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

Cherryhill Mini Mart & Deli, Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0243326

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 that the Retailer Operations Division properly imposed a permanent disqualification of Cherryhill Mini Mart & Deli (hereinafter "Cherryhill Mini Mart & Deli" or "Appellant") from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against Cherryhill Mini Mart & Deli.

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

Cherryhill Mini Mart & Deli was originally authorized to participate as a retailer in SNAP on July 13, 2020. Between April 1, 2021, and April 19, 2021, USDA conducted an investigation at Cherryhill Mini Mart & Deli to ascertain the firm's compliance with Federal SNAP laws and regulations. It was reported that during the course of the investigation, store personnel violated SNAP rules by committing one trafficking violation by allowing an exchange of SNAP benefits for cash as well as allowing ineligible non-food items to be purchased with SNAP benefits on one occasion.

In a letter dated May 20, 2021, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations. The charge letter informed the Appellant that the trafficking violation 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 letter under the conditions specified in 7 CFR § 278.6(i).

In a written response dated May 28, 2021, the Appellant, through counsel, submitted a statement which indicated that the Appellant is responsible for what occurs at his store, and the clerk who was noted as being on probation and stealing from the Appellant was immediately fired after the owner became aware of the incident on April 8, 2021. Also provided as response was an email to the employee's probation officer indicating that the employee had been working for the Appellant for 10 months prior to his being terminated.

After evaluating the Appellant's response and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated June 8, 2021. This 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 letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but that a CMP was not appropriate because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter dated June 16, 2021, the Appellant, through counsel, 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, in 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) states, in part:

> [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, in part:

> *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, in part:

> *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, in part:

> *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, in part:

> *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, in complicity or collusion with others, or acting alone...*

7 CFR § 278.6(b)(2)(ii) states, in part:

> *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, in 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 of the Program...

SUMMARY OF INVESTIGATION

During an investigation conducted April 1, 2021, through April 19, 2021, a USDA contracted investigator completed four compliance visits at Cherryhill Mini Mart & Deli. A report of the investigation was provided to the Appellant as an attachment to the May 20, 2021, charge letter. The investigation report included Exhibits A through D and provided details on the results of each visit. SNAP violations were documented in one of the four exhibits, including trafficking violations in Exhibit C. The report provided the following details:

Exhibit A

Four SNAP eligible items purchased and two ineligible items were refused (sandwich bags and plastic forks).

Exhibit B

Five SNAP eligible items purchased and no additional items were attempted to be purchased with SNAP benefits.

Exhibit C

Three SNAP eligible items purchased and two ineligible items (fabric softener and one bottle of laundry detergent) purchased; one exchange of SNAP benefits for cash.

The investigator noted on the report: *I entered the subject store, placed all items on the counter, and presented the EBT card to the clerk for purchase. The clerk made no mention of the non-food items being purchased using SNAP benefits and completed the transaction. I asked the clerk for cash back off my EBT card, and the clerk agreed. The clerk asked me how much I wanted, and I said as much as you could give me. The clerk then told me to swipe my EBT card again. He then retrieved $100.00 (5-$20.00) from the register and handed it to me with an EBT receipt for the cash transaction.*

Exhibit D

One SNAP eligible item purchased and no additional items were attempted to be purchased with SNAP benefits; cash exchange was refused.

The investigation report noted that there were two clerks identified during the investigation.

The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR § 271.2. The acceptance of SNAP benefits in exchange for cash or consideration other than eligible food is in violation of Section 278.2(a) of the SNAP regulations. As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for the trafficking is permanent disqualification.

APPELLANT'S CONTENTIONS

The following represents 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 submitted, including any not specifically summarized or explicitly referenced in this document.

The Appellant, through counsel made the following contentions in its request for administrative review, summarized by the review officer for purposes of concision and relevance:

- Appellant indicated the incident was due to theft of an employee.
- Appellant fired the employee the day after SNAP benefits were exchanged for cash, noting theft as the reason.
- Appellant contends that such incidents have never occurred in the past at the store.
- Appellant reviews the books and records of the store every day.

ANALYSIS AND FINDINGS

It is important to note that in an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. The purpose of this review is to determine if the decision made by the Retailer Operations Division followed the SNAP regulations and the Food Stamp Act. All facts associated with this decision and any additional facts provided by the Appellant were taken into consideration.

