

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

2082 Madison Food Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0201000

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 finding that the permanent disqualification of 2082 Madison Food Corp. (2082 Madison Food Corp & Grocery or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division 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 USC § 2021 and the 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 July 28, 2017, the Retailer Operations Division charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of December 2016 through May 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided

by 7 CFR § 278.6(e)(1). The letter also noted that Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant replied to the charges by fax on August 10, 2017. Appellant denied trafficking and explained the transactions were largely due to Appellant's practice of extending credit to SNAP households and allowing repayment to be made with SNAP benefits. Appellant also provided purchase invoices and store photographs. Appellant requested a trafficking CMP in lieu of a permanent disqualification and stated that the store owner provides quarterly SNAP training to staff. However, Appellant did not provide any evidence or documentation to support its eligibility for a trafficking CMP within the 10 day period following receipt of the charge letter.

The Retailer Operations Division sent a letter to Appellant dated August 11, 2017. The letter requested documentation to support that food items were purchased on credit and that SNAP benefits were used as repayments. The letter stated that any documentation must identify specific accounts along with corresponding dates and amounts. Appellant did not respond to the request for documentation.

After considering the retailer's reply and the evidence, the Retailer Operations Division issued a determination letter dated September 22, 2017. The determination letter informed Appellant that it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that Appellant was not eligible for a trafficking CMP because 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.

In a postmarked September 29, 2017, Appellant appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions should be reversed. That means the 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

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) 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 § 271.2 states, in part, that, “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 § 271.2 defines trafficking 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 (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 § 278.6(a) states, inter alia, that “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*, . . .” (emphasis added)

7 CFR § 278.6(b)(2)(ii) states, inter alia: “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(e)(1) reads, in part, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.”

7 CFR § 278.6(i) states, inter alia: “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

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from December 2016 through May 2017. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were multiple transactions made from individual benefit accounts in unusually short time frames.
- There were excessively large purchase transactions made from recipient accounts.

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking.

APPELLANT'S CONTENTIONS

In its appeal request postmarked September 29, 2017, Appellant provided the following summarized contentions, in relevant part:

- It is very easy for families to spend the majority of their benefits at Appellant.
- Appellant has allowed a select few customers to have their basic needs filled on credit and they repay the business when they receive their benefits.
- Many of the large transactions are repayments for many smaller transactions added together.
- Appellant was not aware that accepting SNAP as payment for credit was against the rules and regulations.
- Appellant has discontinued this practice.
- Appellant previously sent in letters from customers who received credit.
- Appellant strives to maintain competitive pricing and many of the neighborhood residents satisfy their household needs at Appellant and make large purchases with their benefits.
- Appellant submitted photographs to the Retailer Operations Division showing the large variety of merchandise available.
- Appellant submitted to the Retailer Operations Division purchase receipts from its suppliers to show the many products that are sold.
- Appellant requests a CMP in lieu of a permanent disqualification.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced.

ANALYSIS AND FINDINGS

Store Visit

FNS authorized 2082 Madison Food Corp. as a small grocery on July 31, 2012. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an October 21, 2016, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- 2082 Madison Food Corp. is approximately 1200 square feet, with no additional food storage outside of public view.
- There were no shopping baskets or shopping carts for customer use.

- There was one cash register and one point-of-sale device.
- The available checkout area space was limited and checkout occurred through a small window.
- There were no meat/seafood specials or bundles that might sell for high prices.
- There was limited fresh fish.
- There was no fresh meat or poultry.
- There was a selection of fresh produce with limited quantities including bananas, apples, lemons, limes, potatoes, onions, plantains, sweet potatoes, grapes, and pomegranate, and squash.
- Dairy included milk, butter, cheese, ice cream, and yogurt.
- Other staple food items included eggs, juice, cereal, rice, and a selection of canned goods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included alcohol, hot food, lottery, paper goods, cleaning products, and health and beauty aids.

The SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. Given the available inventory as noted above, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors.

