

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

**Cheapway #8,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0247042**

**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 Cheapway #8 (hereinafter “Cheapway #8” or “Appellant”) from participating 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 Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against Cheapway #8.

**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 Cheapway #8 with Federal SNAP law and regulations during the period August 23, 2021 through September 10, 2021. The investigation report documents that personnel at the Appellant firm, in addition to accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items on five occasions, also exchanged SNAP benefits for cash during two undercover compliance visits. The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR § 271.2.

As a result of evidence compiled from this investigation, the Retailer Operations Division charged the Appellant, in a letter dated November 30, 2021, with trafficking in SNAP benefits. The charge letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated that the Appellant had the right to respond to the charges within 10 days of receipt. The letter also stated that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a

permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i). Per UPS confirmation of delivery, the charge letter was delivered to the Appellant at the store address of record on December 6, 2021.

In responses to the Retailer Operations Division of December 8, 2021 and December 13, 2021, the Appellant, through counsel, replied to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination. In the December 8, 2021 response, counsel requested information and documents with regard to the agency's case against the Appellant pursuant to the Freedom of Information Act (FOIA). The Retailer Operations Division subsequently informed counsel as to how to file an official FOIA request with the FNS FOIA office.

After giving consideration to the Appellant's responses and the evidence in this case, the Retailer Operations Division informed the Appellant, by letter dated May 6, 2022, that Cheapway #8 was permanently disqualified from participation as a retail store in the SNAP. The determination letter also stated that the Appellant was not eligible for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations as the Appellant did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked May 16, 2022, the Appellant, through counsel, requested an administrative review of the permanent disqualification determination. FNS granted the Appellant's request for administrative review by letter dated June 1, 2022.

### **STANDARD OF REVIEW**

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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**

The controlling statute in this matter is covered 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 ...[Emphasis added.]

7 CFR § 271.2 states that the definition of "coupon" includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

7 CFR § 278.6(e)(1)(i) states:

FNS shall ... disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, in part:

Trafficking means the buying or selling of coupons, ATP cards or other benefit instruments for cash or consideration other than eligible food ...

7 CFR § 271.2 defines eligible food, in part, as:

Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption ....

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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system....

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.

7 CFR § 278.6(b)(2) states, in part:

(ii) 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 as specified in § 278.6(i), 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).

(iii) 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.

### **SUMMARY OF CHARGES**

During an investigation conducted during the period August 23, 2021 through September 10, 2021, the USDA conducted five undercover compliance visits at Cheapway #8. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated November 30, 2021. The investigation report included Exhibits A through E which provides a narrative on the results of each compliance visit. The investigation report documents that personnel at the Appellant firm, in addition to accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items on five occasions (Exhibits A, B, C, D, and E), exchanged SNAP benefits for cash during two undercover compliance visits (Exhibits D and E).

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 a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the replies to the charge letter and in the request for administrative review, the Appellant, through counsel, made the following summarized contentions, in relevant part:

- The Appellant objects to the alleged wrongdoing and findings of permanent disqualification and trafficking.
- The owner was very upset after receiving the charge letter.
- The owner does not want to lose his SNAP eligibility at this or any other stores he owns.
- The owner admits that a clerk handled the SNAP transactions improperly, but does not believe that the allegations arise to a level warranting trafficking, a fine, or permanent disqualification.
- There is simply no way that the owner can police every cashier every day.
- The owner was not aware and did not approve of any violations of the SNAP. He does not manage the store on a day to day basis and was unaware that anything out of the ordinary may have been taking place.
- It appears from the investigation reports that the investigator pretty much talked the cashier into breaking the law.
- The Appellant is not guilty of any type of trafficking.
- The Appellant is willing to establish a broader based approach for compliance but instructions were given to all employees to comply with the SNAP regulations at the time any of these alleged violations occurred. The Appellant had rules in place requiring employees to comply with the SNAP rules and they were trained on how to use SNAP cards properly.
- The Appellant is willing to negotiate some form of monetary fine in order to resolve this case.
- The amount of the fee in lieu of permanent expulsion is disproportionate to the amount of improper transactions. A fine such as what has been proposed on a small convenience store is simply absurd.
- The Appellant requests, pursuant to the Freedom of Information Act, copies of any and all statements or other documents showing that anything was done wrong at the Appellant. However, USDA did not provide the Appellant with any specifics which puts the Appellant in a position of attempting to defend itself against allegations that were never shown or proven.
- The Appellant has been denied due process of law. USDA has not presented any evidence to substantiate the charges made against the Appellant.
- The Appellant requests an immediate hearing.

