

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

123 International Market #430075,

Appellant,

v.

Case Number: C0216725

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of 123 International Market #430075 as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against 123 International Market #430075.

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

In a letter dated May 8, 2019, the Retailer Operations Division 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 during the months of September 2018 through February 2019. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated the Appellant had the right to respond to the charges within 10 days of receipt to provide explanations for the irregular SNAP transaction patterns. The letter also stated that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i). The charge letter was delivered to the Appellant by UPS on May 14, 2019

and was signed for by “5 U.S.C. § 552 (b)(6) & (b)(7)(C).” The Appellant did not respond to the charge letter.

After considering the evidence and the Appellant’s lack of response, the Retailer Operations Division issued a determination letter dated June 20, 2019. The letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and 7 CFR § 278.6(e)(1). The determination letter also stated that the Retailer Operations Division considered the Appellant’s eligibility for a trafficking CMP according to the terms of 7 CFR § 278.6(i). The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP 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 violations of the SNAP. The determination letter was delivered to the Appellant on July 15, 2019.

In a letter postmarked July 17, 2019, the Appellant requested an administrative review of the Retailer Operation Division’s determination. The request for administrative review was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means 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 covered in the Food & 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 § 271.2 states that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

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 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 § 271.2 defines eligible food, in part, as:

Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption

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, evidence obtained through a transaction report under an electronic benefit transfer system....

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 § 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).

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from September 2018 through February 2019. This involved the following transaction patterns which are trafficking indicators:

- **Charge Letter Attachment 1:** Multiple transactions were made from individual benefit accounts within a set time period. This attachment lists 48 sets of 106 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits. The largest single transaction set reached a high of 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- **Charge Letter Attachment 2:** Excessively large purchase transactions were made from recipient accounts based on the observed store characteristics and recorded food stock. This attachment lists 187 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The transaction amounts ranged up to a high of 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

APPELLANT'S CONTENTIONS

The Appellant submitted 20 pages of photocopies of miscellaneous purchase receipts and purchase invoices. The Appellant also made the following summarized contentions in its request for administrative review, in relevant part:

- The store never received the charge letter and that is why there was no reply. [Note: the charge letter was delivered to the firm on May 14, 2019 and was signed for by "5 U.S.C. § 552 (b)(6) & (b)(7)(C)"]
- The business was opened as a partnership in 2017; however, only one owner speaks, writes or reads English.
- The store has many customers who use SNAP and it is very important to keep the business open to support them.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Authorization History

FNS authorized 123 International Market #430075 for the SNAP on January 10, 2018. During the review period of September 2018 through February 2019, the firm was classified as a combination grocery store.

Owner Responsibility

An owner signed a SNAP application on behalf of all owners for the store on November 6, 2017 and acknowledged that all owners were aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner(s) would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time." The violations listed on this certification include accepting SNAP benefits in exchange for cash,

otherwise known as trafficking, and other violations such as accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible items.

Store Visit Report

The case record documents that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a March 25, 2019 store visit conducted by an FNS contractor to observe the nature and scope of the store's operation, stock and facilities. This information was then used to ascertain if there were justifiable explanations for the store's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- 123 International Market #430075 is approximately 700 square feet in size.
- The store did not have any shopping carts or shopping baskets for customer use.
- The store had one (1) cash register and one (1) point-of-sale device for purchases.
- The store did not keep food offsite or in a storage area outside of public view.
- The store did not have any optical scanners and there was no conveyor belt at the checkout area.
- The store did not sell meat bundles, seafood specials or boxes of fresh produce that would justify high dollar SNAP transaction.
- The checkout area consisted of a small counter near the front door with no space for stacking items to be purchased.

The store stock consists mostly of a moderate to limited amount of African imported foods, such as frozen vegetables, frozen fish and chicken, dried fish, rice, coffee, canned milk, juices, flour, cooking oil, salt, condiments, canned goods, and some fresh fruits and vegetables. At the time of the store visit, the four (4) most expensive food items sold by the store were:

- 10+ stocking units of 50 pound bags of Bunge flour at \$50 each;
- Two (2) stocking units of 5.51 pounds of Nido Dry Milk at \$45 each;
- Five (5) stocking units of .9 gallons of Cartina Red Palm Oil at \$39 each;
- 10+ stocking units of 50 pounds of Semolina flour at \$35.00 each.

Given the available inventory and store layout as noted above, there is no indication from the store visit report that the store would be likely to have SNAP transaction patterns significantly different from similar-sized competitors offering similar food items.

Multiple Transactions by the Same Household within a Set Time Period

SNAP households have no limit on the number of times they may use their SNAP cards or how much eligible food they may purchase. However, 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 this combination grocery store's stock and facilities and are thus indicative of trafficking.

