

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

SS Friendly Market II Inc #2,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0217484

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a permanent disqualification of SS Friendly Market II Inc #2 (hereinafter “Appellant”) 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 or not the Retailer Operations Division, in its administration of SNAP, took appropriate action consistent with Title 7 Code of Federal Regulations (CFR) Part 278 when it imposed a permanent disqualification against SS Friendly Market II Inc #2.

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

SS Friendly Market II Inc #2 was initially authorized to participate in SNAP on March 31, 2015. Between May 6, 2019, and May 8, 2019, USDA investigators conducted an undercover investigation of SS Friendly Market II Inc #2 to ascertain the firm’s compliance with Federal SNAP law and regulations. It was reported that during the course of the investigation the Appellant firm violated SNAP rules by allowing ineligible non-food items to be purchased with SNAP benefits on two separate occasions. The firm also reportedly committed the violation of trafficking by exchanging SNAP benefits for cash on two occasions.

In a letter dated May 22, 2019, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations. The misuse of SNAP benefits, is a violation of 7 CFR § 278.2(a). 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).

On May 28, 2019, the Appellant responded to the charge letter. In its response, the Appellant explained that the cashier on duty was recently hired and the customer she was waiting on was trying to return some items that had already been purchased. Unfortunately, the cashier did not know how to process a refund for a purchase paid for with SNAP benefits. The cashier and the customer got into an argument about it, so the cashier just gave the customer cash. The Appellant explained that the issue has been addressed with the cashier, including instruction on how to properly handle such a transaction if it should happen again.

The Appellant's response also included a letter from the cashier in question. She stated that she did not tell her boss about the first refund incident out of fear of getting fired, but did tell her boss about the second incident. The cashier reiterated that the customer purchased items with the EBT card on two separate occasions and then attempted to return them. After an argument each time, the cashier acquiesced and gave the customer cash.

After evaluating the Appellant's response and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated June 4, 2019. This letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The 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, but a CMP was not appropriate 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 SNAP violations.

In a letter postmarked June 7, 2019, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an 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 (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...

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.

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(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 § 271.2 states, in part:

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 § 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.

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(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 May 6, 2019, and May 8, 2019, the USDA completed two compliance visits at SS Friendly Market II Inc #2. A report of the investigation was provided to the Appellant as an attachment to the May 22, 2019, charge letter. The investigation report included Exhibits A and B, which provided full details on the results of each compliance visit. SNAP violations were documented during both visits and included trafficking violations each time. The report noted that the following ineligible non-food items were purchased by an investigator using SNAP benefits:

- One 10-ounce bottle of fabric conditioner (*Downy* brand), Exhibit A
- One 12-ounce bottle of antifreeze (*Warren* brand), Exhibit A
- One 28-ounce container of cleanser (*Ajax* brand), Exhibit B
- One pack of cigarettes (*Newport* brand), Exhibit B

Trafficking was reported during each compliance visit. In reporting the trafficking violation of May 6, 2019, the USDA investigator provided the following details, as noted in Exhibit A:

5 U.S.C. § 552 (b)(7)(E)

In reporting the trafficking violation of May 8, 2019, the USDA investigator provided the following details, as noted in Exhibit B:

5 U.S.C. § 552 (b)(7)(E)

The report noted that the same clerk conducted both violative transactions during the investigation.

APPELLANT'S CONTENTIONS

In its request for administrative review, the Appellant submitted the same two letters that it sent to the Retailer Operations Division in response to the charge letter. No additional comments or information was provided. A brief summary of the two letters is as follows:

- The female clerk that was working at the time of the investigation had only recently been hired.
- The customer that she was waiting on wanted to return some items that had already been purchased with an EBT card, but the clerk was not sure how to process a return.
- The clerk and the customer got into an argument, so the clerk just gave the customer cash.
- Appellant owner has spoken with the clerk regarding how to properly handle such transactions in the future.
- The clerk did not tell her boss about the first incident because she was scared that she might get fired because she had just started her job.
- The clerk mentioned the second incident to her boss because the customer had been in the store only the day before.
- The clerk explained to her boss that the customer purchased some items with the EBT card and then wanted to return them, but the clerk did not know how to do that. The clerk explained that she and the customer began to argue because the clerk did not know how to process a refund. Because the customer was unhappy, the clerk decided to just give her cash instead. The following day, the customer came into the store and did the same thing again.
- The clerk acknowledged that her boss addressed the situation with her and told her not to do that, and told her how to properly handle the situation if it presents itself in the future.

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 in this document.

ANALYSIS AND FINDINGS

After reviewing the Appellant's version of events and comparing it with the information provided by both the investigator and the Retailer Operations Division, this review finds, through a preponderance of the evidence, that trafficking violations did occur and that permanent disqualification is the appropriate penalty.

In short, the evidence does not support the Appellant's explanation. 5 U.S.C. § 552 (b)(7)(E).

Exhibit B had a similar result in which 5 U.S.C. § 552 (b)(7)(E).

There is no evidence at all that the investigator attempted to return any items for a refund, and no mention was made of any supposed argument between the clerk and the investigator.

By all indications, the Appellant firm willingly participated in SNAP violations. While the Appellant may dispute the facts surrounding the trafficking allegations, it is notable that it did not contest the information on the report regarding the sale of ineligible items. As best as this review can determine, the firm made no effort to avoid program violations.

It should also be noted that the Appellant has not submitted any evidence to support its insinuation that the disqualification decision should be dismissed. In an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. In this case, the preponderance of evidence weighs heavily in favor of the Retailer Operations Division, which provided a complete and detailed investigation report along with verification that the transactions for the dollar amounts listed did, in fact, occur.

Based on the evidence in this case, there is little question that on two occasions, an employee at the Appellant firm gave an investigator cash in exchange for SNAP benefits. The actions taken by the store clerk clearly fall under the definition of trafficking as found in SNAP regulations at 7 CFR § 271.2 and permanent disqualification is the required penalty.

Civil Money Penalty

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

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a civil money penalty to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate documentation within designated timeframes. The case record shows that the Appellant did not request a trafficking CMP when it replied to the charge letter and there is no evidence that the Appellant submitted any documentation that would indicate that the firm had a compliance policy or training program of any kind.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

Trafficking is defined in Section 271.2 of the SNAP regulations as the buying, selling, or effecting an exchange of SNAP benefits for cash or consideration other than eligible food. Pursuant to regulations at 7 CFR § 278.6(e)(1)(i), permanent disqualification is the required penalty for such a violation. Neither statute nor regulations provide for a lesser penalty.

Based on a review of all available information in this case, this review finds through a preponderance of the evidence that trafficking violations did occur at SS Friendly Market II Inc #2 during a USDA investigation. All transactions cited in the letter of charges were either conducted or supervised by a USDA investigator and all are thoroughly documented. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(1), the decision to impose a permanent disqualification against the Appellant, SS Friendly Market II Inc #2, under the ownership of Avtar Singh, 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.

JON YORGASON
Administrative Review Officer

September 4, 2019