

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

Frog Hop #Grocery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0237793

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of Frog Hop #Grocery (hereinafter “Frog Hop #Grocery” or “Appellant”) from participating 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 Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against Frog Hop #Grocery.

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 Frog Hop #Grocery with Federal SNAP law and regulations during the period February 6, 2021 through February 8, 2021. The investigation report documents that store personnel at the Appellant firm, in addition to accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items on two occasions, also intentionally exchanged cash for food purchased with SNAP benefits during two of the four undercover compliance visits. Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food is trafficking as defined under 7 CFR § 271.2.

As a result of evidence compiled from this investigation, the Retailer Operations Division charged the Appellant, in a letter dated February 23, 2021, 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 that 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). Per UPS confirmation of delivery, the charge letter was delivered to the Appellant at the store address of record on March 4, 2021.

In responses to the Retailer Operations Division of March 5, 2021 and March 9, 2021, the Appellant, through counsel, replied to the charges therein stating that the owner had implemented an effective compliance program to prevent violations of the SNAP per Section 278.6(e)(1) and meets the eligibility requirements for a civil money penalty under Section 278.6(i). The act of one new and since terminated employee resulted in the charges. The employee who is responsible for the alleged charges was properly trained by the owner but went against store policy to benefit himself. The owner did not benefit from the transactions. The Appellant has not been cited for any prior SNAP violations. A SNAP disqualification will impose a hardship on SNAP customers as they will have to travel further distances and spend more money on expensive SNAP goods at the closest competitor.

After giving consideration to the Appellant's replies and the evidence in this case, the Retailer Operations Division informed the Appellant, by letter dated March 23, 2021, that Frog Hop #Grocery was permanently disqualified from participation as a retail store in the SNAP. The letter also stated that the Appellant was not eligible for a trafficking civil money penalty 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 March 31, 2021, the Appellant, through counsel, requested an administrative review of the permanent disqualification determination. FNS granted the Appellant's request for administrative review by letter dated April 12, 2021. In an email correspondence of May 3, 2021, the Appellant, through counsel, submitted additional information in support of the request for administrative review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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

The controlling statute in this matter is covered in the Food and 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 ... [Emphasis added.]

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....

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 from February 6, 2021 through February 8, 2021, the USDA conducted four undercover compliance visits at Frog Hop #Grocery. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated February 23, 2021. The investigation report included Exhibits A through D which provide full details on the results of

each compliance visit. The investigation report documents that store personnel at the Appellant firm, in addition to accepting SNAP benefits in exchange for merchandise which included ineligible nonfood items on two occasions, also intentionally exchanged cash for food originally purchased with SNAP benefits during two of the four undercover compliance visits.

During the compliance visit described in Exhibit B, a store employee purchased three (24-16 ounces) cases of Monster energy drinks and five (24-8.4 ounces) cases of Red Bull energy drinks 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash. During the compliance visit described in Exhibit D, a store employee purchased two (24-16 ounces) cases of Monster energy drinks and five (24-8.4 ounces) cases of Red Bull energy drinks 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in cash. The investigator's narratives document that the store employee(s) was made aware that the cases of Monster and Red Bull energy drinks were purchased with SNAP benefits at another store. Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food is trafficking as defined under 7 CFR § 271.2.

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the replies to the charge letter, in the request for administrative review, and in subsequent correspondence, the Appellant, through counsel, made the following summarized contentions, in relevant part:

- The Appellant contests that the transactions occurred the way presented. The progress of the story told by the investigator is illogical, redundant and clearly the result of a confused investigation.
- The act of one new and since terminated employee resulted in the charges. The employee carried out these transactions for his own benefit to the detriment of the owner. The employee who is responsible for the alleged charges was properly trained by the owner but went against store policy to benefit himself. The owner, his wife and one employee were the only employees of the firm during the investigation.
- Three affidavits are provided, one of which is from a clerk who was terminated. His affidavit confirms that the investigator came to the store and that he did not request that the investigator purchase anything. The investigator did not approach the owner, or speak to her, and instead spent time talking with the prior clerk.
- The Appellant denies the allegations. There are two affidavits in which trafficking is alleged. The evidence is unsworn to by the investigator and contains no corroborating evidence. In this instance, there is a direct witness to the transaction which verify: (1) the owner was not involved in the transaction at all, and (2) there was never a mention that the Red Bull or Monster had been bought on EBT.
- USDA must prove that store personnel knowingly and intentionally purchased items originally bought with SNAP benefits for the purpose of converting those benefits to cash.

