

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

**Wheeler Gas & Convenience,**

**Appellant,**

**v.**

**Case Number: C0194156**

**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 a Permanent Disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Wheeler Gas & Convenience (hereinafter “Wheeler Gas”) by the Retailer Operations Division of FNS.

**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 Wheeler Gas on August 21, 2017.

**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 Wheeler Gas with Federal SNAP law and regulations during the period April 10, 2017 through May 3, 2017. The investigation report documents that personnel at Wheeler Gas, in addition to accepting SNAP benefits in exchange for ineligible items on four occasions, also exchanged SNAP benefits for cash during

two undercover compliance visits. 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 July 21, 2017, that he was charged with violating the terms and conditions of the SNAP regulations. The Charge Letter along with a copy of the investigation report was delivered by UPS on July 24, 2017 and signed for by “5 U.S.C. § 552 (b)(6) & (b)(7)(C)”. 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:

“...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 a letter received by the Retailer Operations Division on August 4, 2017 and in a telephone conversation with Retailer Operations Division staff on August 8, 2017, the Appellant replied to the charges therein admitting that a temporary store employee, who had been trained on the SNAP regulations, exchanged SNAP benefits for cash without the Appellant’s knowledge, consent, or approval. The Appellant also requested a trafficking civil money penalty (CMP) and a temporary SNAP disqualification in lieu of a permanent SNAP disqualification of Wheeler Gas.

After giving consideration to the Appellant’s replies and the evidence in this case, the Retailer Operations Division informed the Appellant, by letter dated August 21, 2017, that Wheeler Gas 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 CMP 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 August 28, 2017, the Appellant requested an administrative review of the permanent disqualification determination. FNS granted the Appellant’s request for administrative review by letter dated September 5, 2017.

## **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, 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 § 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, in part:

Trafficking means the buying or selling of coupons, ATP cards or other benefit instruments for cash or consideration other than eligible food ...

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 ...

7 CFR §278.6(i) states, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 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 ....

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; 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 ....

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). [Emphasis added.]

(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. [Emphasis added.]

## **SUMMARY OF CHARGES**

**5 U.S.C. § 552 (b)(7)(E)**

## **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 Appellant's replies to the Charge Letter, in the review request postmarked August 28, 2017, and in a subsequent correspondence postmarked September 29, 2017, the Appellant made the following summarized contentions, in relevant part:

- A temporary store employee, who had been trained on the SNAP regulations, exchanged SNAP benefits for cash without the Appellant's knowledge, consent, or approval.
- This is the first time that the Appellant has been cited for any SNAP violations.
- To ensure that these types of SNAP violations do not occur in the future, the Appellant has: (1) Terminated the employment of the employee who was responsible for the SNAP violations; (2) Rededicated himself to working with store staff to ensure standards and policies of the SNAP are always adhered to; and (3) Incorporated more strict store policies.
- A permanent SNAP disqualification will impose a hardship on disabled SNAP customers as Wheeler Gas is the only store located within a one mile radius that is handicap accessible.
- A permanent SNAP disqualification will impose a financial hardship on Wheeler Gas.
- The Appellant requests that FNS impose a temporary disqualification from the SNAP in lieu of a permanent SNAP disqualification of Wheeler Gas.
- The Appellant requests that FNS impose a trafficking CMP in lieu of a permanent SNAP disqualification of Wheeler Gas.

In support of the Appellant's contentions, the following documents were submitted to FNS:

- Employee Training Log;
- Two photos of the front of Wheeler Gas;
- Two photos (each) of the front of three area retail stores; and
- A letter from the Appellant to a store employee confirming that the employee was terminated from his employment at Wheeler Gas prior to the receipt of the Charge Letter.

