

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

King Food Market, LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0203077

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operation Division (Retailer Operations) to impose a permanent disqualification against King Food Market, LLC., from participating 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) § 278.6(a), (c), and (e)(1)(i), in its administration of SNAP when it imposed a permanent disqualification against Appellant on October 30, 2018.

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 FNS.

CASE CHRONOLOGY

USDA conducted an investigation of the compliance of Appellant with Federal SNAP law and regulations during the period from March 31, 2018, through May 15, 2018. The investigation report documents that personnel at Appellant committed SNAP violations on three out of six compliance visits. During one compliance visit, store personnel exchanged SNAP benefits for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash (trafficking). The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR § 271.2.

As a result of evidence compiled from the investigation, Retailer Operations informed Appellant, in a letter dated September 26, 2018, that the firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.6(e)(1). The letter of charges states, in relevant part, “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking . . . is permanent disqualification.” The letter also states that “under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of a permanent disqualification of a firm for trafficking.” The record states that the owner did not reply to the Charge letter within the specified timeframe.

By Determination letter dated October 30, 2018, Retailer Operations informed Appellant that it was permanently disqualified from participation as a retail 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 evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

By letter dated November 13, 2018, the owner appealed Retailer Operations’ determination and requested administrative review. The appeal was granted by letter dated November 19, 2018.

STANDARD OF REVIEW

In an appeal of an adverse action, 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 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 & Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 of the Code of Federal Regulations (CFR), Section 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 in the event that personnel of the firm have engaged in trafficking of SNAP benefits.

7 U.S.C. § 2021(b)(3)(B) states: “...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 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 § 278.6(e)(1)(i) states: “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2.” Trafficking is defined, in part, in 7 CFR § 271.2, 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 § 278.6(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

USDA conducted a compliance investigation of Appellant. Appellant was charged with trafficking on September 26, 2018, as stated in the Charge letter of October 30 2018, delivered to Appellant per the record on August 9, 2019. The penalty for trafficking is permanent disqualification.

APPELLANT’S CONTENTIONS

The following may represent a summary of the contentions presented; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- I have been working with SNAP for over seven years without any violations.
- It looks like it was a mistake on the part of the cashier, thinking it was cash back.
- If the employee made a mistake out of confusion, we apologize. He was not directed to do anything illegal.
- Employee was recently hired with less than two months in the job, his English is very deficient. We try to train our employees in the proper way.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the decision of Retailer Operations and is limited to the facts at the basis of Retailer Operations’ determination at the time it was made.

In this case, the owner apologizes for the mistake of his newly hired employee who is not proficient in English, and states the employee was not directed to do anything illegal. The Report of Investigation clearly shows the exchange of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash in Exhibit D.

Both the FNS SNAP retailer application and retailer reauthorization application contain a certification page whereby applicants must confirm their understanding of, and agreement with, SNAP retailer requirements in order to complete the application/reauthorization process. Store ownership certified its understanding and agreement to abide by program rules and regulatory provisions when it applied for authorization as a SNAP retailer.

The FNS investigative report shows that an employee of Appellant transacted SNAP benefits for cash on one occasion. There is no evidence of involvement by the firm's ownership or management. The acceptance of SNAP benefits for cash is a violation of SNAP rules and regulations with the penalty for trafficking being permanent disqualification. There is no regulatory threshold for the exchange of SNAP benefits for cash and store ownership does not dispute that violations occurred or that SNAP benefits were exchanged for cash.

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification "shall be permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store." In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option.

Based on the discussion above, there is not any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

Retailer Operations determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i), 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 within the specified timeframe. As such, Retailer Operations determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

The record supports that Appellant did not submit timely evidence for CMP consideration in lieu of trafficking. As such, Retailer Operations properly applied the applicable regulations, and denied a trafficking CMP.

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did occur as charged and as admitted by store ownership. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted by a USDA investigator, signed under penalty of perjury, 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 is specific and accurate with regard to the dates of the violations, the specific exchange of SNAP benefits for cash, and in all other critically pertinent detail. Additionally, the decision by Retailer Operations that Appellant was not eligible for a trafficking CMP is also found to be correct.

Based on the discussion above, the determination by Retailer Operations to impose a permanent disqualification against Appellant from participating as an authorized retail food store in SNAP is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

Kim Dameron
ADMINISTRATIVE REVIEW OFFICER

November 25, 2019