Charge Letter Attachments

Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

Charge Letter Attachment 1. Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment documents 29 sets of transactions conducted by 23 different households **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**
5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant explains that many families like to conduct separate transactions. A customer will make a personal purchase and then charge the items for another family member separately so they can get a separate invoice. Appellant also contends that customers who have completed their purchases may choose to make another purchase when they see fresh merchandise come through the door. The transaction sets do not depict particularly rapid transactions back to back. **5 U.S.C. § 552 (b)(6) & (b)(7)(C).** Thus, it is unlikely that these transactions were conducted on the same visit and therefore cannot be explained by household members shopping together and charging items separately or customers making additional purchases as the result of seeing newly delivered items.

The SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of Appellant's stock and facilities and are therefore indicative of trafficking. Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The photographs from the store visit offer no legitimate explanation as to why SNAP customers would routinely shop at Appellant multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale. In addition to the store's limited checkout space which is unsuitable for large transactions, 2082 Madison Food Corp. has no shopping carts and no shopping baskets for transporting food within the store.

Appellant informed the Retailer Operations Division that many of these transactions were due to repayments on credit accounts. Appellant stated that it submitted statements from clients which stated that the store allowed the purchase of food on credit. However, the record shows that Appellant did not respond to the request for documentation of the alleged credit accounts. When a retailer claims it maintains credit accounts to explain irregular SNAP transactions and data patterns, FNS requires a level of detail regarding the legitimacy of the claim. This is because retailers have often made false admissions of credit in an attempt to obtain a lesser penalty after committing more egregious violations such as trafficking. Credit transactions must be accounted for with substantive evidence such as the dates credit was extended, to whom, for what amount, and for what items. Appellant did not provide such substantive evidence when requested by the Retailer Operations Division. Therefore, the Retailer Operations Division properly determined that the evidence submitted by the Appellant was insufficient to justify the irregular transactions cited in Charge Letter Attachment 1.

In addition, the multiple transactions shown in Charge Letter Attachment 1 do not show characteristics of a typical credit repayment with SNAP benefits. In a typical credit repayment at a small grocery, the first transaction will be for an excessively large dollar amount and any following SNAP transaction will be for a much smaller amount typical of that store type. However, all of the transactions in Charge Letter Attachment 1 consisted of at two or more excessively large dollar amounts atypical of a small grocery in Bronx County. It is unlikely that these patterns would have occurred due to a credit repayment.

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.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 181 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These large transaction amounts are not consistent with the store's inventory with no fresh meat and limited fresh produce. As noted previously, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors offering similar food items. Appellant did not have any shopping carts or shopping baskets and checkout occurred through a small window. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

Appellant claims that increased food costs have led to higher SNAP transactions. An increase in the cost of food can lead to higher SNAP transactions. However, if there were increases in food prices, this increase would also be reflected in the SNAP transactions of similar-sized competitor stores during the review period. This is not the case here. The Retailer Operations Division compared Appellant to three nearby small groceries. During the review period, Appellant conducted more SNAP transactions compared to the other stores; had the highest SNAP redemption dollar value compared to the other three stores; and had a larger average SNAP transaction amount than the other stores.

The Retailer Operations also determined that the transaction pattern of Appellant exceeded the other three authorized stores, as seen on the table. The Retailer Operations Division considered this an indicator of trafficking.

5 U.S.C. § 552 (b)(7)(E)

Appellant claims that the irregular SNAP transactions in Charge Letter Attachment 2 were due to repayments on credit accounts. When a retailer claims it maintains credit accounts to explain irregular SNAP transactions and data patterns, FNS requires a level of detail regarding the legitimacy of the claim. This is because retailers have often made false admissions of credit in an attempt to obtain a lesser penalty after committing more egregious violations such as trafficking. Credit transactions must be accounted for with substantive evidence such as the dates credit was extended, to whom, for what amount, and for what items. The Appellant did not provide such substantive evidence. Therefore, the Retailer Operations Division properly determined that the evidence submitted by the Appellant was insufficient to justify the irregular transactions cited in Charge Letter Attachment 2.

