

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

**Apopka Supermarket,**

**Appellant,**

**v.**

**Case Number: C0213724**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of Apopka Supermarket as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**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 Apopka Supermarket.

**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 Apopka Supermarket with Federal SNAP law and regulations from December 2018 through June 2019. The investigation report documents that personnel at Apopka Supermarket exchanged cash for SNAP benefits during two (2) undercover compliance visits. The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR § 271.2.

As a result of the evidence compiled from this investigation, the Retailer Operations Division charged the Appellant, in a letter dated July 18, 2019, with trafficking in SNAP benefits. 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 conditions specified in 7 CFR § 278.6(i). The Appellant, through counsel, replied to the charges in a letter dated July 29, 2019. The Appellant requested a trafficking CMP in lieu of a permanent disqualification.

After giving consideration to the Appellant's response and the evidence in the case, the Retailer Operations Division informed the Appellant, by letter dated November 8, 2019, that Apopka Supermarket 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. The letter was received by Appellant's counsel on November 18, 2019.

In a letter postmarked November 25, 2019, the Appellant, through counsel, 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, in part, as:

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 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....

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.

7 CFR § 278.6(b)(2) states, in part:

(ii) 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 as specified in § 278.6(i), 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).

(iii) 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.

## **SUMMARY OF CHARGES**

During an investigation conducted from December 2018 through June 2019, the USDA conducted six (6) undercover compliance visits at Apopka Supermarket. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated July 18, 2019. The investigation report included Exhibits A through F which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations occurred during five (5) of the six (6) compliance visits and were committed by three (3) different clerks. During the compliance visits described in Exhibits E and F, two (2) different clerks exchanged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash for SNAP benefits.

## **APPELLANT'S CONTENTIONS**

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

- The ruling discriminates against the store in favor of other retail food stores.
- The store is the only SNAP authorized store in the area and the local SNAP community will be arbitrarily deprived of their ability to purchase the highest quality of meats, fresh produce and groceries.
- The determination of the Retailer Operations Division that the store is not eligible for a trafficking CMP is contradicted by the store's response of July 29, 2019. The July 29, 2019 response outline the store's on-going training program for employees. The training includes providing employees with a list of all SNAP eligible items. The list is located next to the cash register along with a list of frequently purchased non-food items.
- There is a difference between employees who make honest mistakes and employees who have a criminal intent. From a small business perspective, there is no effective training program available to an owner if the employee is intent on theft.
- The store immediately terminated the employees who committed the violations.
- The store has complied with the obligations under 7 CFR 278.6(i) and it should qualify for a trafficking CMP in lieu of a permanent disqualification.

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**

### **Investigation Report**

The investigation report documents that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted under the direction of a USDA investigator and are thoroughly documented. A complete review of this documentation has yielded no known error or discrepancy. 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. A preponderance of the evidence indicates that personnel at the store exchanged cash for SNAP benefits.

### **Owner Accountability**

The store owner signed the SNAP authorization application for the store on April 19, 2018 and acknowledged that the owner was aware of the SNAP regulations and understood those regulations. That application also included a certification and confirmation that the owner would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits for ineligible non-food items or as repayment on credit accounts.

### **Violations Warrant a Permanent Disqualification**

The exchange of cash for SNAP benefits as documented by Exhibits E and F of the investigation report meets the definition of trafficking as defined at 7 CFR § 271.2. Also, the definition of trafficking contained in the SNAP regulations at 7 CFR §271.2 does not require an element of intent on the part of the violator. Therefore, whether or not the Appellant firm or its employees intended to violate SNAP regulations is irrelevant. Trafficking in SNAP benefits is an extremely serious violation and both 7 U.S.C. §2021(b)(3)(B) and 7 CFR §278.6(e)(1)(i) state that **a first time** violation warrants a permanent disqualification.

### **Corrective Action**

The Appellant states that the store has taken corrective action by firing the employees who committed the violations. Regarding this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is **limited** to what circumstances existed at the time that was the basis of the Retailer Operations Division’s action. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that a store may begin to comply with program requirements.

