

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

**New Munro,**

**Appellant,**

**v.**

**Case Number: C0171455**

**Retailer Operations Division,**

**Respondent.**

**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 Operations Division to impose a permanent disqualification against New Munro (hereinafter “Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it imposed a permanent disqualification against the Appellant.

**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**

New Munro was initially authorized to participate in SNAP as a small grocery store on August 14, 2012. Between January 8, 2014, and March 19, 2014, the USDA Office of Inspector General (OIG) conducted an undercover investigation of New Munro to ascertain the firm’s compliance with federal SNAP law and regulations. During the investigation, the Appellant firm reportedly violated SNAP rules by trafficking SNAP benefits: Appellant accepted a total of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash on five occasions. The firm also reportedly committed the violation of selling ineligible non-food items for SNAP benefits on four occasions.

In a letter dated April 29, 2016, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of SNAP regulations. It also charged the Appellant with accepting SNAP benefits in exchange for ineligible non-food merchandise. The charge letter informed the Appellant that the violations warranted permanent disqualification from SNAP, as provided in 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made within 10 days of receipt of the letter under the conditions specified in 7 CFR § 278.6(i).

The Appellant, through counsel, submitted a letter dated May 6, 2016, in response, addressing only the charge for the sale of ineligibles. The Appellant sought a lesser sanction of a six month disqualification and a civil money penalty (CMP) of \$20,000 in lieu of permanent disqualification. Appellant stated that a lesser penalty was warranted because the regulations permit a lesser penalty for firms that sell ineligible non-food items in exchange for SNAP benefits, the firm had operational policy and procedure in place for training staff on SNAP rules and regulations, the firm was not warned of the possible violations prior to being charged, the violations were due to carelessness and not intended by the firm's owner, and a permanent disqualification would be a hardship to households living within walking distance of the firm.

On May 13, 2016, the Retailer Operations Division spoke with counsel to discuss the response letter, as the letter did not address the trafficking charge. Counsel sought additional information regarding the trafficking charge and was informed to submit a Freedom of Information Act (FOIA) request for this information.

Appellant, through counsel, submitted a FOIA request on May 16, 2016. A partial FOIA response was sent to counsel from FNS on May 26, 2016. On August 16, 2018, OIG inquired to counsel as to whether the Appellant was still interested in the information requested, providing 30 days for response. No response was received. OIG administratively closed the FOIA request on September 27, 2018, due to lack of response. FNS sent a letter, received by Appellant and counsel on October 15, 2018, regarding the closed FOIA request and providing 10 days from receipt of the letter to submit any additional information, explanation, or evidence regarding the charges against the firm.

By letter dated October 19, 2018, the Appellant owner sought a 60 day extension to respond to the charges, stating he could not find his attorney who may be out of the country, and whose office was closed. The Retailer Operations Division did not grant this request for extension, leaving the final day to submit information as October 25, 2018.

On October 24, 2018, the Appellant's new attorney contacted the Retailer Operations Division seeking a copy of the charge letter, as well as a copy of the previous attorney's response. This information was sent to counsel, as requested. No additional information was requested or submitted by counsel.

After considering the Appellant's responses and further analyzing the evidence in the case, the Retailer Operations Division issued a determination letter, dated October 31, 2018. The determination letter informed the Appellant the firm was permanently disqualified from SNAP

participation upon receipt of the letter, in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that the Appellant firm was not eligible for a trafficking CMP under Section 278.6(i) of SNAP regulations because it failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked November 9, 2018, Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The appeal was granted.

### **STANDARD OF REVIEW**

In an appeal of adverse action, such as disqualification from SNAP participation, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 & REGULATIONS**

The controlling law in this matter is found 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 § 278.6(e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern for trafficking SNAP benefits.

7 U.S.C. § 2021(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 [SNAP benefits] or trafficking in [SNAP benefits] 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, in part:

Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption...

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 § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food. [SNAP benefits] may not be accepted in exchange for cash...[and] may not be accepted in payment of interest on loans or for any other nonfood use.

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.... Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and **disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section.**[Emphasis added.]

7 CFR § 278.6(b)(2)(ii) states, in part:

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(b)(2)(iii) states:

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.

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(e) states, in part:

The FNS regional office shall:

(1) Disqualify a firm permanently if:

(i) Personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 278.6(f)(1) states, in part:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm is selling a substantial variety of staple food items, and the firm's disqualification would cause hardship to SNAP households. **A civil money penalty for hardship to**

**SNAP households may not be imposed in lieu of a permanent disqualification.**  
[Emphasis added.]

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....

### **SUMMARY OF INVESTIGATION**

During an undercover investigation conducted between January 8, 2014, and March 19, 2014, OIG completed six compliance visits at New Muno. The violations committed during these visits described by the Retailer Operations Division in the April 29, 2016, charge letter are as follows:

- On March 19, 2014, a store clerk accepted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash. The store clerk also accepted SNAP benefits in exchange for two pre-paid phone cards and a wire transfer processing fee, all ineligible items.
- On February 28, 2014, the store owner accepted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash. The store owner also accepted SNAP benefits in exchange for a pre-paid phone card, an ineligible item.
- On February 24, 2014, the store owner accepted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash.
- On February 19, 2014, a store clerk accepted SNAP benefits in exchange for two pre-paid phone cards, both ineligible items.
- On January 22, 2014, the store owner accepted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash.
- On January 8, 2014, a store clerk accepted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash. The store clerk also accepted SNAP benefits in exchange for two pre-paid phone cards, both ineligible items.

