

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

**Steves Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0181861**

**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 a **Permanent Disqualification** from participation as an authorized retailer in the Supplemental Nutrition Assistance Program<sup>1</sup> was properly imposed against Steves Market (hereinafter “Steves Market” and/or “Appellant”) and its owner of record, by the Retailer Operations Division of the FNS. Additionally the decision of the Retailer Operations Division to deny Appellant’s request for the imposition of a civil money penalty (CMP) in lieu of that permanent disqualification is sustained

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a permanent disqualification against Steves Market in a letter dated December 22, 2017, denying Appellant’s request for the imposition of a civil money penalty (CMP) in lieu of that permanent disqualification.

**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.

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<sup>1</sup> Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

## **CASE CHRONOLOGY**

In a letter dated November 27, 2017, the Retailer Operations Division informed Steves Market that it was charged with violating the terms and conditions of the SNAP regulations based on an investigation conducted between April 2015 and December 2015 by the Ohio (OH) Department of Public Safety wherein SNAP benefits were exchanged for cash in violation of 7 CFR § 271.2. The letter of charges recounts 11 scenarios, between July 10, 2015 and December 8, 2015, wherein employees of Steves Market engaged in trafficking with a confidential informant who was working under the direct supervision and oversight of the OH Department of Public Safety personnel.

The Retailer Operations record reveals that a written reply to the letter of charges was received from Appellant, through counsel, dated December 14, 2017. The response requested consideration of the imposition of a civil money penalty (CMP) in lieu of permanent disqualification and appended materials for consideration of that alternative sanction.

Following documented consideration of the responsive materials the Retailer Operations Division advanced a letter dated December 22, 2017 permanently disqualifying Appellant from participation as a SNAP authorized retailer and denying the request for a CMP in lieu of the permanent disqualification.

In a letter dated January 8, 2018, received in the offices of the Administrative Review Branch on January 11, 2018, Appellant, through counsel submitted an appeal of the Retailer Operations Division's assessment, requesting an administrative review of the action. The appeal was granted as affirmed in a letter dated January 17, 2018.

## **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 AND REGULATIONS**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the "Act")<sup>2</sup>, 7 USC 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR).<sup>3</sup> Part 278.6(e)(1)(i) establishes the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking of SNAP benefits as defined in Part 271.2.

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<sup>2</sup> Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment through P.L. 113-79, enacted February 7, 2014.

<sup>3</sup> Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at [https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab\\_02.tpl](https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl)

7 U.S.C. § 2021(b)(3)(B) states, in relevant 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 §278.6(e)(1)(i) reads, in relevant 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, 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.**" [Emphasis Added]

7 CFR § 278.2(a) "Use of Coupons [Benefits]", states, in relevant part, "Coupons **may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food.**" Further, the citation specifies that "Coupons [benefits] may not be accepted in exchange for cash...or for any other nonfood use." [Emphasis Added]

7 CFR § 278.6(e) states, in relevant part, "Penalties. FNS shall take action as follows against any firm determined to have violated the Act or regulations..."

7 CFR § 278.6(e)(1)(i) reads, in relevant part, "FNS **shall** disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." [Emphasis Added]

7 CFR § 271.2 specifies, in relevant part, that "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 or 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.
- (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 (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 § 278.6(f)(1) states, in relevant part, “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm is selling a substantial variety of staple food items, and the firm’s disqualification would cause hardship to SNAP households...A civil money penalty for hardship to SNAP households **may not** be imposed in lieu of a permanent disqualification.” [Emphasis added]

7 CFR § 278.6(i) states, in relevant 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**...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...”  
[Emphasis added]

### APPELLANT’S CONTENTIONS

In the letter dated January 8, 2018, Appellant, through counsel provides that prior to Appellant’s receipt of the letter of determination dated December 22, 2017 additional supporting documentation “that was inadvertently omitted from her response letter” was routed to the Retailer Operations Division. Copies of those materials, faxed on December 29, 2017, are attached together with a copy of the December 14, 2017 response letter; and, the documents in support of the CMP request.

Appellant, through counsel, summarizes that “Based upon the documentation provided by **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in her attached Response Letter *and* her attached December

29, 2017 letter, Steves Market meets the criteria to be eligible for a civil money penalty pursuant to §278.6(i).

