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

Super Dairy Mill Inc., **Appellant,** **v.** **Retailer Operations Division,** **Respondent.**	**Case Number: C0231650**

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 from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Super Dairy Mill Inc. (Appellant), by the Retailer Operations Division (Retailer Operations).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a), 7 CFR § 278.6(e)(1)(i) and 7 CFR § 278.6(i) in its administration of the SNAP when it imposed a permanent disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7, may file a written request for review of the administrative action with the FNS.

CASE CHRONOLOGY

By Charge letter dated February 1, 2021, Retailer Operations informed Appellant it was charged with violating the terms and conditions of the SNAP regulations determined by a USDA investigation based on trafficking violations noted in Exhibits F and H. The sanction for trafficking is permanent disqualification. The misuse of SNAP benefits was also noted in Exhibits A, B, C, and D, where ineligible items were purchased, that warrants a term disqualification. The investigation was conducted during the period of August 14, 2020 through September 21, 2020, and outlined in the investigative report dated September 26, 2020. Counsel replied to the Charge letter and provided information by letter dated March 15, 2021.

By Determination letter dated July 14, 2021, Retailer Operations informed Appellant that it was permanently disqualified from participation as a retail food store in the SNAP in accordance with Section 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter states that the store was not eligible for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i), because the firm failed to submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

By letter dated July 21, 2021, counsel appealed Retailer Operations' determination and requested administrative review. The appeal for review was granted by letter dated August 12, 2021. Counsel provided additional information by email dated September 17, 2021.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing credible, 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 not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the Act), 7 U.S.C. § 2021, and § 278 of Title 7 of the Code of Federal Regulations (CFR).

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 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;"… (4) Purchasing a product with SNAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with SNAP benefits in exchange for cash or consideration other than eligible food; (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food; (6) Attempting to buy, sell, steal, or otherwise affect 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 signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone."

7 CFR § 278.6(b)(2)(ii) states: "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(i) states: "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 THE CHARGES

The USDA conducted a compliance investigation of Appellant. Appellant was charged with conducing trafficking transactions as described in Exhibits F and H of the investigative report wherein store personnel exchanged SNAP benefits in for cash. The penalty for trafficking is permanent disqualification. Furthermore, two different store personnel exchanged common ineligible nonfood items for SNAP benefits in multiple transactions. The violations in Exhibits A, B, C and D, warrant a non-permanent disqualification period as specified in Section 278.6(e) of the SNAP regulations. Ineligible nonfood items exchanged for SNAP benefits included: plastic plates, spoons, scrubbing cloths, a box of steel wool pads, trash bags, aluminum foil, Comet cleaner, cake pans, and a lighter.

APPELLANT'S CONTENTIONS

In reaching a decision, consideration has been given to all contentions and submissions as presented, including any not specifically recapitulated.

- The owner suffered tragedy during and about the exact time of the Agency's investigation, losing her husband and lifelong partner. Additionally, she has been in charge of her son's medical care for a disease that has ravaged his young life. Due to her son's illnesses, right from the very start of the Market accepting SNAP in 2018, her husband was forced to take on the brunt of the responsibility when it came to the day-to-day operations of the Market.
- The owner's husband guided the Market as best he could, ensuring total compliance with all local laws, including a spotless record with respect to violations of SNAP rules and regulations. By August of 2020, his health was deteriorating at an alarming rate, and fully prevented him from overseeing the Market; it was during this precipitous decline in his health that the Agency's investigation took place.
- In September 2020, one of the longtime managers at the Market, who had worked closely alongside the owner's husband, overseeing the day-to-day operations of the Market, was also forced to take a leave of absence and travel overseas to the Middle East, to be with his wife and family during COVID; said leave has continued to date. The loss of the two main pillars of oversight at the Market, coupled with the essentially forced hiring of substitute temporary employees by the Market, created a storm that would wreak havoc upon the Market.
- From September 2020 through December 2020 when her husband ultimately succumbed to his illnesses, the Market was essentially operating with 'both arms tied behind its back,' forced to rely on mainly temporary employees to continue operations. Although these temporary employees received training (for SNAP and otherwise), the Market was unable to properly supervise them due to the absence of their longtime manager, the illness of the owner's husband and his resulting absence, in addition to the owner's absence due to her being forced to manage the family's day-to-day affairs, while having to watch her husband become sicker and sicker every day. This 'perfect storm' of events created a situation where

the temporary employees were at times, without supervision and exercised at best, terrible judgment in executing any of the allegedly suspicious transactions identified in the Charge Letter, and at worst, intentionally sought to harm the Market by their actions.