## **ANALYSIS AND FINDINGS**

### **Appellant Unaware of SNAP Violations**

The Appellant contends that a temporary store employee, who had been trained on the SNAP regulations, exchanged SNAP benefits for cash without his knowledge, consent, or approval. This contention cannot be accepted as a valid basis for dismissing any of the charges, or for

mitigating the impact of those charges. As owner of the store, the Appellant is liable for all violative transactions that occur at Wheeler Gas. Regardless of whom the ownership of a store may utilize to handle store business (i.e., regardless of whether a store owner, store manager, store clerk, family member, etc. was involved in the violative transactions), ownership is accountable for the proper handling of SNAP benefit transactions. Prior to becoming authorized to participate in the SNAP on February 7, 2011, the Appellant completed and submitted a SNAP Application for Retail Stores. The SNAP Application contained a section indicating that the person(s) signing the Application understood and agreed to ensure that store employees follow the SNAP rules and regulations and that the person(s) accepts responsibility for any SNAP violations that may occur at the store that were committed by any of the store's employees---paid, unpaid, new, temporary, full-time, part-time, etc. The SNAP Application also included a section that contained a statement which acknowledged that the person(s) signing the Application was aware that violations of program rules could result in fines, legal sanctions, withdrawal, or disqualification of the store. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. The Appellant admitted to FNS that a temporary store employee, who had been trained on the SNAP regulations, exchanged SNAP benefits for cash without his knowledge, consent, or approval. Trafficking is defined in 7 CFR § 271.2 of the SNAP regulations which states that 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... 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”. In keeping with this legislative mandate, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. The Appellant's implied contention that the SNAP violations were committed by a temporary store employee without his knowledge, consent, or approval cannot be accepted as a valid basis for diminishing the penalty. 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 USDA.

### **First Time Violator**

The Appellant contends that this is the first time that he has been cited for any 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. Trafficking in SNAP benefits is an extremely serious

violation and both 7 U.S.C. § 2021(b)(3)(B) and 7 CFR § 278.6(e)(1)(i) state that a first time violation warrants a permanent disqualification.

### **Corrective Actions Implemented**

The Appellant contends that in order to ensure that these types of SNAP violations do not occur in the future, he has: (1) Terminated the employment of the employee who was responsible for the SNAP violations; (2) Rededicated himself to working with store staff to ensure standards and policies of the SNAP are always adhered to; and (3) Incorporated more strict store policies. It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. 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 after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that he has taken corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Imposed Hardship on SNAP Customers**

The Appellant contends that a permanent SNAP disqualification will impose a hardship on disabled SNAP customers as Wheeler Gas is the only store located within a one mile radius that is handicap accessible. In support of this contention, the Appellant provided FNS with two photos of the front of Wheeler Gas which show a ramp into the store. The Appellant also provided FNS with two photos (each) of the front of three area retail stores which show no ramp into the stores. 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 regulation 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.

### **Imposed Financial Hardship**

The Appellant contends that a permanent SNAP disqualification will impose a financial hardship on Wheeler Gas. However, 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.

### **Reconsideration of Imposed Permanent Disqualification**

The Appellant requests that FNS impose a temporary disqualification from the SNAP in lieu of a permanent SNAP disqualification of Wheeler Gas. However, 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 "... a disqualification . . . 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 ...". In keeping with this legislative mandate, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. Additionally, the Act noted herein and the regulations pursuant thereto do not stipulate a minimum dollar amount of SNAP benefits trafficked in order to meet the definition of "trafficking" at 7 CFR § 271.2.

### **CIVIL MONEY PENALTY**

The Appellant requests that FNS impose a trafficking CMP in lieu of a permanent SNAP disqualification of Wheeler Gas. In the July 21, 2017 Charge Letter the Appellant was informed by the Retailer Operations Division that, under certain conditions, FNS may impose a civil money penalty 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.

If the Appellant's request for a trafficking CMP and the required documentation are not submitted on time, he will lose his right for any further consideration for a trafficking CMP. 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 do not provide the Agency discretion to extend the time within which documentation and evidence in support of a trafficking civil money penalty may be submitted.

The Appellant responded to the Charge Letter allegations in a letter that was received by the Retailer Operations Division on August 4, 2017 and in a telephone conversation with Retailer Operations Division staff on August 8, 2017. In these responses, the Appellant requested consideration for a trafficking CMP in lieu of a permanent SNAP disqualification of Wheeler Gas. However, the Appellant did not address the requirements described herein and did not provide any evidence, in accordance with the criteria detailed in the referenced regulations, that the firm established and implemented an effective policy and program to prevent violations.

Therefore, in the August 21, 2017 Determination Letter, the Appellant was informed by the Retailer Operations Division that consideration was given to the Appellant for a trafficking CMP according to the terms of the SNAP regulations but the Retailer Operations Division determined that the Appellant was not eligible for the trafficking CMP because he failed to submit sufficient evidence to demonstrate that Wheeler Gas had established and implemented an effective compliance policy and program prior to the SNAP violations occurring in order to prevent violations of the SNAP.

