

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

Young's,

Appellant,

v.

Case Number: C0209918

**Office of Retailer Operations and
Compliance,**

Respondent.

FINAL AGENCY DECISION

Upon completion of an administrative review, it is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is insufficient evidence to support the determination by FNS's Office of Retailer Operations and Compliance (or ROC, formerly Retailer Operations Division) to permanently disqualify Young's (listed on FNS records as "Youngs," hereinafter "Appellant") from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether or not ROC, 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 Young's.

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."

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified from SNAP based on an analysis of EBT transaction data from January 2018 through May 2018. This involved the following transaction patterns, which are common trafficking indicators:

- There were multiple transactions made from the accounts of individual SNAP households within a set time period.
- Excessively large purchase transactions were made from recipient accounts.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Young's for SNAP participation as a convenience store on December 13, 2007. In a letter dated August 16, 2018, ROC charged the 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 January 2018 and May 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made and supporting documentation submitted within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

The record shows that the Appellant, through its previous attorney, made its initial response to the charges on August 26, 2018. Shortly thereafter, the Appellant submitted a formal, written response, dated August 28, 2018, which disputed the trafficking allegations and contained a number of supporting documents, including letters of support from the chief of police and mayor; handwritten attestations of SNAP compliance from store customers; photographs of the store; news articles about the store's owners, etc.

Included in the August 28 response was a request by the Appellant for case file information in a request made under the Freedom of Information Act (FOIA). This request was forwarded by ROC to the FNS FOIA office and all administrative actions on the case were held in abeyance pending completion of the FOIA process.

It should be noted that subsequent to the August 28 written response, the Appellant and its counsel held a telephone call with ROC in which it further disputed the allegations of trafficking. This phone call took place on August 30, 2018. The following day, the Appellant, through counsel, submitted a written request for a trafficking CMP in lieu of permanent disqualification. In this request, the Appellant further denied any wrongdoing, but wished to preserve its rights to this alternative penalty should FNS remain unconvinced of the Appellant's conduct in this matter.

On October 30, 2018, FNS completed its FOIA response and provided Appellant's counsel with a three-page response letter along with 213 pages of documents related to the case.

On January 16, 2019, Appellant's counsel appealed FNS's FOIA response. As such, the case continued to be held in suspension pending the completion of the FOIA appeal. On December 14, 2020, FNS completed its response to the FOIA appeal, and released additional documents to the Appellant, though in a partially redacted format.

In a letter dated December 23, 2020, and delivered to Appellant's counsel on December 28, 2020, ROC informed the Appellant that with the FOIA process completed, it had 10 days to provide any additional response to the charge letter.

On January 7, 2021, the Appellant provided a 12-page letter, which appeared to largely repeat the arguments submitted on August 28 and August 31, 2018.

Sometime in July 2021 (FNS records are not specific as to the exact date), ROC and Appellant's counsel had another telephone conversation. It appears that during this phone call, ROC requested additional documentation from the firm, including inventory invoices and receipts. It appears that ROC further asked if the store allowed customers to shop on credit and then pay the store back with SNAP benefits. According to agency records, the attorney "stated that he does not believe that Young's Market allowed customers to buy on 'credit.'" In response to the request for additional information, Appellant's counsel submitted 173 pages of invoices from various vendors along with brief explanations about the purchases from each vendor. It appears that the Appellant also submitted additional store photographs at this time – 71 photos in total.

After considering the Appellant's responses and further evaluating the evidence in the case, ROC concluded that trafficking had occurred as charged and issued a determination letter dated December 1, 2021. This letter informed the 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 ROC considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but found that a CMP was not appropriate 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 SNAP violations.

In an e-mail dated December 10, 2021, the Appellant, through new counsel, appealed the agency's determination by requesting an administrative review. The request was granted and the case was assigned to an administrative review officer. In subsequent correspondence with the review officer, Appellant's counsel requested additional time to submit its formal contentions in this matter. Accordingly, the Appellant was given until January 28, 2022 to provide any arguments or documents it wished to be considered.

On January 28, 2022, Appellant's counsel submitted an 18-page letter detailing its contentions along with 313 pages of supporting documents, most of which were duplicates of the evidence that had been previously submitted by the Appellant and its representatives prior to ROC's issuance of the determination letter.