- The investigator claims that the clerk came up with the idea of purchasing Red Bull/Monster energy drinks. It is more likely that the investigator suggested the purchase of Red Bull/Monster cases to the clerk. This attributes intent to the clerk which was not actually there—the identification of a product he would like to purchase. The investigator goes from asking the clerk how to traffick, to suggesting a deal where the store received discounted inventory for cash, and finally to simply following the clerk’s instructions to buy Red Bull/Monster on EBT that he would buy for cash.
- USDA lacks audio recordings to prove that the store clerks were actually notified of the nature of the purchase and lacks detailed records of the cash allegedly received. The investigator has no corroborating evidence. There are no recordings of the transactions visually. There are no pictures of eligible food items, no notes about the disposition of items, and no photos of the alleged cash that was received.
- The Appellant has not been cited for any prior SNAP violations. The Appellant has never violated any laws related to Section 278.6(e)(1) and 272.1.
- The investigative report is hearsay. Hearsay in administrative matters can only be relied upon if four conditions are met. The Appellant cannot subpoena or depose the investigator. The investigative report should not be relied upon. The Appellant cited *U.S. Pipe & Foundry Co. v. Webb* and *J.A.M. Builders, Inc. v. Herman*.
- On the face of the documents provided by USDA, there is no reasonable opportunity for the Appellant to subpoena or otherwise depose the witness because the Department has redacted all of that information prior to sending the charge letter. Therefore, the document cannot and should not be relied upon by USDA in determining whether or not trafficking has occurred.
- Given the mischaracterization, failure to document, inaccuracy and persistence demonstrated by the investigator, it is not credible that the investigator’s version of events is accurate. As such, USDA lacks admissible evidence to sustain allegations of trafficking.
- Not holding the determinations in abeyance while a FOIA response is pending violates 7 CFR § 278.6(b)(1) according to *Triple E Express vs. ROD*, because the Appellant is not given a full opportunity to respond.
- Other similar ARB decisions have reversed the determinations.
- Due to the Connecticut Uniform Commercial Code, retailers cannot be held accountable for indirect trafficking. The regulation under which this case proceeds is in excess of FNS’ authority.
- The owner has invested a significant amount of money into opening a grocery store in an impoverished area, where any grocery store would depend heavily on its EBT sales to stay in business.
- The Appellant is located in an economically depressed area. Approximately 7% of the households in the area receive SNAP benefits. A SNAP disqualification will impose a hardship on SNAP customers as they will have to travel further distances and spend more money on expensive SNAP goods at the closest competitor.
- The Appellant should have been issued a civil money penalty as the firm had implemented an effective compliance program to prevent violations of the SNAP per Section 278.6(e)(1) and meets the eligibility requirements for a civil money penalty under Section 278.6(i).

- The owner has provided training and a copy of the manual to all employees. The contents of the manual are discussed and reviewed with employees on a semi-annual basis. Each employee is reminded by the owner to never engage in the following: Giving back cash in exchange for SNAP benefits; disallowing sales to known friends of the card user if it appears as though the card user is paying for the groceries of a person that is not part of their household; and disallowing sales on unqualified EBT items.
- With regard to Criterion 1, the Appellant has been in business since 2019 and has been active in ensuring full compliance with employees and their obligations to USDA. The compliance policy clearly states the following: There is no exchange of cash for SNAP benefits; there is no credit allowed for SNAP purchases; and only qualified grocery items can be sold to SNAP customers.
- With regard to Criterion 2, the firm's compliance policy and program were in operation prior to the occurrence of the violations.
- With regard to Criterion 3, the firm developed and instituted an effective personnel training program to include a review of the FNS handbook with each new employee and to call USDA or the store owner if employees have questions.
- With regard to Criterion 4, the owner did not benefit from the transactions.

