

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

Sam's Market,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0218592

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 Office of Retailer Operations and Compliance to impose a permanent disqualification against Sam's Market (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), in its administration of the SNAP when it imposed a permanent disqualification against Appellant.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, "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

USDA conducted an investigation of the compliance of the Appellant firm with federal SNAP law and regulations during the period August 28, 2019, through November 4, 2019. The investigation determined that personnel at the Appellant firm exchanged \$20.00 in SNAP benefits for \$10.00 cash (trafficking) in both Exhibits E and F and also exchanged SNAP benefits for ineligible items, that included one major ineligible item, on five occasions as noted

in the letter of charges. These transactions were deemed clearly violative and warranted a permanent disqualification.

The exchange of SNAP benefits for cash is defined as trafficking under 7 CFR § 271.2. These transactions were deemed clearly violative and warrant a permanent disqualification. The investigative report shows that one clerk conducted both trafficking transactions in Exhibits E and F. It is also noted that this same clerk allowed the purchase of ineligible items using SNAP benefits without question or hesitation in Exhibits A through D and Exhibit F.

As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant in a letter dated January 21, 2020, that the firm and its ownership were charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.6(e)(1). The 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 permanent disqualification of a firm for trafficking.”

Appellant, through counsel, submitted a Freedom of Information Act (FOIA) request dated January 29, 2020. The Office of Retailer Operations and Compliance was notified of this action by Appellant, through counsel, in correspondence dated February 3, 2020. The agency responded to the FOIA request by correspondence sent via email on June 30, 2021. The Office of Retailer Operations and Compliance sent a 10 day reminder of the opportunity to submit a response to the charges to counsel in a letter dated July 1, 2021. Appellant, through counsel, subsequently requested an extension of time to respond to the charges via email on July 6, 2021, and was approved in a letter dated July 12, 2021, for an extension until July 30, 2021. This approval also stipulated that the deadline to request and to submit evidence in support of a trafficking CMP in lieu of a permanent disqualification could not be extended.

Appellant, through counsel, responded to the charges in a letter dated July 30, 2021, that did not request a CMP in lieu of permanent disqualification or provide any evidence in support of the CMP. The Office of Retailer Operations and Compliance notified Appellant by letter dated October 18, 2021, that the firm was permanently disqualified from participation as a SNAP retailer in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter dated October 23, 2021, Appellant, through counsel, appealed the Office of Retailer Operations and Compliance decision and requested an administrative review of this action. The appeal was granted. Subsequent correspondence dated December 2, 2021, was received from Appellant.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden

of providing relevant evidence that 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 untrue.

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 Section 278. In particular, Sections 278.6(a) and Part 278.6(e)(1)(i) establish 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 § 271.2 states that: Eligible foods means any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot food and hot food products prepared for immediate consumption.

7 CFR § 278.2(a) states that: Coupons [SNAP 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, in payment of interest on loans, or for any other nonfood use.

7 CFR § 278.6(a) states that: 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.

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, selling, stealing, or otherwise 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 . . .” Trafficking is further defined, in 7 CFR § 271.2, to include “(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 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, inter alia: “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.”

7 CFR §278.6(b)(2)(ii) states, inter alia: “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)." Part 278.6(b)(2)(ii) further states that 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 Part 278.6(b)(1), the firm shall not be eligible for such a penalty.

In addition, 7 CFR § 278.6(i)(2) states in relevant part, "As specified in Criterion 3 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with this part 278 of current FNS regulations and current FSP policy on the proper acceptance and handling of food coupons." This section goes on to state, "As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation." This section further states, "A firm which seeks a civil money penalty in lieu of permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted . . ."

