

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

Allen Market,

Appellant,

v.

Case Number: C0211083

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Allen Market, (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the program, 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(c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant by letter dated September 6, 2018.

AUTHORITY

7 U.S.C. § 2023 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 August 2, 2018, 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 January 2018 through June 2018. 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 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).

In correspondence dated August 8, 2018, Retailer Operations Division granted counsel a 10-calendar day extension in which to respond to the charge letter to August 23, 2018. Counsel was also informed that the time in which to request a civil money penalty in lieu of permanent disqualification and to provide the documentation to support such a request could not be extended.

In correspondence dated August 9, 2018, counsel responded to the charge letter and generally stated that it requested consideration for the imposition of a civil monetary penalty (CMP) in lieu of disqualification. Counsel stated that he believe Appellant complies with the criteria set of for consideration of a CMP found in Section 278.6(I) and other provisions of the regulations. Appellant indicated that the firm complies with Criteria's 1, 2, 3 and 4. No supporting documentation was provided with this response.

In subsequent correspondence dated August 20, 2018, Appellant, through counsel, provided an additional reply to the charge letter and generally stated that the data reflected on Attachments 1 and 2 reflect more of a computer anomaly rather than evidence of trafficking conducted by this firm. Counsel indicated that the firm has operated as a family owned business since 2000 and has never experienced a violation of SNAP regulations. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) operates a WIC facility and has not received any violations from the Commonwealth of Pennsylvania. The store is at least eight blocks from a supermarket, thus someone without a car or even with a car must go eight blocks to purchase the food. The traffic from the neighborhood includes a large number of families with young children. A can of formula is approximately \$30 and if someone were to buy four cans it would be \$120, easily exceeding the costs of the items reflected in Attachments 1 and 2. Only 5 U.S.C. § 552 (b)(6) & (b)(7)(C), his wife and occasionally his daughter are behind the counter of the store. They have no manager or part-time workers. The disqualification of the store and its inability to provide SNAP services to the neighborhood population would work a hardship onto families already in distressed economic condition.

After giving consideration to the Appellant's reply and evidence of the case, Retailer Operations Division issued a Determination letter dated September 6, 2018. The letter informed Appellant that it was permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also stated that Retailer Operations Division considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, Retailer Operations Division determined that Appellant was not eligible for the CMP because it failed to submit sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated September 13, 2018, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions 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

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) (c) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 CFR § 278.6(a) states, *inter alia*, that “FNS may disqualify any authorized retail food store...from further participation in the program 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(c) reads, in part, “*Review of Evidence.* 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)...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...”

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.” Trafficking is defined, in part, in 7 CFR § 271.2, as “the buying or selling of SNAP benefits for cash or consideration other than eligible food.”

7 CFR § 271.2 states in part that, “Eligible foods mean: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption.”

SUMMARY OF THE CHARGES

The charges on review were based on an analysis of SNAP electronic benefit transfer (EBT) transactions dated during the six-month period of January 2018 through June 2018. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from the accounts of individual SNAP households within a set time-period.
2. Excessively large purchase transactions were 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

The Appellant, through counsel, made the following summarized contentions in its response to the permanent disqualification letter issued by Retailer Operations Division, and its request for administrative review, in relevant part:

1. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and his family have operated this neighborhood convenience store business without incident or violation of either the SNAP or WIC program continuously since the year 2000.
2. They operate in a rather urban area in Allentown with a high percentage of people at the poverty level with many families headed by a single parent.
3. The nature of the termination significantly affects them, as this is a significant source of business and therefore personal income.
4. I would suggest a less drastic remedy that be imposed by the USDA, which will permit this store to operate without having an almost fatal effect on this family business as well as the neighborhood. I propose the following:
 - a) Reduce the penalty to a warning.
 - b) 5 U.S.C. § 552 (b)(6) & (b)(7)(C) 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and family member who work at the store be required to submit a high level of training with respect to the regulations and objectives of the SNAP program.
 - c) Posters or information sheets be required to be conspicuously posted in their store with respect to the obligations and limitations of the SNAP program.
 - d) The firm undergoes an enhanced inspection and a probation period enacted and enforced against them to monitor their business operations related to SNAP.
 - e) Disqualification be limited to 60-days in lieu of permanent disqualification, from September 7, 2018.

