

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

**Brooklyn Dairyland,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0212170**

**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 Retailer Operations Division (Retailer Operations) properly imposed a permanent disqualification of Brooklyn Dairyland (Appellant) as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Appellant.

**AUTHORITY**

7 U.S.C. § 2023, and its implementing regulations at 7 CFR § 279.1, provides 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 FNS.

**CASE CHRONOLOGY**

USDA conducted an investigation of the compliance of Appellant with Federal SNAP law and regulations from May 7, 2019 through May 22, 2019. The Report of Investigation documents that a store clerk intentionally exchanged cash for food purchased with SNAP benefits during two undercover compliance visits. Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food is trafficking, as defined under § 271.2(5). As a result of the evidence compiled from this investigation, Retailer

Operations charged Appellant with trafficking SNAP benefits in a letter dated November 19, 2020. The Charge Letter included a copy of the Report of Investigation dated May 31, 2019. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated Appellant had the right to respond to the charges within 10 days of receipt. The letter also stated that Appellant could request a trafficking CMP in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant replied to the charges by letters dated November 19, 2019 and December 2, 2019. Appellant requested a CMP in lieu of permanent disqualification and stated it had an effective training program and guidelines in place to ensure the compliance of SNAP regulations. A copy of the guidelines dated November 2019 was provided.

After giving consideration to Appellant's response and evidence in the case, Retailer Operations informed Appellant that it was permanently disqualified from participation in SNAP, by letter dated February 4, 2020. The letter also stated that Appellant was not eligible for a trafficking CMP as 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 SNAP.

In a letter postmarked February 9, 2020, Appellant requested an administrative review of the permanent disqualification determination. The request for administrative review was granted by letter dated February 20, 2020. Appellant provided additional evidence in support of its case by letter postmarked March 6, 2020.

## **STANDARD OF REVIEW**

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means Appellant has the burden of providing relevant, credible evidence that 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 covered in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulation under 7 CFR § 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 Electronic Benefit Transfer (EBT) cards.

7 CFR § 271.2 defines trafficking as:

- (1) The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via 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.
- (2) The exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code, for SNAP benefits;
- (3) Purchasing a product with SNAP benefits that has a container requiring a return deposit with the intent of obtaining cash by discarding the product and returning the container for the deposit amount, intentionally discarding the product, and intentionally returning the container for the deposit amount;
- (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; or
- (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 EBT cards, card numbers and 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(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.

7 CFR § 278.6(b)(2) states, in part:

- (ii) Firms that request consideration of a CMP 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 CMP 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 CMP 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(e)(1)(i) states: 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 CMP 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**

USDA conducted a compliance investigation of Appellant. The Report of Investigation, dated May 31, 2019, included Exhibits A through D, which provides full details on the results of each compliance visit. SNAP violations were documented during three of the four compliance visits and included trafficking violations on two of the compliance visits, as noted in Exhibits B and D. The report documents the following ineligible, non-food items were purchased using SNAP benefits: 12-count box of Parade trash bags (Exhibit A); 32-ounce bottle of All detergent and 2-count box of Bounce fabric softener sheets (Exhibit B).

On May 8, 2019, the investigator provided the following details, as noted in Exhibit B:

I entered subject store. I took items to the register. The clerk asked if it was on the food card. I told him it was. He told me he would have to charge me extra. I told him that was okay. I asked if I could get 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash as well. He told me to wait for a minute for the other customers. He waited on the customers. He then did the transaction. He took cash from the register and gave it to me. I departed the store.

On May 22, 2019, the investigator provided the following details, as noted in Exhibit D:

I entered subject store. I took a can of tea to the register. The clerk rang it up. The register showed a price of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). I gave the clerk the card and asked if I could get 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash as well. He told me 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was too much. He said he could do 5 U.S.C. § 552 (b)(6) & (b)(7)(C). I said "Okay." He did the transaction. He took cash from the register and gave it to me. The clerk charged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash.

The report noted that one clerk conducted both trafficking violations in Exhibits B and D. This same clerk conducted the violative transactions in Exhibits A, B, and D. Because of the seriousness of the violations of trafficking, the Charge Letter stated that the penalty in this case would be permanent disqualification.

### **APPELLANT'S CONTENTIONS**

Appellant's owner made the following summarized contentions in the request for administrative review:

- I was in shock when I received the letter and found out that one of my employees was responsible for most of the transactions. I was completely unknown of this whole

situation. Our small town business has had hard times this year, finding trustworthy employees to run our firm.

- Our business may be small, however we support over four families plus my own to provide the town of Brooklyn. Serving our Food Stamp customers is very valuable to us.
- Many of our customers rely on SNAP benefits and we would not want our customers to lose this privilege due to careless mistakes of our employees. Our business will help the hundreds of families we serve who purchase items with Food Stamps.
- Our business has strict rules in place when it comes to being able to provide EBT customers. We have created a SNAP training program, refresher training program, oath, and special store guidelines to ensure our employees follow the guidelines and are following rules when it comes to taking care of SNAP customers.
- We realize this is our business' second offense on violating the SNAP rules and regulations. After our first offense, we added six extra cameras behind the register to help ensure this mistake would not occur again.
- All employees who were responsible for the violations have been terminated. Our business is currently in the process of making major changes to help improve this situation immediately. We will be performing refresher training every three months, adding a new surveillance system, and creating and posting new signs as reminders of all Food Stamp regulations. We have given each employee new copies of the Food Stamp Training booklet, we will be conducting new interviews and one-on-one talks with our current employees about expectations of SNAP and Food Stamp regulations, and all current employees and ownership have been through SNAP training.