In support of these contentions, the Appellant, through counsel, submitted the following documents for review:

- Photos (11 total) of inside of store with stock and outside of store;
- Numerous Invoices for food purchases;
- Statements (3 total) signed by customers requesting that the Appellant be reinstated in the SNAP due to imposed customer hardship;
- Affidavit/statement of a former employee attesting to purchasing energy drinks from the investigator and to receipt of SNAP training;
- Affidavits/statements of two employees attesting to receipt of SNAP training; and
- Affidavit/statement of store owner attesting to the deliverance of SNAP training to employees.

ANALYSIS AND FINDINGS

SNAP Violations

This review is to either validate or to invalidate the determination made by the Retailer Operations Division; it is limited to the facts at the basis of the Retailer Operations Division's determination at the time it was made.

The Appellant contends that the act of one new and since terminated employee resulted in the charges. The employee carried out these transactions for his own benefit to the detriment of the owner. However, prior to becoming authorized to participate in the SNAP, the Appellant completed and submitted a SNAP Application for Retail Stores. When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for SNAP violations including those

committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

The Appellant contends that it contests that these transactions occurred the way presented. The affidavit from a former employee confirms that the investigator came to the store and that he did not request that the investigator purchase anything. The investigator did not approach the owner, or speak to her, and instead spent time talking with the prior clerk. There is no acknowledgment on the part of the Appellant that these items were purchased on EBT. There is no evidence to corroborate that the clerk was told that these items were purchased with EBT.

The charges of violations are based on the findings of a formal USDA investigation conducted of the compliance of Frog Hop #Grocery with Federal SNAP law and regulations during the period February 6, 2021 through February 8, 2021. The transactions cited in the letter of charges were conducted by USDA investigators and are thoroughly documented. Investigators sign, under penalty of perjury, that investigative reports are true and correct. All transactions are fully documented and a complete review of this documentation has yielded no known error or discrepancy in the reported findings. 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. The investigation report documents by a preponderance of the evidence that the store employee(s) committed trafficking violations by intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.

With regard to the affidavit from a former clerk purporting to establish that the purchase of energy drinks was for his own personal use and that he took a loan from the store's cash register to pay for said drinks, the truth of such statements cannot be verified. Store employees engaging in trafficking transactions would be unlikely to admit to this behavior. On the contrary, store employee statements would be expected to attest to the legitimacy of questionable transactions regardless of whether they were, in fact, legitimate.

The Appellant contends that USDA lacks audio recordings to prove that the store clerks were actually notified of the nature of the purchase and lacks detailed records of the cash allegedly received. The investigator has no corroborating evidence. There are no recordings of the transactions visually. There are no pictures of eligible food items, no notes about the disposition of items, and no photos of the alleged cash that was received.

The documentation on record includes EBT receipts and photos showing that 4 ineligible nonfood items, 10 eligible food items, 10 cases of Red Bull energy drinks, and 5 cases of Monster energy drinks were purchased with SNAP benefits by the investigator. The photos on record also show the cash/bills that were given to the investigator by the employee(s) in exchange for the energy drinks that were purchased with SNAP benefits. Also on record is documentation that confirms that the 4 ineligible nonfood items and the 10 eligible food items previously noted were donated to and signed for by a charitable organization following the

transaction. Such documentation includes the signature and title of the official of the charitable organization accepting the donated item, the name and address of the organization, the date the donation was made, and the official's initials next to the items donated. Moreover, the total purchase costs of each of the transactions involved in the investigation is documented on SNAP terminal receipts obtained during each transaction and matches the reported purchase totals indicated in the investigation report.

Upon review, the evidence supports that SNAP violations occurred at the Appellant firm. The store employee(s) identified in Exhibits B and D was found to be trafficking as defined under 7 CFR § 271.2 (5) (definition of *trafficking*) by “intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.” The evidence supports that the employee(s) was made aware that the cases of Red Bull and Monster energy drinks were purchased with SNAP benefits at another store.

