

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

The Tobacco Store,

Appellant,

v.

Case Number: C0192171

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a permanent disqualification of The Tobacco Store from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against The Tobacco Store.

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 Tobacco Store was initially authorized to participate in SNAP as a convenience store on October 22, 2009. Between August 16, 2016 and April 10,

2017, the USDA conducted an undercover investigation of The Tobacco Store to ascertain the firm's compliance with Federal SNAP law and regulations. It was reported by the investigator that during the course of the investigation, the Appellant firm violated SNAP rules by allowing ineligible non-food items to be purchased with SNAP benefits on five separate occasions. The firm also reportedly engaged in trafficking by exchanging SNAP benefits for cash on two occasions.

In a letter dated June 1, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations. It also charged the Appellant with accepting SNAP benefits in exchange for ineligible non-food merchandise.

The misuse of SNAP benefits, as described in the charge letter, is a violation of 7 CFR § 278.2(a). The charge letter informed the Appellant that the violations warranted permanent disqualification from SNAP as provided in 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

The case record shows that the charge letter was sent via United Parcel Service and that the Appellant signed for the letter on Friday, June 2, 2017, at 10:15 a.m. However, the record shows that the Appellant did not make any kind of response to the charge letter.

After further consideration of the evidence in the case, the Retailer Operations Division issued a determination letter dated June 21, 2017. In most cases, the violation of exchanging ineligible items for SNAP benefits results in a firm's temporary disqualification from SNAP. However, trafficking in SNAP benefits is a much more serious offense and generally warrants permanent disqualification. Since trafficking was alleged in this case, permanent disqualification was the determination made by the Retailer Operations Division. The determination letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter 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 paragraph § 278.6(i), but determined that the Appellant was not eligible for a CMP because it failed to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked July 3, 2017, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW & REGULATIONS

The controlling law in this matter is found in the Food and 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, *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 § 278.2(a) states, *inter alia*:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households... only in exchange for eligible food.

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.... Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and **disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section.**[Emphasis added.]*

7 CFR § 278.6(c) states, *inter alia*:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(e) states, *inter alia*: The FNS regional office shall:

(1) Disqualify a firm permanently if:

(i) Personnel of the firm have trafficked as defined in § 271.2.

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 § 271.2 states, *inter alia*:

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 § 278.6(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(b)(2)(iii) states:

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.

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 INVESTIGATION

During an undercover investigation conducted between August 16, 2016, and April 10, 2017, the USDA completed five compliance visits at The Tobacco Store. A report of the investigation was provided to the Appellant as an attachment to the June 1, 2017, charge letter. The investigation report included Exhibits A through E, which provided full details on the results of each compliance visit. SNAP violations were documented during each of the five visits and included trafficking violations on the last two visits as noted in Exhibits D and E. The report noted the following ineligible non-food items that were purchased by an investigator using SNAP benefits:

- One bar of soap (*Lux* brand), Exhibit A
- Two 30-count packages of cutlery (*Formal* brand), Exhibit B
- One 90-gram bar of soap (*Lux* brand), Exhibit B
- Two 30-count packages of cutlery (*Formal* brand), Exhibit C
- One bar of soap (*Irish Spring* brand), Exhibit C
- Two 150-count boxes of trash bags (*Better Valu* brand), Exhibit D
- Two 30-count packages of cutlery (*Formal* brand), Exhibit D
- One knife and scabbard (no brand indicated), Exhibit E
- One men's size 34-36 leather belt (no brand indicated), Exhibit E
- Two bars of soap (*Lux* brand), Exhibit E

Trafficking was reported during the last two compliance visits. The first trafficking violation occurred on February 13, 2017. In reporting this visit, the USDA investigator provided the following details, as noted in Exhibit D:

Cashier rang up items and I asked for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash back. Cashier asked me for my ID and when I said I didn't have one, he waited on the customer behind me in line. When that customer left, the cashier told me he could only do 5 U.S.C. § 552 (b)(6) & (b)(7)(C) back. After transaction was approved he handed me 5 U.S.C. § 552 (b)(6) & (b)(7)(C) bills from the register and I left premises.

