Act. This is because the SNAP administrative review process derives its own separate and independent authority under Section 14(a)(5) of the Food and Nutrition Act of 2008. Any opportunity for the Appellant to subpoena or depose witnesses would be available through the judicial review process.

The Appellant also cites various case law to support its contentions. However, considerations of legal precedent through case law, or the lack thereof in relation to the present case, is beyond the scope of this review. Instead this administrative review is limited to whether the Retailer Operations Division appropriately followed the Food and Nutrition Act of 2008, as amended, and the regulations promulgated under the Act, and whether the action taken is sustainable by a preponderance of the evidence. Therefore, any application of a supposed judicial precedent would best be addressed in a judicial review in a court of law. Accordingly, no further findings or conclusions are rendered in this regard.

Violations Warrant a Permanent Disqualification

The exchange of cash for SNAP benefits as documented by Exhibits A and B of the investigation report meets the definition of trafficking at 7 CFR § 271.2 (1). The definition of trafficking contained in the SNAP regulations at 7 CFR § 271.2 (1) does not require an element of intent on the part of the violator. Therefore, whether or not the Appellant firm or its employees intended to violate SNAP regulations is irrelevant. 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.

TRAFFICKING 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 SNAP compliance policy and program prior to the violations. 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 (1), as “the buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits ... 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, a preponderance of the evidence supports that trafficking violations did occur during a USDA investigation. Based on the analysis above, the decision to impose a permanent disqualification against Sunrise Liquor, 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. Please note that the judicial filing timeframe is specified in the Act, and this office cannot grant an extension.

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

March 4, 2021