

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

Derby Area Mini Mart,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0188216

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 Derby Area Mini Mart (hereinafter “Derby Area Mini Mart” or “Appellant”) by the Retailer Operations Division.

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 Derby Area Mini Mart in a letter dated January 23, 2017.

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

In a letter dated December 27, 2016 the Retailer Operations Division informed Derby Area Mini Mart that it was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 271 – 282, specifically 7 CFR § 271.2 and 7 CFR § 278.2(a), based on a USDA investigation conducted between May 27, 2016 and November 4, 2016. A redacted copy of the report titled USDA-FNS Report of Positive Investigation (Report of Investigations) number CH45632, dated November 29, 2016 materials for consideration.

The Retailer Operations Division record indicates that a reply to the letter of charges was received on January 9, 2017 and appropriately considered. In a letter dated January 23, 2017 the Retailer Operations Division informed Derby Area Mini Mart that it was permanently disqualified from participation as a retail store in the SNAP. The letter also informed Appellant that it was not eligible for a civil money penalty (CMP) in lieu of the permanent disqualification.

Appellant, through counsel, submitted a request for administrative review, appealing the Retailer Operations Division' assessment via letter dated February 6, 2017. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the "Act")², 7 USC § 2021 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.

7 U.S.C. § 2021(b)(3)(B) states, in relative 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..."

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, further amended through P.L. 113-79 effective February 7, 2014.

³ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title07/7tab_02.tpl

7 CFR § 278.2(a) specifies, in relevant part, that “Coupons [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...or for any other nonfood use.” [emphasis added]

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...”

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.” Trafficking is defined, in part, in 7 CFR § 271.2, 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.” [emphasis added]

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, 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]

SUMMARY OF THE CHARGES

The Retailer Operations Division record contains a Report of Investigations number CH45632, dated November 29, 2016 recounting three (3) visits to Appellant by two (2) USDA investigators. In two (2) of the three (3) visits an unidentified male clerk handling checkout at Appellant exchanged cash for SNAP benefits in direct violation of the SNAP rules and regulations.

APPELLANT'S CONTENTIONS

Via letter postmarked February 6, 2017, Appellant, through counsel, requested review of the Retailer Operations Division's determination, supplementing that request with a letter dated March 13, 2017 appended with a copy of the affidavit by the firm's stated owner previously provided to the Retailer Operations Division on January 9, 2017.

The affidavit, sworn by the owner of record, indicates that:

- the signatory is the sole "Owner/Operator" of Derby Area Mini Mart;
- the letter of charges was received on December 29, 2016;
- there is awareness that a Civil Money Penalty (CMP) in lieu of disqualification may be available if the four (4) criteria as cited in 7 CFR § 278.6(i) are met; and addressing each of the four (4) criteria;
- Appellant is a small operation, in a depressed area of the City where customers who rely on Appellant will incur hardship due to lack of transportation upon Appellant disqualification; and,
- SNAP regulations provide in 2015 will be reviewed again in order to maintain compliance.

The March 13, 2017 letter further stresses the dependence of customers in the depressed area lacking essential transportation expected to experience hardship if Appellant is permanently disqualified. Payment of a CMP is indicated to serve as incentive to strict compliance of SNAP regulations; undercover shopper visits are invited to affirm adherence to SNAP regulations; and, a plea is made for consideration of the importance of continued Appellant operation with SNAP authorization to the owner of record and the community; asking for "One more chance".

The March 13, 2017 letter also specifically states: "It is clear that two mistakes were made, I have learned from my mistakes and vow not to repeat them."

The preceding may represent only a brief summary of the contentions presented in this matter. Please be assured, however, that, in reaching a decision, full attention and consideration have been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

On review it is noted that in the March 13, 2017 letter signed by the owner of record of Derby Area Mini Mart there is an admission that the SNAP trafficking violations that are the subject of the present administration review represent "two mistakes"; and that the owner of record has "learned from my mistakes and vow not to repeat them."

It is important to note that 7 CFR § 278.6(e)(1)(i) references permanent disqualification as the penalty for "**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." Appellant and the owners of record are liable for all SNAP violations which in the instant case are stated to represent mistakes made directly by the owner of record.

The Act itself provides that a store's disqualification "shall be" (Emphasis added.) "permanent upon ... the first occasion of a disqualification based on ... trafficking ... by a retail food store." No discretion for consideration of mitigating circumstances, first time offenses, or subsequent corrective actions are provided within either the Act or the pursuant regulations.

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 January 23, 2017 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 sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of SNAP.

On review it is noted that Appellant addressed each of the four (4) criteria cited in 7 CFR § 278.6(i), and, the record includes documentation of the consideration by Retailer Operations Division of each of those responses, determining that the materials fell short of the describing sufficient evidence to allow for the CMP in lieu of permanent disqualification.

Retailer Operations Division determined that Appellant did not meet each criterion as follows:

- Criterion 1:
 - Appellant's owner of record indicates that because he is the sole Owner/Operator of Appellant no extensive training program exists. He indicates that he has handled SNAP redemptions without previous charges of violations for almost 15 years; and that review of the Retailer Training Materials provided in August 2015 together with recurring annual review evidence that regulations are current.
 - Retailer Operations Division indicates that there was no documentation provided to support that the owner had developed an effective compliance policy noting that although official records indicate that the self-declared owner is the only owner of record currently there is evidence of prior shared ownership between July and October 2002. It is also noted "sole" ownership and operation becomes questionable when considering the Report of Investigations that serves as the basis for the penalty in review identified a female clerk in Exhibit A.

- Criterion 2:
 - Appellant’s owner of record contends that both a compliance policy and program have been in place for nearly 15 years as all information received from the SNAP has been reviewed; and that since 2015 the Training Guide for Retailers has been maintained and reviewed on an annual basis.
 - Retailer Operations Division indicates that Appellant has provided no documentation to support his claims therefore the requirements of Criterion 2 are unmet.

- Criterion 3:
 - Appellant’s owner of record provides notarized affidavit affirming that no personnel training program exists because he serves as the sole Owner/Operator.
 - Retailer Operations Division indicates that although self-declaring as a sole owner/operator the Report of Investigations in the subject case clearly describes the redemption of SNAP benefits for SNAP eligible foods in Exhibit A.

- Criterion 4:
 - Appellant’s owner of record notes that the violations in consideration represent the first occasion of trafficking at Appellant.
 - Retailer Operations Division indicates that if the self-declared owner/operator of record does operate as sole owner/operator he can be presumed to have been the clerk identified to have conducted the trafficking violations as described in Exhibits B and C of the Report of Investigations resulting in the penalty in consideration in this review. In that case the owner of record cannot say that he 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.
 - On review it is noted that Appellant’s owner of record has not declared that he 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. The owner of record has indicated that the trafficking violations described were his “mistakes” and he vows not to repeat them. Instead, the materials indicate that the violations represent the first occasion of violation.

Although the record reflects that the violations in consideration do represent the first violations for Appellant, it cannot be reasonably established that an “effective” compliance policy and training program were in place if the owner of record, who declares to be the sole owner/operator committed one of the most egregious violations when he himself trafficked in SNAP benefits by exchanging cash for SNAP benefits as delineated in Exhibits B and C of the Report of Investigations.

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).

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 the USDA-OIG and the evidence gathered as a result of that investigation. The materials recount activities that are clearly violations of the SNAP regulations.

The decision to impose a permanent disqualification against Derby Area Mini Mart 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

March 28, 2017