

**U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review Branch  
Alexandria, VA 22302**

**Market El Tigre,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0155658**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS) that the permanent disqualification from the Supplemental Nutrition Assistance Program (SNAP) imposed upon Market El Tigre, hereinafter “Appellant”) by the ROD Office (Retailer Operations Division, Investigations and Analysis Branch, hereinafter “SNAP Office”) is hereby sustained.

**ISSUE**

The issue accepted for review is whether the SNAP Office took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 271.2, 7 CFR § 278.6(a), 7 CFR § 278.6(e)(1) and 7 CFR § 278.6(i) in its administration of the SNAP when it imposed a permanent disqualification upon Appellant.

**AUTHORITY**

7 U.S.C. § 2023 and its implementing regulations at 7 C.F.R. § 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**

In a Charge Letter dated January 19, 2016, the SNAP Office informed Appellant that it was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 271 – 282. The record reflects that the SNAP Office received and considered Appellant’s replies to the Charge Letter. By a letter dated April 11, 2017, Appellant was informed that it was permanently disqualified from participation as a retail store in the SNAP and was ordered upon

receipt of the letter to cease accepting SNAP benefits; consequently, Appellant ceased to accept said benefits. On April 20, 2017, Appellant requested an administrative review of the SNAP Office's decision; the request 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 actions should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would 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 contained in the Food & Nutrition Act of 2008, as amended, at 7 U.S.C. § 2021 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6 (e)(1)(i) of the regulations establish the authority upon which a permanent disqualification may be imposed upon a retail food store or wholesale food concern. **5 U.S.C. § 552 (b)(7)(E)**.

7 U.S.C. § 2021(b)(3)(B) states, *inter alia*:

...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, *inter alia*, Trafficking means:

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.

Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.

Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT)...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, *inter alia*:

FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food & 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(e)(1)(i) states:

Disqualify a firm permanently if: Personnel of the firm have trafficked as defined in §271.2

7 CFR § 278.6(e)(5) states:

Disqualify the firm for six months if it is to be the first sanction for the firm and the evidence shows that personnel of the firm have committed violations such as but not limited to the sale of common nonfood items due to carelessness or poor supervision by the firm's ownership or management.

7 CFR § 271.2 states, *inter alia*, 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(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...

7 CFR §278.6(f) states, *inter alia*:

In the event any retail food store or wholesale food concern which has been disqualified is sold or the ownership thereof is otherwise transferred to a purchaser or transferee, the person or other legal entity who sells or otherwise transfers ownership of the retail food store or wholesale food concern shall be subject to and liable for a civil money penalty in an amount to reflect that portion of the disqualification period that has not expired.

7 CFR §278.7(a) states, *inter alia*:

FNS may establish claims against firms or other entities which have accepted or redeemed coupons in violation of the Food and Nutrition Act of 2008 or this part regardless of whether the firms or entities are authorized to accept SNAP benefits.

### **SUMMARY OF THE CHARGES**

Among other documents, the record contains a FNS, Retailer Investigations Branch, Report of Positive Investigation, #LA04318, dated April 1, 2013, which indicates that investigative work was undertaken at Appellant's firm from June 25, 2012 through August 14, 2012 and reflects that five investigative visits were made to Appellant's firm during which store clerks sold common ineligible items (those normally seen in shopping baskets) in exchange for SNAP benefits in combination with eligible food items in a substantial ratio on two separate occasions, indicative of clearly violative activity; on two occasions a store clerk sold expensive and conspicuously ineligible items (in this case, non-food items priced at \$12.99) in exchange for SNAP benefits, a serious violation and indicative of clearly violative activity; and on one occasion one clerk accepted SNAP benefits in exchange for cash, each instance of which is considered SNAP benefit trafficking and an egregious violation of the Act and the implementing regulations.

Moreover, the record contains a USDA, Office of Inspector General, Report of Positive Investigation, # SF-2740-0767, dated June 17, 2014, which indicates that investigative work was undertaken at Appellant's firm from June 5, 2013 to December 2, 2013 and reflects that four investigative visits were made to Appellant's firm during each of which the Store Owner accepted SNAP benefits in exchange for cash, each instance of which is considered SNAP benefit trafficking and an egregious violation of the Act and the implementing regulations. During one visit a store clerk sold common ineligible items (those normally seen in shopping baskets) in exchange for SNAP benefits in combination with eligible food items in a substantial ratio, indicative of clearly violative activity. When the extent of violations was determined, a report was issued and assigned to the ROD Office for consideration of administrative action.

### **APPELLANT'S CONTENTIONS**

In its written request for review, dated April 20, 2017, Appellant provided information in which it was argued that:

1. Appellant requests reconsideration of the disqualification and to allow the firm to again participate in the SNAP. The disqualification will work a hardship upon the firm; Appellant is in tremendous danger of closing without authorization to participate in the SNAP.
2. Appellant proposes a comprehensive compliance plan to demonstrate that it has established an effective compliance policy and program to prevent violations of the SNAP. The plan will be implemented immediately in the event the disqualification is reversed.

