

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

**New Market,**

**Appellant,**

**v.**

**Case Number: C0186292**

**Retailer Operations Division,**

**Respondent.**

**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 a finding that a Permanent Disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against New Market by the Retailer Operations Division of FNS.

**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 New Market on April 17, 2017.

**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 New Market with Federal SNAP law and regulations during the period January 10, 2017 through

January 23, 2017. The investigation report documents that personnel at New Market, in addition to accepting SNAP benefits in exchange for ineligible items on four occasions, also exchanged SNAP benefits for cash during one undercover compliance visit. 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 this investigation, the Retailer Operations Division informed the Appellant, in a letter dated February 13, 2017, that he 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 February 24, 2017 and signed for by “Le”. 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”.

In a letter to the Retailer Operations Division dated March 24, 2017, the Appellant, through counsel, replied to the charges therein admitting that he exchanged SNAP benefits for cash and sold ineligible non-food items with SNAP benefits during the investigation of New Market. However, the Appellant contends that he was coerced or “entrapped” by USDA’s investigator into conducting these violative SNAP transactions by playing on his emotions and giving him instructions on how to traffic SNAP benefits.

After giving consideration to the Appellant’s reply and the evidence in this case, the Retailer Operations Division informed the Appellant, by letter dated April 17, 2017, that New Market was permanently disqualified from participation as a retail store 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 a letter postmarked May 2, 2017, the Appellant, through counsel, requested an administrative review of the permanent disqualification determination. FNS granted the Appellant's request for administrative review by letter dated May 12, 2017.

### **STANDARD OF REVIEW**

In appeals of adverse actions, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions should be reversed. That means the 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**

The controlling statute 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 coupons, ATP cards or other benefit instruments 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(i) states, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 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 ....

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 ....

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 10, 2017 through January 23, 2017, the USDA conducted five compliance visits at New Market. A report of the investigation was provided to the Appellant as an attachment to the Charge Letter dated February 13, 2017. The investigation report included Exhibits A through E which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations occurred during five of the five compliance visits. During one of the compliance visits, a store employee/clerk exchanged cash for SNAP benefits as documented by Exhibit E. The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR § 271.2.

### **APPELLANT'S CONTENTIONS**

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the Appellant's reply to the Charge Letter and in the review request postmarked May 2, 2017, the Appellant, through counsel, made the following summarized contentions, in relevant part:

- The Appellant admits that he exchanged SNAP benefits for cash and sold ineligible non-food items with SNAP benefits during the USDA investigation of New Market. However, he was coerced or "entrapped" by USDA's investigator into conducting these violative SNAP transactions by playing on his emotions and giving him instructions on how to traffic SNAP benefits;
- In support of his defense, the Appellant named various case law citations which he claims: (1) Support his contention that the entrapment defense applies to civil proceedings; (2) Outline the legal tests for entrapment; and (3) Substantiate that Federal courts have found that government

- agents improperly induce otherwise innocent citizens to violate the law;
- This is the first time that the Appellant has been cited for any SNAP violations in the twenty years that he has owned Mini Market; and
  - The Appellant is requesting that FNS reverse its decision to permanently disqualify New Market from participating in the SNAP based on the fact that the USDA investigator entrapped him into trafficking SNAP benefits during the investigation.

## **ANALYSIS AND FINDINGS**

### **Appellant Entrapped by USDA Investigator**

The Appellant contends that he admits that he exchanged SNAP benefits for cash and sold ineligible non-food items with SNAP benefits during the USDA investigation of New Market. However, he was coerced or “entrapped” by USDA’s investigator into conducting these violative SNAP transactions by playing on his emotions and giving him instructions on how to traffic SNAP benefits. The Appellant’s contention that, rather than just verifying violations, the investigator offered and persuaded him to violate seems to imply that the investigator engaged in activity commonly referred to as entrapment. Generally, the entrapment that is forbidden by law depends on whether or not the activity leading up to the violation amounted to putting the activity in the mind of a person who had no prior inclination to violate, and leading him/her to do so for the first time. The U.S. Department of Agriculture’s Office of General Counsel maintains that if investigators merely provide an opportunity for a suspected violator to continue on a course of criminal conduct, such activity would not constitute entrapment. In this regard, the investigation record does not contain any evidence indicating activity characteristic of entrapment, nor has the Appellant provided substantial evidence to support his claim of entrapment.