The report noted that the second trafficking incident occurred on April 10, 2017. The investigator made the following statement on the report, as noted in Exhibit E:

I approached the cashier and asked how much the knife inside the counter was and he said it was \$18.99. I asked if I could get it on EBT and he indicated yes. He then rang up the rest of the items and asked if the belt was on cash. I said EBT and asked if could get some cash like last time. He asked how much and I said 5 U.S.C. § 552 (b)(6) & (b)(7)(C) but that I had over 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on the card and would like more if possible. He ran first transaction for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and handed me one 5 U.S.C. § 552 (b)(6) & (b)(7)(C) bill from the register. He then said he could give me 5 U.S.C. § 552 (b)(6) & (b)(7)(C) more and ran the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transaction, then handed me 5 U.S.C. § 552 (b)(6) & (b)(7)(C)0 in cash from the register. After transaction was approved I left premises.

It is noted that one clerk conducted all five violative transactions during the investigation.

APPELLANT'S CONTENTIONS

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

- Appellant did not receive the first letter asking for sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of SNAP.
- Appellant does have such a policy and can furnish it to USDA.
- Appellant asked for a written response acknowledging receipt of the administrative review request.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

As best as can be determined, the Appellant did not, at any point, dispute that the violations took place as described in the report of investigations, including the two incidents of trafficking. As noted earlier, the Appellant did not respond to

the charge letter, and there were no contentions in the Appellant's request for review that addressed the specific transactions listed in the report. Because the SNAP violations do not appear to be in dispute, it is the determination of this review that program violations did occur as charged by the Retailer Operations Division.

Charge Letter Not Received / Civil Money Penalty

The Appellant contends that it did not receive the original charge letter which stated that the firm could be eligible for a civil money penalty in lieu of permanent disqualification if it provided sufficient evidence to demonstrate that it had an effective compliance policy and program to prevent SNAP violations. The Appellant further argues that it does have such a policy and is willing to furnish it to USDA.

With regard to these contentions, the record shows that the Appellant signed for the original charge letter on Friday, June 2, 2017, at 10:15 a.m. There is no evidence whatsoever that the Appellant did not receive the charge letter or the report of investigation. The record also clearly indicates that the Appellant did not reply to the charges.

As to the Appellant's willingness to provide a copy of the firm's compliance policy, it should be noted that on July 13, 2017, the Appellant received a letter from the administrative review officer acknowledging the Appellant's request for review. In this letter, the Appellant was given until August 7, 2017, to provide any information or evidence to support its request for review. Such information could have included a copy of the firm's compliance policy. However, no such documentation was ever submitted by the Appellant.

It is the determination of this review that the Appellant is not eligible for a civil money penalty in lieu of permanent disqualification pursuant to 7 CFR § 278.6(i) because it did not request this alternative penalty and did not submit any evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a civil money penalty to be considered, a firm must not only notify FNS that it desires 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to consider a CMP in lieu of permanent disqualification, but the firm must also submit appropriate documentation within designated timeframes. In this case, the Appellant did neither. Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii), a civil money penalty in lieu of permanent disqualification for trafficking cannot be granted in this case.

CONCLUSION

Trafficking is defined in Section 271.2 of the SNAP regulations as “the buying or selling of SNAP benefits for cash or consideration other than eligible food.”

Pursuant to regulations at 7 CFR § 278.6(e)(1)(i), permanent disqualification is the required penalty for such violations. The law and regulations do not provide for a lesser penalty for this violation.

Based on a review of the evidence in this case, there is no question that program violations did occur during a USDA investigation. All transactions cited in the letter of charges were conducted or supervised by a USDA investigator 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, including the exchange of SNAP benefits for cash, and in all other critically pertinent details. Therefore, the decision to impose a permanent disqualification against the Appellant, The Tobacco Store, under the ownership of Ali Saleh Almahrek, is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

December 26, 2017