- The owner would like to make it clear that but for the leave of absence by their manager, coupled with the deterioration of her husband's health and his eventual death, these employees would never have been in the position they were, and their alleged nefarious actions never would have occurred.
- While he was forced to take a leave of absence from the Market, he entrusted the Market and his family's economic lifeline to his managers and other employees, believing he could trust them after having guided the Market to such prosperity under his watch.
- Sadly, Market employees decided to focus their attention on destroying the very business he worked his life to create. Unbeknownst to the owner, or anyone in her family, her managers and employees would not only not live up to expectations, but they would actively begin planning to usurp the business from a grieving widow. According to the owner, not only did her staff allow the Market to fail its undercover inspection by the Agency, but that they are actively trying to take the Market, its stock, and its licenses from her.
- One of her employees could not even wait until the body was cold before turning against his now late-employer. On the very day he succumbed, on or about December 10, 2020, Market employees began a process of trying to transfer some of the Market's regulatory licenses from the husband to their own personal name. Furthermore, Market managers, purposely delayed getting the Agency's charge letter to the owner so that she would be unable to request a CMP, have also allowed other licenses to lapse and the Market has begun to incur fines and is now subject to various administrative hearings—all due to the conduct of the owner's supposedly-trustworthy employees.
- The owner has begun the process of purging all the offending employees from the Market, and is determined to ensure her family's financial needs are met by a fully compliant Market.
- The Market has prided itself on being receptive to its SNAP customers' needs especially during this period of a nationwide pandemic. The Market serves a demographic that generally does not have personal transportation or access to multiple grocery suppliers. The need for this local establishment cannot be overstated.

ANALYSIS AND FINDINGS

The purpose of this review is to either validate or to invalidate the decision of Retailer Operations. This review is limited to the facts at the basis of Retailer Operations' determination at the time it was made. The regulations establish that an authorized retail 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 two Exhibits cited in the Charge letter recount the details of the violative trafficking exchanges by store personnel, who exchanged cash for SNAP benefits. No evidence to refute the trafficking violations or the sale of ineligible items was advanced.

Ownership is accountable for the proper handling of SNAP benefit transactions. To allow the store owner to be free from accountability for the acts of persons whom the owner allowed to conduct store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. 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.

A review of the entirety of the case record supports by a preponderance of evidence the violative trafficking exchanges by store personnel of the exchange of cash for SNAP benefits. The regulations stipulate the FNS shall disqualify a firm permanently if firm personnel have trafficked. The case record also supports by a preponderance of evidence the sale of ineligible items on multiple dates in exchange for benefits, a violation of 7 CFR § 278.6(e)(5) of the SNAP regulations that states that a firm is to be disqualified for six months "if it is to be the first sanction for the firm and the evidence shows that personnel of the firm have committed violations such as but not limited to the sale of common nonfood items due to carelessness or poor supervision by the firm's ownership or management." The six month disqualification penalty for such sales is subsumed in the permanent disqualification for trafficking.

CIVIL MONEY PENALTY

The regulations at Section 278.6(i) specify the criteria for a firm's eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. A firm must submit a timely request for a CMP that shows substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. The record confirms that Appellant submitted a request for a CMP dated February 24, 2021, and provided evidence to support the request. Retailer Operations assessed the submission to determine if Appellant met the criteria for a trafficking CMP in lieu of permanent disqualification.

Retailer Operations noted that a document submitted for CMP consideration was identical to a document that counsel submitted for another store he represented. Therefore, Retailer Operations questioned that the disciplinary procedures document was actually in effect at Appellant prior to the Charge letter, rather than a generic document advanced solely for the CMP submission. Furthermore, , Retailer Operations found that the "Employees must abide by all guidelines in the SNAP training materials when accepting SNAP/EBT benefits from customers" submission, refers to an Oregon Helpline; Appellant is located in the state of New York. This supported Retailer Operations' conclusion that the guidelines stated to be those of Appellant, where taken from another submission by counsel to argue for a CMP at another store, rather than guidelines actually in place at Appellant prior to the issuance of the Charge letter.

Retailer Operations also noted that the disciplinary procedures document states: "Records of all compliance-related disciplinary actions will be permanently maintained." Therefore, Retailer Operations had an expectation that documents confirming the disciplinary action that the owner stated she took against the violating employees, would have been advanced, yet no documentation to support the "purge" of the said violating personnel was provided. Retailer Operations also noted that no information was advanced regarding internal reviews conducted by Appellant to ensure SNAP compliance. The store was authorized to accept SNAP benefits on May 22, 2018. Thus, it had about two years and three months of SNAP authorization history

prior to the first documented violative transaction on Exhibit A dated August 14, 2020. As such, the store did not have "nearly half a decade" of SNAP participation as claimed.

The one page "SNAP TRAINING SESSION LOG" listed "date of training" for three individuals with "start date" all in 2020; no other training information for prior years was advanced. The training log was not signed or dated by the individuals listed. It is not clear that the start date is the employment start date, or the start date of the reported training. One listed name has a start date under "date of training" of October 2, 2020, after the investigative dates. Retailer Operations did not find the submission was sufficient to demonstrate that Appellant had an effective training program that was in place prior to the cited violations. Retailer Operations denied a trafficking CMP, finding that Appellant did not meet three of the four criteria for the submission of substantial evidence to be eligible for a CMP as required by the regulations.

Additional information was submitted to support the CMP request under review. Counsel referenced legal cases to support the position that the permanent disqualification of retail food stores upon the first trafficking offense, without any evaluation of preventative measures taken or complicity in the trafficking, seems excessively harsh. Counsel states that it is exceptionally clear that the Agency must take into account a retailer's longstanding history of compliance, as well as the context and extent of the trafficking violations when determining an appropriate penalty for a store and its owner.

