

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

Orow Hayes Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0254470

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) against Orow Hayes Market (hereinafter “Appellant”).

ISSUE

The issue accepted for review is whether the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Orow Hayes Market.

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

Orow Hayes Market was initially authorized to participate in SNAP on January 25, 2013. In a letter dated January 11, 2023, 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 between the months of November 2021 through April 2022 and information obtained during a visit to the store by an FNS contractor on April 26, 2022. The attachments enclosed with the charge letter specified the questionable and unusual SNAP transactions indicative of trafficking that were conducted at Appellant during the review period. The letter noted that the penalty for trafficking is permanent disqualification, as provided by 7 CFR § 278.6(e)(1). It informed Appellant of the right to respond to the charges within 10

days of receipt to explain the irregular SNAP transaction patterns and provided that Appellant may request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking within 10 days of receipt of the charge letter, under the conditions specified in 7 CFR § 278.6(i).

In a January 19, 2023, email, Appellant provided a written reply to the charge letter. In its response, Appellant stated that it carried a multitude of products that can accumulate to transactions of \$50.00 to \$100.00, the store is in a poverty-stricken area where households purchase in bulk, local customers are food deprived and have unhealthy eating habits, the store carries formula priced between \$19.99 to \$29.99, and the store sells cases of beverages.

After evaluating Appellant's response and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated January 25, 2023. This letter informed Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but that a CMP was not appropriate because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In an email dated February 3, 2023, Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted. In an email correspondence of March 3, 2023, Appellant, through counsel, submitted additional information in support of the request for administrative review.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 law in this matter is found 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...

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, **inconsistent redemption data, [or] evidence obtained through a transaction report under an electronic benefit transfer system...** [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, 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 § 271.2 states, in part:

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 § 278.6(b)(1) states, in part:

Any firm considered for disqualification...under paragraph (a) of this section...shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification.... The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter...

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(b)(2)(ii) states, in part:

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(i) states, in 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 of the Program...

SUMMARY OF CHARGES

FNS charged Orow Hayes Market with trafficking based on an analysis of FNS records, which included observed store characteristics, recorded food stock, and store pricing gathered during a store visit, as well as Electronic Benefit Transfer (EBT) transaction data for November 2021 through April 2022. The attachments enclosed with the charge letter reflected the following transaction patterns, which may be indicators of trafficking:

- **Charge Letter Attachment 1:** Multiple transactions made from the accounts of individual SNAP households within a set time period.
- **Charge Letter Attachment 2:** EBT transactions that were large based on the observed store characteristics and recorded food stock.

APPELLANT'S CONTENTIONS

- Appellant denies the trafficking allegations.
- Appellant has been in business since 2012 and is a busy neighborhood store.
- Due to its size, Appellant must restock frequently.
- Appellant is stocked with a full line of groceries.
- Appellant is conveniently located, and many of its customers live nearby.
- It is not uncommon for customers to frequent the store multiple times per day. For example, customers stop before and after work or during a break period, make separate purchases for lunch, and return later to purchase dinner items. Other times, customers purchase forgotten items or return to the store after discovering additional items are needed.
- Appellant is located near housing, a church, and a playground.
- Appellant's purchase invoices substantiate the large dollar transactions in the charge letter.
- Disqualification of Appellant would cause hardship to the local neighborhood residents and Appellant's business.
- In lieu of permanent disqualification, Appellant requests a CMP as it has met each of the criteria listed within Section 278.6(i) of the SNAP regulations.
 - Appellant submitted a copy of its compliance policy which was in place prior to the violations.
 - The compliance policy requires employees to notify the owners if they suspect a customer misuses EBT funds.
 - The compliance policy prohibits employee abuse of EBT funds.
 - Every store employee is trained on how to accept SNAP customer benefits.
 - Appellant's ownership was not aware of, did not participate in, did not benefit from, and did not approve of any EBT misconduct.
 - Appellant's ownership closely monitors the conduct of its employees and verifies that none have ever trafficked in EBT benefits.

