

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

**Kingz Downtown Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0235180**

**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 Kingz Downtown Market as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). However, the decision is modified to remove the fiscal claim of \$129.44.

**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 Kingz Downtown Market and assessed a fiscal claim of \$129.44.

**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 Kingz Downtown Market with Federal SNAP law and regulations in September 2020. The investigation report documents that SNAP violations occurred on three (3) out of six (6) compliance visits. During two (2) of these visits, a clerk who self-identified as the store owner intentionally exchanged cash for food purchased with SNAP benefits at another store. 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 (5).

As a result of the evidence compiled from this investigation, the Retailer Operations Division charged the Appellant, in a letter dated October 28, 2020, 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 criteria specified in 7 CFR § 278.6(i). The charge letter was delivered to the Appellant store by UPS on October 29, 2020.

The Appellant, through counsel, responded to the charges in a letter dated November 4, 2020. The Appellant alleged that the store was located in a food desert and was essential to the community in which it was located. The Appellant timely requested a trafficking CMP in lieu of a permanent disqualification. The Appellant also provided multiple exhibits including but not limited to the store employee handbook, pictures of the store and affidavits from store employees and the store owner. The store owner's affidavit denied that the store owner intentionally exchanged cash for food previously purchased with SNAP benefits at another store.

After giving consideration to the Appellant's contentions and the evidence in the case, the Retailer Operations Division informed the Appellant, by letter dated December 3, 2020, that Kingz Downtown Market was permanently disqualified from participation in the SNAP and was also assessed a fiscal claim of \$129.44. 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 permanent disqualification letter was delivered to the Appellant by UPS on December 4, 2020.

In a letter postmarked December 10, 2020, 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 in September 2020, the USDA conducted six (6) undercover compliance visits at Kingz Downtown Market. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated October 28, 2020. The investigation report included Exhibits A through F which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations occurred during three (3) compliance visit as documented in Exhibits A, D and E.

During the compliance visit described in Exhibit A, a female clerk exchanged ineligible nonfood items for SNAP benefits.

During the compliance visit described in Exhibit D, a male clerk exchanged **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** cash for four (4) cases of Red Bull previously purchased at

another authorized store 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits. The four (4) cases of Red Bull consisted of two (2) cases of 24 8.4-ounce cans and two (2) cases of 24 12-ounce cans.

During the compliance visit described in Exhibit E, the same male clerk self-identified as the store owner and exchanged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash for two (2) cases of Coca Cola and two (2) cases of Sprite previously purchased at another authorized store 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits. The investigator's narrative documents that the clerk/owner who conducted these transactions was made aware that the cases of Red Bull, Coca Cola and Sprite were purchased with SNAP benefits at another store.

### **APPELLANT'S CONTENTIONS**

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

- Kingz Downtown Market requests a review of the decision to deny a trafficking CMP under 7 CFR §278.6(i) in lieu of a permanent disqualification.
- Kingz Downtown Market requests a hardship CMP under 7 CFR §278.6(f)(1) because the firm is located in a food desert. The Appellant states that this provision applies in the present case as a temporary disqualification penalty under 7 CFR § 278.6(e)(4)(i) is more appropriate for this firm given the conduct described in the investigation report and the lack of the firm being a prior offender.
- A permanent disqualification will also cause a hardship to the store and its employees.

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**

#### **Investigation Report**

The action taken by the Retailer Operations Division to permanently disqualify Kingz Downtown Market is supported by an investigation report provided to the Appellant in the charge letter dated October 28, 2020. The clerk who conducted the transactions in Exhibits D and E of the investigation report 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." This same clerk identified himself as the store owner during the transaction described in Exhibit E.

In Exhibit C, the investigation report states, in part:

5 U.S.C. § 552 (b)(7)(E)

In Exhibit D, the investigation report states, in part:

5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(7)(E)

In Exhibit E, the investigation report states, in part:

5 U.S.C. § 552 (b)(7)(E) and 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Exhibits C and D of the investigation report documents that the clerk/owner specifically instructed the investigator what to purchase and also proposed the dollar exchange rate which was then accepted by the investigator. The instructions of the clerk/owner regarding product type, amount and dollar exchange rate were specific and reasonably caused the investigator to come back to the store with the requested product and conduct the transactions described in Exhibits D and E.

There is no indication that the clerk/owner in Exhibits D and E was forced, coerced or intimidated into conducting the transactions. There is no evidence to support that the investigator entrapped the owner. The investigator's actions were not improper as the investigator was merely doing what SNAP recipients will sometimes attempt to do in real life situations. Store owners and their employees are provided training materials in order to respond to these real life situations and not to violate SNAP rules and regulations under any circumstances. The investigation report and narrative does not reveal any evidence that the investigator did not follow acceptable procedures for an undercover compliance visit. In the absence of convincing rebuttal evidence, this review can only conclude that the investigation report is accurate and truthful.

In summary, 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 are thoroughly documented. 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 the owner committed trafficking violations by knowingly purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.