Appellant provided a copy of the following American Fact Finder reports, Census Tract 17 and 18: Poverty Status in the past 12 Months of Families, percentage of household receiving SNAP, a report of the Limited English Speaking Households, a report of the population and copies of its response to the charge letter. In subsequent correspondence dated October 19, 2018, Counsel provided a letter from Allen Market Employees and a petition containing 147 signatures as well as 41 additional customer comments.

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

ANALYSIS AND FINDINGS

The FNS authorized the business as a small grocery store on January 11, 2001. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a July 18, 2018, store visit to the business 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 EBT

transactions at Appellant that formed patterns indicative of trafficking. The firm review summary documented the following store size, description, and characteristics:

- One cash register and one POS device with a small counter area partially obstructed by other smaller items available for sale.
- Estimated to be approximately 600 square feet.
- No shopping baskets or carts available for customers.
- No adding machines or optical scanners were available at checkout. No specialty registers present.
- Store does not operate through a night window or plastic barrier with food stock behind the barrier.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- No unusual pricing structure such as ending most products with 00 cents and does not round transaction totals.
- No food stored in an area outside of public view
- No storage freezers or coolers and no food stored off site.
- Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
- Store does not take telephone or online orders and does not offer delivery
- Highest priced eligible food items were baby formula priced at \$17.49, \$18.19, \$21.99, and \$22.50
- Store stocks a substantial amount of non-food items such as but not limited to paper products, household products, tobacco products, clothing items, health and beauty aids, lottery tickets, and cleaning products.
- Store stocks minimal amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products. Minimal amount of fresh produce, no fresh meat or poultry.
- No kitchen/prepared food area and no hot foods sold for onsite consumption.
- Food is sold for on-site consumption with a microwave available for heating.
- No deli or prepared food section.
- No meat or seafood specials, bundles or fruit/vegetable boxes sold.
- Some shelves contained empty spaces or were sparsely stocked.

The issue for consideration is whether Retailer Operations Division has presented a convincing case that Appellant likely trafficked in SNAP benefits. 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.

Attachment 1 of the Charge Letter - Multiple transactions were made from the accounts of individual SNAP households within a set time-period

There were 17 sets of 42 SNAP transactions that met the parameters of this attachment. Multiple transactions conducted by the same household account within a set time-period is a method

which violating stores use to avoid the detection of single high dollar transactions that cannot be supported by the retailer's inventory and structure.

Appellant, through counsel, provided a copy of the following American Fact Finder reports: the Census Tract 17 and 18 Poverty Status in the past 12 Months of Families; percentage of household receiving SNAP; a report of the Limited English Speaking Households and a report of the population. With regard to this contention and information, the demographics of any particular area may indicate percentages of resident ages, income, household size, population and other census information and is not disputed. However, although census information may forecast a SNAP households shopping routine, it is important to note that Appellant's proximity to a low-income neighborhood simply provides access for recipients and does not prove that the recipients only shop at or spend their benefits at Appellant's store. The store visit report does not indicate any compelling reason for customers to consider Appellant's store a first choice destination to fulfill large purchases of food, or that they would have made relatively large multiple purchases at this store within a set time-period. Additionally, being located in a low-income neighborhood does not adequately explain or justify the irregular and suspicious transaction patterns in the charge letter.

The record reflects that SNAP households are also traveling to numerous other surrounding stores and not shopping exclusively at Appellant's store. These other retailers are larger supermarkets and superstores and are well equipped and properly stocked to supply the needs of the SNAP recipients. However, the record reflects that Appellant's average SNAP transaction in the Attachment was 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per transaction, which upon review exceeded the average SNAP transaction for a super store in Lehigh County Pennsylvania during the review period. As Appellant's stock is limited, it is not credible that its average SNAP transactions would exceed that of a super store.

