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

Park Ave Minimarket, **Appellant,** **v.** **Office of Retailer Operations and Compliance,** **Respondent.**	**Case Number: C0245130**

FINAL AGENCY DECISION

The record supports that Park Ave Minimarket (Appellant), committed violations of the Supplemental Nutrition Assistance Program (SNAP). It is the decision of the USDA that there is sufficient evidence to sustain the permanent disqualification of Appellant from participation as an authorized retail food store in the SNAP, as imposed by the Office of Retailer Operations and Compliance (Retailer Operations).

ISSUE

The issue accepted for review is whether Retailer Operations 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 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7, may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

CASE CHRONOLOGY

By Charge letter dated May 20, 2021, Retailer Operations informed the owner that it had compiled evidence that Appellant had violated the SNAP regulations based on electronic benefit transfer transactions that established clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for the firm type. Retailer Operations charged Appellant with trafficking. The sanction for trafficking is permanent disqualification.

By letter dated May 24, 2021, the owner appointed an authorized representative to reply on his behalf. The representative replied by letter dated June 23, 2021. Retailer Operations issued a

Determination letter dated July 16, 2021. The letter informed Appellant that it was permanently disqualified as a retail food store in accordance with Sections 278.6(c), and 278.6(e)(1) of the regulations. Retailer Operations considered Appellant's eligibility for a civil money penalty (CMP) according to Section 278.6(i) of the regulations, and found it was not eligible because insufficient evidence was submitted timely to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program to prevent violations.

The owner requested administrative review by letter dated July 21, 2021. The review was granted by letter dated August 13, 2021. Counsel provided additional information by email dated September 1, 2021.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of demonstrating, by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing credible, relevant evidence, which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 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 CFR § 278.6(e)(1) states: "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined, in 7 CFR § 271.2, as: "(1) The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers, 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;…
(4) Purchasing a product with SNAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with SNAP benefits in exchange for cash or consideration other than eligible food; (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food; (6) Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone."

7 CFR § 271.2 states: "Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food products prepared for immediate consumption."

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."

7 CFR § 278.6(b)(2)(ii) states: "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: "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

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true, that the questionable transaction patterns were the result of trafficking. The charges were based on an analysis of SNAP transaction data during the period of November 2020 through April 2021. The transaction patterns indicative of trafficking are:

- Multiple transactions made from the accounts of individual households within a set time period.
- The store conducted EBT transactions that are large based on the observed store characteristics and recorded food stock.

APPELLANT'S SUBMISSIONS AND CONTENTIONS

In reaching a decision, consideration has been given to all contentions as presented, and submissions, including any not referenced.

- The owner asserts that he did not violate SNAP regulations and hence permanent disqualification is inappropriate. He provides that the store has a SNAP rules review system every four months. The explanation as to the EBT transaction increase at the store was that stores in the vicinity were disqualified from SNAP. While open, the store remained open and took all mandatory precautions in accordance with New Jersey's executive orders regarding the pandemic.
- The owner explains that many of the store's customers frequent several times a day and within relatively short periods of time.
- The owner qualifies for a CMP in lieu of permanent disqualification in accordance with SNAP Regulations, He has maintained a compliance policy that includes the guidelines referenced in the 7 CFR 278.6(i)(1). In the June 23, 2021 letter, he established that there is a

training program with the personnel operating the EBT machines every four months.

- As previously cited by the owner he was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of the of the trafficking violations. WE DID NOT COMMITTED ANY TRAFICKING OR ANY OTHER VIOLATIOS [sic] TO THE SYSTEM. We are so very careful to follow USDA, SNAP rules and regulations. We have created a review system of the SNAP rules. We review every 4 months.
- The reason our sales of Food Stamp increased is due to the fact that few stores in our vicinity had lost their SNAP authorization. Most nearby competitors have closed due to the pandemic, resulting in increased customer activity at the subject store.
- The owner listed stores with addresses that lost their SNAP. Another reason our sales increased was that we remained open during Covid-19, taking all mandated precautions to assist the public with their groceries. We had to extend our open hours to 12:00 am. Many people come to the store sometimes 2 or three times in the same day some times within short period of time.
- Neighbors had been buying products from the subject store to help undocumented immigrants in need; the nearby church, St. Paul's, would distribute juice, bread, canned goods and other items to the needy.
- Those who visited the store to purchase items for donation would spend between $50 and $100 in a single visit. No illegal activity was taking place at the store.
- The owner has never been in noncompliance, and the suspicious transaction patterns detailed in the charge letter were the result of a pandemic-related increase in customer activity. Customers now visit the subject store up to 4 times daily. He personally oversees store operations from 7:00 a.m. to 12:00 a.m. daily. He has no control over what his customers buy or when they visit the subject store and cannot refuse to serve SNAP customers.

