

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

**Deangely Market,**

**Appellant,**

**v.**

**Case Number: C0203693**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of Deangely Market 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 Deangely Market.

**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 Deangely Market with Federal SNAP law and regulations from March 2018 to May 2018. The investigation report documents that personnel at Deangely Market intentionally exchanged cash for food purchased with SNAP benefits during two (2) 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 7 CFR § 271.2.

As a result of the evidence compiled from this investigation, the Retailer Operations Division charged the Appellant, in a letter dated May 22, 2018, 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 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). The charge letter was delivered by UPS on May 23, 2018.

The Appellant store owner replied to the charges in a letter postmarked on May 29, 2018 and received on May 31, 2018. The owner stated the investigator came many times to the store and insisted on selling SNAP benefits or purchasing non-food items with SNAP benefits. After several times, the owner finally agreed to “get some things my children would consume” and would last for one or two years. The owner stated that he thought as long as he was not buying anything for the store, he would not be breaking the law and apologized for any wrong doing. The Appellant did not request a trafficking CMP.

After giving consideration to the Appellant’s letter and the evidence in the case, the Retailer Operations Division informed the Appellant, by letter dated July 31, 2018, that Deangely Market was permanently disqualified from participation in the SNAP. The letter also stated that the Appellant was not eligible for a trafficking CMP 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. The Appellant received the determination letter on August 1, 2018.

In a letter postmarked August 7, 2018, the Appellant, through counsel, requested an administrative review of the permanent disqualification determination. The request for administrative review was granted.

## **STANDARD OF REVIEW**

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means an 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 AND REGULATIONS**

The controlling law in this matter is covered in the Food & 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 ....

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 defines trafficking as:

- (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.
- (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.** [Emphasis added.]
- (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 § 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 from March 2018 to May 2018, the USDA conducted seven (7) undercover compliance visits at Deangely Market. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated May 22, 2018. The investigation report included Exhibits A through G which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations occurred during two (2) of the seven (7) compliance visits and were committed by the same clerk.

During the compliance visit described in Exhibit E, a store clerk purchased 18 stocking units of cereal valued at \$52.80 for \$25.00. The investigator's narrative documents that the rate of exchange was negotiated between the two parties after the clerk was informed that the cereal was purchased with SNAP benefits.

During the compliance visit described in Exhibit G, the same store clerk purchased 15 stocking units of cereal, 12 stocking units of Kool-Aid mix, eight (8) stocking units of lemonade mix, and four (4) stocking units of ice tea mix. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The investigator's narrative documents that the rate of exchange was negotiated between the two parties after the clerk was informed that the food items were purchased with SNAP benefits.

### **APPELLANT'S CONTENTIONS**

The Appellant, through counsel, made the following summarized contentions in request for administrative review, in relevant part:

- The finding of trafficking in this case is predicated on conjecture and speculation and does not involve a typical trafficking transaction where a store directly exchanges cash for SNAP benefits. In five of the compliance visits, no violations occurred although the investigator offered to purchase food for Deangely Market by using his SNAP benefits at another store. After the fourth and sixth visit, the undercover agent, without the knowledge, consent, or involvement of the owner or his employees, went to another store and allegedly purchased the food product using his EBT card. Once he acquired the goods the investigator returned to the store and allegedly informed the clerk once again of the providence of the soda before he sold it to the clerk. Under the penalty of perjury the clerk swore in an affidavit that the conversations that allegedly took place at the fourth, fifth, sixth, and seventh visits did not take place.
- The Appellant questions why the investigator exchanged no words with a male store clerk in the third visit [Exhibit C] and did not attempt to exchange SNAP benefits for cash or non-food items.
- The store owner denies having any knowledge that the food items were purchased with SNAP benefits and the charges against him must be dismissed.
- The agent has failed to provide a sworn affidavit under the penalty of perjury that his allegations regarding the contents of the conversation are true. In addition, the agent has failed to provide a transcript of any audio recordings between the clerk and himself.

The preceding may represent only a brief summary of the 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 recapitulated or specifically referenced herein.

