

United States  
Department of  
Agriculture



Food and  
Nutrition  
Service

Supplemental  
Nutrition  
Assistance  
Program

Administrative  
Review Branch

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February 12, 2021

Randall S. Strause and Antonio R. Fernandez, Attorneys  
Strause Law Group PLLC  
804 Stone Creek Pkwy, Suite 1  
Louisville, KY 40223

Re: Case Number C0221265  
Mohammed K Yshaw  
Ken Mart  
1507 Kenilworth Ave NE  
Washington, DC 20019-2006

Dear Counselors:

Enclosed is the Final Agency Decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service, in response to your client's request for administrative review postmarked October 30, 2020.

The USDA finds that there is insufficient evidence to support the permanent disqualification determination made by the Retailer Operations Division. Therefore, the permanent disqualification is reversed and Ken Mart is to be reinstated as an authorized retailer in the Supplemental Nutrition Assistance Program.

Sincerely,

A handwritten signature in black ink that reads "Ronald C. Gwinn". The signature is written in a cursive, flowing style.

RONALD C. GWINN  
Administrative Review Officer

Enclosure

cc: Mohammed K Yshaw

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

**Ken Mart,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0221265**

**FINAL AGENCY DECISION**

It is the decision of the USDA that there is insufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of Ken Mart as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). Therefore, the permanent disqualification is reversed and the store is to be reinstated as an authorized SNAP retailer.

**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, when it imposed a permanent disqualification against Ken Mart.

**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**

The USDA conducted an investigation of the compliance of Ken Mart with Federal SNAP law and regulations in March 2020. As a result of the evidence compiled from this investigation, the Retailer Operations Division charged the Appellant, in a letter dated July 15, 2020, with trafficking in SNAP benefits as defined at 7 CFR § 271.2. The charge letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated the Appellant had the right to respond to the charges within 10 days of receipt. The letter also stated that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the criteria specified in 7 CFR § 278.6(i).

The Appellant store owner responded to the charge letter in an email dated July 21, 2020. Some of the Appellant's written contentions were difficult to understand because of an apparent language barrier; however, the Appellant, among various contentions, alleged additional conversations between the investigator and the store clerks that were not documented in the investigation report.

After giving consideration to the Appellant's response, the Retailer Operations Division informed the Appellant, by letter dated October 29, 2020, that Ken Mart was permanently disqualified from participation in the SNAP. The letter also stated that the Appellant was not eligible for a trafficking CMP as the Appellant did not 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 postmarked October 30, 2020, the Appellant requested an administrative review of the permanent disqualification determination. The request for administrative review 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 action 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 AND REGULATIONS**

The controlling law in this matter is covered in the Food & 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 § 271.2 states that the definition of "coupon" includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

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 defines trafficking as:

- (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.
- (2) The exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code, for SNAP benefits;
- (3) Purchasing a product with SNAP benefits that has a container requiring a return deposit with the intent of obtaining cash by discarding the product and returning the container for the deposit amount, intentionally discarding the product, and intentionally returning the container for the deposit amount;
- (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; or
- (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.** [Emphasis added.]
- (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 § 271.2 defines eligible food, in part, as:

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

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, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system....

## SUMMARY OF CHARGES

During an investigation conducted in March 2020, the USDA conducted four (4) undercover compliance visits at Ken Mart. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated July 15, 2020. The investigation report included Exhibits A through D which provide a narrative on the results of each compliance visit. During the compliance visit described in Exhibit C, a store clerk exchanged \$30 in cash for three (3) cases of Red Bull previously purchased at another authorized store for \$104.97 in SNAP benefits.

## APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in support of the administrative review, in relevant part:

- FNS lacks sufficient evidence with which to confirm that an employee of the firm intentionally and knowingly exchanged cash for items purchased with SNAP benefits at another store.
- The evidence that FNS used was based on improper means constituting entrapment.
- Additional information regarding the conversations between the clerk(s) and the investigator were omitted from the investigation report. There remains reasonable doubt concerning the contents of the conversation and whether a clerk specifically directed the investigator to purchase Red Bull with SNAP benefits in return for cash.
- In Exhibit A, the clerk removed non-food items from the investigator's purchases and told the investigator they could not be purchased with SNAP benefits. The investigator then asked the clerk again to accept SNAP benefits in exchange for non-food items and the clerk refused.
- The investigative narrative in Exhibit B is devoid of key information as to what the investigator portrayed to the clerk, notably the fact he provided him a name, a phone number, and told the clerk he was needing to find cash to feed his hungry children during a pandemic so as to entrap the client into committing a violation of SNAP in order to help feed his children, which was all a made-up scenario. In light of this fact, it calls into question what else was omitted or fabricated from the remainder of the investigative reports involved in this case.
- In Exhibit C, the investigator brought the three (3) cases of Red Bull allegedly requested by the clerk in Exhibit B to the store. A different clerk was present and called the clerk from Exhibit A and B who allegedly "verified" the deal. The clerk in Exhibit C, then gave the investigator \$30 for three (3) cases of Red Bull. However, the complete conversation between the two clerks is not documented in the investigation report and the requisite intent upon the clerk in Exhibit C cannot be verified from the slim facts in the entirety of the investigation report.

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

A review of the case record, indicates that the investigation report contains insufficient evidence to support a permanent disqualification for trafficking as defined under 7 CFR § 271.2 (5) , as “ ... **Intentionally** [emphasis added] purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.” Accordingly, it is unnecessary to fully address the Appellant’s contentions in this matter or the merits of each individual contention.

Please note that this administrative review decision is not precedent setting as the decision is based on the specific circumstances of this case as documented by materials provided by both the Appellant and the Retailer Operations Division. In addition, this administrative review decision does not establish policy or supersede Federal law, regulations or policy guidance.

## CONCLUSION

Based on a full review of the case record, there is insufficient evidence to support a permanent disqualification for trafficking under 7 CFR § 271.2(5) which is defined as “Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.” Based on the analysis above, the decision to impose a permanent disqualification against Ken Mart, Appellant, is **reversed** and the store will be reinstated as a SNAP authorized retailer.

## RIGHTS AND REMEDIES

Under the Freedom of Information Act, FNS is 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.

RONALD C. GWINN  
Administrative Review Officer

February 12, 2021