- a. A new SNAP Compliance Officer will conduct an inter-store audit to ensure SNAP compliance and will remain current on all pertinent laws and regulations related to the SNAP. The Compliance Officer will perform regular compliance monitoring reviews.
- b. Monthly and refresher training will be mandatory for the Owner and employees and will consist of:
  - i. reading, reviewing and acknowledgement of understanding of the FNS training guide.
  - ii. reading, reviewing and acknowledgement of understanding of the FNS “Determining Product Eligibility for Purchase with SNAP benefits.”
  - iii. reading, reviewing and acknowledgement of understanding of the “Generic Product Determinations” excel sheet.
  - iv. reading, reviewing and acknowledgement of understanding of the SNAP Provisions of the Agricultural Act of 2014.
  - v. Watching the 17 minute video offered by FNS which reviews program rules and regulations.
- c. Employees will be advised that any violations will result in immediate suspension and, pending further investigation, can result in termination.
- d. All registers will have posted nearby a copy of the FNS listing of eligible food items, generic product determinations and a copy of the SNAP provisions of the Agricultural Act of 2014.
- e. New SNAP Fraud Posters will be posted inside and showing outside the store in a prominent location to encourage the reporting of fraud and abuse.

## **ANALYSIS AND FINDINGS**

In regard to contention 1 above, the issue of hardship worked upon retailers or SNAP clients is not a consideration under the statute or regulations in decisions to disqualify firms due to SNAP-benefit trafficking.

Regarding contention 2 above, 7 CFR §278.6(i) provides for the imposition of a civil money penalty in lieu of permanent disqualification for trafficking; Appellant was advised of the requirement regarding civil money penalties in lieu of permanent disqualification in the SNAP Office’s January 19, 2016 Charge Letter, which further advised that documentation of eligibility for this sanction was to be provided within a given time limit. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) 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, the firm shall not be eligible for such a penalty.” The regulations provide no discretion to extend the time within which documentation and evidence in support of a civil money penalty may be submitted. Appellant did not request consideration of said sanction; thus the SNAP Office decision not to impose a civil money penalty is found to have been in accordance with 7 CFR §278.6(b)(1), §278.6(b)(2)(ii), §278.6(b)(2)(iii) and §278.6(i). Appellant presented a request for consideration of a trafficking civil money penalty (TCMP) in its April 20, 2017 request for review, which was postmarked April 21, 2017, 452 days following the firm’s receipt of the Charge Letter and far beyond the 10-

day timeframe. Though the request cannot therefore be considered, the documentation and evidence provided by Appellant clearly fall short of the standard detailed at § 278.6(i), as noted in the following:

**Criterion 1:**

- Appellant provided insufficient written and dated documentation to reflect a commitment to ensure that the firm was operated in a manner consistent with SNAP regulations **5 U.S.C. § 552 (b)(7)(E)**:
  - Documentation of the development and/or operation of procedures/policy to implement corrective action in response to complaints of violations (not provided).
  - Documentation must establish that the policy statements were provided to violating employees prior to the commission of the violation(s) (not provided).

**Criterion 2:**

- Appellant did not provide documentary evidence which establishes that the firm's compliance policy and program were in operation prior to the occurrence of the violations at issue.

**Criterion 3:**

- Appellant did not provide the following:
  - Documentation of dated training curricula and dates of training sessions prior to the violations.
  - Records of dates of employment of all firm personnel.
  - Contemporaneous documentation of participation of violating personnel in initial and follow-up training prior to violations.

**Criterion 4:**

- Appellant provided insufficient evidence in support of the following:
  - Ownership/Management was not aware of, did not approve, did not benefit from or was not involved in trafficking. Appellant has provided no records or documentation demonstrating that SNAP benefits used in the transactions noted in the Charge Letter were in fact not deposited into its bank account. Conversely, as noted above, transaction data and other evidence confirms that the violative transactions did in fact result in monetary deposits into the firm's bank account in the amounts noted in the Charge Letter. Moreover, the Owner of the Appellant firm was personally involved in trafficking violations. It is noted for the record that the regulations allow an exception to the Criterion 4 language if it is ownership/management's first involvement in SNAP-benefit trafficking.

**5 U.S.C. § 552 (b)(7)(E)**. The standard of substantial evidence employed above is difficult to meet, indeed impossible if such policy and program are not implemented and documented prior to the violations, but such is the standard required by the regulations, as noted above, and to

which Appellant is held during the course of this review. Additionally, neither the size of an organization nor the number of its personnel is a consideration in determining the eligibility of a firm for a civil money penalty in lieu of permanent disqualification for trafficking. Moreover, while significant effort may be required to develop and maintain a compliance policy and program, if such fails to meet the requirements, that level of effort, even if substantial, does not mitigate the insufficiency. Lastly, the criteria for eligibility for a civil money penalty in lieu of permanent disqualification are clearly stated as *minimum* standards below which eligibility is precluded. The regulations at 7 C.F.R § 278.6(i) are purposely prescriptive and require an unequivocal and well-documented commitment to compliance and training.

Lastly, it should be noted that, at a minimum, a six-month period of disqualification or a civil money penalty in lieu thereof would have resulted in the absence of SNAP benefit trafficking in the present case, in accordance with & CFR § 278.6(e); however, though Appellant is likewise liable for this lesser sanction, it is merely subsumed under the precedent sanction of permanent disqualification. Thus, had Appellant qualified for a civil money penalty in lieu of permanent disqualification for trafficking, the firm would continue to be liable to sanctioning for the sales of ineligibles as documented in the investigation reports. As the firm failed to qualify for a civil money penalty in lieu of permanent disqualification, the issue of a hardship civil money penalty in lieu of a lesser sanction (than permanent disqualification) did not arise.

## **CONCLUSION**

In view of the above, the decision of the ROD Office to permanently disqualify Market El Tigre from participation in the SNAP is hereby sustained and will become final upon the 30<sup>th</sup> day following your firm's receipt of this document.

## **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 provisions of the Freedom of Information Act (FOIA), 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.

DANIEL S. LAY  
Administrative Review Officer

November 30 2017