

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

1338 Food Inc.,

Appellant,

v.

Case Number: C0234782

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a permanent disqualification of 1338 Food Inc. (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) as imposed by FNS’s Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not 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 1338 Food Inc.

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 November 2019 through April 2020. 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.
- The firm conducted EBT transactions that were large based on observed store characteristics and recorded food stock.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized 1338 Food Inc. for SNAP participation as a small grocery store on November 2, 2016. In a letter dated October 7, 2020, 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 between the months of November 2019 and April 2020. 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).

In a letter dated October 26, 2020 the Appellant, through its accountant, responded to the trafficking allegations, stating that the transactions in question were normal for the business – customers shopping at the store multiple times a day or on subsequent days. The Appellant claimed that the transactions were not violations, but rather similar transactions with three different customers. The Appellant stated that the store never has and never would intend to disregard the SNAP rules. It further claimed that the store could not withstand a disqualification or civil money penalty because the firm is a small business and such penalties would likely cause the store to close.

In support of its response, the Appellant submitted copies of the store's bank statements from November 2019 to April 2020 to show the firm's income, deposits, and credit card and SNAP income. The Appellant also submitted copies of SNAP regulations to demonstrate that the firm is aware of the regulations and understands them.

It is noted that the Appellant did not request a CMP in lieu of permanent disqualification, nor did it submit any evidence to show that it would be eligible for this alternative penalty.

After evaluating the 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 November 5, 2020. 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 the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but determined 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 a letter postmarked November 16, 2020, the Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and was assigned to an administrative review officer. On July 16, 2021, the review was reassigned to administrative 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...

APPELLANT'S CONTENTIONS

The Appellant, through its accountant, made the following summarized contentions in its request for administrative review, in relevant part:

- The Appellant requests an administrative review because it is not at fault for the alleged violations.
- The sales and amounts in question are not significant or unusual for the business.
- Many of the items sold at the store are expensive and show that a customer's charges could be higher than what might be assumed at a small business such as 1338 Food Inc.
- The store never intended to disregard SNAP laws.

To support its contentions, the Appellant submitted 12 undated photographs of food items available for purchase at the store. Several of the photos are close-up shots of pricing labels for expensive items. For example, one photo shows that a 24-ounce jar of honey sells for \$8.99. Another photo shows an unknown-sized bag of rice selling for what appears to be \$30.49. Other items include a 40-ounce package of cooked salami for \$23.99; a 16-ounce bag of salted pollock for \$7.99; and a 50-ounce can of Nesquik powdered drink mix for \$26.99.

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

The key issue for consideration in a case based on suspicious SNAP redemption data is whether or not FNS's Retailer Operations Division adequately established that the Appellant firm likely engaged in the violation of trafficking. In other words, does the agency's evidence show that it is more likely true than not true that the irregular and unusual transaction patterns cited in the charge letter were the result of trafficking violations?

Having reviewed the agency's evidence against 1338 Food Inc. as well as the firm's initial response to the allegations, this review finds that FNS has sufficiently demonstrated that trafficking violations were likely occurring. As such, the burden in this administrative review lies with the Appellant to prove, by a preponderance of the evidence, that the agency's determination of permanent disqualification was improper and that the penalty should be reversed or modified. The paragraphs below provide an analysis of both the agency's case and the Appellant's contentions in its request for administrative review.

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm's EBT transaction data, but also information obtained from a July 16, 2020 store visit which was conducted by an FNS contractor to observe the nature and scope of the firm'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 and photographs documented the following store size, description, and characteristics:

