

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

**Sky Market and Deli,
Appellant,
v.
Retailer Operations Division,
Respondent.**

Case Number: C0251088

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 the permanent disqualification of Sky Market and Deli (Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

AUTHORITY

7 USC § 2021 and the 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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period from May 6, 2022, through June 8, 2022. The investigation report documents that personnel at Appellant exchanged cash for SNAP benefits during two of the visits. The store employees also sold ineligible non-food items in exchange for SNAP benefits. The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR §271.2.

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As a result of evidence compiled from the investigation, the Retailer Operations Division informed Appellant, in a letter dated August 9, 2022, that it was charged with violating the terms and conditions of the SNAP regulations. On August 22, 2022, Appellant, through counsel, replied to the charge letter and explained that the transactions were conducted by an employee, all the employees were trained, and a disqualification will have an adverse impact on the surrounding community.

After considering the retailer's reply and the evidence, the Retailer Operations Division notified Appellant in a letter dated September 27, 2022, that the firm was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6(c) and § 278.6(e)(1) for trafficking violations. This determination letter further stated that Appellant was not eligible for a trafficking CMP because it failed to timely 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 dated October 11, 2022, Appellant appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted.

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, would 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 contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) and (e)(1) 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 SNAP benefits.

7 USC § 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 § 271.2 states, in part, 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 § 278.6(a) states:

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) reads, in part:

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

7 CFR § 271.2(1) defines trafficking, in part, as:

The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.

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).** [Emphasis added.]

(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. [Emphasis added.]

INVESTIGATION DETAILS

An investigator conducted six compliance visits at Sky Market and Deli from March 6, 2022, through June 8, 2022. The investigation report dated June 22, 2022, was provided to the Appellant as an attachment to the charge letter and included Exhibits A through F which provide details on

the results of each compliance visit. The investigation reported that personnel exchanged \$30.00 in cash for \$50.81 in SNAP benefits on one occasion (Exhibit E) and \$30.00 in cash for \$49.65 in SNAP benefits on another visit (Exhibit F). Transactions of this nature are referred to in the regulations as “trafficking”. During each of the visits, Appellant also exchanged ineligible non-food items, including scrub sponge, dish liquid, heavy duty forks, sandwich bags, laundry detergent, hand soap, press and seal wrap, napkins, party tumblers, and tall kitchen bags, for SNAP benefits.

APPELLANT’S CONTENTIONS

In its October 11, 2022, administrative review request, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- The owner and employee were trained.
- Subsequently hired employees were advised that they either had to successfully complete the training or have the on-duty manager complete the customers’ SNAP purchases.
- The employee was terminated.
- Employees have received additional training regarding SNAP and employment rules, and a more robust oversight by the two managers is now in place.
- The investigator’s reports detail deceitful and undue influence on employees including advising an employee how to override the register to wrongfully obtain EBT benefits.

ANALYSIS AND FINDINGS

The investigation report, which was provided as an attachment to the charge letter, is specific and details each occasion during which violations occurred, their dates, the amount of cash provided in exchange for SNAP benefits, and the descriptions and any comments of the clerk involved. A full review of the case record shows that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted by an investigator and are thoroughly documented. The evidence in the record includes EBT receipts which substantiate the amounts of the trafficking transactions cited in the investigative report and photos of the items purchased. A complete review of this documentation has yielded no error or discrepancy.

Counsel contends that the investigator’s reports detail deceitful and undue influence on Appellant’s employees including expressly advising an employee, step-by-step, regarding how to override the cash register system to wrongfully obtain EBT benefits. However, a review of the evidence presented by the Retailer Operations Division establishes by a preponderance of the evidence that the violations as reported occurred at Appellant. The evidence indicates that the violation described in Exhibits E and F of the investigation report meet the definition of trafficking. The documentation presented by the Retailer Operations Division establishes by a preponderance of the evidence that the violations as reported occurred at Appellant. Trafficking in SNAP benefits is an extremely serious violation and both 7 USC §2021(b)(3)(B) and 7 CFR §278.6(e)(1)(i) state that a first-time violation warrants a permanent disqualification.

Corrective Action

Appellant explains that it terminated the employee and retrained all its employees. 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 within the authority of this review to consider what subsequent remedial actions may have been taken or will be taken in the future so that a store may begin to comply with program requirements. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment based on corrective actions implemented after investigative findings of program violations. Therefore, Appellant's contention that it took corrective action to prevent future violations does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Household Hardship

Counsel stated that a permanent hardship presents a hardship to the surrounding community. The available evidence shows that within a one-mile radius of Appellant there are five other authorized stores. Moreover, where there is a hardship to SNAP households, FNS may impose a hardship CMP on a firm in lieu of a disqualification where there is a lack of authorized stores in the area. However, 7 CFR § 278.6(f)(1) clearly states that "a civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a permanent disqualification." Because the Retailer Operations Division has acted to permanently disqualify Appellant's firm, a hardship CMP in lieu of disqualification cannot be granted.

Civil Money Penalty

Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i) even though it was informed of the right to do so in the charge letter. SNAP regulations at 7 CFR § 278.6(b)(2)(iii) 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 § 278.6(b)(1), the firm **shall not be eligible** for such a penalty." [Emphasis added.]

With its administrative review request, Appellant explained that the owner and an employee were properly trained. Appellant submitted a one-page sheet of paper titled Guidelines that listed all employees must go through EBT training and must follow EBT and WIC rules. However, Appellant did not provide any evidence of when the training occurred or what the training consisted of. In the charge letter, the Retailer Operations Division informed Appellant that it would need to provide both the request and supporting evidence within ten calendar days of receiving the charge letter and that no extension of time could be granted for making the request or for providing the required evidence. Appellant did not submit sufficient information in support of its training program within the required time frame.

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is limited to

what circumstances existed at the time that was the basis of the Retailer Operations Division's action. Moreover, the timeframe for providing this documentation cannot be extended.

In conclusion, the Retailer Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i) even though it was informed of the right to do so in the charge letter. SNAP regulations at 7 CFR § 278.6(b)(2)(iii) 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 § 278.6(b)(1), the firm **shall not be eligible** for such a penalty." [Emphasis added.]

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 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's owner resides or is 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, 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

April 19, 2023