APPELLANT'S CONTENTIONS

The following may represent a 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:

- The Appellant firm opened and became SNAP authorized in 2006. Appellant discussed the layout of the store, store hours of operation, the surrounding neighborhood, and nearby stores based on a statement by one of the owners;
- The charge letter did not specify which subsection of the trafficking definition the firm violated. No receipts were provided with the charge letter or in the FOIA response. The firm denies trafficking and states that the third paragraph of Exhibits E and F in the Investigative Transaction Reports contain factually inaccurate descriptions of what transpired. The statements by the owner and by the responsible clerk state that the investigator made repeated and inappropriate efforts to convince the clerk to exchange SNAP benefits for cash. Appellant further states, "It also appears from the Investigative Transaction Reports that the undercover investigator entered and left the firm multiple times on October 24, 2019, and November 4, 2019." The owner and the clerk deny that ineligible items were sold using SNAP and that trafficking occurred. The Appellant firm denies that any store clerk engaged in trafficking in SNAP benefits and specifically denies that a preponderance of the evidence exists to establish that any store employee knowingly exchanged SNAP benefits for cash. Finally, the store did not profit in any way based on the alleged exchange of SNAP benefits for cash
- Appellant objects to FNS's determination because it was based on records not provided to the store or undersigned counsel. A federal agency should not permanently disqualify a retail food store from participating in the SNAP program without affording it a full and

fair opportunity to seek review of all such records. Any agency determination based on records never provided to a SNAP retailer is inequitable, unfair, and has discriminatory impacts on retailers based on their religion and national origin, in violation of USDA's civil rights regulations and policies. The clerk is a member of the Hindu faith and is an immigrant from India;

- None of the owners were working in the store on either October 24, 2019, or on November 4, 2019, but the clerk recalls interacting with the investigator. The clerk denies giving the investigator \$10.00 cash from the register in exchange for \$20.00 in SNAP benefits on either date. All interactions between the clerk and the investigator were commenced exclusively by the investigator. There also is no doubt that the investigator was extremely insistent and was preventing the clerk from conducting business normally;
- The firm had and still has a sophisticated point-of-sale (POS) system that maintains electronic copies of receipts for 90 days. While store ownership was able to download the store's EBT receipts for November 4, 2019, the October 24, 2019, receipts had already been deleted by the time the firm received the charge letter in late January 2020. The total of the firm's seven EBT transactions on November 4, 2019, was \$128.07. Had the firm charged an additional \$20.00, as alleged in Exhibit F, the deposit associated with the firm's EBT transactions for November 4, 2019, would have totaled \$148.07, not \$128.07. It is also inexplicable that the undercover investigator did not know how much all of the items she allegedly purchased with SNAP benefits cost. This is true because the firm's POS system provides itemized receipts which are given to all customers;
- In order to find that a retail food store or firm has engaged in trafficking, FNS needs to determine by a preponderance of the evidence that each element has been met. In order to conclude that trafficking took place, FNS needed to determine, based on a preponderance of the evidence, that the firm knew that the clerk, while acting in an employment capacity and within the scope of his duties, intentionally exchanged SNAP benefits for cash or consideration other than eligible food. Review of the limited evidence provided to the store, when coupled with store ownership's and the clerk's declarations reveals that a preponderance of the evidence did not establish that the firm engaged in exchanging SNAP benefits for \$10.00 in cash on two occasions during late 2019. There was (and is) simply no evidence that, prior to the receipt of the Charge Letter, the firm or its owners had any knowledge of what transpired at the firm on October 24, 2019, and November 4, 2019. Moreover, SNAP retailers are not responsible for everything that transpires at a retail food store. FNS's regulations simply do not provide that retail food stores or firms are responsible for all activities of their employees, especially when they are acting outside of the scope of their employment. Appellant cited Massachusetts law regarding the scope of an employee's conduct. The clerk appears to have been confused about which items were eligible. Had store ownership been present, no ineligible food items would have been exchanged for SNAP benefits; and,
- Unless ROD placed greater weight on the undercover investigator's report, a preponderance of the evidence did not establish that the firm engaged in trafficking in SNAP benefits. As noted above, ROD (and ARB) does not have authority under the Food and Nutrition Act of 2008 or any SNAP regulations to place greater weight on the undercover investigator's report simply because he was a governmental employee or

contractor. Moreover, insufficient evidence in the Exhibits to the Charge Letter established that the clerk was acting within the scope of his duties as a store employee when he allegedly gave cash (which is disputed) to the undercover investigator. A preponderance of the evidence also did not exist establishing that SNAP benefits were exchanged for cash. This is unquestionable when looking at all of the evidence surrounding the store visit described in Exhibits E and F, especially when comparing that with the funds received in connection with SNAP benefits redeemed at the firm on November 4, 2019. Additionally, no register receipts and no copies of any cash allegedly received from the firm's register were ever produced to the firm or its counsel.

