

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

**Pearl Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0227740**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is insufficient 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 Pearl Market (Appellant) by the Retailer Operations Division (Retailer Operations). The decision is modified. There is sufficient evidence to sustain a six month period of disqualification of Appellant from the SNAP.

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a), 7 CFR § 278.6(e)(1)(i), and 7 CFR § 278.6(i) in its administration of the SNAP when it imposed a permanent disqualification against Appellant.

**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 the FNS.

**CASE CHRONOLOGY**

By Charge letter dated December 9, 2020, Retailer Operations informed Appellant that as a result of a USDA investigation, it was charged with violating the terms and conditions of the SNAP regulations based on trafficking violations noted in Exhibits F and I, that warrant permanent disqualification, and violations in Exhibits A, C, and D that warrant a non-permanent

disqualification period. The investigation was conducted from June 28, 2020 through July 17, 2020, as outlined in an investigative report dated July 30, 2020. Counsel provided a reply to the Charge letter by letter dated December 18, 2020.

By Determination letter dated January 4, 2021, Retailer Operations informed Appellant that it was permanently disqualified from participation as a retail food store in the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the regulations. The letter states that the store was not eligible for a trafficking civil money penalty (CMP) per Section 278.6(i), because the firm failed to submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

By letter dated January 8, 2021, counsel appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated February 1, 2021.

## **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the 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 and Nutrition Act of 2008, as amended (the Act), 7 U.S.C. § 2021, and § 278 of Title 7 of the Code of Federal Regulations (CFR).

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(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 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;"... (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; (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food. (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 § 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.”

7 CFR § 278.6(e)(5) states that a firm is to be disqualified for six months: “if it is to be the first sanction for the firm and the evidence shows that personnel of the firm have committed violations such as but not limited to the sale of common nonfood items due to carelessness or poor supervision by the firm’s ownership or management.”

7 CFR § 278.6(f)(1) provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause hardship to SNAP benefit households because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It states: “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to SNAP benefit households because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices.”

## **SUMMARY OF THE CHARGES**

The USDA conducted a compliance investigation of Appellant. Appellant was charged with conducting trafficking transactions as described in Exhibits F and I. The penalty for trafficking is permanent disqualification. The violations in Exhibits A, C, and D warrant a non-permanent disqualification period as specified in Section 278.6(e) of the regulations. The SNAP violations involved the exchange by store personnel for benefits, of ineligible nonfood items including: forks, spoons, dishwashing liquid, and a scrub sponge.

## **APPELLANT’S CONTENTIONS**

In reaching a decision, full attention and consideration have been given to all contentions as presented, including any not specifically recapitulated.

- Petitioner admits that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash was given to the undercover

agent, however, The Petitioner (by affidavit) states that agent came into the store while he was behind the deli counter asking if the Petitioner wanted to buy some cases of Monster Energy Drinks (by the case). The Petitioner accept both offers.

