

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

U.S. Tobacco And Beer, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 Retailer Operations Division, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

**Case Number: C0179763**

**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 from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) against U.S. Tobacco And Beer (“Appellant”).

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of Code of Federal Regulations (CFR) § 278.6(e)(1)(i) in its administration of SNAP when it imposed a Permanent Disqualification against Appellant on August 30, 2016.

**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 Appellant with federal SNAP law and regulations during the period January 23, 2015 through October 21, 2015. The investigation reported that personnel at Appellant accepted SNAP benefits in exchange for cash (trafficking) in the amount of \$20 on one occasion and \$20 on another occasion. Identification information ascertained from the investigation indicates that these violative transactions were handled by one unidentified clerk.

As a result of evidence compiled from this investigation, the Retailer Operations Division informed Appellant, in a letter dated April 18, 2016, that its firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.6(e)(1). This 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."

Appellant, through counsel, replied to the charges in a subsequent letter to the Retailer Operations Division. The record reflects that the Retailer Operations Division received and considered this information prior to making a determination.

The Retailer Operations Division notified Appellant in a letter dated August 30, 2016 that the firm was being 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 civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated to Appellant that ". . . 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."

On August 30, 2016, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted.

## **STANDARD OF REVIEW**

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means 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 argument asserted is more likely to be true than not true.

## **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 Part 278. In

particular, 7 CFR § 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.

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 or selling of [SNAP benefits] or other benefit instruments for cash or consideration other than eligible food.*

### **APPELLANT’S CONTENTIONS**

Appellant’s contentions regarding this matter are essentially as follows:

- Appellant terminated all the employees. Appellant provided separation notices for three employees and two pages of W-2 forms;
- Appellant requests a CMP. In support of Appellant’s request for a CMP, it described its compliance policy and training practices, provided employee agreements signed by 3 employees, the SNAP training guide, ~5 pages of SNAP training materials, ~10 store photos, 3 pages of training sheets, and ~6 pages written in a language other than English(possibly Cyrillic);
- The owner was not involved in trafficking;
- Appellant denies the allegations; and,
- This is Appellant’s first alleged trafficking offense.

The preceding may represent only a brief summary of Appellant’s contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any not specifically recapitulated.

### **ANALYSIS AND FINDINGS**

As to Appellant’s denial of violations, this review examines the relevant information regarding the determination. Once the ROD establishes a violation occurred, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that that the permanent disqualification should be reversed. If this is not demonstrated, the case will be sustained. Assertions that the firm has not violated program rules, without supporting evidence and rationale, do not constitute valid grounds for overturning the determination.

Appellant contends that the owner was not involved in any of the alleged violations. When ownership signed the FNS application to become an authorized SNAP retailer, this 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 document include trafficking. Regardless of whom the ownership of a store may

utilize to operate the cash register and handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. To allow store ownership 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 and the enforcement efforts of the USDA.

### **First SNAP Violation**

Appellant contends that this is the first time there has been an issue related to SNAP. In this regard, a record of program participation with no documented previous violations does not constitute valid grounds for mitigating the impact of the present serious charges of trafficking. Moreover, the report indicates that both times that trafficking was attempted, it was permitted by store personnel.

This review is limited to consideration of the circumstances at the time the ROD's decision was made. It is not within the scope of this review to consider actions Appellant may have taken subsequent to this decision to begin to comply with program requirements. There is no provision in SNAP regulations for reducing an administrative penalty on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, Appellant's terminating the previous employees and training the new staff do not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **CIVIL MONEY PENALTY**

With regard to Appellant's contention that the firm submitted sufficient evidence to demonstrate that the store had established and implemented an effective compliance policy and program to prevent violations of SNAP, there is a provision at 7 CFR § 278.6(i) of the SNAP regulations for the imposition of a CMP in lieu of permanent disqualification for trafficking. Appellant was advised of this provision in the charge letter of April 18, 2016 which also advised that documentation of eligibility for that alternative sanction had to be provided within a specific time limit. Although Appellant described its compliance policy and training practices within the timeframes set forth in the charge letter, the records does not support that Appellant submitted evidence of eligibility for a CMP in a timely manner, as required by 7 CFR § 278.6(i).

To be considered eligible for a CMP a firm must 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 Section 278.6(i)(1);
- 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;
- Criterion 3: The firm had developed and instituted an effective personnel training program as specified in Section 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 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.

In support of Appellant's contention that the firm is eligible for a CMP, it subsequently provided undated employee agreements signed by three employees, three pages of training sheets, the SNAP training guide and about five other pages of SNAP training materials. The employee agreements and training sheets appear to be for the new employees hired on or about April 25, 2016.

In this regard, the various documentation provided by Appellant is not "substantial evidence" that fulfills each of the four criteria of 7 CFR § 278.6(i), demonstrating "that the firm had established and implemented an effective compliance policy and program to prevent violations." There is no contemporaneous documentation that could verify that a compliance policy and training program existed prior to the trafficking. The documentation provided could have simply been created subsequent to the firm being charged. The standards for eligibility of a trafficking CMP are high in that they require that it be substantially shown that there is an established and implemented compliance policy and program, and that it had been in place prior to the occurrence of violations. This was perhaps to thwart efforts of firm's attempting to falsely present compliance policies and programs that really were not implemented prior to violations. In the absence of any such documentation provided by the firm, a CMP was not imposed in lieu of permanent disqualification by the Retailer Operations Division. That decision is sustained as appropriate pursuant to 7 CFR § 278.6(b)(1); § 278.6(b)(2)(ii) and (iii); and, § 278.6(i).

## **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 a formal USDA investigation. All transactions cited in the letter of charges were conducted under the supervision of 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, the specific exchanges of SNAP benefits for cash, and in all other critically pertinent detail.

Based on the discussion above, the determination by the Retailer Operations Division to impose a permanent disqualification against U.S. Tobacco And Beer 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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released could constitute an unwarranted invasion of privacy.

/s/  
RICH PROULX  
ADMINISTRATIVE REVIEW OFFICER

October 17, 2016  
DATE