Review of the CMP submission confirms that the log was customized to Appellant. However, the log is not signed or dated by the three individuals stated to have been trained. As noted, the dates seen are not clear as to whether they represent the start of employment of the personnel, or the start of training. The "Disciplinary Procedures" text, as noted by Retailer Operations, is the exact same text as previously submitted by counsel for another retailer. Furthermore, one page states: "If asked about broken or lost EBT, refer customers to the Oregon helpline: 1-888-997-4447." This supports that the document was likely not in effect or used by or at Appellant, but was created for a different store, and re-used here for the purposes of the CMP submission. The "Training Guide" is current as of "2/24/2021," this being a date after the dates of the violations made during the onsite investigation. It has the store name in two locations, but does not support that the guide was in place prior to the violations charged in this matter.

As to the affidavit submitted by the owner, it states that: "As a small business it is imperative that my staff also understand the repercussions of any mistakes with EBT or any other government programs, and the effect it could have for them as well as the store itself. Our training and compliance programs have always been in place since Super Dairy Market was authorized to accept SNAP purchases. Furthermore, Super Diary Market regularly reviews both its training and compliance programs to ensure any needed updates are made to said programs. Super Dairy Market ownership and management does not and would never condone any unethical and unlawful behavior by its employees. Store ownership and management would condone our store profiting off any unlawful actions by its employees. We are located in a neighborhood where a majority of resident rely on programs such as EBT. Our store is convenient to all of these people, and for most it's at walking distance. During this pandemic we have been able to help offer contactless pickup and even at times delivery to those who most need it. If we were to lose the capability to accept these programs not only would another small

business suffer in the middle of this pandemic, but I fear the local community who has come to rely on us will as well."

The statement by the owner presumably should have read: Store ownership and management would **not or never** (bold added for clarity) condone our store profiting off any unlawful actions by its employees. Retailer Operations accepted that Appellant met Criterion 4 of the applicable CMP regulations. As to the owner's contention of hardship to SNAP recipients, the regulations are clear that in cases of permanent disqualification for trafficking, a CMP is afforded not based on hardship, but upon the timely submission of evidence that "establishes the firm's eligibility for a civil money penalty…in accordance with the criteria included in § 278.6(i)." Nevertheless, the Retailer Operations' record includes supporting information that there are other authorized stores within a nearby area of Appellant that sell as large a variety of staple food items at comparable prices, and as such the disqualification of Appellant would not pose a hardship to SNAP recipients.

Consideration was made of the mitigating circumstances advanced by counsel related to the personal traumatic events that coalesced to leave Appellant in a vulnerable position to "nefarious activity." The record supports that the owner did not actively manage Appellant due to the illness and home schooling of her son, leaving those daily management duties to her husband, who had been diagnosed in April 2017 with an ultimately fatal illness. Based on counsel's brief, the other day-to-day manager reportedly left the store and the country around September 2020. The lack of strong daily management at Appellant, indicates that it was in a weak position to ensure compliance with the SNAP regulations. As discussed herein, Appellant has not demonstrated by credible substantial evidence, that Appellant had implemented an effective SNAP compliance program such that it demonstrates that it had established the firm's eligibility for a CMP in lieu of permanent disqualification.

The SNAP authorization application contains an owner-certification that states: I accept responsibility on behalf of the firm for violations of the SNAP regulations including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. These include violations such as, but not limited to trading cash for SNAP benefits (i.e. trafficking), and accepting SNAP benefits for ineligible items. As to the court cases cited by counsel, the administrative review process should determine whether FNS followed the Food and Nutrition Act and the regulations issued under the Act when it took action against the retailer. The administrative review officer is not responsible for determining whether any legal cases cited by counsel apply to Appellant's situation. If the final agency decision is appealed to the federal district court, the judge is responsible for determining whether any case decisions cited by counsel are on point and applicable to Appellant's case.

CONCLUSION

The record supports by a preponderance of the evidence that two trafficking exchanges occurred at Appellant. These exchanges meet the regulatory definition of trafficking. The preponderance of the evidence as described in multiple cited Exhibits, further supports that the sale of ineligible nonfood items, also occurred at Appellant. The disqualification penalty for these violations is subsumed by the permanent disqualification penalty for the trafficking violations. There is no

provision in the Act, or regulations, that reverses or reduces a sanction based upon a lack of documented history of prior violations by a firm and its owners, managers and/or employees. The regulations stipulate "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2." Upon review, it is also decided that Retailer Operations' denial of a trafficking CMP was in accordance with the applicable regulations. The permanent disqualification of Appellant as a SNAP retail food store is sustained. The effective date of this decision is thirty (30) days after delivery of the decision to Appellant.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and to 7 CFR § 279.7 of the regulations, with respect to applicable rights to judicial review of this decision. 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 where 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 delivery 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.

M. Viens December 10, 2021
ADMINISTRATIVE REVIEW OFFICER