

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

New Broadway Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0201440

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS) finds there is insufficient evidence to support a permanent disqualification of New Broadway Market (Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). Accordingly, the Retailer Operations Division's determination is reversed.

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

In a letter dated October 5, 2017, the Retailer Operations Division charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of January 2017 through June 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

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In response to the charge letter, on November 6, 2017, Appellant, through counsel, requested documents under the Freedom of Information Act (FOIA). The FOIA Office responded to the request on December 20, 2017. On March 12, 2018, counsel appealed the Agency's FOIA response. On January 22, 2020, the FNS FOIA Office issued its final response to the FOIA appeal. On January 24, 2020, the Retailer Operations Division provided counsel with ten days to provide its final response to the letter of charges. Appellant responded on May 29, 2020. Appellant, through counsel, denied trafficking and explained that the transactions were normal based on the unique circumstances of the store.

After considering the evidence and the retailer's reply, the Retailer Operations Division issued a determination letter dated June 2, 2020. The determination letter informed Appellant that 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 Appellant was not eligible for a trafficking CMP because 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 June 12, 2020, Appellant, through counsel, appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted. On July 10, 2020, counsel again requested documents under FOIA. This review was held in abeyance while this new FOIA was processed. On November 9, 2022, the FOIA office provided counsel with its response to the FOIA request. Counsel provided additional information in support of its administrative review request on November 29, 2022.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action 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) 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 USC § 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 ...

7 CFR § 271.2 defines trafficking, in part, 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; . . .

7 CFR § 278.6(a) states:

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(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.

SUMMARY OF THE CHARGES

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from January 2017 through June 2017. This involved the following SNAP transaction patterns which are indicative of trafficking:

- Multiple transactions were made from the accounts of individual SNAP households within a set time period.
- The majority or all of individual recipient benefits were exhausted in unusually short periods of time.

- The store conducted EBT transactions that were large based on the observed store characteristic and recorded food stock.

ANALYSIS AND FINDINGS

A review of the evidence does not support the Retailer Operation Division's determination to permanently disqualify Appellant from participating as an authorized retailer in the SNAP. Accordingly, it is unnecessary to address Appellant's contentions in this matter.

This administrative review decision is based on the specific circumstances of this case as documented by materials provided by Appellant and the Retailer Operations Division. In addition, this administrative review decision does not establish policy or supersede Federal law or regulations.

CONCLUSION

Based on a preponderance of evidence, the determination by the Retailer Operations Division to permanently disqualify New Broadway Market from participating as an authorized retailer in SNAP is reversed.

RELEASE OF INFORMATION

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

January 20, 2023