- 1338 Food Inc. is a small grocery store, roughly 1,000 square feet in size, operating in New York City, New York. The store has approximately 450 additional square feet of storage space.
- The store visit photographs showed one cash register and agency records reflected the use of one EBT point-of-sale terminal for SNAP purchases. There is no evidence that the store used scanning equipment to process transactions.
- At the time of the store visit, the firm did not have any shopping carts for customer use. The store is likely too small and the aisles too narrow for shopping carts. There were two handheld shopping baskets visible in the contractor's photographs. One was located in the kitchen area and the other appeared to be filled with fresh produce, so it was difficult to determine if the baskets were primarily for the store's use or for customer use.
- The store's staple food inventory appeared to be typical of small grocery stores in the area – well-stocked with staple foods, including fresh produce, and fresh meats and cheeses sold by the pound. The store also sold a variety of accessory foods, including snack foods, candy, condiments, and carbonated and uncarbonated drinks. Also available was a large amount of nonfood merchandise, particularly alcoholic beverages, paper goods, cleaning supplies, and other miscellaneous household merchandise.
- The store contained a large kitchen area where hot meals were prepared. Hot, prepared meals appeared to be a fairly significant part of the firm's business. It should be noted that hot food is not eligible to be purchased with SNAP benefits.
- The checkout area was typical of a small grocery store or corner market in the area, with enough space to place only a few items. The checkout area was not suitable for conducting large or rapid transactions, as there was little room to maneuver with a large volume of groceries or other merchandise.
- As with a majority of retail stores, the prices of most items appeared to end with a cents-value of 9, such as .69 or .99.
- There was little evidence that the firm had special food packages for sale or that items were sold in bulk. However, there appeared to be a small number of fairly expensive items, such as a 50-pound bag of rice for \$24.99 (seven in stock); a 24-unit case of Ensure nutrition shakes for \$39.99 (one in stock); a 3.52-pound container of Nido powdered milk substitute for \$26.99 (two in stock); and a 12.5-ounce container of Enfamil infant formula for \$22.99 (one in stock). It should be noted that infant formula would not be expected to be a common purchase by SNAP households, as formula is part of the WIC food package, and most SNAP households with infants are simultaneously eligible for WIC participation. It should also be noted that other stores in the vicinity of 1338 Food Inc. also sell many of the same expensive items listed above, so the presence of these items at the

Appellant store is not unique and would not likely result in SNAP transaction patterns that differ significantly from other similar stores in the area.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a small grocery store, where households normally purchase a limited number of items to supplement their overall dietary needs. There was little indication that SNAP households would be inclined to regularly visit 1338 Food Inc. to purchase large quantities of groceries, especially considering the very constricted checkout area, the absence of shopping carts and baskets, and the availability of much larger stores in the area, including a supermarket located directly across the street. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of similar-sized competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: Multiple transactions were made from the accounts of individual SNAP households within a set time period. This attachment lists 14 sets of transactions (28 transactions in all) totaling \$2,155.12 in SNAP benefits, averaging \$76.97 per transaction, or \$153.94 per set of transactions. 5 U.S.C. § 552 (b)(7)(E).

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) – an extraordinary amount for a small grocery store with no shopping carts and limited shopping baskets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Such transactions at a typical small grocery store like 1338 Food Inc., which has limited overall inventory, are highly irregular and are often an indication of trafficking.

The Appellant has argued that it is not uncommon for customers at 1338 Food Inc. to shop at the store multiple times a day or on subsequent days, and argues that the transactions are large because the store has some expensive inventory. Unfortunately, the Appellant has submitted no evidence to show that the transactions in question were legitimate purchases of eligible food. Such evidence might have included itemized cash register receipts to show what was purchased during each transaction or other evidence to show how frequently the expensive merchandise was purchased by customers using SNAP benefits. Without compelling evidence from the Appellant to counter the agency's conclusions, it is the finding of this review that trafficking was a likely cause of the transaction patterns listed in this attachment.

Charge Letter Attachment 2: The store conducted EBT transactions that were large based on observed store characteristics and recorded food stock. This attachment lists 193 SNAP transactions totaling \$17,866.69, for an average transaction amount of \$92.57. These large transactions are not consistent with a small grocery store in the state of New York. The Retailer Operations Division has determined that during the review period, the average SNAP transaction for a small grocery store in New York State was \$11.67. In New York City, the average was even lower, at \$11.37 per transaction, but the average transaction in Attachment 2 was almost than eight times larger than the average purchase amount for this store type.