With regards to the Appellant’s entrapment claim, he also disputes the accuracy of some of the information that was provided on the investigation report to include the “investigator’s bare bones assertions in Exhibits A-E that he simply placed the items on the counter and asked for non-food and then left without further conversation”. In fact, the investigator insisted and begged the Appellant to help him out even though the Appellant was refusing to violate the SNAP regulations. Such a contention cannot be accepted as a valid basis for dismissing or mitigating any of the charges. In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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. The Appellant did not

provide any documentation to support his claim that the information included on the investigation report by the investigator is inaccurate and that he was coerced or “entrapped” into selling SNAP benefits for cash. Without such documentation to contradict the investigator’s claims, it is still more likely than unlikely that the Appellant voluntarily trafficked SNAP benefits at New Market. A thorough review of the Report of Positive Investigations 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 ineligible merchandise sold in exchange for SNAP benefits, the amount of SNAP benefits that were exchanged for cash, and in all other critically pertinent detailed. The penalty imposed by the Retailer Operations Division is based on violative transactions involving the exchange of SNAP benefits for cash by the Appellant during the investigation period. As such, the contentions brought out by the Appellant regarding possible inaccuracies in the Investigation Report cannot be used to lessen or mitigate the penalty imposed by the Retailer Operations Division.

It is also important to note that prior to becoming authorized to participate in the SNAP on August 31, 2000, the Appellant completed and submitted a SNAP Application for Retail Stores. The SNAP Application contained a section indicating that the person(s) signing the Application understood and agreed to ensure that store employees follow the SNAP rules and regulations and that the person(s) accepts responsibility for any SNAP violations that may occur at the store that were committed by any of the store’s employees---paid, unpaid, new, temporary, full-time, part-time, etc. The SNAP Application also included a section that contained a statement which acknowledged that the person(s) signing the Application was aware that violations of Program rules could result in fines, legal sanctions, withdrawal, or disqualification of the store. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. The Appellant admitted to FNS that he exchanged SNAP benefits for cash during the USDA investigation of New Market. Trafficking is defined in 7 CFR § 271.2 of the SNAP regulations which states that trafficking means 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... The Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement 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, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. The Appellant’s implied contention that he was coerced or “entrapped” by USDA’s investigator into conducting these violative SNAP transactions by playing on his emotions and giving him instructions on how to traffic SNAP benefits cannot be accepted as a valid basis for diminishing the penalty. The Appellant was cited for and he admitted to exchanging SNAP benefits for cash during USDA’s investigation of New Market.

### **Case Law Citations**

In support of his defense, the Appellant named various case law citations which he claims: (1) Support his contention that the entrapment defense applies to civil proceedings; (2) Outline the legal tests for entrapment; and (3) Substantiate that Federal courts have found that government agents improperly induce otherwise innocent citizens to violate the law. With regard to the various case law citations provided by the Appellant, this administrative review decision is limited to whether the Retailer Operations Division appropriately followed the Food and Nutrition Act of 2008 and the regulations and agency policy promulgated under that Act. The Administrative Review Officer is not responsible for determining whether any cases cited by the retailer apply to the retailer’s situation. If the case is appealed to the Federal district court, the judge is responsible for determining whether case law cited by the retailer are on point and applicable to the retailer’s case. Therefore, any application of a supposed judicial precedent would be best addressed in a judicial review.

### **First Time Violator**

The Appellant contends that this is the first time that he has been cited for any SNAP violations in the twenty years that he has owned Mini Market. However, 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.

### **Reversal of Permanent Disqualification Requested**

The Appellant is requesting that FNS reverse its decision to permanently disqualify New Market from participating in the SNAP based on the fact that the



USDA investigator entrapped him into trafficking SNAP benefits during the investigation. However, the Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that "... a disqualification . . . 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 ...". In keeping with this legislative mandate, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. Additionally, the Act noted herein and the regulations pursuant thereto do not stipulate a minimum dollar amount of SNAP benefits trafficked in order to meet the definition of "trafficking" at 7 CFR § 271.2.

### **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 he 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 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, New Market, is sustained.

### **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to 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.

LORIE L. CONNEEN  
Administrative Review Officer

February 20, 2018