

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

Sunoco Mini Mart,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0195442

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 Sunoco Mini Mart (hereinafter “Sunoco 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 Sunoco Mini Mart in a letter dated May 30, 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

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period between January 18, 2017 and March 20, 2017. As a result of the investigation a report titled USDA-FNS Report of Positive Investigation (Report of Investigations) number CH46762, dated April 10, 2017 was provided to the Retailer Operations Division for consideration.

The Report of Investigations recounts six (6) visits to Appellant by a USDA Investigator. During four (4) of the six (6) visits an unidentified male clerk is documented to have exchanged ineligible items as defined in 7 CFR § 278.2(a) for SNAP which included plastic cups, toilet tissue and air fresheners. Additionally, the Report of Investigations documents that in one (1) of the six (6) visits, identified as Exhibit E, the same unidentified male clerk exchanged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash for eight (8) 12-packs of Mountain Dew that was known to have been purchased with SNAP benefits because the EBT receipt for purchase was shown to the clerk; this activity is trafficking as defined in 7 CFR § 271.2.

In a letter dated April 18, 2017 the Retailer Operations Division informed Sunoco 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). The letter of charges indicates that Appellant was specifically charged with trafficking, therefore subject to permanent disqualification; as well as with accepting SNAP benefits in exchange for common ineligible non-food items, subjecting Appellant to a non-permanent disqualification. 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 indicates that replies to the letter of charges were received and fully considered.

In a letter dated May 30, 2017 the Retailer Operations Division informed Sunoco Mini Mart that it was permanently disqualified from participation as a retail store in the SNAP; and, that Appellant was not eligible for a civil money penalty (CMP) in lieu of the permanent disqualification because it failed to submit sufficient evidence to demonstrate that an effective compliance policy and program had been established to prevent violations of SNAP.

Appellant, through an employee representative, submitted a request for administrative review, appealing the Retailer Operations Division's assessment via letter dated June 3, 2017. The appeal was granted as affirmed in a letter dated June 13, 2017.

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 as defined in Part 271.2.

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...”

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 [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...”

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.”

7 CFR § 271.2 specifies, in relevant part, that “Trafficking means: ... (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.”

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

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 https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

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]

APPELLANT’S CONTENTIONS

Via letter dated June 3, 2017, Appellant, through its authorized employee representative requested review of the Retailer Operations Division’s determination. The request indicates:

- That a violation of SNAP occurred at Appellant on March 16, 2017 when an employee exchanged cash for merchandise that was purchased with EBT benefits.
- That the violation resulted from a miscommunication between the employee and the USDA Investigator.
- That the employee gave the USDA Investigator **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** cash as a donation to the Investigator’s temple of worship.
- The deeply regretted mistake has resulted in operational changes including implementation of more training, both for the specific employee and for all employees; together with an update to the cash registers to separate SNAP ineligible from eligible items.

Further, Appellant requests reconsideration of the denial for a civil money penalty (CMP) indicating discussion with the Retailer Operations Division staff revealed that incomplete materials had been previously submitted. The request

is appended with a request for CMP together with training logs dating between December 2014 and May 2017 and compliance policy statements. It is indicated that Appellant is a “family operated business” which, together with its customers, will benefit from reinstatement.

In a second letter dated June 19, 2017 Appellant indicates that the request for review is warranted because:

- The mistake was made by an employee who didn’t fully understand that even donations from his own pocket was against SNAP rules;
- A CMP should be allowed because this is a first offense for Appellant;
- Appellant assures no further mistakes will be made because all current employees have been retrained and the retraining will continue;
- Appellant has four (4) full time (payroll) employees and two (2) part-time cash (1099) employees who have all been trained even though the part-time employees do not operate the cash registers;
- The mistake is taken very seriously and it is hoped that SNAP authorization is reinstated based on the additional information provided regarding the compliance policy and training program.

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

Operational Changes:

In its initial request for administrative review Appellant indicated that operational changes were made to avert potential future mistakes in this family owned business that employees only four (4) full time payroll employees and two (2) part time cash paid employees. These operational changes include retraining both payroll and 1099 employees; planning ongoing retraining events; and, an upgrade of the cash register system to identify SNAP eligible versus ineligible foods.