## **ANALYSIS AND FINDINGS**

### **SNAP Violations**

This review is to either validate or to invalidate the determination made by the Retailer Operations Divisions; it is limited to the facts at the basis of the Retailer Operations Division's determination at the time it was made.

The Appellant contends that the owner admits that a clerk handled the SNAP transactions improperly, but does not believe that the allegations arise to a level warranting trafficking, a fine, or permanent disqualification. There is simply no way that the owner can police every cashier every day. The owner was not aware and did not approve of any violations of the SNAP. He does not manage the store on a day to day basis and was unaware that anything out of the ordinary may have been taking place.

However, prior to becoming authorized to participate in the SNAP, the Appellant completed and submitted a SNAP Application for Retail Stores. When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, 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. 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. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

Regardless of who the store owner utilizes to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf.

The transactions cited in the letter of charges were conducted by a USDA investigator and are thoroughly documented. Investigators are trained thoroughly before entering any retail establishment and all protocols, including but not limited to what can and cannot be said. Investigators sign, under penalty of perjury, that investigative reports are true and correct. All transactions are fully documented and a complete review of this documentation has yielded no known error or discrepancy in the reported findings. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. The investigation report documents by a preponderance of the evidence that the store employee(s) committed trafficking violations by buying or selling SNAP benefits for cash or consideration other than eligible food.

Investigative personnel stand by their report that the items listed in the investigation report were, in fact, purchased and have documentation on file that confirms the items listed were donated to and signed for by a charitable organization following each transaction. Also supporting the conclusion that the investigation did take place at the subject store are EBT receipts obtained during the investigation whose transaction amounts correspond exactly to the purchase amounts and times indicated in each of the Exhibits of the investigation report, and clearly bear the name and address of the subject store. Also, photos of the bills provided to the investigator in exchange for SNAP benefits which include each bills' series year and serial number are also included in the case record. Therefore, the evidence supports the conclusion that the Appellant was not misidentified as the offending store and that the SNAP violations as noted occurred.

The evidence supports that SNAP violations occurred at the Appellant firm. The store employee identified in Exhibits D and E was found to be trafficking as defined under 7 CFR § 271.2 by buying or selling of SNAP benefits for cash or consideration other than eligible food. The investigation report documents that on September 3, 2021 (Exhibit D), a female employee accepted an unknown amount in SNAP EBT benefits in exchange for \$20.00 in cash; and on September 10, 2021 (Exhibit E), a female employee accepted an unknown amount in SNAP EBT benefits in exchange for \$20.00 in cash.

Exhibit D of the investigation report states, in part:

“5 U.S.C. § 552 (b)(7)(E).”

Exhibit E of the investigation report states, in part:

“5 U.S.C. § 552 (b)(7)(E).”

With regard to the Appellant’s contention that, rather than just verifying violations, the investigator offered and persuaded the store clerk to violate seems to imply that the investigator engaged in activity commonly referred to as entrapment. Generally, the entrapment that is forbidden by law depends on whether or not the activity leading up to the violation amounted to putting the activity in the mind of a person who had no prior inclination to violate, and leading him/her to do so for the first time. The U.S. Department of Agriculture’s Office of General Counsel maintains that if investigators merely provide an opportunity for a suspected violator to continue on a course of criminal conduct, such activity will not constitute entrapment. In this regard, the investigation record does not contain any evidence indicating activity characteristic of entrapment, nor had the retailer provided substantial evidence to support the claim of entrapment.

Neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations 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 extremely serious, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a nonmanagerial 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, § 278.6(e)(1)(i) of the SNAP regulations states that FNS must 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.

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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. The Appellant did not provide any evidence that the violations cited in the charge letter did not occur. The preponderance of the evidence in the record supports that trafficking, as defined in the regulations, did occur at the Appellant and that the permanent disqualification was properly applied.

### **Corrective Action**

With regard to the Appellant’s contentions with respect to the implementation of corrective actions to ensure that future SNAP violations do not occur, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action

at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that it has taken or will take corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

## FOIA

The Appellant requests, pursuant to the Freedom of Information Act, copies of any and all statements or other documents showing that anything was done wrong at the Appellant. However, USDA did not provide the Appellant with any specifics which puts the Appellant in a position of attempting to defend itself against allegations that were never shown or proven.

