

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

**Shekina International African Market
#722168,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0206223

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Shekina International African Market #722168 (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the program, as initially imposed by the Retailer Operations Division was appropriate.

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 in its administration of the SNAP, when it imposed a permanent disqualification against Appellant in a letter dated October 15, 2018.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provides 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 State of Missouri Department of Social Services conducted an investigation of the compliance of Shekina International African Market #722168 with Federal SNAP law and regulations from April 25, 2018 through August 10, 2018. The investigation report documents the following:

1. On April 25, 2018, the store's owner, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), accepted SNAP EBT benefits in exchange for eligible food and ineligible items such as a purse, wallet, and 2 shirts.
2. On July 6, 2018, the store's owner, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), exchanged SNAP EBT benefits for eligible food and an ineligible item such as a men's shirt.
3. On August 10, 2018, the store's owner, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), exchanged SNAP EBT benefits for ineligible items such as cooking pots and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP EBT benefits for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash.

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 October 9, 2018, that it was charged with violating the terms and conditions of the SNAP regulations. 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 an October 15, 2018, telephone conversation with Retailer Operations Division, Appellant replied to the charge letter and stated that she was afraid of the undercover agents and that she did not exchange ineligible items or cash for SNAP benefits with other people. Appellant asked for forgiveness. Appellant was asked if she exchanged ineligible items and cash for SNAP benefits, and she answered "yes." Appellant was then asked if she knew that it was against the law to exchange ineligible items and cash for SNAP benefits, she answered "yes." Appellant stated that she was afraid of the undercover agents because no one ever came in to purchase ineligible items with SNAP benefits. When asked if she was threatened in any way she answered "no."

After considering the Appellant's reply and the evidence in the case, the Retailer Operations Division issued a determination letter dated October 15, 2018. The determination letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations. The Retailer Operations Division determined that the Appellant was not eligible for the trafficking CMP because the Appellant

failed to 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 dated October 23, 2018, the Appellant requested an administrative review of the Retailer Operations Division's determination. The appeal 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, 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 contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). In particular, 7 CFR § 278.6(a) and (e)(1)(i) establishes 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, inter alia: "... 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, inter alia: "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;..."

7 CFR § 278.6(e)(1)(i) states, in relevant part, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2."

7 CFR § 278.6(a) states, inter alia: "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*...." [Emphasis added]

7 CFR § 278.6(f)(1) states, inter alia: "FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm's disqualification would cause hardship to [SNAP] 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... A civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a permanent disqualification."

7 CFR § 278.6(b)(2)(ii) states, inter alia: “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, inter alia: “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 THE CHARGES

During an on-site investigation, Missouri Department of Welfare Services Agents conducted five compliance visits at Appellant. The investigation report documents the following:

1. On April 25, 2018, the store’s owner, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), accepted SNAP EBT benefits in exchange for eligible food and ineligible items such as a purse, wallet, and 2 shirts.
2. On July 6, 2018, the store’s owner, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), exchanged SNAP EBT benefits for eligible food and an ineligible item such as a men’s shirt.
3. On August 10, 2018, the store’s owner, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), exchanged SNAP EBT benefits for ineligible items such as cooking pots and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP EBT benefits for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash.

APPELLANT’S CONTENTIONS

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

1. I feel like I have followed SNAP regulations at my store but I may not have handled the situation correctly when I was found in violation recently. The people who came into the store were very intimidating to me.
2. I have had many of the African immigrants come into the store and attempt to pay for their food with food stamps. If I cannot accept food stamps from these customers, I assume they have to go to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or another grocery store that only sells American food, which as a rule is not natural food and not well liked by African people.
3. I know I made a mistake that resulted in my suspension from SNAP. I felt intimidated by the people I made the transaction with and I made a mistake in part because I am an immigrant.

4. I have reread the handbooks and other materials provided by the USDA and I feel if I am pressured to make a transaction that it not right, I will handle the situation correctly.

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

Appellant does not dispute that trafficking violations occurred in its store. Instead, Appellant admits to making a mistake and contends that ownership was intimidated and felt pressured by the undercover agents. With regard to Appellant's contention, it is important to note that a review of the audio and video evidence presented by the Missouri Department of Welfare and Social Services, of their investigation, does not show or indicate that the owner was under any duress or in fear while the Agents were in the store or during any of the SNAP transactions. The audio and video evidence was visible, audible and did not appear to have been altered in any manner. Therefore, it is implausible that Appellant actually felt a sense of fear or duress during the investigation and this contention do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

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 compliance policy to prevent SNAP violations. Appellant was advised of this provision in the charge letter of October 9, 2018, which also advised that documentation of eligibility for that alternative sanction had to be provided within a specific time limit. Such documentation must establish that there was an effective compliance policy and training program and that both were in effect and implemented *prior* to the occurrence of violations. In the absence of any such documentation, Retailer Operations Division did not impose a civil money penalty in lieu of permanent disqualification.

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 State of Missouri Department of Social Services investigation. All transactions cited in the letter of charges were conducted or supervised by an Agent with the State of Missouri Department of Social Services 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. The decision to impose a permanent disqualification against Shekina International African Market #722168 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 Title 7, Code of Federal Regulations, Part 279.7 (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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If the USDA receives such a request, it will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

Monique Brooks
Administrative Review Officer

May 7, 2019