In this case, the Appellant has not provided any evidence to counter FNS's allegations of trafficking. The Appellant contended that the employee was fired upon realizing what had happened. With no evidence from the Appellant to show that violations did not take place, it is the finding of this review that SNAP violations did occur as charged and a penalty is warranted.

When the Appellant submitted an application to participate in SNAP, a signed certification page was included with the application. The signed certification page confirmed that the owner understood and agreed to abide by the SNAP regulations. The signed certification page also indicates that the owner/officers are fully responsible for violations of the Supplemental Nutrition Assistance Program regulations, including those committed by any of the firm's employees (paid or unpaid, new, full-time, or part-time). The certification statement signed by the owner also is clear in stating that violations of program rules can result in administrative

actions such as fines, sanctions, withdrawal or disqualification from SNAP, can also result in federal, state and/or local criminal prosecution and sanctions.

The transactions cited in the letter of charges along with the attached Report of Investigation were conducted by a contracted USDA investigator, that has signed under perjury, that the Report of Investigation is true and correct. The Report of Investigation clearly spells out that violations consisting of the sale of ineligible items as well as trafficking occurred at the store and the report documents by a preponderance of the evidence that a store employee committed the trafficking violation by buying or selling SNAP benefits for cash or consideration other than eligible food.

No prior incidents

The Appellant contends that the incident was due to an employee stealing and no other incidents have ever occurred in the past.

This administrative review acknowledges that the owner may not have known or intended for SNAP trafficking violations to occur at the store. However, the Report of Investigation record shows that SNAP trafficking did occur. The store record shows that the certification page as part of the application was signed by the Appellant acknowledging that they understood the certification statement which indicates the owner is responsible for violations of SNAP occurring in the store by any of the firm's employees including paid or unpaid, new, full-time or part-time. An owner or manager is not free of responsibility simply because they did not commit the violations. The ownership of the firm is ultimately responsible for all transactions conducted in the store and for the proper training of staff including paid or unpaid, new, full-time, or part-time employees at the store. As such, the owner's contention that the employee stole from the store is not a valid reason to dismiss the charges or modify the penalty in any way.

As to the contention that this has never occurred in the past, statute at 7 U.S.C. § 2021(b)(3)(B) and SNAP regulations at 7 CFR § 278.6(e) require that when trafficking occurs, permanent disqualification is the necessary penalty, even on the first occasion, regardless of a firm's prior compliance with program rules. This review finds that the sanction imposed by the Retailer Operations Division in this case fully conforms to SNAP regulations and is consistent with sanctions imposed upon other retail stores that have committed similar first-time violations. Furthermore, this review has no authority to reduce a period of disqualification in a case in which trafficking violations were found to have occurred.

Based on the statement provided through counsel, the owner suggested that they checked the books and records of the store every day. While this may be true and potentially the reason the trafficking transaction was discovered by the owner and the employee fired, this has no additional relevance to the fact that trafficking did occur at the store during the USDA investigation on April 7, 2021.

TRAFFICKING CIVIL MONEY PENALTY

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking civil money penalty in lieu of permanent disqualification for trafficking because the Appellant did not submit sufficient evidence within 10 days of receipt of the charge letter.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a CMP to be considered, a firm must notify and submit appropriate supporting documentation to USDA, Food and Nutrition Service within 10 days of receipt of the charge letter. Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

Trafficking, as defined in Section 271.2 of the SNAP regulations, includes the exchange of SNAP benefits for cash. Pursuant to regulations at 7 CFR § 278.6(e)(1)(i), permanent disqualification is the required penalty for such a violation.

Based on a review of all available information in this case, this review finds, through a preponderance of the evidence, that a trafficking violation did occur at Cherryhill Mini Mart & Deli during a USDA investigation. All transactions cited in the letter of charges were either conducted or supervised by a USDA investigator and all are thoroughly documented. A review of facts and documentation has produced no indication of error on the Retailer Operations Division for implementing the sanction of permanent disqualification from SNAP based on the trafficking violation. The Appellant in this case has not offered any additional evidence in support of its contentions and thus a reversal of the agency's sanction determination would not be appropriate. Pursuant to 7 CFR § 278.6(a) and (e)(1), the decision to impose a permanent disqualification against the Appellant, Cherryhill Mini Mart & Deli, is sustained.

RIGHTS AND REMEDIES

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 to Section 279.7 of the SNAP regulations (7 CFR § 279.7). 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 thirty (30) days of receipt of this decision. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

Jamie Slack
Administrative Review Officer

June 23, 2022