5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(7)(E)

The Appellant offered no explanation for this irregular transaction pattern. The evidence in the case file documents that it is unlikely that SNAP customers would shop at the store and purchase such a large volume of items multiple times during a set time frame. In addition, the store's small checkout area and limited counter space makes it unsuitable for conducting large transactions. The store had no shopping baskets or shopping carts for transporting such a large volume of food within the store. Based on the analysis above, and in the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

Excessively Large Transactions

SNAP households have no limit on the amount of eligible food they may purchase (subject to the remaining balance on the card). However, the SNAP transactions noted in the charge letter are questionable **not** because they exceed any regulatory limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of this combination grocery store's stock and facilities and are thus indicative of trafficking.

5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(7)(E)

The store visit pictures show that the store layout is not conducive to these excessively large transactions. There were no shopping carts or baskets for transporting food around the store. The checkout counter space is very limited and not conducive to stacking multiple items for purchase. The store did sell some relatively expensive specialty items; however, these did not appear to be available in sufficient quantities to justify the number of excessively large transactions cited in the charge letter. The Retailer Operations Division properly considered these factors in making its determination that the transaction patterns cited in the charge letter are, more likely than not, due to trafficking.

Sometimes a store may have higher than normal SNAP transactions due to the lack of access to other comparable SNAP authorized stores in the area. The Retailer Operations Division examined two other combination stores in the area with a comparable or better selection of African international foods. These stores were within a half-mile radius of the Appellant firm. Although these nearby competitor stores were comparable in depth and breadth of stock they did not exhibit the same type of irregular transaction patterns as the Appellant firm.

The case record also documents that the Retailer Operations Division conducted a detailed analysis of four (4) households with irregular transactions identified in the charge letter to analyze their shopping patterns at 123 International Market #430075 compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at supermarkets and/or superstores. However, despite this access to larger and better stocked stores, these sampled households conducted excessively large transactions at 123 International Market #430075 on the same day or within a few days of shopping at a supermarket or superstore. It is unlikely that a combination grocery store, even one with a moderate supply of African international foods, would have legitimate SNAP transactions so much larger than these SNAP authorized supermarkets and superstores.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts and baskets support the Retailer Operations Division determination. Customers purchasing such large quantities of food items would have to enlist the help of many others while shopping. Based on a preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 2 are more likely than not the result of trafficking in SNAP benefits.

Invoices

The Appellant submitted its purchase invoices from the review period in an attempt to show it had sufficient food inventory to support its SNAP redemptions. The food purchases in these invoices were totaled by the Retailer Operations Division and a 40 percent markup was applied to arrive at an estimated retail food sales figure of just over 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for the review period. However, this indicated a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) shortfall of food inventory as the firm had over 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP redemptions during the review period. Assuming that the store also had cash, debit and credit card sales of food, the actual shortfall of food inventory in comparison to SNAP redemptions should be even greater.

Hardship to SNAP Customers

The Appellant claims that SNAP is necessary to keep the business open for the many customers who rely upon the store. Regarding this contention, there is no provision in SNAP law or regulations that would negate, waive or reduce a permanent disqualification for trafficking due to a purported hardship to SNAP customers. Where there is a hardship to SNAP households due to a lack of authorized stores in the area, FNS may impose a hardship CMP on a firm in lieu of a **less than** permanent disqualification. However, the regulations at 7 CFR § 278.6(f)(1) clearly state that "a civil money penalty for hardship to SNAP households may not be imposed in lieu of a **permanent** disqualification." [Emphasis added.] Because the Retailer Operations Division has taken action to permanently disqualify the Appellant firm, a hardship CMP in lieu of disqualification cannot be granted.

It should also be noted that there are two (2) SNAP authorized stores selling African international food within a half-mile radius of the Appellant stores. Therefore, it is unlikely that the local SNAP community will suffer a hardship as opposed to a mere inconvenience due to the permanent disqualification of 123 International Market #430075.

TRAFFICKING CIVIL MONEY PENALTY

The Appellant did not request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i) even though it was informed of the right to do so in the charge letter. The SNAP regulation at 7 CFR § 278.6(b)(2)(ii) mandates that a request for a

trafficking CMP along with supporting documentation shall be submitted within ten (10) days of receipt of the charge letter.

The SNAP regulation at 7 CFR § 278.6(b)(2)(iii) also states, in part, 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 ... the firm **shall not be eligible** for such a penalty.” [Emphasis added.]

Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program prior to the violations. Therefore, the Retailer Operations Division’s decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

The Retailer Operations Division’s analysis of the Appellant’s EBT transaction record was the primary basis for its determination to permanently disqualify the retailer. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Stores caught in trafficking violations consistently display particular, characteristic patterns of transactions, including those cited in the letter of charges.

In the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did in fact occur as determined by the Retailer Operations Division. Based on the discussion above, the decision to impose a permanent disqualification against 123 International Market #430075, Appellant, is sustained.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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.

RONALD C. GWINN
Administrative Review Officer

October 22, 2019