In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations. Therefore, the Appellant’s contention that corrective action has taken place does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Hardship to Firm**

The Appellant contends that a permanent disqualification will discriminate against the store in favor of other retail food stores which will benefit economically. With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store

is disqualified from participation in the SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to either the owner personally or the firm resulting from the imposition of such penalty. To allow stores to be excused from assessed administrative penalties based on a purported economic hardship would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

### **Hardship to the Local Community**

The Appellant claims that a permanent disqualification would be a disservice to the local community as it provides fresh meat, produce and groceries not available at other stores. Regarding this contention, **there is no provision** in SNAP law or regulations that would negate, waive or reduce a permanent disqualification for trafficking due to a purported hardship to SNAP customers.

Where there is a hardship to SNAP households due to a lack of authorized stores in the area, FNS may impose a hardship CMP on a firm in lieu of a **less than** permanent disqualification. However, the regulations at 7 CFR § 278.6(f)(1) clearly state that “a civil money penalty for hardship to SNAP households may not be imposed in lieu of a **permanent** disqualification.” [Emphasis added.] Because the Retailer Operations Division has taken action to permanently disqualify the Appellant firm, a **hardship** CMP in lieu of disqualification cannot be granted.

It should also be noted that there are 19 SNAP authorized stores located within a one-mile radius of the Appellant store including a superstore and a supermarket. Therefore, it is unlikely that the local SNAP community will suffer a hardship as opposed to a mere inconvenience due to the permanent disqualification of Apopka Supermarket.

### **TRAFFICKING CIVIL MONEY PENALTY**

The Appellant states that its submission dated July 29, 2019 is sufficient to qualify the store for a trafficking CMP in lieu of a permanent disqualification. This review finds that, although the request for a trafficking CMP was timely, the Appellant did not provide the required supporting documents to establish that it qualified for a trafficking CMP.

SNAP regulations at 7 CFR § 278.6(b)(2)(iii) 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 7 CFR § 278.6(b)(1), the firm **shall not be eligible** for such a penalty.” [Emphasis added.] The Appellant’s submission included only unsubstantiated statements regarding the store’s compliance policy and training.

The criteria for a trafficking CMP in lieu of disqualification is defined under 7 CFR § 278.6(i) which reads, with emphasis added, in part:

In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by **substantial** evidence its fulfillment of each of the following criteria:

Criterion 1. The firm shall have developed an **effective** compliance policy as specified in §278.6(i)(1); and

Criterion 2. The firm **shall establish** that both its **compliance policy and program were in operation** at the location where the violation(s) occurred **prior to the occurrence of violations** cited in the charge letter sent to the firm; and

Criterion 3. The firm had developed and instituted an **effective** personnel training program as specified in §278.6(i)(2); and

Criterion 4. Firm ownership 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 ....

Regarding compliance policy standards, 7 CFR 278.6(i)(1) further states, with emphasis added, in part:

As specified in Criterion 1 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 [SNAP] regulations .... 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**. In addition, in evaluating the effectiveness of the firm's policy and program to ensure FSP compliance and to prevent FSP violations, FNS may consider the following:

- (i) Documentation reflecting the development and/or operation of a policy to terminate the employment of any firm employee found violating FSP regulations;
- (ii) Documentation of the development and/or continued operation of firm policy and procedures resulting in appropriate corrective action following complaints of FSP violations or irregularities committed by firm personnel;
- (iii) Documentation of the development and/or continued operation of procedures for internal review of firm employees' compliance with FSP regulations ....

Regarding training program standards, 7 CFR 278.6(i)(2) further states, with emphasis in part:

A firm which seeks a civil money penalty in lieu of a permanent disqualification **shall document its training activity** by submitting to FNS its **dated training curricula** and **records of dates** training sessions were conducted; a **record of dates** of employment of firm personnel; and **contemporaneous documentation** of the participation of the violating employee(s) in initial and any follow-up training held prior to the violation(s).

Although the Appellant had timely requested a trafficking CMP, the Appellant has not provided the actual documents required by regulations to support such a request. Therefore, the Retailer

Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

### **CONCLUSION**

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 ....” The SNAP regulation at 7 CFR § 278.6(e)(1)(i) reads, in part, “FNS shall ... disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.” The law and regulations do not provide for a lesser period of disqualification for this violation.

Based on a full review of the evidence in this case, a preponderance of the evidence supports that trafficking violations did occur during a USDA investigation. Based on the analysis above, the decision to impose a permanent disqualification against Apopka Supermarket, Appellant, is **sustained**.

### **RIGHTS AND REMEDIES**

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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.

RONALD C. GWINN  
Administrative Review Officer

March 2, 2020