

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

KC's Mini Mart & Deli 2,

Appellant,

v.

Case Number: C0241211

**Office of Retailer Operations and
Compliance,**

Respondent.

FINAL AGENCY DECISION

It is the decision of the United States Department of Agriculture (USDA) that there is sufficient evidence to support a permanent disqualification of KC's Mini Mart & Deli 2 (hereinafter "Appellant") from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as imposed by the Office of Retailer Operations and Compliance (ROC) of FNS.

ISSUE

The issue accepted for review is whether ROC took appropriate action in its administration of SNAP, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278, when it imposed a permanent disqualification against Appellant, on June 29, 2021.

AUTHORITY

Per 7 U.S.C. § 2023 and its 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

ROC conducted an investigation of Appellant's compliance with federal SNAP law and regulations, during the period of January 2, 2021 through January 11, 2021, and involved six compliance visits. The investigation report included Exhibits A through F, which provide full details on the results of each compliance visit, and indicates that SNAP violations occurred on four of the six compliance visits. Specifically:

Exhibit A

Appellant sold the investigator two common nonfood items (one package each of paper plates, and plastic forks), along with four eligible items, using a SNAP card. The investigator did not attempt to traffic SNAP benefits. The investigator described this transaction as follows:

“I entered the subject store, placed all items on the counter, and presented the EBT card to the clerk for purchase. The clerk made no mention of the non-food items being purchased using SNAP benefits and completed the transaction.”

Exhibit B

Appellant sold the investigator two common nonfood items (one package each of bath tissue and soap), along with four eligible items, using a SNAP card. The investigator did not attempt to traffic SNAP benefits. The investigator described this transaction as follows:

“I entered the subject store, placed all items on the counter, and presented the EBT card to the clerk for purchase. The clerk made no mention of the non-food items being purchased using SNAP benefits and completed the transaction.”

Exhibit C

Appellant sold the investigator three common nonfood items (one package each of detergent, soap, and sandwich bags), along with three eligible items, using a SNAP card. The investigator did not attempt to traffic SNAP benefits. The investigator described this transaction as follows:

“I entered the subject store, placed all items on the counter, and presented the EBT card to the clerk for purchase. The clerk made no mention of the non-food items being purchased using SNAP benefits and completed the transaction.”

Exhibit D

Appellant sold the investigator six eligible items, using a SNAP card. The investigator did not attempt to purchase common nonfood items or traffic SNAP benefits. The investigator described this transaction as follows:

“I entered the subject store, placed all items on the counter, and presented the EBT card to the clerk for purchase. The clerk completed the transaction.”

Exhibit E

Appellant trafficked \$40 in SNAP benefits; and sold the investigator one major nonfood item (one package of shampoo) and four eligible items, using a SNAP card. The investigator described this transaction as follows.

“I entered the subject store, placed all items on the counter, and presented the EBT card to the clerk for purchase. The clerk made no mention of the non-food item being purchased using SNAP benefits and told me the amount due for the items was \$29.55. I asked the clerk for cash back off my EBT card, and the clerk agreed, saying "I can only do up to \$40.00." I replied "that would be awesome." The clerk retrieved \$40.00 (1- \$20.00, 2- \$10.00) from the register and handed it to me. The clerk then completed the transaction and handed me the receipt.”

Exhibit F

Appellant sold the investigator three eligible items, declined to sell three ineligible items using SNAP benefits, and declined to traffic SNAP benefits. The investigator described this transaction as follows.

“I entered the subject store, placed all items on the counter, and presented the EBT card to the clerk for purchase. The clerk removed the non-food items and stated that they could not be purchased using SNAP benefits. I asked the clerk to utilize the EBT card for the non-food items and the clerk refused. The clerk then completed the transaction for the food items only. Additionally, I asked the clerk for cash back off my EBT card, but the clerk refused.”

In a letter dated February 10, 2021, ROC charged Appellant with trafficking (i.e., the acceptance of SNAP benefits in exchange for cash), in violation of 7 CFR § 271.2. The letter also informed Appellant that, per 7 CFR § 278.6(e)(1), the trafficking violation warranted a permanent disqualification, and that FNS may impose a civil money penalty (CMP) in lieu of a permanent disqualification for trafficking, under the conditions specified in 7 CFR § 278.6(i). The letter included a copy of the investigation report.

