

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

U Mart,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0219847

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 Office of Retailer Operations and Compliance to impose a permanent disqualification against U Mart (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), in its administration of the SNAP when it imposed a permanent disqualification against Appellant on February 6, 2020.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period November 18, 2019, through December 19, 2019. The investigation determined that personnel at the Appellant firm accepted SNAP benefits in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash as noted in the letter of charges. This transaction was deemed clearly violative and warrants a permanent disqualification. Additionally, the investigation determined that personnel at the firm accepted SNAP benefits in exchange for ineligible merchandise on three occasions. The items sold are best described in regulatory terms as common nonfood items such as sandwich bags, toilet tissue, a scrubbing pad,

and cleaning supplies. The investigative report indicates that these violative transactions (Exhibits B, D, and F) were handled by the same clerk. The investigative report also notes that the firm refused to exchange SNAP benefits for ineligible items on one occasion (Exhibit A). It is further noted that while the clerk in Exhibit F did refuse to exchange SNAP benefits for a sound system, he did allow SNAP benefits to be exchanged for two ineligible items and for cash in this transaction.

As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant, in a letter dated January 28, 2020, that the firm and its ownership were charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.6(e)(1). The letter of charges states, in relevant part, “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking . . . is permanent disqualification.” The letter also states that “under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of permanent disqualification of a firm for trafficking.”

Appellant responded to the charges in a letter dated January 30, 2020, that did not request a CMP in lieu of permanent disqualification or provide evidence in support of a CMP within the specified timeframe. After giving consideration to the evidence, the Office of Retailer Operations and Compliance notified Appellant in a letter dated February 6, 2020, that the firm was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6(c) and 278.6(e)(1) for trafficking violations. This determination letter also states that Appellant’s eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated “. . . you are not eligible for the CMP because you failed to submit sufficient evidence to demonstrate that your firm had established and implemented an effective compliance policy and program to prevent violations of the Supplemental Nutrition Assistance Program.”

By letter dated February 13, 2020, Appellant, through counsel, appealed the Office of Retailer Operations and Compliance’s decision and requested an administrative review of this action. The appeal was granted. No subsequent correspondence was received.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing 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 untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Section 278. In particular, Sections 278.6(a) and Part 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 in the event that personnel of the firm have engaged in trafficking of SNAP benefits.

7 CFR § 271.2 states that: 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 § 278.2(a) states that: Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food. Further, the citation specifies that coupons may not be accepted in exchange for cash, in payment of interest on loans, or for any other nonfood use.

7 CFR § 278.6(a) states that: 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) reads, in part, “FNS shall . . . [d]isqualify 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, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone . . .” Trafficking is further defined, in 7 CFR § 271.2, to include “(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.”

7 CFR § 278.6(f)(1) states in relevant 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.”

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.”

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).” Part 278.6(b)(2)(ii) further states that 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 Part 278.6(b)(1), the firm shall not be eligible for such a penalty.

In addition, 7 CFR § 278.6(i)(2) states in relevant part, “As specified in Criterion 3 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that

the firm is operated in a manner consistent with this part 278 of current FNS regulations and current FSP policy on the proper acceptance and handling of food coupons.” This section goes on to state, “As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation.” This section further states, “A firm which seeks a civil money penalty in lieu of permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted . . .”

APPELLANT’S CONTENTIONS

The following may represent a summary of Appellant’s contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- On three of six occasions ineligible items were purchased and on one of the three occasions the cashier gave 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash when requested by the customer. The owner was the clerk on the other three occasions when ineligible items were refused. It is not store policy to allow ineligible items to be purchased using SNAP. The owner denied the ineligible items the three times when he was running the register. The incidents where the cashier allowed the sale of ineligible items was solely the cashier’s mistake. That cashier is 70 years old and has trouble communicating in English, seeing, and listening;
- Upon receipt of the charge letter, the owner discussed the transactions with the clerk who stated he was not thinking and was extremely remorseful for his actions. The owner reprimanded the clerk and retrained him on EBT guidelines. The owner also prepared a listing of eligible and ineligible items and posted it behind the register to serve as a reminder for the clerk.
- Under Criterion 1: The owner implemented an effective compliance policy as described above. A photocopied booklet is provided to each of its employees and issues concerning EBT processing are addressed as questions and issues arise and on a semi-annual basis. The owner has been in business and accepting SNAP since 2016 and since then has been active in ensuring full compliance with his employees and their obligations to USDA FNS. The compliance policy clearly states there is no exchange of cash for EBT, no store credit is allowed for EBT, individuals are not allowed to share a card, and only qualified grocery items may be sold on EBT. Under Criterion 2 and 3: The owner has provided training, in-store training, and a copy of the manual to all employees and store operators and he reviews the FNS Handbook with each new employee and employees are told to call USDA or the owner if they have any questions. Employees are reminded to never give cash in return for EBT, to disallow sales to known friends of the cardholder if it appears the cardholder is outright paying for the groceries of a person not in their household, and to disallow sales on unqualified EBT items. Under Criterion 4: The owner has not realized any benefits to himself by allowing illegal EBT transactions and has committed himself to serving his customers in an impoverished area;
- Appellant provided its own CMP calculation and the owner is acceptable to paying the calculated amount;
- Appellant states that the owner’s spouse has never been a part of the business and did not

intend for her name to be on the SNAP license. It is requested that her name be removed from the license; and,

- The owners want to continue serving the community and SNAP customers and request USDA FNS look into this matter and allow the owners to smoothly run the business and waive off the penalty or reduce it to its lowest as this is a very small business.