Given that the Appellant firm has a moderate inventory of staple foods as well as other SNAP-eligible items, including snacks and drinks, and considering the possibility that the store sells

large bags of rice and a few other expensive items, it is probable that there would be an occasional purchase where the transaction amount is high, perhaps exceeding \$70.00 or even \$80.00. As such, it is likely that there are some legitimate SNAP transactions among the questionable transactions listed in Attachment 2. However, as noted earlier, there is little evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from similar-sized competitors in the area. The substantial number of high-dollar transactions in a six-month period calls into question the legitimacy of these transactions.

Attachment 2 lists nine transactions for \$200.00 or more during the review period, including a high of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Another 44 transactions were between \$100.00 and \$199.99. Considering how many food items it would typically take to add up to \$100.00 or more, and considering that the store has a very constricted checkout area, and almost no shopping carts or baskets to help a customer transport large quantities of food, this review finds it difficult to believe that every large transaction in Attachment 2 was a legitimate purchase of eligible food.

Regarding large transactions, the Appellant contends that such sales are neither significant nor unusual for the business, and argues that many items at the store are expensive, which results in larger transactions than what might be expected at a small store. To support its claims, the Appellant provided several photographs of the firm's inventory, particularly pricing labels.

Unfortunately, the Appellant's evidence is not convincing, as it does not demonstrate that the specific transactions listed in Attachment 2 were legitimate purchases of eligible food. Undated photographs of expensive merchandise do not prove in any way that such items were regularly purchased by SNAP customers. Likewise, bank statements, such as those submitted with the Appellant's original response to the charge letter, do not list individual transactions and thus offer little insight into the transactions in question. Persuasive evidence might have included copies of itemized cash register receipts or other documentation to show what took place between customers and store personnel at the point of sale.

This review does not doubt that 1338 Food Inc. sells eligible food items and conducts some legitimate SNAP business. There is no evidence that this has ever been questioned. But when unusually large transactions form patterns that are substantially different from comparable stores in the area, compelling evidence from the Appellant is warranted to verify that there is not something else, such as trafficking or other program violations, taking place. In this case, the Appellant's arguments and evidence do not adequately explain what occurred at the point of sale. Accordingly, it is the finding of this review that trafficking was a likely cause of the unusual transaction patterns found in Attachment 2.

Except for the rule that SNAP benefits are to be used only for the purchase of eligible food, the regulations do not govern or mandate how a SNAP household should spend its benefit allotment, including how many times a household may use its EBT card at a particular location or how large an individual transaction can be. However, the transactions noted in the charge letter are not questionable because they exceed any limits for use, but because they display patterns of use that are inconsistent with the store's documented physical characteristics and food inventory. It

should be further noted that the transactions identified in the charge letter are not marginally abnormal, but decidedly so, especially in comparison with other nearby SNAP-authorized stores with similar characteristics. This review does not contend that repetitive or large EBT transactions are overtly suspicious when they occur on an occasional or intermittent basis, but when such transactions form questionable patterns on a consistent basis over a substantial period of time, such activity is considered highly irregular, and a firm's intent to comply with program regulations is called into question.

In an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that trafficking did not occur. Unfortunately, the Appellant's contentions and evidence do not meet this standard.

Civil Money Penalty

The Retailer Operations Division determined that the Appellant firm was not eligible for a civil money penalty 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. This review agrees with that determination.

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 the Appellant did not request a trafficking CMP when it replied to the charge letter and there is no evidence that the Appellant submitted any documentation that would indicate that the firm had a compliance policy or program of any kind.

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 the Appellant's EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify 1338 Food Inc. 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 the Appellant. Likewise, the 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 the Appellant, 1338 Food Inc., under the ownership of Luis Junior Rodriguez, 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.

JON YORGASON
Administrative Review Officer

September 30, 2021