

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

**Shapla,**

**Appellant,**

**v.**

**Case Number: C0187936**

**Retailer Operations Division,**

**Respondent.**

**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 a finding that the permanent disqualification of Shapla (Shapla or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

**AUTHORITY**

7 USC § 2021 and the 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**

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period from April 5, 2017, through May 2, 2017. The investigation report documents that personnel at Shapla exchanged SNAP benefits for cash during two of the compliance visits. The store employees also sold ineligible non-food items in exchange for SNAP benefits. 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 evidence compiled from the investigation, the Retailer Operations Division informed Appellant, in a letter dated May 17, 2017, that it was charged with violating the terms and conditions of the SNAP regulations. The letter stated, in relevant part, that:

“...[Y]our firm is charged with trafficking, as defined in Section 271.2 of the SNAP regulations. As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for the trafficking violation(s) . . . is permanent disqualification.”

The charge letter also stated that:

“The SNAP regulations also provide that under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000.00 in lieu of permanent disqualification of a firm for trafficking. The SNAP regulations, Section 278.6(i), list the criteria that you must meet in order to be considered for a CMP. If you request a CMP, you must meet each of the four criteria listed and provide the documentation as specified within 10 calendar days of your receipt of this letter.”

Appellant, through counsel, replied to the charges by fax on May 30, 2017, and August 10, 2017. After considering the retailer’s replies and the evidence, the Retailer Operations Division notified Appellant in a letter dated September 22, 2017, 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 further stated that Appellant was not eligible for a trafficking CMP because it failed to 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 October 30, 2017, Appellant appealed the Retailer Operations Division’s determination and requested an administrative review. The appeal was granted.

## **STANDARD OF REVIEW**

In appeals of adverse actions, the Appellant bears the burden of proving by a clear 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, 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 and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) and (e)(1) 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 SNAP benefits.

7 CFR § 271.2 states, in part, 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 § 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; . . .”

7 CFR § 278.6(a) states, inter alia, 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**, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system, . . .” (emphasis added)

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).”

7 CFR § 278.6(b)(2)(iii) states, “If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such a penalty.”

7 CFR § 278.6(e)(1) reads, in part, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.”

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.”

## INVESTIGATION DETAILS

During an investigation conducted from April 5, 2017, through May 2, 2017, a confidential informant under the direction of a USDA investigator conducted seven compliance visits at Shapla. The investigation report dated May 8, 2017, was provided to the Appellant as an attachment to the charge letter, and included Exhibits A through G which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were committed during six of the compliance visits. The investigation reported that personnel at Shapla exchanged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of cash for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits during two of the transactions. Transactions of this nature are referred to in regulatory terms as “trafficking”. During six of the visits, Appellant also exchanged common ineligible non-food

items including soap, a wool scrubber, dish soap, incense sticks, air freshener, hand soap, zipper bags, trash bags, a sponge, and roach spray for SNAP benefits.

### **APPELLANT'S CONTENTIONS**

In its administrative review request postmarked November 9, 2017, and subsequent correspondence submitted on December 13, 2017, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- Appellant has been in business for 13 years serving the grocery needs of SNAP participants.
- Each employee has been trained to implement the SNAP program and accept EBT payments since the store started accepting EBT payments.
- The training included a disclosure of the store's policies regarding violation of the EBT regulations and complete training for what transactions were permissible, what items were eligible, and how/when payments could be accepted.
- The evidence does not achieve the preponderance standard and the permanent disqualification should be reversed.
- The confidential informant prepared the summaries and not the investigator.
- The statements are hearsay.
- Hearsay may only be relied upon in administrative matters in certain situations (*U.S. Pope & Foundry Co. v Webb*, 595 F.2d 264, 270 (5<sup>th</sup> Cir. 1979); *J.A.M. Builders, INC. v. Herman*, 233 F.3d 1350, 1354 (11<sup>th</sup> Cir. 2000)).
- The CI could very well be an informant that has offered information and informant services to avoid his/her own prosecution.
- There is no reasonable opportunity for the Appellant to subpoena or otherwise dispose the witness because FNS redacted all of the information prior to sending the charge letter.
- The store denies the allegations of trafficking as the store has a policy against trafficking and the sale of ineligible items as a whole.
- No video can be produced because FNS refused to furnish the Appellant's with the exact time of the transaction.
- FNS has by design denied the Appellant the opportunity to present the evidence.
- FNS delayed its charges until long after a reasonable retailer would be expected to maintain specific transaction receipts, again denying the retailer a meaningful opportunity to respond.
- FNS must look to the credibility of the Investigator, which was called into question in the first allegation of a transaction that could not have happened as described.
- There is no corroborating information that would verify the story of the investigator, except that the CI exited the building with items in his/her hands and receipts.
- The CI has a personal interest in obtaining proof of trafficking and simply manufactured a transaction that did not occur as alleged.

