

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

Theken Food Mart Inc.,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0256209

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS) finds there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification of Theken Food Mart Inc. (“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 Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Theken Food Mart Inc.

AUTHORITY

7 U.S.C. § 2023 and 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

Theken Food Mart Inc. was initially authorized to participate in SNAP on July 30, 2021. Between September 20, 2022, and October 8, 2022, the USDA conducted an undercover investigation of Theken Food Mart Inc. to ascertain the firm’s compliance with Federal SNAP law. Agency records show that during the investigation, Appellant violated SNAP regulations by engaging in trafficking. Appellant exchanged SNAP benefits for cash on one occasion. The firm also reportedly allowed ineligible non-food items to be purchased with SNAP benefits on three occasions.

In a letter dated November 1, 2022, the Retailer Operations Division charged Appellant with trafficking, as defined in Section 271.2 of SNAP regulations. This charge letter also informed Appellant that the violations warranted a permanent disqualification from SNAP, as provided in 7

CFR § 278.6(e)(1). The letter further stated that under certain conditions, and in accordance with § 278.6(i), FNS may impose a civil money penalty (CMP) in lieu of a permanent disqualification. To be eligible, the firm would have to request the CMP and submit supporting documentation within 10 days of receipt of the charge letter.

Appellant, through counsel, replied to the Retailer Operations Division's charges in writing on November 9, 2022, and November 10, 2022. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

The Retailer Operations Division issued a determination letter, dated January 19, 2023. This letter informed Appellant that the Retailer Operations Division found that the violations did occur as outlined in the charge letter and that a permanent disqualification would be imposed in accordance with 7 CFR § 278.6(c) and (e)(1). The determination letter also stated that a trafficking CMP was considered, but that the firm was ineligible for a CMP because 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.

On January 23, 2023, 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 an adverse action, an appellant bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. This means 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

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and is promulgated through regulation under Title 7 CFR Part 278. Specifically, 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 § 271.2 states, in part:

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....

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 § 278.2(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. SNAP benefits] may not be accepted in exchange for cash....

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(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(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)(1)(i) states, in part:

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

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 undercover investigation conducted between September 20, 2022, and October 8, 2022, the USDA completed six compliance visits at Theken Food Mart Inc. A report of the investigation was provided to Appellant as an attachment to the charge letter, dated November 1, 2022. The report included Exhibits A through F and provided full details on the results of each compliance visit. SNAP violations documented during four visits included trafficking on one visit and the sale of ineligibles on three visits.

The report noted that the following ineligible non-food items were sold in exchange for SNAP benefits: paper towels, dishwashing liquid, fabric conditioner, detergent, foam plates, and sandwich bags.

Trafficking activities occurred during the fifth visit to the store, on October 5, 2022, as reported by the investigator in Exhibit E.

5 U.S.C. § 552 (b)(7)(E).

Exhibit E indicates that for the trafficking transaction, the store charged the investigator's EBT card a total of \$110.00.

In addition to the investigation report, the record contains corroborating evidence, including photographs of the items purchased and the \$100.00 bill received in exchange for SNAP benefits and a certification that the purchased items were donated to a charitable organization.

APPELLANT'S CONTENTIONS

Appellant's contentions regarding this matter are summarized as follows:

- Appellant requests reconsideration of the permanent disqualification determination.
- A permanent disqualification is unduly harsh for a single instance of exchanging SNAP benefits for cash and the purchase of four ineligible items.
- Appellant has never been accused of any other misconduct pertaining to this store.
- Appellant trains all employees on the proper handling of SNAP transactions.
- Appellant has taken corrective measures to ensure further transgressions will not transpire, including giving its employees even more stringent guidance as to proper SNAP protocols and closely reviewing employee register conduct.
- Ownership was not aware of, did not benefit from, and was not involved in any SNAP violations.
- Disqualifying Appellant would adversely impact the local community.
- It appears certain employees of the store deviated from the proper protocol for their own benefit despite Appellant's aggressive efforts to ensure the SNAP regulations were followed.
- Appellant requests a civil money penalty (CMP) in lieu of disqualification.

The preceding may represent only a summary of Appellant's contentions presented in this matter. However, in reaching a decision, full consideration was given to all contentions presented, including any not specifically summarized or referenced herein.

ANALYSIS AND FINDINGS

Trafficking is defined in SNAP regulations, at 7 CFR § 271.2, 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..." Trafficking is an extremely serious violation and both 7 U.S.C. § 2021(b)(3)(B) and 7 CFR § 278.6(e)(1)(i) provide that even one trafficking violation warrants a permanent disqualification.

This review examines the relevant information regarding the Retailer Operations Division's determination. Once the Retailer Operations Division establishes a violation occurred, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that the disqualification should be reversed. If this is not demonstrated, the case will be sustained. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

In this case, the report of investigation, signed by the investigator under penalty of perjury, documents that the charges of violations are based on the findings of a formal USDA investigation. A complete review of this documentation has yielded no material error or discrepancy. The investigation report appears to be specific and thorough regarding the dates of the violations, the critical facts related thereto, and is supported by documentation that confirms the details of the transactions. The record further indicates that the Retailer Operations Division has documented the transaction in which personnel at the store trafficked SNAP benefits.