Appellant provided store photos and invoices in support of its contention that the store carries a large amount of groceries, deli products and produce. Appellant explains that it would be easy for a household to expend their benefits at the store. However, a government report on SNAP benefit redemption patterns¹ reveals that households most often redeem their benefits at supermarkets and supercenters with only four percent of all households never shopping in a supermarket. A small grocery might have larger than average SNAP transactions if no larger stores are available. However, the Retailer Operations Division determined that there are 167 SNAP authorized stores within a one-mile radius of Appellant. These include five large groceries, 13 supermarkets, and 13 super stores, all of which offer a greater variety and amount of staple food at comparable or better prices. Therefore, it would be highly unlikely that SNAP recipients would regularly purchase large amounts of merchandise at Appellant when larger, better stocked stores are readily available and in the vicinity of the Appellant firm.

Lastly, the Retailer Operations Division examined four households identified in the charge letter to analyze their shopping patterns at 2082 Madison Food Corp. compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at

¹ Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program, Mathematica Policy Research, by Laura Castner and Juliette Henke, for the U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, February 2011.

supermarkets and super stores. However, despite this access to better stocked stores, each of the four households conducted excessively large transactions at 2082 Madison Food Corp.

5 U.S.C. § 552 (b)(7)(E) of shopping at a supermarket or super store. There is no legitimate reason why households would conduct large transactions at Appellant when these household had just visited or planned to visit larger stores with a better selection of staple foods including fresh meat and produce and likely better prices.

In summary, Appellant's layout, business structure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. There is insufficient evidence that these irregular transactions are due to repayments on credit accounts. In addition to the irregularity of such high dollar transactions in comparison to similar stores, the limited availability of counter space for checking out and the lack of shopping carts and baskets support the Retailer Operations Division determination. It is not plausible that the store's customers are carrying large amounts of food around the store without the benefit of shopping carts and only a limited amount of shopping baskets. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of 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

Appellant submitted 164 pages of invoices to document its inventory to support the high SNAP redemption amounts. The Retailer Operations Division analyzed the invoices. Twelve invoices were excluded because they were outside of the review period. Additional invoices from American Food Corp. were also excluded because they were not itemized to indicate what eligible food products were purchased. Appellant is a Women, Infants and Children Program (WIC) authorized vendor as well and the Retailer Operations used Appellant's WIC redemptions during the review period in its analysis. The Retailer Operations Division determined that 20% of sales were possibly attributable to non-WIC and non-SNAP transactions. Given these estimates, the Retailer Operations Division determined that Appellant did have sufficient food purchases to justify its total monthly SNAP redemptions.

However, even if the invoices and store photos did show that the store purchased sufficient food inventory to account for the firm's SNAP redemption volume, sufficient inventory alone does not explain the suspicious patterns of SNAP transactions such as rapid and consecutive transactions by individuals during the same store visit or in a single day. Even the large dollar transactions would remain questionable if there were sufficient food inventory to support such transactions when consideration is made of there being no shopping carts or baskets and very little counter space to place food for purchase at the checkout counter.

Rule Abiding Business

Appellant contends that it has always been a rule abiding business and Appellant has always observed the rules and regulations of the SNAP program and under no circumstances would it violate them. Yet, the record shows that the retailer was sent a warning letter in April 2015 for selling ineligible non-food items in exchange for SNAP benefits. Regardless, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. There is no provision in the Act, regulations, or agency policy that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

Economic Hardship

Appellant states that the business will be forced to close if it is disqualified. It is recognized that economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations or internal agency policy directives for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty.

To excuse ownership from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that the firm will incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposition.

CIVIL MONEY PENALTY

Appellant timely requested consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i). However, the Appellant did not provide any information or evidence to establish its eligibility for a trafficking CMP. The SNAP regulations at 7 CFR § 278.6(b)(2)(ii) state, 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 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).***

Therefore, under the regulations at 7 CFR § 278.6(b)(2) Appellant is not eligible for a trafficking CMP 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. 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 Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. 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 occur as charged by the Retailer Operations Division. The determination to impose a permanent disqualification against Appellant is sustained.

The Retailer Operations Division also determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations. Under review, the denial of a trafficking CMP was deemed correct and proper.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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's owners resides 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, 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.

Mary Kate Karagiorgos
Administrative Review Officer

January 12, 2018