In support of its contentions, Appellant submitted a copy of its reply to the Retailer Operations Division, copies of the charge, determination, and administrative review acknowledgment letters, a two-page report titled "Summary of Sales/Use/Withholding Tax" for Orow Hayes Market, Inc. from 2021 and 2022, a two-page affidavit from Jamil Orow, a one-page compliance policy dated March 2, 2023, and signed by Jamil Orow, approximately 357 pages of inventory invoices, and approximately 18 pages of undated photographs of Appellant's stock,

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented and evidence submitted.

ANALYSIS AND FINDINGS

This review examines the relevant information regarding the Retailer Operations Division's trafficking determination. The record must contain evidence sufficient to raise a presumption that trafficking occurred. In a trafficking determination, this evidence includes SNAP transaction data, considered together with other available information, such as store visit observations, the location and characteristics of competitor firms, and household shopping patterns. Once the presumption is established, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that it did not engage in trafficking. If Appellant fails to show this, the case will be sustained.

Retailers are provided opportunities to submit evidence accompanied by explanations of the legitimacy of questionable transactions, both to the Retailer Operations Division and here on administrative review. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

Based on the evidence in this case, the SNAP transactions listed in the January 11, 2023, charge letter were indicative of trafficking. Appellant has not provided reasonable explanations supported by sufficient credible and convincing evidence to demonstrate that these transactions were more likely due to reasons other than trafficking. Accordingly, the permanent disqualification is sustained. Discussed below are elements of the Retailer Operations Division's record, Appellant's contentions, and the findings of this review.

Store Characteristics

In reaching a disqualification determination, the Retailer Operations Division considered information obtained during the April 26, 2022, store visit conducted by a USDA contractor to observe Appellant's operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report documented the store size, description, and characteristics. The report also described the store's checkout counter space area and noted the effect of any limitations of the available surface area on placing large purchases or processing more than one customer at a time.

On review, Appellant provided approximately 18 pages of undated photographs of the store. There is no evidence of any dates affixed to the photos, so it is likely they were taken after the firm received the charge letter. Because there is no way for this review to determine that Appellant's photographs reflect store conditions at the time of the review period, this review finds them to be of little probative value.

There was no indication that SNAP households were inclined to visit the store regularly to purchase large quantities of grocery items. Given the available inventory, there was no sign that Appellant would be likely to have SNAP redemption patterns that differed significantly from those of similarly-sized competitors.

SNAP Transaction Analysis

While SNAP households are not limited in the number of times they may use their SNAP benefit card or how much eligible food they may purchase in SNAP transactions, government analyses have found that stores likely trafficking SNAP benefits have particular transaction patterns or characteristics that are inconsistent with the transaction patterns and characteristics of similarly situated stores. The charge letter attachments specify the unusual transactions and transaction patterns found at Appellant's store, which are considered together with other available information, such as store visit observations, the location and characteristics of competitor firms, and household shopping patterns, to determine if the anomalies can be explained based on circumstances specific to the store.

Charge Letter Attachment 1: Multiple transactions were made from the accounts of individual SNAP households within a set time period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Abnormally repetitive transactions over short periods of time at rates substantially greater than expected can be an indication that trafficking violations are occurring.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Although it is not uncommon for customers to have multiple transactions in a day or two, it is uncommon that, at a convenience store, such multiple transactions total large dollar amounts. The SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of Appellant's stock and facilities and are therefore indicative of trafficking. The photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Appellant multiple times during a short period to purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale.

Appellant contends customers stop at the store multiple times per day due to convenience and Appellant's location. The Retailer Operations Division identified 20 other authorized retailers within a one-mile radius of Appellant. Appellant has not provided any explanation for why, if such behaviors were occurring, these purchases would occur at Appellant rather than at nearby, larger stores. Agency records show that more than 76% of the households on this attachment completed a transaction at a large grocery store, supermarket, or superstore within one day of an Attachment 1 transaction. An unsubstantiated argument such as this does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

SNAP benefits are intended to supplement the food budget for households whose net income is near or below the Federal Poverty Level. It is difficult to believe customers who must rely on SNAP benefits to make ends meet prefer to pay higher prices and spend considerable amounts of their benefits at a convenience store. Spending sizable portions of one's SNAP benefit allotment in a convenience store - when there are larger stores at which one also shops that carry more variety of foods, likely at a lower cost - is unreasonable customer behavior. Moreover, some households listed in this attachment conducted this strange shopping pattern of making substantial purchases at Appellant multiple times during the review period.