Appellant submitted an affidavit by the store owner, an affidavit by the partner/operator, an employee affidavit, an employee agreement, an employee warning letter, a training log sheet, and a listing of eligible and ineligible EBT items in support of these contentions.

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 Office of Retailer Operations and Compliance and is limited to what circumstances were at the basis of the Office of Retailer Operations and Compliance action at the time such action was made. In this case, store ownership has admitted in its response to the charge letter that store personnel conducted violative transactions that included the trafficking of SNAP benefits. The Report of Investigation clearly shows the exchange of an unknown amount of SNAP benefits for **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** cash in Exhibit F and the exchange of SNAP benefits for ineligible items in Exhibits B, D, and F.

While store ownership may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, that ownership is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. Both the 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 and reauthorization process. Store ownership did certify its understanding and agreement to abide by program rules and regulatory provisions when it initially applied to become a SNAP retailer. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time regardless of the amount of time the owner(s) are present at the subject firm.

The FNS investigative report shows that one employee of the Appellant firm transacted SNAP benefits for ineligible items on three occasions as well as for cash on one of the three occasions indicating an ongoing pattern of SNAP violations. The transactions from the investigative report have been matched to SNAP transactions posted by the firm on the dates in question with no disagreements and a review of the investigative report shows no errors or discrepancies. There is no evidence of involvement by the firm's ownership or management. The acceptance of SNAP benefits for ineligible items or for cash are both violations of SNAP rules and regulations with the penalty for trafficking being permanent disqualification. There is no regulatory threshold for the exchange of SNAP benefits for cash or for the dollar value of the ineligible items purchased and store ownership does not dispute that violations occurred or that SNAP benefits were exchanged for cash and ineligible merchandise. Additionally, it is highly improbable, based on the willingness of the firm's employees to exchange SNAP benefits for ineligible nonfood items and for cash, that the only instances of SNAP violations were those identified as part of the FNS

undercover investigation. Common sense dictates that their actions more likely than not represented an ongoing pattern of SNAP violations at the Appellant firm.

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, 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, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option.

Based on the discussion above, there is not any valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant’s request for his spouse’s name to be removed from the firm’s SNAP license is not addressed as it has no bearing on the matter under review.

CIVIL MONEY PENALTY

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

SNAP regulations at 7 CFR § 278.6(i) state that, “FNS may impose a CMP 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.” The regulations go on to state the standards of eligibility for a CMP in lieu of a permanent disqualification for trafficking, at a minimum, are to establish by substantial evidence the firm’s fulfillment of each of the four criteria listed in Section 278.6(i). SNAP regulations are explicit in what constitutes substantial evidence.

The Office of Retailer Operations and Compliance determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because Appellant failed to submit sufficient evidence within the specified timeframe to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. As such, the Office of Retailer Operations and Compliance determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

As previously stated, Appellant’s response to the charges did not request a CMP in lieu of permanent disqualification nor did Appellant submit any evidence in support of a CMP within

the specified timeframe. While Appellant, through counsel, did request a CMP in the request for administrative review, the request was submitted after the deadline specified in the charge letter and therefore is not a timely request. In addition to be submitted after the deadline, Appellant's request did not include a copy of the firm's SNAP compliance policy and program, any dated training curricula, or any other compelling evidence supporting the existence of the compliance policy and program at the firm. While the employment agreement may serve as evidence of the start of employment, it is not a statement of the firm's SNAP compliance policy as it fails to address key SNAP areas of compliance while addressing topics unrelated to SNAP. The employment agreement submitted by Appellant also states that "Any employee distributing cash for EBT will be terminated immediately", yet the responsible employee was not terminated and purportedly received a warning letter thus showing a failure by store ownership to comply with its own guidelines. The fact that the request for administrative review says that Appellant's training policy includes a reminder by the store owner that employees should be "Disallowing sales to known friends of the card user if it appears as though the card user is outright paying for the groceries of a person that is not a part of their household" is further proof that no effective training program was in place as sharing EBT cards is not prohibited by SNAP regulations. Additionally, a review of Appellant's training log sheet shows that it does not include the name of the store employee present during the FNS 2016 store visit thereby suggesting that the training log sheet was fabricated after the fact in an attempt to receive a CMP and avoid permanent disqualification. The statements by the store owner, the partner/operator, and the responsible employee are also dated after receipt of the charge letter and therefore do not provide evidence that store employees received SNAP training prior to the violations cited in the charge letter. The statements also do not specify what topics were covered during training sessions or what training materials were used.

Based on the above discussion and the evidence under review, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not request or provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Accordingly, the Office of Retailer Operations and Compliance's decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

It is also noted that Appellant submitted an affidavit by an individual identified as the partner/operator of the firm even though this individual was not listed on Appellant's 2016 SNAP retail store application nor was FNS notified separately of this individual's status as a partner/operator. Failure to disclose the full ownership of a SNAP retail store is a violation of SNAP regulations.

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did occur as charged and as admitted to by Appellant in the response to the charge letter. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted by a USDA investigator, signed under penalty of perjury, 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, the specific

exchange of SNAP benefits for cash, and in all other critically pertinent detail. Additionally, the decision by the Office of Retailer Operations and Compliance that Appellant was not eligible for a trafficking CMP is also found to be correct.

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against the Appellant business from participating as an authorized retailer in SNAP is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

March 25, 2020