It should be noted that on January 31, 2022, the administrative review was reassigned to review officer Jon Yorgason.

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....

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...

7 CFR § 279.4(a) states, in part:

Upon receipt of a request for review of administrative action, the administrative action shall be held in abeyance until the designated reviewer has made a determination. However, permanent disqualifications for trafficking shall not be held in abeyance and shall be effective immediately as specified in 278.6(b)(2) of this chapter. If the disqualification is reversed through administrative or judicial review, the Secretary shall not be held liable for the value of any sales lost during the disqualification period...

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made a large number of contentions in its request for administrative review. For purposes of brevity, this review has reduced these arguments to the following key points, as summarized below:

- Appellant respectfully denies that any trafficking of SNAP benefits occurred at the store and submits that the transactions listed on the attachments to the charge letter do not constitute “unusual, irregular, and inexplicable” activity or evidence of trafficking.
- The charge letter was not based upon direct evidence, but rather circumstantial evidence from FNS’s computerized ALERT system – a system which is replete with bias and is not subject to proper statistical and other controls. While ALERT may flag patterns of allegedly suspicious transactions, a finding of trafficking is arbitrary and capricious absent substantial additional investigation.
- FNS’s failure to provide a store with the complete, unredacted administrative record when it is faced with permanent disqualification from SNAP violates the due process clause of the Constitution of the United States. ROC had the full record when it decided to permanently disqualify the store, but the store does not have the benefit of reviewing the same records, and thus, has not been provided with a full and fair opportunity to review and respond to the evidence used against it. In short, FNS’s administrative process is not a level playing field. Requiring retailers to seek judicial review in order to obtain the complete administrative record is fundamentally inequitable and an abuse of authority delegated to FNS by Congress.
- Young’s was started by the current owner’s parents in 1945 and has been in continuous operation for more than 75 years. The store has been a bedrock of the community.
- The city of Earle is an extremely impoverished town located in Crittenden County, Arkansas. The population has decreased by more than 30 percent since the 1990 census and more than 23 percent of its residents live below the poverty line.
- While agency records indicate that Young’s is a convenience store, it is clearly a small grocery store, as it sells no gasoline and carries far more staple foods than nearly all convenience stores in Arkansas. Because of FNS’s mischaracterization of the store, the transactions were erroneously flagged by ALERT.

- The store has a wide array of staple foods, including many expensive items, such as seafood and fresh meat and poultry. It also sells fresh fruits and vegetables. The firm's SNAP redemption activity is hardly surprising because it is not a convenience store and because it carries dozens of high-priced meat and seafood items and is located in an extreme food desert.
- There are no other comparable stores in the vicinity. Only three other SNAP-authorized retailers are located within five miles of Young's. None are within a reasonable walking distance and none sell fresh fruit, fresh vegetables, fresh meat or seafood. The closest store is more than half a mile away and is a much smaller store that sells far fewer staple food items. While hardship to SNAP households is not a consideration in trafficking cases, a permanent disqualification of Young's would have a profoundly negative impact on the community.
- Regarding multiple transactions from the same household in a set time period (Attachment 1 of the charge letter), these transactions do not support a trafficking determination because nearly all were hours apart or were on different days. The two sets of transactions that were four and eight minutes apart, respectively, are statistical outliers, but not illegal.
- Regarding the high dollar transactions listed in Attachment 2, these are not unexpected given the high-dollar seafood and meat items sold at the store. Such transactions are not unusual at an extremely busy, small grocery store like this one, especially when considering its location in an extreme food desert.
- Simply put, ROC's analysis was flawed because it ignored the items sold at the store, it mischaracterized the store as a convenience store, and it ignored the characteristics of the surrounding community and its location in an extreme food desert.
- The charge letter impermissibly attempted to shift the burden of proof to Young's to provide evidence to conclusively refute the allegations, as opposed to disqualifying stores only when FNS possesses a preponderance of evidence which establishes that trafficking took place. While this is not a criminal case, FNS is, in effect, treating Young's as guilty until proven innocent.
- Charges based solely upon circumstantial forensic analysis of computerized sales records do not satisfy constitutional concerns. This is especially true when considering that FNS did not interview store owners, clerk, or SNAP beneficiaries in connection with its investigation. Cases like this are founded upon SNAP redemption patterns triggered by the ALERT system and FNS typically accuses retailers of committing trafficking violations based upon arbitrary and capricious criteria that are not the subject of rulemaking and which are not supported by peer-reviewed statistical analysis.
- It is not a violation of the Food and Nutrition Act or any SNAP regulations for recipients to shop at a store multiple times a day or to redeem all of their monthly benefits at one time. SNAP retailers may not refuse to complete such transactions. Further, SNAP regulations are silent as to what might constitute an excessively large EBT transaction or what multiple transactions from individual households within a set period of time means. Absent a precise set of rules or standards to adhere to, retailers cannot conform their conduct to FNS's vague and undisclosed trafficking enforcement standards.
- The store's inventory invoices from the review period strongly support dismissal of the trafficking charges, as they establish that the store spent thousands of dollars to purchase SNAP-eligible items, far exceeding the aggregate value of SNAP redemptions.