It is understood that the operational improvements described are likely to increase the efficiency of Appellant’s operation; however, neither the Act nor the SNAP regulations supporting the Act provide allowance for consideration that changes, however positive, can be considered a basis to mitigate or reverse SNAP violations.

First Time Violation:

In reference to your contention that Appellant has never previously been cited for any program violation; such a record of program participation with no previously documented violations does not constitute valid grounds for mitigating the impact of the present serious charges of trafficking. 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."

Employee Mistake:

Appellant indicates that the employee who is reported to have exchanged cash for Mountain Dew, known to have been purchased with SNAP, thought he was helping by giving 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash as a donation to the Investigator's temple. The resulting SNAP violation is said to have occurred because of miscommunication. On review this explanation is not accepted as reasonable. There is no indication in the Report of Investigations that any temple or donations were discussed. Instead the unidentified male clerk is reported to have devised a plan (exhibit D) to provide the USDA Investigator with the cash being requested by advising that 12- packs of Mountain Dew would be purchased for \$2.50 each.

Upon presentation of the Mountain Dew (exhibit E) the USDA Investigator reports showing the clerk both the SNAP EBT card and the Wal-Mart receipt showing that eight (8) 12-packs of Mountain Dew were purchased for \$4.68 each, a total 5 U.S.C. § 552 (b)(6) & (b)(7)(C), in a SNAP transaction. The clerk is reported to have directed the placement of the SNAP products with two (2) of the 12-packs placed on the cash register counter and the other six (6) 12- packs placed with Appellant's existing inventory. It is not reasonable to accept that giving the USDA Investigator 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash after having directed the USDA Investigator where to place the eight (8) 12-packs of Mountain Dew can be considered a donation.

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. Appellant contends that a CMP should be allowed because this is a first offense;

and because Appellant assures no further mistakes will be made as all current employees have been retrained and the retraining will continue. Neither the Act, nor the pursuant SNAP regulations allow for mitigating factors such as first offense; the implementation of corrective actions; or even assurances that violations will not be repeated to be considered. The “trafficking” of SNAP benefits as defined in 7 CFR § 271.2 is the most egregious of SNAP violations for which permanent disqualification is the only applicable penalty.

The May 30, 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 the April 18, 2017 letter of charges clearly provides that a civil money penalty (CMP) in lieu of permanent disqualification is only available under certain conditions which include four (4) criteria specifically referenced in 7 CFR § 278.6(i). The letter provides that in order to be considered for the alternative sanction Appellant must meet the four (4) criteria listed, **and** provide documentation within 10 calendar days of the receipt of the letter of charges.

Appellant’s June 3, 2017 request for appeal confirmed that Sunoco Mini Mart had not previously provided all materials to confirm that a compliance policy was in place to prevent violations of the SNAP and included attachments consisting of training logs dating between December 2014 and May 2017 and compliance policy statements. The additional materials provided on review, with the letter dated June 3, 2017, cannot be considered because they do not represent materials provided within 10 calendar days of the receipt of the letter of charges as required in 7 CFR § 278.6(i)(1).

The Retailer Operations record documents receipt of a timely request for the imposition of a CMP in lieu of permanent disqualification; and, having completed a comparison and analysis of the materials provided as they relate to the four (4) criteria listed in 7 CFR § 278.6(i)(1) finding that it could not be verified that the document was created, presented and signed prior to the receipt of the April 18, 2017 letter of charges,

The three (3) continuous page document starts with Section 1 on page 1 affirming through signature that the SNAP (EBT) training guide was read on December 6, 2014. Section II, which starts at the bottom of the first page and ends at the top of page 2 affirms through signature, that those same employees all watched the SNAP (EBT) training DVD on December 7, 2014. Page 2 then continues with the introduction of a Compliance Policy, dated December 7, 2014, which affirms through signature on page 3 that the six (6) SNAP Do Nots were

each reviewed. While the materials indicate that initial training was provided in December 2014, no reference is made to, or verification provided, of any follow up or refresher training; and, the document does not address Criterion 4 by indicating that ownership was not aware of, did not approve, nor was in any way involved in the conduct or approval of the cited violations.

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). The materials submitted for consideration are not considered substantial, nor do they effectively convey that Appellant operation was positioned to support full compliance of all SNAP regulations.

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. The materials recount trafficking that is clearly a violation of the SNAP regulations.

The decision to impose a permanent disqualification against Sunoco 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

August 24, 2017