It is important to note that it is not uncommon to see back-to-back purchases in the case of a forgotten item or impulse purchase of a nominal amount. However, in many of the Attachment 1 transactions, the subsequent transaction(s) were for amounts that exceed any nominal, afterthought purchase. In fact, in nearly 65% of the 17 transaction sets (11), a follow up transaction exceeded the prior transaction in the set. While there are legitimate reasons why a SNAP household may shop at a given store multiple times in a short time frame, the repetitive transactions cited in Attachment 1 present patterns of activity that appear inconsistent with the stores, characteristics and available stock and as a result is a strong indicator that trafficking is likely occurring.

It is also important to note that the record reflects that an anonymous complaint was submitted against Appellant stating that the store gives money for food stamps and takes a percentage of the exchange. The complainant indicated that this is an ongoing business practice.

In conclusion, it is therefore more likely true than not true that the irregular transactions cited in the charge letter Attachment 1 are due to trafficking in SNAP benefits.

Attachment 2 of the Charge Letter - Excessively large purchase transactions were made from recipient accounts

There were 104 SNAP transactions that met the parameters of this attachment. Based on the results of the contracted store visit, the large transaction amounts are not consistent with the store's inventory of low priced foods. The firm does not offer food in bulk or any ethnic or specialty foods that sell for a high price. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

Appellant, through counsel, contends that Appellant participates in WIC and a can of formula is approximately \$30. If someone were to buy four cans, it would be \$120, easily exceeding the costs of the items reflected in Attachments 1 and 2. With regard to this contention, households with small children who are eligible for SNAP benefits are also eligible for WIC benefits. The WIC Program provides participants with vouchers to obtain free baby formula, as well as other products for lactating women, infants and children, from participating vendors. Allen Market participates in the WIC Program and takes in WIC vouchers at an average monthly value of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, substantiating that WIC vouchers are, in fact, being redeemed in the store. Therefore, if baby formula were being purchased in large quantities, it would be more reasonable for them to use their WIC vouchers to obtain free formula than to pay for formula using their SNAP benefits.

Retailer Operations also conducted an analysis of the shopping habits of four of the households identified in the charge letter. This analysis concluded that these households also shopped at other area grocery stores including full-line supermarkets and superstores that offer a much larger quantity and variety of eligible food items for likely better prices either on the same day or within days of visiting Appellant's firm. This again indicates that lack of access to other stores is not at issue. However, despite this access to large supermarkets and superstores, these households consistently conducted much higher transactions at the Appellant firm than at better-stocked supermarkets/superstores in and around the Lehigh County area of Pennsylvania. This is another strong trafficking indicator.

Furthermore, of the 44 households revealed in the charge letter, 27 (more than 61%) completed a transaction at a large grocery store, supermarket, or superstore on the same day they completed a questionable transaction at Appellant's firm. If we extend this to within 1 day of the questionable transaction at Appellant, 34 of the 44 households (or more than 77%) completed a transactions at a large grocery store, supermarket, or super store. This would imply that transportation was not an issue for the majority of the households in the charge letter.

Appellant, through counsel, contends that the penalty be reduced to a warning or limited to 60-days in lieu of permanent disqualification. With regard to these contentions, although the firm was being investigated for six months, 7 CFR §278.6(d)(2)&(3) of the SNAP regulations provides that "The FNS office making a disqualification or penalty determination ... shall consider ... any prior action ... to warn the firm about the possibility that violations are occurring..." However, that citation requires only that the Retailer Operations Division consider any prior warnings when determining a sanction. It does not require the Retailer Operations Division to give such warnings. FNS representatives visited the store in month following the

six-month focus period to observe the nature and scope of the firm's operation, stock and facilities to determine if there were any justifiable explanations, for SNAP transactions of the firm, that formed patterns indicative of trafficking. They found none. Even upon charging the firm with trafficking, the Retailer Operations Division had not yet made a final determination of violation and even afforded Appellant the opportunity to reply to the charges in order to provide explanations that would justify the questionable transactions as being other than the result of trafficking. Only after consideration of a number of factors, including Appellant's reply to the charges, did the Retailer Operations Division make a final determination, through a preponderance of evidence, that questionable transactions were, in fact, the result of trafficking.