### **Permanent Disqualification is Appropriate Penalty**

The Appellant contends that the transactions described in Exhibits D and E should only be subject to a temporary disqualification period and bases this claim on 7 CFR § 278.6(e)(4)(i). That regulation states:

Disqualify the firm for 1 year if:

(i) It is to be the first sanction for the firm and the ownership or management personnel of the firm have committed violations such as **the sale of common nonfood** items in amounts normally found in a shopping basket, and FNS had not previously advised the firm of the possibility that violations were occurring and of the possible consequences of violating the regulations .... [Emphasis added.]

The Appellant's contention is not correct. The transactions described in Exhibit D and E did not involve the exchange of common nonfood items in exchange for SNAP benefits. Instead the transactions in Exhibits D and E fit the definition of trafficking under 7 CFR § 271.2 (5) described as "Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food."

Trafficking in SNAP benefits is an extremely serious violation and both 7 U.S.C. §2021(b)(3)(B) and 7 CFR §278.6(e)(1)(i) state that a **first time violation** warrants a permanent disqualification. A preponderance of the evidence indicates that the violations described in Exhibits D and E of the investigation report meet the definition of trafficking under 7 CFR § 271.2 (5) and warrants a permanent disqualification.

### **Hardship to the Local Community**

The Appellant claims that a permanent disqualification would be a hardship to the local SNAP community as Kingz Downtown Market is located in a food desert. Regarding this contention, there is no provision in SNAP law or regulations that would negate, waive or reduce a permanent disqualification for trafficking due to a purported hardship to SNAP customers.

Where there is a hardship to SNAP households due to a lack of authorized stores in the area, FNS may impose a hardship CMP on a firm in lieu of a less than permanent disqualification. However, the regulations at 7 CFR § 278.6(f)(1) clearly state that "a civil money penalty for hardship to SNAP households **may not** be imposed in lieu of a permanent disqualification." [Emphasis added.] Because the Retailer Operations Division has taken action to permanently disqualify the Appellant firm, a hardship CMP in lieu of a permanent disqualification cannot be granted.

### **Hardship to the Store**

The Appellant notes that the permanent disqualification has created a financial hardship for the store and its employees. With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in the SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to either the owner, the firm or its employees resulting from the imposition of such penalty. To allow stores to be excused from assessed administrative penalties based on a purported economic hardship 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 Appellant timely requested consideration for a trafficking CMP in lieu of a permanent disqualification and provided some supporting documentation under 7 CFR § 278.6(i). However, the Retailer Operations Division determined 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 criteria for a trafficking CMP in lieu of disqualification is defined under 7 CFR § 278.6(i) which reads, with emphasis added, in part:

In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by **substantial** evidence its fulfillment of each of the following criteria:

Criterion 1. The firm shall have developed an **effective** compliance policy as specified in §278.6(i)(1); and

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and

Criterion 3. The firm had developed and instituted an **effective** personnel training program as specified in §278.6(i)(2); and

Criterion 4. **Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations;** or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm ....

A review of the case record reveals that the Retailer Operations Division agreed with the Appellant that Kingz Downtown Market met the standards under Criterion 1 and Criterion 2 but did not meet Criterion 3 and Criterion 4. Therefore, the issue in this administrative review is limited to whether or not a preponderance of the evidence supports that Kingz Downtown Market meets Criterion 3 and Criterion 4.

Regarding Criterion 3 training program standards, 7 CFR 278.6(i)(2) states, with emphasis in part:

A firm which seeks a civil money penalty in lieu of a permanent disqualification **shall document its training activity** by submitting to FNS its **dated training curricula and records of dates** training sessions were conducted; **a record of dates of employment of firm personnel;** and contemporaneous documentation of the participation of the violating employee(s) in **initial** and any follow-up training held **prior** to the violation(s).

A preponderance of the evidence supports that the Appellant **did not meet** Criterion 3 because the documents it submitted do not establish any record of dates of employment for firm personnel or dated training curricula and training logs. There are no supporting materials submitted which describe the scope of the training and there is no evidence any materials were ever used prior to the violation listed in the investigation report.

Regarding Criterion 4, the investigation report documents that the violations in Exhibits D and E were conducted by the store owner. Therefore, a preponderance of the evidence indicates that Kingz Downtown Market does not meet Criterion 4 as store ownership was involved in the conduct of trafficking as described in 7 CFR § 278.6(i).



In summary, this review agrees that the Appellant has not documented by **substantial** evidence that it has met Criterion 3 and Criterion 4 under 7 CFR § 278.6(i). Therefore, the Retailer Operations Division’s decision not to impose a trafficking CMP in lieu of disqualification is **sustained** as appropriate.

### 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.” 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 the analysis above, the Retailer Operations Division properly imposed a permanent disqualification of Kingz Downtown Market, Appellant, as an authorized retailer in the Supplemental Nutrition Assistance Program. However, the determination is **modified** to remove the fiscal claim of \$129.44.

### 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. 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, 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

April 1, 2021