Violations were reported during all six compliance visits. Trafficking occurred during five of the compliance visits, while ineligible items were sold during four of the visits. The store owner conducted three of the violative transactions, all of which included trafficking; two different store clerks conducted the three remaining violative transactions.

### **APPELLANT'S CONTENTIONS**

The Appellant, together with counsel, made the following summarized contentions in the request for administrative review and in subsequent correspondence, postmarked December 10, 2018, in relevant part:

- A civil money penalty is appropriate in this case because the provider is the only halal food market in its neighborhood, where there are low-income apartment complexes with

Somali residents who cannot or do not drive and would need to take a taxi or other means of transportation to purchase ethnic foods at a different market;

- Permanent disqualification of the Appellant would effectively cut off these residents from the only grocery provider feasibly accessible to them;
- Appellant now has increased inventory and is fully stocked with culturally specific groceries;
- Appellant has installed a surveillance camera system to better monitor the store's transactions and re-trained each individual that will be working a cash register;
- Appellant has updated the cash register system to separate EBT purchases from ineligible purchases;
- The trafficking allegations only amount to a few hundred dollars, and the Appellant takes the allegations seriously and wishes to conduct business lawfully and in accordance with SNAP regulations;
- Appellant has been using the EBT program for several years, had been following federal guidelines, and believes the firm was using the system properly; and
- Appellant's customers have trusted the Appellant's services for years and would like to see the program return to the store.

Appellant also submitted 24 undated photographs of the firm, showing increased inventory, including stock of culturally specific groceries.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

## **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 earlier decision of the Retailer Operations Division and is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made.

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 process. These requirements include the prohibition against trading cash for SNAP benefits (i.e., trafficking) as well as the requirement for owners to train themselves and their employees on SNAP rules and regulations upon authorization as a SNAP retailer. Store ownership certified his understanding and agreement to abide by program rules and regulatory provisions when he applied for authorization as a SNAP retailer.

On administrative review, the Appellant has not offered any evidence to contradict the investigative report, nor has the Appellant denied that violative transactions, including the trafficking of SNAP benefits, took place as described in the charge letter. In fact, there is evidence that the firm's owner was personally involved in trafficking during three of the violative transactions. Because the violations themselves do not appear to be in dispute, it is the

determination of this review that program violations, including trafficking, did occur as charged by the Retailer Operations Division and warrant permanent disqualification from SNAP participation. The balance of this review will address the Appellant's remaining contentions.

### **Business History of the Firm**

The Appellant contends the firm had been using the EBT program for several years, had been following federal guidelines, and was using the system properly. Further, the Appellant contends that the trafficking allegations only amount to a few hundred dollars, that the allegations are being taken seriously, and the firm wishes to conduct business lawfully and in accordance with SNAP regulations.

With regard to this contention, SNAP regulations at 7 CFR § 278.6(e) require that when serious violations, such as trafficking, occur, permanent disqualification is the necessary penalty, even on the first occasion and regardless of a firm's prior compliance with program rules. Because trafficking is a serious violation, there is no minimum dollar amount that must be transacted in order to trigger a trafficking charge. As stated earlier, the issue under review is whether or not the Retailer Operations Division took appropriate action, consistent with SNAP regulations, in its imposition of a permanent disqualification against New Munro. As long as the administrative action taken by the agency fully conforms to SNAP regulations, this review has no authority to dismiss or reduce a period of disqualification. In this case, the sanction imposed by the Retailer Operations Division is wholly in line with SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations.

### **Remedial Actions Taken**

The Appellant says that inventory has been increased and the firm is now fully stocked with culturally specific groceries. Also, a surveillance camera system has been installed to improve monitoring of the store's transactions, employees have been re-trained, and the cash register system has been updated to separate EBT purchases from ineligible purchases.

With regard to these contentions, this review is limited to the circumstances that existed at the time the violations were committed. It is not the authority of this review to consider any subsequent remedial actions that may have been taken or will take place so that a store may enhance or 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 on the basis of alleged or planned corrective actions implemented subsequent to 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 a valid basis for dismissing the charges or for modifying the penalty imposed.

### **Hardship to the Community**

Appellant contends that a CMP is appropriate in this case because the Appellant firm is the only halal food market in the neighborhood, where there are many low-income Somali residents who

cannot or do not drive and would have difficulty obtaining ethnic foods at a different market. Further, Appellant's customers would like to see the program return to the store.

As noted earlier, the Retailer Operations Division determined that the Appellant firm was not eligible for a CMP in lieu of permanent disqualification for trafficking because the Appellant did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

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 lack of authorized stores in the area, FNS may impose a hardship CMP for a firm in lieu of a **less than permanent** disqualification. However SNAP 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.**" Because the Retailer Operations Division has taken action to permanently disqualify the Appellant firm, a hardship CMP cannot be granted.

### **TRAFFICKING 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 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**

Based on a review of the evidence in this case, there is no question that violations charged against New Muno during an OIG investigation did occur. All transactions cited in the charge letter were 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 appears to be 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 Muno, is sustained.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 the Appellant owner resides or is engaged in



business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

MICHELLE WATERS  
Administrative Review Officer

February 14, 2019