Appellant provided the following in support of its contentions:

- Copies of 2 Employee's and Owner's Oaths
- Copies of 2 Employee's and Owner's SNAP Training (Part 1, 2, and Refresher)
- 2 photos of surveillance cameras
- Copies of Store Signage
- Copy of the SNAP Training Guide For Retailers
- Copy of Company's Policy
- Copy of a poster of rules and regulations

The preceding may represent only a brief summary of Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically referenced herein.

## **ANALYSIS AND FINDINGS**

Appellant has not provided any evidence to counter FNS' allegations of trafficking or the sale of ineligible items. In fact, Appellant's owner states this is not its first offense and has taken corrective action to help ensure this mistake will not occur again. Without any evidence from Appellant to show that violations did not take place, it is the determination of this review, through a preponderance of the evidence, that SNAP violations did occur as charged and a penalty is warranted.

## **Owner Involvement**

Appellant's owner stated he was unaware that violations occurred in its store, and that he has been having a hard time finding trustworthy employees.

Even if Appellant's owner had not been a participant in any trafficking transactions, the owner is accountable for the violations committed by its employees. Store owners are responsible for the proper training of store staff and the monitoring and handling of SNAP benefit transactions. To allow store owners to disclaim accountability for the acts of persons whom the owner chooses to utilize would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. Upon receipt of its license, the owner received an authorization package that included Program training materials (EBT Do's and Don'ts for Cashiers, and Penalties for Violations of SNAP: FNS-136; SNAP Training Guide for Retailers: FNS 330; Using SNAP Benefits Poster-What You Can and Cannot Buy: FNS 110; decals, etc.) for guidance and reference, and to assist in training store personnel. Retailers are encouraged to ensure all store employees are properly trained and are adhering to the SNAP rules and regulations at all times. In addition, the owner signed the most recent SNAP reauthorization application on February 27, 2018. That application included a certification and confirmation that the owner would "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."

## **Corrective Action**

Appellant's owner contends all employees responsible for the violations have been terminated and the business is currently in the process of making major changes to help improve this situation immediately – completing refresher training every three months, installing a new surveillance system, creating and posting new signs as reminders of all Food Stamp regulations, conducting new interviews and one-on-one talks with current employees about expectations of SNAP and Food Stamp regulations. Each employee was given a new copy of the Food Stamp Training booklet and ownership and its current employees have completed SNAP training.

Although this is admirable, it does not change the fact that these violations have already occurred. 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 Retailer Operations. This review is limited to what circumstances were at the basis of Retailer Operations' 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 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, 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.

## **Hardship to SNAP Recipients**

Appellant's owner contends many of its customers rely on SNAP benefits and does not want its customers to lose this privilege due to careless mistakes of its employees. The business helps hundreds of families who purchase items with Food Stamps.

Though not explicitly stated, this contention implies that Appellant's customers will suffer hardship if the disqualification is upheld. It is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and a household is forced to use its benefits elsewhere. 7 CFR § 278.6(f) does allow, in some circumstances, for a CMP to be imposed in lieu of disqualification when there is an absence of other SNAP-authorized retailers in the area. However, the regulations are clear that a CMP for hardship to SNAP households may not be imposed in lieu of permanent disqualification for trafficking.

## **Financial Hardship**

Appellant's owner contends its business may be small; however, it supports over four families plus its own. Serving its Food Stamp customers is very valuable and requests another chance to serve its beloved customers.

Federal statute at 7 U.S.C. § 2021(b)(3)(B) makes it clear that disqualification for trafficking shall be permanent. It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP; however, there is no provision in the statute or regulations for a waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty.

To allow store ownership to be excused from administrative penalties based on a purported economic hardship would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA. Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations.

## **TRAFFICKING CMP**

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

Retailer Operations determined that Appellant was not eligible for a CMP 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. The company guidance and employee training documentation provided by Appellant were dated after the violations occurred.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a CMP in lieu of permanent disqualification for trafficking is not an option in this case.

## **CONCLUSION**

Trafficking is defined, in part, in 7 CFR § 271.2(5) as intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food. 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. The law and regulations do not provide for a lesser period of disqualification for this violation.

All transactions cited in the Charge Letter were either conducted or supervised by a USDA investigator 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 appears to be specific and accurate with regard to the dates of the trafficking violations and in all other critically pertinent details. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(1), the decision to impose a permanent disqualification against Brooklyn Dairyland, under the ownership of Maish Desai, is sustained. The effective date is 30 days after delivery of this Decision to Appellant. Please contact Raymond Pau at (646) 289-5647 or [raymond.pau@usda.gov](mailto:raymond.pau@usda.gov) with any operational questions.

## **RIGHTS AND REMEDIES**

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and 7 CFR § 279.7 address 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 30 days of receipt of this Decision. Please note that the judicial filing timeframe is specified in 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.

Kim Dameron  
Administrative Review Officer

November 17, 2020