ANALYSIS AND FINDINGS

Retailer Operations uses data patterns, onsite store photographs, shopping histories, and other analyses to evaluate the type and extent of potential SNAP violations by authorized retailers. This review encompasses the examination of the information in this case to determine whether the owner demonstrates by a preponderance of the evidence, that the permanent disqualification for trafficking should be reversed.

Store Characteristics

Appellant was authorized as a SNAP retail food store and typed as a small grocery store. A contracted FNS onsite store visit was conducted on March 9, 2021. The store report and photos show Appellant had two shopping handbaskets and no shopping carts for customer use. The store photos support that the firm had some staple food stock, a deli and cooking area for prepared foods, deli meats and cheeses by the pound, soft drinks, rice, some limited fresh produce, snacks and packaged items. Four of the six most expensive eligible items recorded on the onsite store inventory were stocked in under ten units. The highest priced items listed on the report ranged from $5.99 to $14.99. Appellant stocked non-food, SNAP ineligible items including: tobacco products, cleaning products, housewares, health aids, and paper products. The onsite visit report indicates that the store has one register and one POS device. The checkout area has a small counter space to conduct transactions.

The record supports that FNS issued an official warning letter to Appellant dated November 7, 2019, which was delivered November 8, 2019. The letter states that FNS determined that the firm had accepted SNAP benefits in exchange for items that are not eligible for purchase with SNAP benefits.

Attachment 1: Listed are 26 sets of two or more transactions, conducted by 18 different households (HHs) in 5 U.S.C. § 552 (b)(6) & (b)(7)(C). In some flagged sets, the second transaction amount, or combined subsequent transaction amounts, exceeded the initial transaction amount. This is not characteristic of a recipient purchasing a forgotten item(s). The transactions were deemed unlikely and indicative of trafficking.

The data shows that within a one mile radius of Appellant there were 12 authorized medium grocery stores, three large grocery stores, more than 40 other small groceries, three supermarkets and five super stores. Eleven of the 18 the households identified, or 61 percent conducted SNAP transactions at a supermarket(s) or a super store(s) within one day of transacting benefits at Appellant. This supports that the households flagged sought out other SNAP authorized locations to transact SNAP benefits, and did use other authorized stores.

Retailer Operations compared Appellant's data to three nearby authorized small grocery stores located less than a half mile from Appellant. Compared to Appellant, with 26 data sets flagged, two comparable same type stores each had one data flag, and one store had seven flags. Appellant's total SNAP dollar volume was 61% and 26% higher than the two comparable stores for the same time period. Thus, Appellant's transaction activity was unusual.

No itemized cash register tapes to support SNAP eligible food sales at Appellant were provided. No vendor invoices to support the acquisition of SNAP eligible foods were advanced by the owner to support the dollar volume of SNAP redemptions during the review period. The owner provided no recipient statements regarding their shopping behavior at the store. No federal tax records or state sales tax reports were advanced to counter the trafficking charge. No business banking records were offered to support the owner's contention that trafficking did not occur at Appellant. As such, Retailer Operations did not find that the explanations advanced by counsel adequately addressed the Attachment pattern to more show that it was the result of legitimate SNAP transactions, than the result of the charged trafficking.

Attachment 2: Listed are 172 transactions conducted by 62 unique HHs that are large based on the observed store characteristics and recorded food stock. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The average SNAP transaction amount listed for the review period in this Attachment is $65.49, more than the average SNAP transaction amounts in the state for authorized supermarkets, $46.12, and super stores, $62.92. As compared to three nearby same type stores, Appellant had many more flags on this Attachment at 172, compared to 4, 47 and 23 flags at the nearest small groceries each located within .16 of a mile from Appellant.