### **ANALYSIS AND FINDINGS**

In this case, a store employee was found to be trafficking as defined under 7 CFR § 271.2 (5) by "Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food." The Appellant's counsel is correct that the intent of the store employee in purchasing the food items described in Exhibits E and G of the charge letter are crucial to the decision in this case. A review of the same redacted investigation report

that was provided to the Appellant documents that the investigator on two occasions as described in Exhibits E and G told the store employee that he had purchased the food in his possession using his SNAP benefits. Immediately thereafter, the investigator's documentation indicates that, again on both occasions, the two parties negotiated a rate of exchange roughly equal to a 50 percent discount in which the clerk gave the investigator cash for the food. In addition, during compliance visits prior to the violations (Exhibits D and F) the investigator and the clerk had discussions about what type of food the investigator should buy for the store. The investigator documented that he told the clerk he would buy these items with SNAP benefits at another location. In Exhibit F, it is documented that the clerk told the investigator to go to Walmart because it was cheaper.

It should also be noted that in the Appellant store owner's original response to the charge letter, he stated that he [the owner] finally agreed to "get some things my children would consume" and would last for one or two years. The owner stated that he thought as long as he was not buying anything for the store, he would not be breaking the law and apologized for any wrong doing. Based on the above, the evidence supporting a trafficking violation is more than mere speculation or conjecture as the Appellant's counsel claims.

### **Investigation Report**

The Appellant questions why the investigator exchanged no words with the store clerk in the third visit [Exhibit C] and did not attempt to exchange SNAP benefits for cash or non-food items. The Appellant feels that this is suspicious and is evidence of some ill intent on the part of the investigator. However, this is not an unusual practice for the agency in these type of investigations and represents nothing untoward in the way the investigation was conducted.

The Appellant states that the case is flawed because the agent has failed to provide a sworn affidavit under the penalty of perjury that his allegations regarding the contents of the conversation are true. However, on the front page of the investigation report that was provided to the Appellant is a certification statement that says: "... The facts stated in this declaration are true to my knowledge. If I am called to testify as a witness in any proceeding, I am competent to testify to the matters stated herein. Further declarant sayeth not. I declare under penalty of perjury the foregoing is true and correct." The certification statement is signed by the investigator, but the signature is redacted from the investigation report provided to the Appellant to protect the investigator's identity.

The Appellant also states that the investigator failed to provide a transcript of any audio recordings between the clerk and himself. Regarding this contention, it is not the agency's practice to audio tape conversations during compliance visits. This does impact the validity of the investigation report.

In conclusion, the investigation report documents 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 under the direction of a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no known error or discrepancy. 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 personnel at the store committed trafficking violations by intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.

### **Owner Accountability**

The Appellant, through counsel, states that the owner had no knowledge and did not approve of any SNAP violations. It should be noted that his claim is not wholly consistent with the statement that the owner made in his reply to the charge letter. Nevertheless, even if the owner was allegedly not involved in the violations, it 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 owner 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 ownership to disclaim accountability for the acts of persons whom the owner chooses to utilize 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.

Lastly, the owner signed the FNS reauthorization application on February 15, 2015, which 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.”

### **CIVIL MONEY PENALTY**

The 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. The SNAP regulation at 7 CFR § 278.6(b)(2)(ii) mandates that a request for a trafficking CMP along with supporting documentation shall be submitted within ten (10) days of receipt of the charge letter.

The SNAP regulation at 7 CFR § 278.6(b)(2)(iii) also states, in part, 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 ... the firm **shall not be eligible** for such a penalty.” [Emphasis added.]

Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program prior to the violations. Therefore, 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**

Trafficking is defined, in part, in 7 CFR § 271.2, as “ ... Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.” The SNAP regulation at 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. Based on a full review of the evidence in this case, a preponderance of the evidence supports that trafficking violations did occur during a USDA investigation. Based on the analysis above, the decision to impose a permanent disqualification against Deangely Market, Appellant, is sustained.

## **RIGHTS AND REMEDIES**

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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.

RONALD C. GWINN  
Administrative Review Officer

December 14, 2018