In the same letter, ROC charged Appellant with accepting SNAP benefits in exchange for ineligible nonfood items, which is also a violation of 7 CFR § 278.2(a). The letter also informed Appellant that, per 7 CFR § 278.6(e), the violation for sale of ineligible items warranted a non-permanent disqualification and that; under certain conditions, FNS may impose a CMP in lieu of a disqualification, as provided in 7 CFR § 278.6(f)(1).

The charge letter also indicated that Appellant has the right to reply to the charges; may present any information, explanation, or evidence regarding the charges; and must reply within 10 calendar days of the date of receipt of the charge letter. Per UPS confirmation of delivery, the charge letter was delivered to Appellant, at the store address of record, on February 11, 2021.

Appellant responded to the charge letter, through counsel, in e-mails dated February 15, 16, and 26, 2021.

After evaluating Appellant’s response, ROC concluded that trafficking had occurred as charged, and notified Appellant, in a determination letter dated June 29, 2021, that Appellant was being permanently disqualified from participation as an authorized retailer in SNAP. This letter also stated that ROC considered Appellant’s eligibility for a trafficking civil money penalty (CMP),

according to the terms of Section 278.6(i). However, the letter indicated that “. . . 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.” Per UPS confirmation of delivery, the determination letter was delivered to Appellant, at the counsel’s address of record, on June 30, 2021.

Via letter postmarked July 7, 2021, Appellant appealed ROC’s decision to impose a permanent disqualification and requested an administrative review of the action. Subsequently, via e-mail dated August 6, 2021, Appellant requested an extension to submit documents supporting the request for administrative review, through August 25, 2021. This request was granted, and Appellant submitted additional a brief on August 25, 2021, via e-mail.

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 AND REGULATIONS

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 regulations 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 for trafficking.

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 § 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 § 271.2 states, in part:

“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...”

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 . . . 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 § 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.”

APPELLANT’S CONTENTIONS

The following represents a brief summary of the Appellant’s contentions in this matter:

- Appellant “explicitly stated that it did not believe any trafficking of benefits occurred at the Market...”
- Appellant has “never had a male work/intern/volunteer/under its employ of any kind ever in the history of the Market.”
- Appellant asserts that “considering the documentary evidence of the Market’s initial training program upon hire and its compliance policy, coupled with the affidavit as to informal and ongoing retraining, along with the Market’s spotless record and its size, leads to one conclusion: that the Market meets the requirements for a CMP.”
- “[B]usinesses (both big and small) around this country are closing their doors due to the COVID pandemic. Businesses are doing all they can to merely survive and get to a point where they can begin to recover. Allowing the Market to retain its SNAP privileges will go a very long way in ensuring the Market not only keeps its doors open for the duration of the pandemic, but that it can come back even stronger once the pandemic subsides.”
- “...[D]isqualifying the Market’s participation in SNAP will undoubtedly cause additional hardship to both the surrounding community and the Market itself.”

While the preceding represents a brief summary of Appellant’s contentions presented in this matter, in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically reiterated or specifically referenced herein.

ANALYSIS AND FINDINGS

Investigation Report

The purpose of this administrative review is to either validate or to invalidate ROC’s determination that Appellant should be permanently disqualified from participation as a SNAP authorized store. This review is limited to the facts at the basis of the ROC’s determination at the time it was made.

Appellant contends that "...it did not believe any trafficking of benefits occurred at the Market..." However, the facts of this case contradict Appellant's contention on this point. The charges of violations in this case are based on the findings of a formal USDA investigation of Appellant's compliance with Federal SNAP law and regulations, conducted from December 16, 2020 through January 2, 2021. Investigators certify, under penalty of perjury, that their investigative reports are true and correct. In this case, all transactions are fully documented in the investigative report, and contain no known error or discrepancies. The investigation report is specific and thorough, with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. Specifically, the investigative report documents that a store employee engaged in the trafficking of SNAP benefits -- noted in Exhibit E -- warranting permanent disqualification for Appellant from being a SNAP retail food store. Aside from its assertions, Appellant submitted no evidence that contradicts these findings.

