

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

AC Tropical Corp,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0253083

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 AC Tropical Corp (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.

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 April 15, 2022, through May 3, 2022. The investigation determined that personnel at the Appellant firm accepted \$100.29 in SNAP benefits in exchange for \$70.00 cash in both Exhibit D and Exhibit E. These transactions were deemed clearly violative and warrant a permanent disqualification. Additionally, the investigation determined that personnel at the firm accepted SNAP benefits in exchange for ineligible merchandise on all

five visits to the Appellant firm. The items sold are best described in regulatory terms as common nonfood items such as batteries, a metal spoon, an aluminum mug, a plantain press, a mortar and pestle, toilet tissue, paper towels, and bar soap. The investigative report indicates that these violative transactions were handled by the same clerk.

As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant, in a letter dated June 23, 2022, 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, through its accountant, responded to the charges in a letter emailed on July 6, 2022, that admitted to the violations and a lack of training by the store owner. This response 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 July 21, 2022, 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 submitted via email on July 29, 2022, 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. 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:

- The owner wishes to prove that he implemented an effective compliance program to prevent violations of SNAP Section 271.2;
- The owner has been in business since 2019 and an EBT vendor since 2021. He has never violated any laws related to Section 271.2 and 278.6(e)(1);
- Under 271.2(d), ownership and/or its employees have not violated SNAP law. Their transactions are based on the sale of qualified merchandise;
- The owner meets Criterion 1 since he implemented an effective compliance policy as described in 271.2 that ensures full compliance with employees and their obligations to USDA. The compliance policy states there is no exchange of cash for EBT and only qualified EBT grocery items can be sold to customers;
- Criteria 2 was copied from the SNAP regulations;
- Under Criterion 3, the owner’s training program includes a review of the FNS Handbook with each new employee and they are told to call the USDA or the store owner if they have any questions;
- Criteria 4 was copied from the SNAP regulations;
- The owner uses the FNS Retailer Training Guide to provide in-store training and a copy is provided to each employee. The contents of the manual are discussed and reviewed with employees and partners on a semi-annual basis. Each employee is reminded to never give cash back in return for EBT purchases, to disallow sales to known friends of the card user if it appears that the card user is outright paying for the groceries of a person that is not part of their household, and to disallow sales on unqualified EBT items;
- This is the first time the owner has received a violation from USDA and has always taken the time and effort to train and enforce USDA policy on both full and part time employees. Unfortunately, one of the employees continuously failed to apply proper diligence and committed actions that were forbidden by the USDA handbook and its corresponding compliance policies;
- The owner was not aware, would definitely not approve, did not benefit from, and was not in any way involved in the employee’s repetitive illegal conduct. Based on Exhibits, the contractor always came in around the same time (5 p.m. to 6 p.m.). During this timeframe, the owner was never in the store due to his responsibility as a grandparent to pick-up his daughter’s two children from school. This shows that the owner was not aware of the malpractice and did not intend to profit from illegal EBT practices;

- The owner confronted the employee after receiving the USDA letter. The employee admitted that he was being careless and failed to follow the store's compliance policies. The owner terminated the employee even though he was a long-term friend;
- The store is in a populated area with multiple struggling neighborhoods, schools, and parks. Families depend on public transit or walk. The owner has also invested a significant amount of time into the community by ensuring the store always has a large variety of inventories including fresh vegetables and fruit to accommodate all customers. Hence, if the USDA permanently disqualifies Petitioner's store from the SNAP program, the loss to the local community will be significant. The USDA may be better served by approving a CMP than disqualifying the business which will be burdensome to the local community; and,
- In following SNAP guidelines and having a proven Compliance Policy in place as shown by the Exhibits, the owner shows no intentions on allowing such violations to happen again. The owner requests a temporary disqualification or an HCMP in lieu of permanent disqualification.

Appellant submitted a signed statement from the store owner and from an employee attesting to SNAP training as well as six customer statements from purported SNAP recipients and eight undated color photos 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 and in the request for administrative review that store personnel conducted violative transactions that included the trafficking of SNAP benefits. Additionally, the Report of Investigation clearly shows the exchange of \$100.29 in SNAP benefits for \$70.00 cash in both Exhibit D and Exhibit E.

While store ownership may or 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 and again when it applied for reauthorization. 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 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 indisputable 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 employee 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.

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, although Appellant's request for administrative review did request a hardship CMP or a trafficking CMP in lieu of permanent disqualification, no evidence in support of a trafficking CMP was submitted within the specified timeframe and hardship CMP's are not allowed for cases involving trafficking.

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 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).

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. 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

May 31, 2023