Appellant submitted a copy of the charge letter, a copy of the determination letter; a statement by store ownership; a statement by the responsible clerk; seven unidentified printouts allegedly for SNAP transactions on November 4, 2019; and a bank statement for November 2019 in support of these contentions.

ANALYSIS AND FINDINGS

Regarding Appellant's denial of violations, the purpose of this review is to either validate or to invalidate the earlier decision of the Office of Retailer Operations and Compliance and is limited to what circumstances were at the basis of the Office of Retailer Operations and Compliance action at the time such action was made. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations. In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that 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 untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. Additionally, a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

SNAP regulations at 7 CFR § 271.2 define trafficking in part as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". Trafficking also includes "(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food." Both the SNAP retailer application and retailer reauthorization application contain a certification page whereby applicants must confirm their understanding of and agreement with SNAP retailer requirements in order to complete the application and the reauthorization process. When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer and again when it applied for reauthorization, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time regardless of the amount of time the owner(s) is present at the subject firm and that ownership is accountable for the proper

training of staff and the monitoring and handling of all SNAP benefit transactions. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP.

The investigative report shows that the same clerk working at the Appellant firm readily and without question allowed the exchange of SNAP benefits for ineligible items on five different occasions over a 10 week investigatory period as described in the Exhibits to the Report of Investigation. Additionally, this same clerk also allowed the exchange of SNAP benefits for cash in Exhibits E and F. That fact that this clerk willingly allowed the purchase of ineligible items using SNAP benefits and also conducted two SNAP trafficking transactions all for a complete stranger is strong evidence that this was a normal business practice at the Appellant firm indicating a pattern of SNAP violations. This directly refutes store ownership's uncorroborated claim regarding the training provided to employees as well as the clerk's claim that he was, "familiar with FNS rules regarding SNAP transactions".

The investigative report shows that the nature and scope of the violations under review do violate SNAP regulations and a review of the report shows no errors or discrepancies. The transaction amounts cited in the report have been matched to SNAP transactions posted by the Appellant firm with no disagreements and a comparison of the dates/amounts on the POS receipts given by the Appellant firm to the investigator correspond to the dates/amounts provided to FNS by the firm's EBT processor when it submitted the transactions to FNS for reimbursement. FNS evidence consisting of photos of the POS receipts with the firm's name, detailed donation records signed by a local charitable organization, and photos of the ineligible items and cash provide conclusive evidence supporting the details provided in the investigative report. The exchange of SNAP benefits for cash (Exhibits E and F) constitutes trafficking as previously defined in SNAP regulations with the penalty being permanent disqualification. There is no regulatory threshold for the dollar value of the trafficking for permanent disqualification to be imposed. That the clerk in Exhibits E and F freely advised the investigator that for \$10.00 cash, the EBT card would be swiped for double that amount combined with the \$10.00 cash being removed from the store's cash register provides indisputable proof that the trafficking was intentional. A review of the investigative report also shows that the denominations, series, and serial numbers for the cash paid by the Appellant clerk to the investigator in both Exhibits E and F are listed in the investigative report. Photos of the cash clearly showing the same serial numbers further substantiates that SNAP benefits were, in fact, exchanged for cash at the Appellant firm.

Appellant's entire defense is based on the EBT receipts allegedly downloaded by store ownership for the SNAP transactions that occurred on November 4, 2019. Redemption information for the Appellant firm shows there were, in fact, five SNAP transactions on November 4, 2019, not the seven claimed by the Appellant. The five actual transactions do total to the same amount of \$128.07 as stated by the Appellant, but show one transaction in the amount of \$39.43 occurring at 11:17 AM instead of the three smaller transactions (\$9.33, \$10.67, and \$19.43) as claimed by the Appellant. It is noted that the alleged receipt printouts provided by the Appellant of the firm's November 4, 2019, SNAP transactions all have the same transaction time of 11:39 providing further evidence that these three transaction receipts were

fabricated in order to cast doubt on the accuracy of the FNS Report of Investigation. The last four transactions listed by Appellant (\$7.17, \$8.17, \$8.14, and \$65.16) do match those from the firm's SNAP redemptions in FNS records. SNAP redemption data for SNAP retailers comes to FNS through the financial services network used for debit card transactions so is far more likely to be an accurate reflection of the actual SNAP transactions occurring at the Appellant firm than Appellant's unsupported claims and fabricated evidence.