Appellant also "never had a male work/intern/volunteer/under its employ of any kind ever in the history of the Market." Although Appellant provides an affidavit to this effect, Appellant provided no other documents (work schedules, payroll, etc.) to support that assertion. Alone, Appellant's affidavit is not persuasive.

Based on this discussion, ROC's decision to permanently disqualify Appellant from being a SNAP authorized retailer, for trafficking SNAP benefits, is appropriate, and there is no valid basis for dismissing the charges or for mitigating the penalty imposed.

Case Law

With regard to other the case law cited by the Appellant, it is beyond the scope and authority of this review to determine the applicability of same. This review is limited to consideration of whether or not ROC duly adhered to the Food and Nutrition Act of 2008, as amended, and the implementing regulations, and whether or not the action taken is sustainable by a preponderance of the evidence. Therefore, the application of any judicial precedent is better addressed via judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

CIVIL MONEY PENALTY

ROC considered Appellant's eligibility for a trafficking civil money penalty (CMP), but determined Appellant was not eligible for such a penalty because it did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

To be eligible for a trafficking CMP, per 7 CFR 278.6(i), Appellants must meet four criteria

- Criterion 1: "...[H]ave developed an effective compliance policy as specified in § 278.6(i)(1); and"
- Criterion 2: "...[T]hat both its compliance policy and program were in operation" prior to the "violations cited in the charge letter sent to the firm; and"
- Criterion 3: "[H]ad developed and instituted an effective personnel training program as specified in § 278.6(i)(2); and"

- Criterion 4: “[O]wnership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm...”

In this case, Appellant submitted documents that purportedly constitute its “Compliance Program,” “Training Guide” and “Training Completion Checkoff Sheet.” The “Compliance Program” is not dated at all, and therefore is not persuasive evidence that Appellant had an “effective compliance policy” in place prior to the charge letter, as required by Criterion 1. The “Training Guide” is dated February 15, 2021, after the date of the charge letter, and therefore is not evidence that its compliance and training program was in place prior to the charge letter, as required by Criterion 2. Finally, the “Training Completion Checkoff Sheet” is purportedly signed on dates of prior training sessions, from October 2017 to December 2020; but all the dated signatures belong to the owner, rather than employees who would have needed to be trained, and written with no perceptible deviations in the handwriting, ink color, or type of pen used, and are therefore not persuasive evidence towards meeting Criterion 3. Thus, Appellant does not qualify for a trafficking CMP.

CONCLUSION

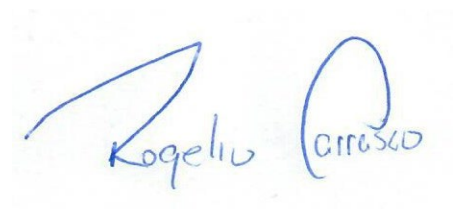
Trafficking, as defined in Section 271.2 of the SNAP regulations, includes the exchange of SNAP benefits for cash. Per SNAP regulations at 7 CFR § 278.6(e)(1), permanent disqualification is the required penalty for such a violation.

Based on a review of all available information in this case, this review finds, through a preponderance of the evidence, that a trafficking violation did occur at Appellant’s store during a USDA investigation. All transactions cited in the letter of charges were conducted by a USDA investigator, 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 date of the trafficking violations, and in all other critically pertinent details. Further, the Appellant has not offered convincing evidence in support of its counterarguments, and its contentions do not persuade this review to conclude that a reversal of the agency’s sanction determination would be appropriate. Therefore, pursuant to 7 CFR § 278.6(a) and (e)(1), the decision to impose a permanent disqualification against the Appellant is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act (7 U.S.C. 2023) and to Section 279.7 of the Regulations (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, 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.

A handwritten signature in blue ink. The first part of the signature is a stylized, sweeping line that forms the letter 'R'. The second part is the name 'Carrasco' written in a cursive script.

ROGELIO CARRASCO
ADMINISTRATIVE REVIEW OFFICER

August 10, 2022