The preceding may represent only a brief summary of the Appellant's contentions presented 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.

## **ANALYSIS AND FINDINGS**

Appellant contends it cannot provide evidence to rebut the allegations because USDA will not provide the exact time of the transaction and delayed issuing a charge letter until long after transaction receipts would be normally kept. Appellant was provided a copy of the investigation report, redacted to protect the identity of the investigative operative, which details each occasion during which violations occurred, their dates, the amount of cash provided in exchange for SNAP benefits, and the descriptions and any comments of the clerk involved. The time of the transaction is not included to avoid identification of the confidential informant. Appellant has also received all file information requested under the Freedom of Information Act except information that is specifically exempt from disclosure by law.

The Retailer Operations Division provided receipts for each of the exhibits, and third-party non-profit organizations provided receipts for the items identified in each of the exhibits. The store receipts each identify "Shapla" at Appellant's address and confirm the day, time, transaction amounts and all other pertinent details mentioned in the investigative report. The third-party receipts confirm the accuracy of the information stated in the investigator's report as the items donated immediately after the purchases at Appellant's store correspond with the items identified as being purchased in the report. There is substantial documentation that the violations occurred at Appellant.

A full review of the case record shows 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 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. The documentation presented by the Retailer Operations Division establishes by a preponderance of the evidence that the violations as reported occurred at the Appellant store. In conclusion, there is no evidence to support the Appellant's contention that the violations did not take place.

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** . . . ." (Emphasis added.)

### **Hearsay/Court Cases Cited**

Appellant contends some of the information on which the charges were based may be hearsay which, according to case law, requires certain criteria be met including showing the confidential informant was not biased and allowing the confidential informant to be subpoenaed by Appellant

prior to the hearing. The administrative review of FNS determinations against SNAP retailers is authorized under Section 14(a)(5) of the Food and Nutrition Act of 2008. The SNAP rules at 7 CFR Part 279 have been promulgated pursuant to the Food and Nutrition Act of 2008, and the administrative review adheres to the process provided for in these regulations.

As to the court cases cited by counsel, the administrative review process is to determine whether FNS followed the Food and Nutrition Act and the regulations issued under the Act when it took action against the retailer. The administrative review officer is not responsible for determining whether any court cases cited by counsel apply to Appellant's situation. If this final agency decision is appealed to the federal district court, the judge is responsible for determining whether the court cases cited by counsel are on point and applicable to the case presently under review.

### **Ineligible Items**

Appellant alleges that there is a reference to selling ineligible items, but Appellant was not charged with this. The charge letter specifically states that Appellant was charged with selling ineligible items. The charge letter states the following:

“In addition, you are charged with accepting SNAP benefits in exchange for merchandise, which, in addition to eligible foods, included common ineligible non-food items. The misuse of SNAP benefits noted in Exhibit(s) B, C, D, E, F, and G violates Section 278.2(a) of the SNAP regulations.”

Thus, Appellant was charged with selling ineligible non food items in addition to being charged with trafficking violations.

### **CIVIL MONEY PENALTY**

The case record documents that the Retailer Operations Division determined there was insufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations prior to the violations in this case.

The criteria for a trafficking CMP in lieu of a permanent disqualification is defined under 7 CFR § 278.6(i) which reads, *inter alia*:

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** [emphasis added] 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** [emphasis added] cited in the charge letter sent to the firm; and

Criterion 3. The firm had developed and instituted an **effective** [emphasis added] 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 violation . . .

The charge letter dated May 17, 2017, clearly states:

“The SNAP regulations, Section 278.6(i), list the criteria that you must meet in order to be considered for a CMP. If you request a CMP, you must meet each of the four criteria listed and provide the documentation as specified within 10 calendar days of your receipt of this letter. No extension of time can be granted for making a request for a CMP or for providing the required documentation.”

Appellant, through counsel, contends that each employee has been trained to implement the SNAP program and the training included what transactions were permissible, what items were eligible, and how/when payments could be accepted. Appellant did not submit any documentation to support this statement. Therefore, Appellant fell short of the regulatory standard for a trafficking CMP as it did not timely request a CMP and it did not provide **substantial** evidence that it met all four criteria required by 7 CFR § 278.6(i). 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

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 “the buying or selling of SNAP benefits 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 review of the evidence in this case, there is no question that program violations did occur during a USDA investigation. All transactions cited in the letter of charges were conducted or supervised by a USDA investigator and all are thoroughly documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for cash, and in all other critically pertinent details. Therefore, the decision to impose a permanent disqualification against Appellant, Shapla, is sustained.

## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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 the Appellant's owner resides or is 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, 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.

MARY KATE KARAGIORGOS  
Administrative Review Officer

March 12, 2018