The request for review materials also indicate that under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), Steves Market has had no prior citations for violations under the SNAP regulations; and, because Appellant is located in an economically depressed neighborhood participation in the SNAP is important to the business welfare of Appellant and to the low income community.

In a letter dated February 6, 2018, Appellant, through counsel provided evidence of the dismissal of the criminal charges related to the SNAP trafficking reported by the OH Department of Public Safety against both the husband of the sole owner of Appellant; and, the reportedly violating clerk. The materials further affirm the plea of guilty to the charges of SNAP trafficking entered by the son of the sole owner, for which sentencing was imposed. Appellant contends that these materials, supported by affidavits from counsel representing each of the individuals, evidences that the SNAP trafficking reported by the OH Department of Public Safety represented the acts of a single employee and not a system wide issue.

The preceding represents only a brief summary of Appellant's contentions in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

### **SUMMARY OF THE CHARGES**

USDA, in cooperation with State Agencies enter into State Law Enforcement Bureau (SLEB) agreements supporting investigations of the compliance of retail food stores, in part, to ascertain the nature and extent of SNAP violations that may be occurring. In the instant case the OH Department of Public Safety reports to the Retailer Operations Division, in materials dated November 3, 3017, that, in cooperation with a confidential informant, three (3) employees of Steves Market exchanged SNAP benefits for cash, and used SNAP benefit cards assigned to the SLEB agency, to make SNAP purchases at SNAP authorized retailers during the period of April 2015 through December 2015. The confidential informant was reported to be working under the direct supervision and oversight of the OH Department of Public Safety investigators and is reported to have made multiple visits to Steves Market where SNAP benefits were exchanged for cash with a clerk and relatives of the owner, including the son and husband of the sole owner, who were working at the location. An automated report of SNAP transactions conducted through the use of two (2) SNAP cards authorized for use by the OH Department of Public Safety was provided as evidence of the SNAP transactions.

The investigative report also indicates that the results of the investigation were referred to the Summit County Prosecutor's Office for consideration of the pursuit of criminal charges; and, provides results of the criminal case findings advanced through the Summit County Common Pleas Court.

- On January 19, 2017, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), identified as an employee of Steves Market and the son of the sole owner entered a plea of guilty for one (1) count of OH Revised Code (ORC) 2923.32 – Engaging In a Pattern of corrupt activity; and, two (2) counts of ORC 2913.46 – Illegal Use of Food Stamp Benefits. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was sentenced on February 22, 2017 to four (4) years of incarceration, suspended upon the completion of two (2) years of community control sanctions.
- The court ordered \$11,000 in restitution be made to the OH Department of Public Safety Investigative Units and that the \$162 confiscated funds be forfeited.

## ANALYSIS AND FINDINGS

That SNAP benefits are not for the purchase of non-food items is clear in the “Act” and in the SNAP regulations, with noted exceptions, such as seeds used to grow food, and hunting equipment in remote areas of Alaska. This and other rules governing SNAP were provided to Appellant upon initial SNAP authorization in May of 2012, and have been restated in reauthorization materials and various retailer notifications routinely provided to all SNAP authorized retailers.

The permanent disqualification being imposed upon Appellant results from reported instances of trafficking. Trafficking is the most egregious of SNAP violations and specifically subject to the imposition of permanent disqualification on the **first offense** as indicated in the Food and Nutrition Act of 2008 (Act). 7 U.S.C. § 2021(b)(3)(B) states, in relevant 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...”

The Act is further supported with SNAP regulations at 7 CFR § 278.6(e)(1)(i) which reads, in relevant part, “FNS **shall** disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.” [Emphasis Added].

The administrative record evidences multiple instances of trafficking, conducted by three (3) employees at Steves Market, who were positively identified to include a clerk, the son of the owner, and the husband of the owner. Appellant materials, provided through counsel and appended to a February 6, 2018 letter evidence the dismissal of the criminal charges against both the husband of the sole owner and the clerk identified in the investigative report. The materials further affirm that the son of the sole owner plead guilty and was sentenced based on that conviction. Despite that Appellant has provided evidence that the trafficking instances reported by the OH Department of Public Safety resulted from one (1) person conducting SNAP trafficking, and do not therefore evidence a system wide situation, neither the Act nor the supporting SNAP regulations require that the imposition of a permanent disqualification be imposed only when system wide situations occur. Instead the Act and the SNAP regulations clearly require that FNS disqualify a SNAP retailer on the first offense of trafficking. That the Retailer Operations Division has imposed the appropriate sanction in the instant case is clearly supported by the evidence.

