

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

Tres Estrellas,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0195746

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 was properly imposed against Tres Estrellas (hereinafter “Tres Estrellas” and/or “Appellant”) and its owner of record, by the Retailer Operations Division of the FNS.

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 Supplemental Nutrition Assistance Program (SNAP) when it imposed a permanent disqualification against Tres Estrellas in a letter dated February 5, 2018.

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.

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

CASE CHRONOLOGY

The USDA conducted an investigation of the compliance of Tres Estrellas with Federal SNAP law and regulations which consisted of six (6) visits completed between December 29, 2016, and April 20, 2017.

As a result of the investigation a report titled USDA-FNS Report of Positive Investigation (hereinafter, "Investigative Report") number ME41017 dated November 28, 2017 was provided to the Retailer Operations Division for consideration. The Investigative Report disclosed that on six (6) separate occasions Tres Estrellas personnel accepted SNAP benefits for merchandise that was ineligible for purchase with such benefits from a USDA Investigator and a Confidential Informant, working under the direct supervision and oversight of the USDA Investigator. The common ineligible items exchanged for SNAP benefits in Exhibits A, B, C, D, and E include toilet paper/bathroom tissue, sandwich bags, a cigarette lighter, baby wipes and Clorox bleach. Additionally, the materials recount that in Exhibit D a soccer ball valued @ \$17.99 was exchanged for SNAP; and in Exhibit F liquid laundry detergent valued at \$12.99 was exchanged for SNAP benefits. The soccer ball and liquid laundry detergent are considered major ineligible items. Identification information ascertained from the Investigative Report indicates that these SNAP violations were handled at Appellant firm by one (1) unidentified male clerk. Most egregiously the Investigative Report documents that during two (2) of the visits (Exhibits E and F) the same unidentified male clerk exchanged SNAP benefits for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash, respectively, on each occasion additionally charging 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to complete the transaction. The exchange of SNAP for cash is **trafficking** as defined in 7 CFR § 271.2.

As a result of the evidence compiled during the USDA investigation, in a letter dated December 28, 2017, the Retailer Operations Division, charged Appellant with violating the terms and conditions of the SNAP regulations, 7 CFR § 271 – 282, specifically 7 CFR § 271.2 for which the sanction for trafficking violations, identified in Exhibits E and F, is permanent disqualification in accordance with 7 CFR § 278.6(e)(1). The December 28, 2017 letter of charges included a redacted copy of the Investigative Report delineating, as exhibits A through F, the specific dates of each visit; identification of the items exchanged for SNAP benefits; descriptions of the clerks involved; and additional details on the specifics of the occurrence such as discussions regarding the exchange being conducted.

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

The Retailer Operations Division record documents receiving a phone call from Appellant's counsel on January 3, 2018 during which the process for response to the letter of charges was reportedly provided. No further responses are documented in the record between the date of the letter of charges and the issuance of a final determination letter, dated February 5, 2018, wherein Retailer Operations Division assessed a permanent disqualification from participation as an authorized retailer in the SNAP against Tres Estrellas. The February 5, 2018 letter further advised Appellant that it was not eligible for a civil money penalty (CMP) in lieu of the

permanent disqualification because a CMP had not been requested and Appellant failed to submit timely evidence to demonstrate that an effective compliance policy and program had been established to prevent violations of SNAP.

In a letter dated February 8, 2018, received in the offices of the Administrative Review Branch on February 13, 2018, Appellant submitted an appeal of the Retailer Operations Division's assessment, requesting an administrative review of the action. The appeal was granted as affirmed in a letter dated February 1, 2018. The record documents that a written response to the letter of charges, also dated February 8, 2018 and delivered to the Retailer Operations Division via facsimile. A copy of the response to the letter of charges was appended to the request for administrative review as well.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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 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 2023 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 relevant 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) "Use of Coupons [Benefits]", states, in relevant part, "Coupons 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..."

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 with subsequent amendment through P.L. 113-79, enacted 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

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 the 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 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...”
[Emphasis added]

APPELLANT’S CONTENTIONS

In the letter dated February 8, 2018 requesting appeal, counsel, on behalf of Appellant indicates that:

- the violations identified in the Investigative Report represent the first occurrence; and, therefore should be considered for deferred penalty imposition; analogous to imposition of a deferred prosecution;
- economic distress motivated the violations described therefore they were caused by necessity as opposed to willful conduct;
- upon notification of the violation Appellant’s owner has experienced remorse and looks forward to lawful compliance moving forward; and,
- Counsel asserts that Appellant is deserving of a second opportunity to prove that all SNAP regulations will be complied with going forward.

As noted previously counsel, on behalf of Appellant also provided a response to the letter of charges, dated February 8, 2018 describing a telephonic discussion which had been understood to suffice as response.

In a facsimile dated March 15, 2018 counsel, on behalf of Appellant, provided 10 pages of documents identified as copies of delinquent bills addressed to Appellant and Appellant’s owner. No explanation for the provision of the materials was included.

The preceding represents only a brief 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.

SUMMARY OF THE CHARGES

USDA conducts investigations of the compliance of retail food stores, in part, to ascertain the nature and extent of SNAP violations that may be occurring. In the instant case the Investigative Report dated November 28, 2017, reveals that a USDA Investigator, and a Confidential

Informant working under the direct supervision and oversight of the USDA Investigator, completed six (6) total investigative visits at Tres Estrellas between December 29, 2016 and April 20, 2017.