- It just so happens that the undercover agent had the cases of Monster Energy drinks outside the store in his car and brought them from his vehicle in on both occasions. There was never any mention that the Petitioner requested the undercover agent to go somewhere else to purchase the cases of drinks using an EBT card and to bring them back. To be clear, the money given to the agent was pulled from the Petitioner's own wallet.
- This would mean that there was absolutely no exchange of cash for EBT in either of the two alleged transactions as the cash register was never a part of either transaction. The Petitioner never saw a receipt and thus had no idea that the agent previously purchased the cases using a EBT card (not his own personal EBT card) issued by the USDA.
- This is a blatant attempt to justify the Petitioner violated the USDA rules by alleging that these incidents occurred in the way the agent refers to in his ITRs. The ITRs are extremely inaccurate.
- On the day of questioning about the 3 cases of Monster energy drink, I 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was behind the deli case and someone came in the store. And from the door he asked me if I wanted to buy some cases of Monster energy drink for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) a case, so I said I'll take 3. He went outside got the three cases and I paid him from my wallet 5 U.S.C. § 552 (b)(6) & (b)(7)(C). And that was it. Nothing was mentioned about how he bought the Monster energy drink.
- Petitioner only learned of alleged sales of non-EBT items using an EBT card by an undercover agent after he received the initial charge letter (Exhibit A, C and D). Unfortunately, the Petitioner could not address these allegations with his employee as his employee died suddenly a few weeks prior to the receipt of the charge letter and thus the Petitioner cannot properly defend those allegations. (see Petitioner's Affidavit). "I (Owner of Pearl Market), received a letter stating that someone purchased with food stamps 1 billo pad, dish liquid, and some plastic spoons and forks. The person described that was behind the counter, working the cashier that day was my cousin. He is now deceased. I wasn't aware of this situation until I received the letter in the mail."
- It also appears that the same employee refused to sell non-EBT items to the undercover agent. This makes the events as described by the undercover agent a little sketchy. Again, to defend the allegations appears to be one sided. It seems that the USDA takes the words of the agent and does not give the Petitioner the benefit of the doubt. In this case because the alleged clerk is now deceased.
- Petitioner attests that no intentional violations have ever taken place and similarly there has been no benefit to the Petitioner by any misuse of EBT.

## ANALYSIS AND FINDINGS

The purpose of this review is to either validate or to invalidate the determination made by Retailer Operations. This review is limited to the facts at the basis of Retailer Operations' determination at the time it was made. The regulations establish that an authorized retail food store may be disqualified from participating in the SNAP 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 Charge letter Exhibits recount two exchanges by store personnel of cash for items purchased with SNAP benefits. Upon review, it is decided that there is insufficient evidence to support the trafficking charges and resultant permanent disqualification. The determination is modified.

The evidence in the record supports that Appellant established a record of selling nonfood items on multiple occasions. The regulations at 7 CFR § 278.6(e)(5) specify that FNS shall “disqualify the firm for six months if it is to be the first sanction for the firm and the evidence shows that personnel of the firm have committed violations such as, but not limited to, the sale of nonfood items due to carelessness or poor supervision by the firm’s ownership or management.” Three violations are considered evidence of carelessness. The owner is accountable for the proper handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons whom the ownership allowed to conduct store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. Therefore, the violations in this case are not too limited to warrant a disqualification period of six months.

The responding owner submitted no evidence to support that the transactions did not occur at Appellant. Retailers are informed that it is their responsibility to ensure that store personnel are properly trained regarding the SNAP rules. The preponderance of evidence under review supports that Appellant’s personnel sold nonfood items on multiple store visits in exchange for SNAP benefits, a program violation that warrants a six month disqualification.

### **CIVIL MONEY PENALTY**

Retailer Operations rendered a finding that it was not appropriate to impose a trafficking CMP in lieu of a permanent disqualification from SNAP. On review, the data supports that there are other authorized stores within a nearby radius of Appellant, that stock a variety of comparable staple foods at comparable prices. The evidence does not support that it will cause hardship for SNAP recipients if Appellant is disqualified. Therefore, Appellant is deemed not eligible for a hardship CMP.

### **CONCLUSION**

The record does not support, by a preponderance of the evidence, that the exchanges by store personnel of cash for products purchased with SNAP benefits, meet the definition of trafficking. The permanent disqualification is modified. The preponderance of the evidence supports that SNAP violations did occur at Appellant as described in the Exhibits A, C, and D, that warrant a six month disqualification of Appellant from the SNAP. The SNAP violations involved the sale by store personnel of nonfood items in exchange for benefits. A hardship CMP is denied in accordance with the applicable regulations. The effective date of this decision is 30 days after delivery of the decision to Appellant.

## **RIGHTS AND REMEDIES**

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023), and to 7 CFR § 279.7 of the regulations, with respect to applicable rights to judicial review of this decision. 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 where Appellant's owner resides or is 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 delivery 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.

M. Viens  
ADMINISTRATIVE REVIEW OFFICER

April 6, 2021