### **No Prior SNAP citations:**

The request for review materials also indicate that under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), Steves Market has had no prior citations for violations under the SNAP regulations; however, neither the Act nor the SNAP regulations supporting the Act support the mitigation or reversal of a permanent disqualification based on prior presumed SNAP compliance. Therefore, Appellant's contention does not serve as a basis for mitigation or reversal of the permanent disqualification herein imposed.

### **Economic Impact:**

Appellant, through counsel contends that Steve's Market is located in an economically depressed neighborhood making authorization of Appellant as a SNAP retailer important to the business welfare. It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the Act or the SNAP regulations 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 to be excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Act and the enforcement efforts of the USDA.

### **Hardship Civil Money Penalty:**

7 CFR §278.6(f)(1) of the SNAP regulations provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable SNAP authorized firm in the area to meet their needs. However, this regulation also sets forth the following specific exception to assessments: **"A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification."** Therefore, because the matter at hand involves a permanent disqualification, this civil money penalty provision is not applicable in the present case, and there is no comparison of similar firms made.

### **Trafficking Civil Money Penalty:**

The December 22, 2017 determination letter advised Appellant of its ineligibility for the imposition of a trafficking civil money penalty in lieu of permanent disqualification as allowed in 7 CFR § 278.6(i) based on failure to submit **sufficient evidence in a timely manner** to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of SNAP.

As affirmed in the January 8, 2018 request for review Appellant, through counsel, provided documentation supporting a request for CMP made on December 14, 2017. The January 8, 2018 further indicated that although citing inclusion of certain documents the December 14, 2017

materials had “inadvertently omitted” two (2) key documents. Those documents were then provided to the Retailer Operations Division as part of a fax dated December 29, 2017. The December 29, 2017 materials include:

- A “Statement Of Understand Of and Compliance With the Company’s General Compliance Policy” signed by the clerk referenced in the investigative materials to have committed SNAP trafficking. The date on the document advanced is undiscernible.
- The “Personnel Training Program confirmation statement” also signed by the same clerk.

The record documents that the Retailer Operations Division considered the materials provided for consideration of the imposition of a CMP in lieu of permanent disqualification in accordance with

7 CFR § 278.6(i). Notably the documents appended to the December 29, 2017 fax were not “timely” submitted (within 10 days) as defined in the SNAP regulations, therefore could not be considered despite being referenced in the December 14, 2017 submission.

The findings of the Retailer Operations relative to each criterion include:

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

- Criterion 1 is met based on the submission of the general compliance policy in place at Steves Market.

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.

- Criterion 2 is not met because statements were not provided for all employees.

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

- Criterion 3 was not met because employment for two (2) employees is indicated to have started in 2011 although evidence of training was only provided for January 10, 2015. No evidence of training provided within 30 days of employment; or evidence of annual renewal of training was provided.

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.

- Criterion 4 was found to have been met based on Appellant’s contentions without evidence to the contrary.

In sum, the Retailer Operations Division found that Appellant failed to meet Criterion 2 and 3 and therefore was not eligible for the imposition of a CMP in lieu of permanent disqualification.

On review it is agreed that the Retailer Operations appropriately found Appellant ineligible for the imposition of a CMP in lieu of permanent disqualification.



## **CONCLUSION**

Based on a review of the evidence in this case, it appears that the program violations at issue did, in fact, occur as charged. As noted previously, the charges of violations are based on the findings of an official USDA investigation and the evidence gathered as a result of that investigation. A full review of the Investigative Report reveals no errors or discrepancies.

The materials recount trafficking that is clearly a violation of the SNAP regulations, for which an employee plead guilty and was sentenced. The decision to impose a permanent disqualification against Steves Market is sustained; and, Steves Market is not found eligible for a CMP in lieu of permanent disqualification.

## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

NANCY BACA-STEPAN  
Administrative Review Officer

June 11, 2018