Of the households flagged on this Attachment, 61% conducted a transaction(s) at a supermarket, or super store within one day of making a transaction(s) at Appellant. Within two days of conducting transaction(s) at Appellant, the percentage of households making transactions at the larger store types rose to more than 69%. This indicates that the households were aware of other

nearby authorized retailers, and transacted benefits at larger stores. Retailer Operations' review of some households' shopping patterns at Appellant supported that they had access to larger and better stocked stores, and that transportation did not appear to be a constraint. The analyzed household data supported that HHs flagged at Appellant routinely transacted benefits at supermarkets and super stores. Nevertheless, they made high dollar SNAP transactions at this small grocery, often at times that were proximate to transactions conducted at larger store types. This is suspicious.

The record supports that the average purchase transaction amount for small grocery stores in New Jersey's Passaic County during the review period was 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant's average total SNAP dollar volume was 25.5% higher than the average for small grocery stores in Passaic County. Appellant's total SNAP transaction count was 16.5% higher than the average count for small grocery stores in the County.

Retailer Operations compared Appellant to nearby authorized small grocery stores and noted that Appellant had the highest total SNAP dollar volume ranging from 26% to 196% higher from the other three same type stores. Appellant had total SNAP transaction counts that were 2% and 91% higher than two comparators, and 12.9% fewer than one store. Appellant had the highest average SNAP average purchase transaction amount, the other stores being lower by 24% to 57%. This is unusual.

Retailer Operations searched the redemption data of the six named stores that the owner claimed lost their authorizations which resulted in Appellant's increased SNAP sales. Some of the stores were typed as convenience stores, while Appellant was typed as a small grocery. The named stores did not redeem at different points in time during the review months for various reasons. Retailer Operations' assessment of the redemption data at these six stores indicated that the disqualifications of the stores in the vicinity did not explain either of the Attachment patterns at Appellant.

Appellant has the burden to provide evidence in support of its position. The regulations at 7 CFR § 278.6(a) establish the authority upon which FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through inconsistent redemption data and evidence obtained through a transaction report under an electronic benefit transfer system. In this case, Retailer Operations determined that the owner's contentions, did not outweigh the evidence in the record.

CIVIL MONEY PENALTY

The regulations at 7 CFR Section 278.6(i) specify the criteria for a firm's eligibility for a CMP in lieu of permanent disqualification for trafficking. The criteria are identified as a minimum standard that firms must meet to be eligible for CMP consideration. Retailer Operations determined Appellant did not provide a submission of documentation regarding a CMP within the ten calendar days specified in the regulations, and cited in the Charge letter. The regulations were not met, and Retailer Operations denied the CMP.

As to the court cases cited by counsel, the administrative review process should determine whether FNS followed the Food and Nutrition Act and the regulations issued under the Act when it took action against the retailer. The administrative review officer is not responsible for determining whether any legal cases cited by counsel apply to Appellant's situation. If the final agency decision is appealed to the federal district court, the judge is responsible for determining whether case law cited by counsel is on point and applicable to Appellant's case.

CONCLUSION

Retailer Operations' analysis of Appellant's SNAP transaction data was the primary basis for its determination to permanently disqualify Appellant. The record also included onsite store photographs, an onsite store report and inventory, households' shopping histories, and other data that provided evidence that the questionable transaction patterns during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. The owner did not provide a preponderance of evidence that the Attachment patterns were transactions for eligible foods rather than the result of trafficking. Based on the entirety of the record, the preponderance of the evidence supports that violations did occur at Appellant as charged by Retailer Operations.

Retailer Operations denial of a trafficking CMP was also proper per the applicable regulations. Therefore, the decision to impose a permanent disqualification against Appellant is sustained. This decision is effective thirty (30) days from its delivery to Appellant.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008, and to 7 CFR § 279.7 of the regulations, with respect to the applicable rights to judicial review of this decision. If 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 Appellant's owner resides or is 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 delivery of this decision.

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

M. Viens December 9, 2021
ADMINISTRATIVE REVIEW OFFICER