Exhibit A of the investigation report documents that the employee specifically told the investigator to purchase Red Bull and Monster energy drinks in order to receive cash off the EBT card for an unspecified amount. Exhibit A states, in part:

“5 U.S.C. § 552 (b)(7)(E)”

Exhibit B of the investigation report, states, in part:

“5 U.S.C. § 552 (b)(7)(E).”

Exhibit C of the investigation report documents that the employee specifically told the investigator to purchase Red Bull and Monster energy drinks in order to receive cash off the EBT card for an unspecified amount. Exhibit C states, in part:

“5 U.S.C. § 552 (b)(7)(E).”

Exhibit D of the investigation report, states, in part:

“5 U.S.C. § 552 (b)(7)(E).”

The Appellant argues the investigative report is worded to imply that the clerk came up with the idea of purchasing Red Bull/Monster energy drinks and that it is more likely that the investigator suggested the purchase of Red Bull/Monster energy drinks. The Appellant may be correct in that it is likely that the investigator proposed the purchase of Red Bull/Monster energy drinks in this case. However, the Appellant's contention that, rather than just verifying violations, the investigator offered and persuaded employees to violate seems to imply that the investigator engaged in activity commonly referred to as *entrapment*. Generally, the entrapment that is forbidden by law depends on whether or not the activity leading up to the violation amounted to putting the activity in the mind of a person who had no prior inclination to violate, and leading him/her to do so for the first time. The U.S. Department of Agriculture's Office of General Counsel maintains that if investigators merely provide an opportunity for a suspected violator to continue on a course of criminal conduct, such activity would not constitute entrapment. In this

regard, the investigation record does not contain any evidence indicating activity characteristic of entrapment, nor has the Appellant provided substantial evidence to support its claim of entrapment.

The Appellant is correct in that the firm has no previous history of SNAP violations. However, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

The Appellant contends that due to the Connecticut Uniform Commercial Code, retailers cannot be held accountable for indirect trafficking. The Appellant is located in Missouri, not Connecticut. Regardless, state laws do not supersede Federal regulations regarding SNAP compliance.

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.” Trafficking is defined, in part, in 7 CFR § 271.2, as “. . . Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.” The Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that “Disqualification . . . shall be permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store”. The law and regulations do not provide for a lesser period of disqualification for this violation.

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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. The Appellant did not provide any evidence that the violations cited in the charge letter did not occur. The preponderance of the evidence in the record supports that trafficking, as defined in the regulations, did occur at the Appellant and that the permanent disqualification was properly applied.

FOIA

The Appellant contends that not holding determinations in abeyance while FOIA responses are pending violates 7 CFR §278.6(b)(1) according to Triple E Express vs. ROD, because the Appellant is not given a full opportunity to respond. With regard to this contention, effective October 26, 2020, the changes to 7 CFR § 278.6 and 7 CFR § 279.4 went into effect. These changes prohibit holding determinations and administrative reviews in abeyance while FOIA responses are pending. The finding in Triple E Express was based on outdated regulations.

Hearsay in Administrative Hearings

The Appellant contends that the investigative report is hearsay. Hearsay in administrative matters can only be relied upon if four conditions are met. The Appellant cannot subpoena or

depose the investigator. The investigative report should not be relied upon. The Appellant cited *U.S. Pipe & Foundry Co. v. Webb and J.A.M. Builders, Inc. v. Herman*.

The Appellant's contentions with regard to hearsay are duly noted. However, the cases cited by the Appellant refer to criteria for documents submitted into evidence in lieu of witness testimony in administrative hearings. Revisions to parts 278 and 279 of the SNAP regulations eliminated administrative hearings. The revisions became effective September 8, 2003. Accordingly, these case citations are not relevant to this administrative review.

No Opportunity to Depose Witness

The Appellant contends that on the face of the documents provided by USDA, there is no reasonable opportunity for the Appellant to subpoena or otherwise depose the witness because the Department has redacted all of that information prior to sending the charge letter. However, neither the Food and Nutrition Act of 2008 nor the SNAP regulations pursuant thereto provide for evidentiary proceedings at the administrative level of review, and therefore such proceedings are not included in the administrative review process. Rather, the Act and Regulations provide that any firm aggrieved by an administrative review determination may seek judicial review of the determination in Federal court or a state court of record having competent jurisdiction. In such event, trial de novo proceedings ensure the firm of a full evidentiary hearing on the agency action at issue.