FNS acknowledges that in the December 8, 2021 response to the letter of charges, counsel requested information and documents with regard to the agency's case against the Appellant pursuant to the Freedom of Information Act (FOIA). The Retailer Operations Division subsequently informed counsel as to how to file an official FOIA request with the FNS FOIA office. However, as of the date of this Final Agency Decision, no FOIA request was submitted by counsel to the FNS FOIA office.

It is also important to note that effective October 26, 2020, changes to 7 CFR § 278.6 and 7 CFR § 279.4 went into effect which allow FNS to take administrative action against a firm, even if the firm has submitted a FOIA request or appeal for records. According to recently published regulations: "278.6(p) Freedom of Information Act (FOIA) requests and appeals. A FOIA request or appeal for records shall not delay or prohibit FNS from making a determination regarding disqualification or penalty against a firm under paragraphs (c) and (d) of this section, or delay the effective date of a disqualification or penalty listed in paragraph (e) of this section."

With regard to the Appellant's contentions with respect to lack of due process, prior to a disqualification determination, the firm was given ample opportunity to reply to the charge letter provide any information to explain the transactions noted in the charge letter and investigation reports. The Appellant, through counsel, provided information in responses to the letter of charges on December 8, 2021 and December 13, 2021. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

The second level of due process involves an administrative review, of which the Appellant, through counsel, has likewise availed itself and in the process of which the Appellant was granted an additional three weeks within which additional information may be provided in support of the request for review. Therefore, any evidence and information that the Appellant presented to the Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to the Appellant's right to a fair and thorough review. The Appellant has exercised its opportunity to reply to the charge letter and its administrative review rights, and by doing so has availed itself of the full complement of the agency's statutory obligations with regard to due process.

## Hearing Request

With regard to the Appellant's request for an immediate hearing, this disqualification is an administrative action and the SNAP regulations do not provide for a hearing, but rather for an administrative review of the action. As noted previously, the Act and regulations provide that any firm aggrieved by an administrative review determination may seek judicial review of the determination in Federal court or a State court of record having competent jurisdiction. In such event, trial de novo proceedings ensure the firm of a full evidentiary hearing on the agency action at issue.

## CIVIL MONEY PENALTY

In the November 30, 2021 charge letter the Appellant was informed by the Retailer Operations Division that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000 in lieu of permanent disqualification of a firm for trafficking. Per Section 278.6(i) of the SNAP regulations, four criteria must be met in order to be considered for a trafficking civil money penalty. If requesting a trafficking CMP, an Appellant must meet each of the four criteria listed and provide the documentation as specified within ten days of the Appellant's receipt of their charge letter.

If the Appellant's request for a trafficking CMP and the required documentation are not submitted on time, it will lose its right for any further consideration for a trafficking CMP. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) 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, the firm shall not be eligible for such a penalty". The regulations do not provide the agency discretion to extend the time within which documentation and evidence in support of a trafficking civil money penalty may be submitted.

In the December 8, 2021 response to the letter of charges, the Appellant, through counsel, requested consideration for the imposition of a trafficking civil money penalty in lieu of permanent disqualification. The Appellant contends that instructions were given to all employees to comply with the SNAP regulations at the time any of these alleged violations occurred. The Appellant had rules in place requiring employees to comply with the SNAP rules and they were trained on how to use SNAP cards properly.

While the Appellant's request for the imposition of a trafficking civil money penalty in lieu of permanent disqualification was timely submitted, the Appellant did not submit timely substantial evidence, as required by the regulations, to meet the criteria for a trafficking CMP in lieu of permanent disqualification. Therefore, the Retailer Operations Division's decision not to impose a civil money penalty in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

## CONCLUSION

As previously stated, 7 CFR § 278.6(e)(1)(i) reads, in 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 or selling of SNAP benefits for cash or consideration other than eligible food." The law and regulations do not provide for a lesser period of disqualification for this violation.

Based on a full review of the evidence in this case, the Retailer Operations Division properly imposed a permanent disqualification of Cheapway #8, the Appellant, as an authorized retailer in the Supplemental Nutrition Assistance Program. As such, the decision to impose a permanent disqualification against Cheapway #8, the Appellant, is sustained.

## **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that 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 you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, FNS is 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.

LORIE L. CONNEEN  
ADMINISTRATIVE REVIEW OFFICER

May 3, 2023