Additionally, the Act, at §2021, does not allow for discretion in determining sanctions for trafficking and is quite specific in its requirement that "disqualification ... shall be permanent upon ... the first occasion of a disqualification based on ... trafficking ... by a retail food store." In keeping with this legislative mandate, 7 CFR §278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. Therefore, permanent disqualification is warranted for any firm, which is determined to have trafficked in SNAP benefits. Furthermore, 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.

The transaction data and overall firm record convincingly demonstrate repetitive patterns of unusual, irregular, and inexplicable SNAP activity for this type of firm indicative of trafficking. Once Retailer Operations Division established the convincing case against Appellant, ownership bears the burden of proving, by a preponderance of the evidence, that the administrative action 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. If this is not demonstrated, the case is to be sustained.

As noted, 7 CFR § 278.6(a) states 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 inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Retailer Operations Division has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns in two attachments of EBT transaction data, the inadequacy of the firm's eligible food stock as observed and recorded during the onsite visit to support such large transactions, the lack of evidence of invoices of foods in inventory to cover SNAP redemption totals for the review months, the lack of explanation for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant, and the irregular SNAP transaction data of Appellant as compared to other small grocery stores in the State.

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the charge letter. Therefore, based on this empirical data, and in the absence of evidence for the legitimacy 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. While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence in the record.

The purpose of the administrative review process is to ensure that firms aggrieved by Retailer Operations Division' adverse actions have the opportunity to have their position fairly considered by an impartial review authority prior to that adverse action becoming final. Appellant has been duly given, and has taken the opportunity to present to USDA through the administrative review process whatever evidence and information it deems pertinent in support of its position that Retailer Operations Division' adverse action should be reversed. Therefore, any evidence and information that Appellant presented to Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to Appellant's right to a fair and thorough review.

CIVIL MONEY PENALTY

The Appellant, through counsel, contends that it complies with the criteria set for consideration of a CMP found in Section 278.6(I) and other provisions of the regulations. Appellant indicated that the firm complies with Criteria's 1, 2, 3 and 4. With regard to this contention, Appellant did not submit any additional documentation in support of its request for a TCMP in lieu of a permanent disqualification. Because Appellant, through counsel, only submitted a statement that they met the criterion and wanted to be considered for the TCMP rather than be disqualified, this is considered insufficient evidence to demonstrate that the store had established and implemented an effective compliance policy and training program prior to the SNAP violations in this case. Therefore, criteria 1, 2 and 3 are not met.

Criterion 4: Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations

With no evidence to the contrary and based on Appellant's allegations, it is concluded that this is the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of a trafficking violation that occurred at the subject firm. As such, criteria 4 is met. Appellant, through counsel, did not submit sufficient documentation to show that it met all four criteria required by 7 CFR § 278.6(i). Therefore, Appellant is ineligible for a Trafficking Civil Money Penalty in lieu of permanent disqualification and

Retailer Operations Division correctly determined that Appellant was not eligible for a trafficking CMP as set forth in the SNAP regulations.

CONCLUSION

Ownership has not provided sufficient evidence to rebut the convincing case that Appellant most likely trafficked in SNAP benefits. As such, the SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have trafficked, which is that FNS shall disqualify the firm permanently.

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Allen Market from participation in the SNAP. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Therefore, based on a review of all the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged by Retailer Operations Division. Based on the discussion herein, the determination to impose a permanent disqualification against Allen Market is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to 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 (FOIA), 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.

Monique Brooks
Administrative Review Officer

March 19, 2019