Without compelling evidence from Appellant to show that the transactions in Attachment 1 were legitimate, this review finds that trafficking was a likely cause of the unusual patterns.

Charge Letter Attachment 2: EBT transactions that are large based on the observed store characteristics and recorded food stock. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The transactions in this charge letter attachment were all higher than 85% of all convenience store purchase transactions during the review period.

Appellant contends it is stocked with a full line of groceries and frequently restocks. At the time of the store visit, Appellant had four items priced at \$5.00 or more. Three of these items were infant formula; the store had 12 total units of formula in stock at the time of the store visit. It is noted, however, that while infant formula is eligible for purchase with SNAP benefits, this item is also part of the food package for participants in the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC). It is unlikely that SNAP households would frequently spend limited SNAP funds on expensive infant formula when they could make such a purchase with WIC benefits in a WIC-authorized store. The fourth item stocked at the store, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The store's inventory and characteristics did not support the frequency of large transactions reflected in this Charge Letter Attachment.

There is nothing notable about the store that would make its redemption patterns differ so significantly from those of similarly-sized competitors offering similar food items. The store had no shopping carts or shopping baskets available for customer use. The checkout area sits behind a glass or Plexiglass barrier, and transactions are conducted through a small opening. Based on the store layout, infrastructure, and available inventory, it is not credible that Appellant would so frequently conduct such large transactions.

In a case such as this one, which is based on an analysis of transaction data, Appellant must prove, through a preponderance of evidence, that the transactions detailed in the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. In the absence of compelling information or documentation weighed in comparison to that provided by the Retailer Operations Division, the agency's determination must be sustained.

Competitor Stores:

The Retailer Operations Division reviewed the number of SNAP authorized retailers within a one-mile radius of Appellant to determine if households living near Appellant had access to other shopping options during the review period. Mapping showed one supermarket, two superstores, one medium grocery store, and 16 other convenience stores 5 U.S.C. § 552 (b)(7)(E). This review demonstrates that households shopping at Appellant were nearby a larger store that may have lower prices and better inventory, making it less likely that SNAP recipients would expend their SNAP benefits in large amounts at Appellant's convenience store, and that they would do so recurrently.

Household Analysis:

In addition to determining if households had access to other shopping options, the Retailer Operations Division conducted a household analysis to determine if households conducting suspicious transactions at Appellant actually utilized larger stores during the review period. Larger stores usually have lower prices and better inventory.

The analysis included examples of six households with unusual shopping patterns at Appellant that also regularly shopped at larger stores. The following examples show households shopped at better stocked firms on or about the same day as conducting transactions meeting the parameters in the charge letter at Appellant:

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Despite this access to larger, better stocked stores, these sampled households conducted multiple transactions in set time frames and transactions that were large based on the observed store characteristics and recorded food at Orow Hayes Market.

Comparison with Similarly Situated Convenience Stores:

The Retailer Operations Division compared Appellant's transaction activity to the transaction activity of four nearby convenience stores identified as carrying similar stock. Appellant had substantially more SNAP transactions meeting the parameters of multiple transactions from the same household in set time frames and transactions that were large based on the observed store characteristics and recorded food.

Appellant's average transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for the review period was between 28% and 38% higher than the average transaction of the four nearby convenience stores the Retailer Operations Division determined carried similar stock.

Appellant's inventory, characteristics, and location do not explain why Appellant had more frequent transactions meeting the parameters in the charge letter and a notably higher average transaction as compared to nearby convenience stores. If Appellant's arguments about store location or customer shopping habits were causing the questionable transactions at the subject store, it would be expected that similar patterns would exist at other nearby convenience stores. However, that is not the case.