Administrative Reviews Not Precedent Setting

The Appellant contends that the determination should be reversed based on the Final Agency Decisions in other cases. Prior administrative review decisions, as well as this decision, are not precedent setting as they are based on the specific circumstances of each case as documented by materials provided by the Appellant and the Retailer Operations Division. Administrative review decisions do not establish policy or supersede Federal law, regulations or policy guidance. The determination in this case conforms to SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations.

Financial Hardship

With regard to the Appellant's contentions that a SNAP disqualification will impose a financial hardship on the firm, there is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, the Appellant's contention that the firm

may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Customer Hardship

With regard to the Appellant's contentions that a SNAP disqualification will impose hardship on area SNAP customers, 7 CFR § 278.6(f) of the SNAP regulations provides for civil money penalty assessments in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs. However, this regulations also sets forth the following specific exception to such assessments there under: "A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification." Therefore, since this case involves a permanent disqualification action, the civil money penalty provision is not applicable to the present case.

CIVIL MONEY PENALTY

In the February 23, 2021 charge letter the Appellant was informed by the Retailer Operations Division that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000 in lieu of permanent disqualification of a firm for trafficking. Per Section 278.6(i) of the SNAP regulations, four criteria must be met in order to be considered for a trafficking civil money penalty. If requesting a trafficking CMP, an Appellant must meet each of the four criteria listed and provide the documentation as specified within ten days of the Appellant's receipt of their charge letter. As specified in 7 CFR § 278.6(i), in determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following four criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in 7 CFR § 278.6(i)(1);

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

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in 7 CFR § 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.

In the replies to the charge letter and in the administrative review request, the Appellant contended that the firm should have been issued a civil money penalty as the firm had implemented an effective compliance program to prevent violations of the SNAP per Section 278.6(e)(1) and meets the eligibility requirements for a civil money penalty under Section 278.6(i). The owner has provided training and a copy of the manual to all employees. The contents of the manual are discussed and reviewed with employees on a semi-annual basis. Each employee is reminded by the owner to never engage in the following: Giving back cash in

exchange for SNAP benefits; disallowing sales to known friends of the card user if it appears as though the card user is paying for the groceries of a person that is not part of their household; and disallowing sales on unqualified EBT items.

- With regard to Criterion 1, the Appellant has been in business since 2019 and has been active in ensuring full compliance with employees and their obligations to USDA. The compliance policy clearly states the following: There is no exchange of cash for SNAP benefits; there is no credit allowed for SNAP purchases; and only qualified grocery items can be sold to SNAP customers.
- With regard to Criterion 2, the firm's compliance policy and program were in operation prior to the occurrence of the violations.
- With regard to Criterion 3, the firm developed and instituted an effective personnel training program to include a review of the FNS handbook with each new employee and to call USDA or the store owner if employees have questions.
- With regard to Criterion 4, the owner did not benefit from the transactions.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking civil money penalty in lieu of a disqualification under 7 CFR § 278.6(i) because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. For example: **5 U.S.C. § 552 (b)(7)(E).**

The standards of eligibility for a trafficking CMP are high. They require substantial proof that a compliance policy and program was established and implemented prior to the occurrence of violations. These standards exist to thwart attempts to falsely present compliance policies and programs that were not actually implemented prior to violations. As the Appellant did not provide the required supporting documentation, the Retailer Operations Division's decision not to impose a civil money penalty in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

As previously stated, 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." Trafficking is defined, in part, in 7 CFR § 271.2, as ". . . Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food." 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, the Retailer Operations Division properly imposed a permanent disqualification of Frog Hop #Grocery, the Appellant, as an authorized retailer in the Supplemental Nutrition Assistance Program. As such, the decision to impose a permanent disqualification against Frog Hop #Grocery, the Appellant, is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

June 2, 2021