- Attachment 1 lists only 18 sets of transactions (48 transactions in all), and all but two sets took place more than two hours apart. Considering the available foods at the store and its location, the transactions in this attachment are neither surprising nor unusual. The two sets of transactions that took place in under an hour may be somewhat unusual, but do not constitute a pattern, as they represent just over 0.1 percent of all SNAP transactions that took place at the store during the review period, and the two sets involved different households more than three months apart.
- Had ROC interviewed the store's customers regarding their transactions prior to issuing the charge letter, the agency would have learned that each transaction was legitimate and involved the purchase of eligible food items. The Administrative Review Branch can still do so prior to making a Final Agency Decision; failure to do so constitutes a willful decision to decline to ascertain whether or not these were legitimate transactions.
- Regarding Attachment 2, all of these transactions involved only the purchase of eligible food. It is clear that the Appellant's customers purchased substantial amounts of meat, fruit, vegetables, infant formula, and other staple food and SNAP-eligible items.
- Attachment 2 included all transactions exceeding 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which represents only 6.5 percent of all SNAP transactions that occurred during the review period; and only 16 of those exceeded \$100.00 – approximately three such transactions per month. Simply put, these transactions do not represent a pattern, particularly given the available food at the store and its location. A small number of outliers is neither evidence of suspicious redemption activity nor of trafficking.

In support of its contentions, the Appellant submitted a large number of documents, most of which were duplicate copies of evidence provided by the Appellant prior to the issuance of the determination letter or were documents created by FNS. New supporting documentation included a three-page written declaration, dated January 27, 2022, and signed by Appellant owner 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The declaration largely repeats many of the contentions found in the 18-page letter from Appellant's counsel. The Appellant also submitted copies of its 2018 U.S. Income Individual Tax Return (IRS Form 1040) and other Federal and State tax return forms. The Appellant also provided a few new inventory purchase records from vendors such as Malani Enterprises, M&M Dist. Forest City Inc., Devazier Distributing, Memphis Cash & Carry, Sam's Club, and Costco.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all evidence and contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

A critical issue for consideration in a case based on suspicious SNAP redemption data is whether or not ROC adequately established that the Appellant firm engaged in the violation of trafficking; or in other words, whether ROC, through a preponderance of the evidence, established that it is more likely true than not true that the irregular and unusual transactions cited in the charge letter were the result of trafficking.

A determination of permanent disqualification must be supported to such a degree as to conclude that trafficking is the most plausible explanation. After a thorough examination of all available information in this case, it is the finding of this review that ROC's determination failed to meet this standard. This case does not reach a level of persuasiveness to conclude that trafficking was the most likely reason for the transaction patterns listed in the charge letter, particularly considering the abundance of food in this very rural store and the distance to other available shopping.

Because this finding is based on the underlying data of the case rather than any particular contentions submitted by the Appellant, a detailed analysis of the Appellant's contentions is unnecessary.

CONCLUSION

It is the determination of this review that the Office of Retailer Operations and Compliance has not met the burden of proving, by a preponderance of the evidence, that the transactions listed in the charge letter were, more likely than not, the result of trafficking. As such, the determination to impose a permanent disqualification against Young's 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.

JON YORGASON
Administrative Review Officer

February 23, 2022