Invoices and Other Supporting Documents

Appellant submitted approximately 357 pages of inventory invoices and a two-page report titled "Summary of Sales/Use/Withholding Tax" for Orow Hayes Market, Inc. from 2021 and 2022 to substantiate the firm's inventory and demonstrate that there was adequate eligible food items to account for the transactions during the review period.

The Retailer Operations Division conducted an analysis of the invoices. Inventory invoices that did not identify what was purchased, did not have vendors, were missing information, were

duplicates, or were outside the review period were not included in the invoice analysis. Purchases of ineligible nonfood items were excluded from the invoice analysis as well. The Retailer Operations Division determined that even with an 85% markup, the invoice analysis indicated the firm lacked sufficient purchased food stock to cover its SNAP redemptions for the review period. The analysis also does not account for any non-SNAP purchases (cash, credit and debit card, etc.) of food items at Appellant. In sum, the invoices do not explain the questionable transactions at Appellant.

It is important to note that even if the results of the invoice analysis had indicated that Appellant had purchased sufficient food inventory to account for the firm's SNAP redemption volume, sufficient inventory alone does not explain the suspicious patterns of SNAP transactions such as repeat transactions by the same household during the same store visit or in a short period of time. Even the large dollar transactions would remain questionable if there were sufficient food inventory to support such transactions when consideration is made of there being only a limited variety of eligible food items in the store and no shopping carts or shopping baskets. Even if there were sufficient food stock at Orow Hayes Market to mathematically support high dollar transactions, there does not appear to be anything that would reasonably attract SNAP households to shop there, a convenience store, in some cases traveling a few miles to do so, and spend substantial amounts of their SNAP benefits.

Appellant also submitted a two-page report for 2020 and 2021 titled "Summary of Sales/Use/Withholding Tax" to support its contention that the transactions were the result of eligible food sales. The records provided do not provide detailed evidence as to the legitimacy of the charge letter transactions, as they offer little insight into what transpired at the point of sale and do not adequately explain the unusual transaction patterns listed in the charge letter.

Hardship to Appellant and SNAP Recipients

Appellant has stated that disqualifying the store would cause hardship to participating households. Appellant further contends that permanent disqualification from SNAP would damage Appellant's business.

With regard to Appellant's contention that the community will experience hardship if the firm is disqualified, it is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and a household is forced to use its benefits elsewhere. Regulations at 7 CFR § 278.6(f) do allow, in some circumstances, for a civil money penalty to be imposed in lieu of disqualification when there is an absence of other SNAP-authorized retailers in the area. However, the regulations are clear that a CMP for hardship to SNAP households may not be imposed in lieu of permanent disqualification for trafficking.

As for the assertion that the firm would suffer financially if the disqualification were to be upheld, Federal statute at 7 U.S.C. § 2021(b)(3)(B) makes it clear that disqualification for trafficking shall be permanent, even on the first occasion. 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 SNAP regulations for waiver or reduction of an

administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty.

Civil Money Penalty

Appellant requests a CMP in lieu of a permanent disqualification because it has met the criteria listed within Section 278.6(i) of the SNAP regulations.

As noted earlier, the Retailer Operations Division determined that Appellant firm was not eligible for a CMP in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a CMP to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate supporting documentation within 10 days of receipt of the charge letter. The case record shows that Appellant did not request a trafficking CMP or provide any evidence of a compliance policy or training program within the required 10-day period.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

An analysis of Appellant's EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify Orow Hayes Market from SNAP participation. This data provided sufficient evidence for this review to conclude that the questionable transactions and patterns listed in the charge letter were more likely than not the result of trafficking violations committed by Appellant. Likewise, Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

Based on a review of all available information in this case, the decision to impose a permanent disqualification against Appellant, Orow Hayes Market, under the ownership of Souad Orow and Jamil Orow, is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

AMIE CHURCHILL
Administrative Review Officer

March 22, 2023