

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

**Miami Food Emprium,**

**Appellant,**

**v.**

**Case Number: C0196395**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the USDA that there is sufficient evidence that the permanent disqualification of Miami Food Emprium from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against Miami Food Emprium.

**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 Miami Food Emprium with Federal SNAP law and regulations from January 2017 through March 2017. The investigation report documents that personnel at Miami Food Emprium exchanged

SNAP benefits for cash during two (2) undercover compliance visits. 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 the evidence compiled from this investigation, the Retailer Operations Division informed the Appellant, in a letter dated July 26, 2017, that it was charged with violating the terms and conditions of the SNAP regulations. The charge letter along with a copy of the investigation report was delivered by UPS on July 27, 2017 and was signed for by "ROY." The letter stated, in relevant part, that:

*Your firm is charged with trafficking, as defined in Section 271.2 of the SNAP regulations. As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for the trafficking violation(s) ... is permanent disqualification.*

The charge letter also stated that:

*... under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000.00 in lieu of permanent disqualification of a firm for trafficking. The SNAP regulations, Section 278.6(i), list the criteria that you must meet in order to be considered for a CMP. If you request a CMP, you must meet each of the four criteria listed and provide the documentation as specified within 10 calendar days of your receipt of this letter.*

The Appellant, through the wife of one of the store owners, replied to the charges in a faxed letter dated August 13, 2017. The letter stated that her husband has been under psychiatric care for nearly two years, and she has been trying to fill in his shoes for the last 18 months. The Appellant believes that the night clerk was committing the violations and the store is now being closed at night in order to have more control over operations. Lastly, the store alleged it will not be able to survive without the SNAP and the WIC program.

After giving consideration to the Appellant's reply and all the evidence in the case, the Retailer Operations Division informed the Appellant, by letter dated August 22, 2017, that Miami Food Emprium 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.

In an e-mailed letter dated August 23, 2017, the Appellant 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 actions should be reversed. That means an appellant has the burden of providing relevant evidence which 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 AND REGULATIONS

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 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 .... [Emphasis added.]*

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 states, in part:

***Trafficking** means the buying or selling of ... [SNAP] benefits for cash or consideration other than eligible food ....*

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 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).*** [Emphasis added.]

(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.*** [Emphasis added.]

### SUMMARY OF CHARGES

During an investigation from January 2017 through March 2017, the USDA conducted seven (7) compliance visits at Miami Food Emprium. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated July 26, 2017. 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 four (4) of the seven (7) compliance visits. During two (2) of the compliance visits a clerk exchanged cash for SNAP benefits as documented by Exhibits F and G.

### APPELLANT'S CONTENTIONS

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

- The Appellant does not refute the findings of the investigation report. However, the investigation report does state that there was an employee between the ages of 59-64 working at the store. There is or was no one of that age working in the store.
- The night clerk was fired and two of the day clerks have left the store.
- The store has hired, or is in the process of hiring, new more dependable staff. The store is now instructing its new clerks as to what items can be purchased with SNAP benefits.
- This is the first violation for the store.
- The store is located in an impoverished neighborhood and relies on the SNAP for its business. If the store is permanently disqualified it will likely go out of business.

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 Appellant does not refute the findings of the investigation report. However, the Appellant noted that the report states that there was an employee between the ages of 59-64 working at the store. The Appellant states there is (or was) no one of that age working in the store. With regard to this contention, it should be noted that the USDA investigator does not ask for names or identification documents from the clerks during a compliance visit as this would be counterproductive to the undercover nature of the transactions. As a result, the general descriptions in the investigation report are somewhat subjective in nature. Therefore, different observers may describe the same individual somewhat differently. The general descriptions of store employees in the investigation report are largely to enable FNS to distinguish the different clerks who participated in each compliance visit.

A full review of the case record shows 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 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 documentation presented by the Retailer Operations Division establishes by a preponderance of the evidence that the violations as reported occurred at the Appellant store.

### **Owners not Involved in Violations**

The Appellant states that the violations were likely committed by the night clerk who was subsequently fired by the store. Although the owners were allegedly not aware of the violations, this cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. An Appellant store owner signed the FNS application to become a SNAP authorized retailer on August 25, 2003. That application included a certification and confirmation that the owner(s) 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.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking.

Regardless of whom the owners of a store may utilize to handle store business, the owners are 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.

### **No Prior Violations**

The Appellant states that this is the first SNAP violation at Miami Food Emprium. With regard to this contention, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges. 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.

### **Corrective Action**

The Appellant contends it has taken corrective action in firing the employee who engaged in trafficking as well as other remedial actions to prevent trafficking in the future. With regard to this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is limited to what circumstances existed at the time that was the basis of the Retailer Operations Division's action. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that a store may begin to comply with program requirements.

In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of alleged or planned after-the-fact corrective actions implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that corrective action has taken place or that further remedial actions are planned does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Hardship to Store and Employees**

The Appellant contends that a permanent disqualification will create a hardship for the store and its employees as it relies on the SNAP to stay in business. 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 ownership personally or the firm 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.

### **Hardship to the SNAP Community**

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 store, a hardship CMP in lieu of disqualification cannot be granted.

In any case, there are 23 SNAP authorized stores located within a one-mile radius of Miami Food Emprium. These stores include two (2) large grocery stores, a supermarket and a superstore. Therefore, the disqualification of Miami Food Emprium, a convenience store, would not cause a hardship to the SNAP community as opposed to a minor inconvenience.

### **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. 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**

As previously stated, 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.” Trafficking is defined, in part, in 7 CFR § 271.2, as “the buying or selling of SNAP benefits for cash or consideration other than eligible food.” 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, there is no question that program violations did occur during a USDA investigation. All transactions cited in the letter of charges were 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 is specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for cash, and in all other critically pertinent details. Therefore, the decision to impose a permanent disqualification against the Appellant, Miami Food Emprium, 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, 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.

RONALD C. GWINN  
Administrative Review Officer

October 4, 2017