Appellant offered no evidence to validate any of its other claims made regarding the purported inaccuracies in Exhibits E and F of the Investigative Transaction Reports. It is also noted that the Investigative Report contains no evidence to support Appellant's claim that the investigator entered and left the Appellant firm multiple times on October 24, 2019, and on November 4, 2019. A review of the statements by both the owner and the clerk make no mention of multiple visits by the investigator on these dates. Lastly, Appellant's claim that the investigator should have known how much all of the items purchased cost since the firm's POS system provides itemized receipts to all customers is inaccurate and misleading. A review of the Investigative Transaction Reports shows that the firm did not provide any cash register receipts, itemized or not, to the investigator during any of the six transactions. The investigator did receive EBT POS receipts for the first four transactions, but did not receive them for the two trafficking transactions since the clerk is documented as stating that he doesn't give receipts when he gives cash, as described in the investigative report. The clerk's statement for both Exhibits E and F regarding charging double the amount of cash and not providing receipts shows that trafficking was a normal occurrence at the firm. Since Appellant's other contentions are only assumptions, not facts, and no basis has been presented to substantiate them, they are found to be without merit.

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification "shall be permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store." In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option.

Based on the discussions above, there is not any valid basis for dismissing the charges or for mitigating the penalty imposed.

Other Contentions

In regard to the state law cited by Appellant, considerations of relevant legal precedent through case law or state law, or the lack thereof in relation to the present case, are beyond the scope of this review. This review relies upon the statute and regulations governing the SNAP and

evaluates whether the decision to impose a disqualification upon the Appellant was in accordance with same and sustainable by a preponderance of the evidence. Appellant's state law reference is acknowledged in this context only.

Regarding counsel's claim of discrimination by USDA FNS on retailers based on their religion and national origin, stores that are investigated by FNS are not selected based on owner information. Racial, gender, religious, ethnicity, and nationality information are not collected as part of the SNAP application process so FNS has no way of knowing any of these details about a store owner when conducting a review of a firm. A review of the official record shows no evidence to support the allegation that the Office of Retailer Operations and Compliance permanent disqualification action may have resulted from disparate treatment due to race, color, national origin, religion, sex, disability, age, marital status, type of business, or other factors. It is also noted that no claims of discrimination by store ownership or by the store clerk were evident in their statements. However, store ownership has the right to pursue any such allegations of discrimination directly with the USDA office which handles such matters. If ownership wishes to file a Civil Rights Program Complaint of discrimination with USDA, the USDA Program Discrimination Complaint form, which may be found online at https://www.usda.gov/sites/default/files/documents/Complain_combined_6_8_12_508.pdf, should be completed. Information on filing a Program Discrimination Complaint may be found at <https://www.usda.gov/oascr/filing-program-discrimination-complaint-usda-customer>. Ownership may also write a letter containing all of the information requested in the form. Information on where to send the completed form or letter by mail, fax, or email may also be found at this address. Any such allegations of discrimination will be handled by that office independent of this administrative review.

CIVIL MONEY PENALTY

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

The Office of Retailer Operations and Compliance determined that the Appellant was not eligible for a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i) because Appellant failed to request a CMP or to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. As such, the Office of Retailer Operations and Compliance determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

Based on the above discussion and the evidence under review, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Office of Retailer Operations and Compliance's decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did 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 by a USDA investigator, signed under penalty of perjury, 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 exchange of items purchased with SNAP benefits for cash, and in all other critically pertinent detail. Additionally, the decision by the Office of Retailer Operations and Compliance that Appellant was not eligible for a trafficking CMP is also found to be correct.

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against the Appellant business 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, 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.

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

April 13, 2022