

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

**T&A Market,**

**Appellant,**

**V.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0211827**

**FINAL AGENCY DECISION**

It is the decision of the USDA that the record indicates that T&A Market (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the program, 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 Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against Appellant.

**AUTHORITY**

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provides 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 Appellant with Federal SNAP law and regulations from October 3, 2018 through November 28, 2018. The investigation report documents that personnel at Appellant committed SNAP violations on six (6) out of eight (8) compliance visits. During two (2) compliance visits, store personnel exchanged SNAP benefits for cash. 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 this investigation, the Retailer Operations Division informed the Appellant, in a letter dated April 10, 2019, that it was charged with violating the terms and conditions of the SNAP regulations. The letter stated, in relevant part, that:

Your 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 misuse of SNAP benefits noted in Exhibit(s) C, D, E, F, G and H violates section 278.2(a) of the SNAP regulations. Further, the violations in Exhibit(s) C, D, E, F and H warrant a non-permanent disqualification period as specified in Section 278.6(e) of the SNAP regulations.

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.

In correspondence dated April 18, 2019 and faxed on April 22, 2019, Appellant, through counsel, replied to the charge letter and provided a letter of representation and indicated that it was requesting a Civil Money Penalty (CMP) in lieu of disqualification. Appellant, stated that the store has not had any prior violations and has a large number of customers that use their EBT benefits. Appellant provided an Affidavit which states that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is the manager of T &A Market. His mother is the owner of the store and has been on an extended trip overseas therefore, he is responsible for the day to day operations of the store. Appellant also requested an extension in which to provide additional documentation. Appellant stated that he was not one of the employees who allegedly sold ineligible items or committed a trafficking offense. The store is a family business and he had previously trained and monitored employees on how to accept benefits through SNAP. He is now the only employee as he has terminated all previous employees because of the allegations.

Appellant further stated that the business has an effective policy in place to prevent violations, it continued to train and monitor before the violations occurred, the business has a training program and he did not engage in conduct that arose to the violations. The store is located in a neighborhood with several apartment and residential complexes that are considered low income housing. The store is very busy with customers who have EBT benefits and walk to the location. Appellant indicated that it will continue to abide by the SNAP guidelines and train, guide and teach any future employees on the guidelines and procedures set in place by the government through SNAP. Appellant requested an extension of time in which to provide further documentation in response to the charge letter.

In correspondence dated April 23, 2019, Retailer Operations Division granted an extension of the 10 calendar day time to respond to the charge letter of April 10, 2019. The time to respond

was extended to May 2, 2019 however Appellant was notified that the time to request a civil money penalty in lieu of permanent disqualification and to provide the documentation to support such a request was not extended. The record reflects that no additional response was provided. After considering the Appellant's reply and the evidence in the case, the Retailer Operations Division issued a determination letter dated May 8, 2019. The determination letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations. The Retailer Operations Division determined that the Appellant was not eligible for the trafficking CMP 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 violations of the SNAP.

In a letter dated May 20, 2019, the Appellant requested an administrative review of the Retailer Operations Division's determination. The appeal 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 1977, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). 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, *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 § 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 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;..."

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 and Nutrition Act of 1977, 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....”

7 CFR § 278.6(f)(1) states, *inter alia*: “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to [SNAP] households because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices... A civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a permanent disqualification.”

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(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.”

### **SUMMARY OF THE CHARGES**

During an investigation from October 3, 2018 to November 28, 2018, the USDA conducted eight (8) compliance visits at Appellant. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated April 10, 2019. The investigation report documents that, SNAP violations were committed during six (6) of the eight (8) compliance visits. During two (2) of the compliance visits, store personnel committed a trafficking violation by exchanging SNAP benefits for cash.

### **FOIA Request**

In subsequent email correspondence dated June 14, 2019, Appellant, through counsel, submitted a Freedom of Information Act (FOIA) request. The FOIA request was processed on June 17, 2019, and Counsel received the requested documentation on July 5, 2019. In email correspondence dated July 25, 2019, Appellant, through counsel, submitted documentation in support of its position.

### **APPELLANT’S CONTENTIONS**

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

1. T & A Market timely asked for a CMP and was improperly denied. While counsel and T&A Market understand the general criteria for requesting a CMP, the burden that the agency requires in presenting such criteria is unrealistic. Counsel provided an affidavit of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), outlining his relationship to the store, his duties and obligations, his knowledge of the training of store employees regarding SNAP guidelines, and his actions in terminating employees after learning of the allegations. While this alone may not provide all of the information needed to accept a CMP, this information, along with the store's USDA case file, together show that the store has been in compliance and has an effective policy in place to train employees and prevent violations.
2. Attached as Exhibit 1 are all Exhibits in the 2011 USDA Investigative Reports that shows early in its inception that a policy was put into place at the business and that the clerks were properly trained with rules of SNAP. Four years later, USDA made three separate investigative visits to T&A Market and as before the clerks refused to accept EBT for non-eligible food items and to trade EBT for cash. This is even more proof that T&A has a policy in place and has trained its employees in how to properly accept EBT and follow the guidelines. What more proof does the USDA need than that of prior investigations where store employees unequivocally refused to allow purchases for non-eligible items and the exchanges of cash?
3. T&A Markets asserts that the agency's assessment of permanent disqualification is arbitrary and capricious and an abuse of agency discretion.