In his request for administrative review postmarked August 28, 2017 and in a subsequent correspondence postmarked September 29, 2017 (Note: These dates are NOT within ten days of the Appellant's receipt of the Charge Letter), the Appellant requested consideration for a trafficking CMP in lieu of a permanent SNAP disqualification of Wheeler Gas. However, the Appellant only **partially** addressed the requirements described herein and did not provide **substantial** evidence, in accordance with the criteria detailed in the referenced regulations, that the firm had established and implemented an effective compliance policy and program to prevent violations. To verify that the Appellant had established and implemented an effective

compliance policy and program at Wheeler Gas prior to the occurrence of SNAP violations, the Appellant submitted the following information/documents to the FNS Administrative Review Officer:

- Employee Training Log; and
- A letter from the Appellant to a store employee confirming that the employee was terminated from his employment at Wheeler Gas prior to the receipt of the Charge Letter.

However, the information/documents provided by the Appellant was not sufficient to demonstrate that Wheeler Gas had established and implemented an effective compliance policy and program prior to the occurrence of the SNAP regulations. The Appellant submitted no evidence to validate that Wheeler Gas had an effective compliance policy and program in place prior to the occurrence of the SNAP violations other than his statement of such. The Appellant did not provide an employee roster showing dates of hire for each employee (both current and past employees who received training—including the store manager (if applicable) and the store owner), no signatures were provided from each employee (both past and present) acknowledging that they had received training or that a compliance policy was in effect prior to the review period and on which dates they had received the training, etc. The Appellant did not provide FNS with any documentation to validate the employees who had worked at Wheeler Gas, verification on the dates of their employment at Wheeler Gas, verification that the employees listed have been the only employees who have worked at the store since the compliance program was implemented, etc.

The Appellant did not provide FNS with any documentation to verify that he had developed and implemented an employee training manual prior to the cited SNAP violations. The Appellant did not provide FNS with any documentation/validation that the training materials used to train store employees and store managers (if applicable) on the SNAP rules and regulations clearly stated that the following acts are prohibited and are in violation of the Food and Nutrition Act and regulations: 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...

The Appellant did not provide any evidence to verify that all new employees are trained on the compliance policy and program prior to being able to conduct SNAP transactions as there were no signatures provided from store employees verifying this claim. In addition, the Appellant provided no documentation that store employees received on-going, periodic training on the SNAP regulations and the proper acceptance and handling of SNAP coupons. In addition, the Appellant did not provide FNS with an evaluation of the effectiveness of the firm's compliance policy and program to ensure SNAP compliance and to prevent SNAP violations, as is required by Appellants who are seeking an assessment for a trafficking CMP in lieu of permanent SNAP disqualification. There was no indication that the firm's policy was to terminate the employment of violating store employees or that the firm had implemented a policy intended to initiate corrective action following complaints of SNAP violations. The SNAP regulations state that an effective compliance policy includes documentation reflecting the development and/or operation

of a policy to terminate the employment of any firm employee found violating the SNAP regulations prior to the occurrence of the SNAP violations.

The Appellant indicated to FNS that “ownership was not aware of, did not approve of and did not benefit from any trafficking violations”. However, in determining whether store ownership benefited from trafficking of SNAP benefits in which they were not directly involved, it is generally assumed that if EBT settlements are made to the store owner’s account, the store owner had benefited from such transaction. The store employee involved in the trafficking transactions took cash out of the store’s cash register and the benefits most likely went into the Appellant’s bank account. The Appellant did not submit any documentation to contradict this issue.

Therefore, based on the lack of substantial evidence and information submitted to FNS and the fact that the Appellant did not provide any documentation/evidence to support his request for a trafficking CMP within ten days of receipt of the Charge Letter, FNS has determined that the Appellant failed to demonstrate that Wheeler Gas had established and implemented an effective compliance policy and program prior to the SNAP violations that occurred during the review period. As such, the Appellant’s request for consideration of a trafficking civil money penalty in lieu of a permanent SNAP disqualification was appropriately denied by the Retailer Operations Division.

## **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 the Appellant, Wheeler Gas & Convenience, 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

April 25, 2018