Appellant has not provided any evidence to counter FNS's allegations of trafficking. Rather, Appellant appears to acknowledge that program violations occurred, stating store employees deviated from the proper protocol for their own benefit. This review finds, by a preponderance of

the evidence, that trafficking did occur as charged by the Retailer Operations Division and a permanent disqualification is warranted.

Evidence of Trafficking Violation

The Retailer Operations Division provided substantial evidence corroborating the report of investigation, to include photographs of the items purchased at the store by the investigator, a photograph of the \$100.00 bill received by the investigator in the trafficking transaction, photographs of the EBT receipts provided by the store to the investigator together with an automated system report corroborating the dates and amounts of the receipts, and a donation certification listing the specific items purchased during the investigation and showing the charitable organization the items were donated to, including a signature of receipt by the charitable organization.

Based on the evidence in the record, the Retailer Operations Division has established the presumption that Appellant trafficked SNAP benefits on one occasion. Appellant has not submitted sufficient evidence to rebut this presumption. Accordingly, Appellant has failed to prove, by a preponderance of the evidence, that trafficking did not occur.

First SNAP Violation

Appellant maintains that it has never been accused of any other misconduct pertaining to this store.

While this may be true, 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. Further, this review has no authority to reduce a period of disqualification in a case in which trafficking violations were found to have occurred.

Excessive Penalty

Appellant contends a permanent disqualification is unduly harsh for a single instance of exchanging SNAP benefits for cash and the purchase of four ineligible items.

With regard to this contention, the regulation at 7 CFR § 278.6(e)(1) does not allow for a modification or a reduction of a disqualification based on punishment that appears to be excessive in comparison to the violations that were committed. The regulation states that FNS “shall disqualify the firm permanently if personnel of the firm have trafficked as defined in § 271.2.” (emphasis added). In short, if trafficking of any amount occurs, permanent disqualification is the required penalty.

Remedial Actions Taken

Appellant contends it has taken corrective measures to ensure further transgressions will not transpire, including giving its employees even more stringent guidance as to proper SNAP

protocols and closely reviewing employee register conduct.

With regard to these steps taken by Appellant, it must be made clear that this review is limited to the facts that existed at the time the violations were committed. This review has no authority to consider any subsequent remedial actions that may have been taken or that will take place so that a store may enhance or begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty on the basis of alleged or planned corrective actions implemented after the discovery of program violations.

Impact to SNAP Participants

Appellant asserts that its permanent disqualification would impact the local community.

Some degree of inconvenience to SNAP benefit users is inherent in the disqualification from SNAP of any participating food store, since the normal shopping pattern of such SNAP participants may be changed due to the disqualification. Section 278.6(f)(1) of SNAP regulations provides for CMP assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP households because of the unavailability of a comparable participating retail food store in the area to meet their needs. However, this regulation also sets forth the following specific exception: “A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.” Because the matter at hand involves a permanent disqualification, this CMP provision is not applicable.

No Intent to Violate

Appellant contends that certain employees of the store deviated from the proper protocol for their own benefit despite Appellant’s aggressive efforts to ensure the SNAP regulations were followed. Further, it stated the store owner was not aware of, did not benefit from, and was not involved in any SNAP violations.

Regarding these contentions, the record shows that the Appellant owner signed an application to participate as a SNAP retailer on June 2, 2021. By signing this application, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. The record clearly establishes that Appellant owner agreed to abide by program rules, including taking responsibility for violations committed by any of the firm’s employees, whether paid or unpaid, new, full-time or part-time. An owner or manager is not free of responsibility simply because he or she was not in the vicinity at the time the violations occurred or because he or she was uninvolved in the violations.

Although ownership allegedly was not involved in, and did not profit from, the trafficking violations, this cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. Regardless of whom the ownership of a store may utilize to handle store business, the owner is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store owners to disclaim accountability for the acts of persons whom the ownership chooses to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Trafficking Civil Money Penalty

The Retailer Operations Division determined that Appellant was not eligible for a civil money penalty in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a CMP to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate supporting documentation within 10 days of receipt of the charge letter.

Appellant requested a civil money penalty and stated it had a training program in place to prevent SNAP violations. However, Appellant did not submit any evidence of the training program. Additionally, the case record shows that Appellant did not submit any documentation that would indicate that the firm had a compliance policy or program of any kind.

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

This review finds, by a preponderance of the evidence, that program violations of 7 CFR § 278.2(a) did occur at Theken Food Mart Inc. during a USDA investigation. Accordingly, the Retailer Operations Division's determination to impose a permanent disqualification against Theken Food Mart Inc., under the ownership of Shajumon Philip, is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this determination are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in SNAP regulations, at 7 CFR § 279.7. If 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 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.

AMIE CHURCHILL
Administrative Review Officer

March 13, 2023