Appellant provided a copy of a positive investigative report dated September 12, 2011, as Exhibit 1 and a negative investigative report dated October 30, 2015 as Exhibit 2. The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

### **ANALYSIS AND FINDINGS**

Appellant, through counsel, does not dispute that the SNAP violations occurred but instead contends that Appellant has provided sufficient documentation for a trafficking CMP. It is important to note that as owner of the store, Appellant is liable for all volatile transactions handled by store personnel. Regardless of whom the ownership of a store may utilize to handle store business, whether employee or family member helping out, full-time, part-time, paid or unpaid, ownership is accountable for the proper handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA.

The Appellant, through counsel, contends that the agency's assessment of permanent disqualification is arbitrary and capricious and an abuse of agency discretion. With regard to this contention, 7 CFR § 278.6(a), noted herein, establishes the authority upon which FNS may disqualify an authorized retail food store as a result from a finding of a violation on the basis of

evidence that may include facts established through on-site investigations. The record reflects that an on-site investigation was conducted at Appellant's firm which resulted in six (6) instances of SNAP violations with two (2) of those instances resulting in trafficking as defined in Section 271.2 of the SNAP regulations. Moreover, the charges of violations are based on the findings of a formal Department of Agriculture investigation; the transactions cited were conducted under the direct supervision of a Department Investigator. All transactions are fully documented and a review of this documentation has yielded no indication of substantial error or discrepancy in the reported findings; the investigative record is specific and thorough with regard to the date and other specifics of the violation and in all other critically pertinent detail. Agency policy and procedures direct that only after a careful, comprehensive and complete analysis, from which appropriate conclusions are logically derived, will the firm be issued a charge letter. The firm is then given the opportunity to reply to the charges and provide any information it deems appropriate to justify the violations as cited and detailed in the charge letter. In the present case, these policies and procedures are shown by the record to have been duly performed in all relevant and appropriate detail.

### **CIVIL MONEY PENALTY**

Appellant, through counsel, contends that while it understands the general criteria for requesting a CMP, the burden that the agency requires in presenting such criteria is unrealistic. The information provided along with USDA's case file show that the store has been in compliance and has an effective policy in place to train employees and prevent violations.

The issue to be decided here, then, is whether, through a preponderance of the evidence, T&A Market had an effective policy and program to prevent trafficking violations that was fully in accord with the provisions of 7 CFR §278.6(i), and thus that it is eligible for a CMP.

7 CFR §278.6(i) specifies that in order for a firm to qualify for a CMP in lieu of permanent disqualification, it must submit **substantial evidence** that it has fulfilled each of the following criteria:

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

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

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

Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm..."

As it relates to the above Criteria 1 and 2, 7 CFR §278.6(i)(1), entitled "Compliance policy standards," provides the following, in relevant part:

“...in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with this part 278 of current SNAP regulations and current SNAP policy on the proper acceptance and handling of food coupons. As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation. In addition, in evaluating the effectiveness of the firm’s policy and program to ensure SNAP compliance and to prevent SNAP violations, FNS may consider the following:

- i. Documentation reflecting the development and/or operation of a policy to terminate the employment of any firm employee found violating SNAP regulations;
- ii. Documentation of the development and/or continued operation of firm policy and procedures resulting in appropriate corrective action following complaints of SNAP violations or irregularities committed by firm personnel;
- iii. Documentation of the development and/or continued operation of procedures for internal review of firm employees’ compliance with SNAP regulations;
- iv. The nature and scope of the violations charged against the firm;
- v. Any record of previous firm violations under the same ownership; and
- vi. Any other information the firm may present to FNS for consideration.”

As it relates to the above Criterion 3, 7 CFR §278.6(i)(2), entitled “Compliance training program standards,” provides the following, in relevant part:

“...the firm shall have developed and implemented an effective training program for all managers and employees on the acceptance and handling of (SNAP benefits)...A firm which seeks a civil money penalty in lieu of a permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted; a record of dates of employment of firm personnel; and contemporaneous documentation of the participation of the violating employee(s) in initial and any follow-up training held prior to the violation(s). FNS shall consider a training program effective if it meets or is otherwise equivalent to the following standards:

- i. Training for all managers and employees whose work brings them into contact with (SNAP benefits) or who are assigned to a location where (SNAP benefits) are accepted, handled or processed shall be conducted within one month of the institution of the compliance policy under Criterion 1 above. Employees hired subsequent to the institution of the compliance policy shall be trained within one month of employment. All employees shall be trained periodically thereafter;
- ii. Training shall be designed to establish a level of competence that assures compliance with Program requirements as included in this part 278;
- iii. Written materials, which may include FNS publications and program regulations that are available to all authorized firms, are used in the training program.

Training materials shall clearly state that the following acts are prohibited and are in violation of the Food and Nutrition Act and regulations: the exchange of... (SNAP benefits)...for cash...”

Appellant, through counsel, did not provide any documentation, as specified in the SNAP regulations, verifying that the firm had developed and instituted an effective personnel training program, i.e., training curricula and dates of employment and the employee's initial SNAP training as well as subsequent follow up training sessions. Without specific training to clearly show trafficking was discussed as a violation and dated materials to clearly show it was completed prior to the violations, Appellant does not meet the four Criterion, as stipulated by SNAP regulations, and is not eligible for a Trafficking CMP. The notarized affidavit and previous investigative reports do not rise to the level of evidence required for a trafficking CMP. 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. The decision to impose a permanent disqualification against T&A Market is sustained.

### **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (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 (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.

Monique Brooks  
ADMINISTRATIVE REVIEW OFFICER

November 4, 2019