The report materials were provided to Appellant as attachments to the charge letter dated December 28, 2017, and included exhibits A through F that provide detail of the investigative results. Most egregiously the Investigative Report documents that during two (2) of the visits (Exhibits E and F) an unidentified male clerk exchanged SNAP benefits for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash, respectively, charging a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) fee for each exchange. The exchange of SNAP for cash is **trafficking** as defined in 7 CFR § 271.2

The Investigative Report further reveals SNAP violations were recorded during each of the six (6) reported visits. In five (5) of the six (6) visits, included as exhibits A, B, C, D, and E, of the Investigative Report, the exchange of SNAP benefits for common non-food items including toilet paper/bathroom tissue, sandwich bags, a cigarette lighter, baby wipes and Clorox bleach is documented. Additionally, the materials recount that major ineligible items, including a soccer ball and liquid laundry detergent, were exchanged for SNAP in exhibits D and F. Most egregiously exhibits E and F document the exchange of SNAP benefits for cash (5 U.S.C. § 552 (b)(6) & (b)(7)(C) in exhibit E, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in exhibit F) each time with the assessment of a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) fee. The violations are documented to have involved one (1) unidentified male clerk.

The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf.

ANALYSIS AND FINDINGS

That SNAP benefits are not for the purchase of non-food items is clear in the “Act” and in the SNAP regulations, with noted exceptions, such as seeds used to grow food, and hunting equipment in remote areas of Alaska. This and other rules governing SNAP were provided to Appellant upon initial SNAP authorization in June 2014, and have been restated in various retailer notifications routinely provided to all SNAP authorized retailers.

The permanent disqualification being imposed upon Appellant results from two (2) instances of trafficking, which is the most egregious of SNAP violations and specifically subject to the imposition of permanent disqualification on the **first offense** as indicated in the Food and Nutrition Act of 2008 (Act). 7 U.S.C. § 2021(b)(3)(B) states, in relevant 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...” The Act is further supported with SNAP regulations 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.” [Emphasis Added].

First Violation – Seeking Deferred Penalty:

Counsel identified the violations recounted in the Investigative Report as a first occurrence; and, therefore compared the situation to the imposition of a deferred prosecution indicating Appellant should be considered for deferred penalty imposition. Neither the Act nor the pursuant SNAP regulations support the deferral of SNAP penalties. Moreover, both the Act and the SNAP regulations specifically require the imposition of a permanent disqualification penalty on the first occurrence of trafficking.

Owner Accountability:

The record indicates that the owner of record signed the SNAP retailer application on June 12, 2014, affirming awareness of and understanding of the SNAP regulations. That material includes certification and confirmation that the owners “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.” Based on Appellant’s request for review, provided through counsel, it is surmised that the unidentified violating male clerk was Appellant’s sole owner. The request for review provides that the owner has experienced remorse and looks forward to lawful compliance going forward; and, counsel cites that he believes Appellant is deserving of a second opportunity to prove he will abide by and comply with SNAP regulations going forward. As previously indicated both the Act and the pursuant SNAP regulations are very clear that permanent disqualification is required at the first occurrence of SNAP trafficking. The Investigative Report clearly identifies two (2) specific instances of trafficking that Appellant has not denied, therefore, the required penalty the instant case is permanent disqualification.

Economic Distress Motivated Violations:

Appellant, through counsel, explains that the SNAP violations identified in the letter of charges resulted from economic distress being experienced by Appellant’s owner which led to violations by necessity as opposed to willful conduct. However, it is clarified that the SNAP regulations do not include consideration of intent, or lack thereof, in the imposition of SNAP penalties for regulatory violations. Therefore, notwithstanding whatever personal or professional economic influences may have been experienced the trafficking of SNAP benefits is a clear violation of SNAP regulations subject to permanent disqualification.

The imposition of resulting sanction is made in accordance with the SNAP regulations and is dependent on the identified violations. In the instant case if only ineligible items had been exchanged for SNAP the SNAP regulations would have supported the imposition of a six-month disqualification as defined in 7 CFR § 278.6(e)(5). However, because there is an incident of SNAP trafficking, the SNAP regulations require permanent disqualification on the first offense in accordance with 7 CFR § 278.6(e)(1)(i) .

Overdue Billing Information:

In a facsimile data March 15, 2018 counsel, on behalf of Appellant provided 10 pages of materials identified as delinquent bills. The materials included no explanation. It is considered likely that the materials were provided to support the claim of economic distress being endured which is contended to have precipitated the SNAP violations recounted in the Investigative Report. Notwithstanding the financial situation of Appellant and its owner SNAP trafficking is not supported or excused in any way.

Civil Money Penalty

7 CFR §278.6(f)(1) of the SNAP regulations provides 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.

The February 5, 2018 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 either a request for the alternative sanction; or substantial evidence in a timely manner to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of SNAP.

Based on a review of the record, 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).

It is further noted that, at a minimum, a six-month period of disqualification or a civil money penalty in lieu thereof would have resulted in the absence of SNAP benefit trafficking in the present case, in accordance with & CFR § 278.6(e); however, though Appellant is likewise liable for this lesser sanction, it is merely subsumed under the precedent sanction of permanent disqualification.

CONCLUSION

Based on a review of the evidence in this case, it appears that the program violations at issue did, in fact, occur 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. A full review of the Investigative Report reveals no errors or discrepancies. The materials recount trafficking that is clearly a violation of the SNAP regulations. Notably the official Investigative Report includes a statement introducing each of the Details of the Transaction/Visit affirming that the USDA Investigator makes the statements included “freely and voluntarily, knowing that this statement may be used in evidence.”

The decision to impose a permanent disqualification against Tres Estrellas 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.

NANCY BACA-STEPAN
Administrative Review Officer

June 12, 2018