

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

Athemy Inc,

Appellant,

v.

Case Number: C0209173

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Athemy Inc., (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 27, 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 July 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 November 2017 through April 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 July 9, 2018, Appellant, through counsel, replied to the charge letter and generally stated that, there is no evidence of trafficking contained in the letter. For Item#1: My client sells large amounts of Red Bull soda, which is a permitted SNAP item, for \$2.00 per can. The purchases of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) other even numbers are for Red Bull. Since these transactions are exempt from Connecticut sales tax the sales all end in round numbers. My client also sells bottles of juice for \$1.00, which would also result in round number transactions. Customers' often choose to round off their transactions for their convenience. The customer can pay whatever extra amount is due in cash and still easily keep track of the balance on their SNAP card. For Item#2: Customers return frequently to the store, sometimes on the same day after they have made an initial purchase.

There is no parking available at the store and only limited street parking. By my client's estimate 90 percent of the customers are pedestrians who live close by so multiple daily trips to the store are normal. Customers are also effectively limited to purchasing what they can carry home themselves on any individual visit to the store. For Item#3: Customers purchase as many items as they can while they have credit on their EBT cards at the beginning of the month. Prior to March 2018 my client sold meat which customers would purchase in bulk at the beginning of the month. Common staples such as bags of rice are also purchased in quantity at the beginning of the month. There is no evidence of undercover cash exchanges or purchases of prohibited items. Mere suspicion, explained or unexplained, cannot serve as the basis for a disqualification of trafficking. There has not been any previous action taken by the FNS to warn the store that violations may be occurring. Appellant, through counsel, requested the issuance of a warning letter in lieu of the disqualification. The Athemy Inc. Market has an effective compliance policy. The policy is to allow only authorized items to be purchased and to not exchange cash for food stamp credits. The policy has been in operation during all relevant time periods in this matter.

Appellant's reply, through counsel, also include a FOIA request, which was processed by Retailer Operations Division on July 30, 2018. In correspondence dated August 7, 2018, the FOIA office notified counsel of his outstanding fee balance from previous FOIA requests and informed him that the balance must be paid in full by August 31, 2018. As of September 4, 2018, counsel did not pay the balance and the FOIA office notified counsel via a September 4, 2018 email that the FOIA request for Athemy Inc. had been closed due to nonpayment of the fee balance.

In a September 19, 2018, telephone conversation; counsel requested an extension in which to reply to respond to the charge letter dated July 2, 2018. Retailer Operations Division informed Appellant that meat invoices were needed in support of the July 9, 2018 letter, which indicated that meat was sold in bulk prior to March 2018. The time to respond was extended to September 24, 2018. The record reflects that on two occasions, counsel failed to provide requested documentation in a timely manner.

Retailer Operations Division issued a Determination letter dated September 27, 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 October 6, 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 ...**” (*Emphasis added*)

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 November 2017 through April 2018. This involved three patterns of EBT transaction characteristics indicative of trafficking:

1. Unusual number of transactions ending in the same cents value.
2. Multiple transactions were made from the accounts of individual SNAP households within a set time period.
3. 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. There is nothing in the USDA decision that addresses the fact that Section 274.12(e)(4)(f)(1) of the SNAP regulations specifically authorizes an unlimited number of EBT transactions that the USDA claims are improper in Item #2 of the February 20, 2014 letter.
2. There is nothing in the USDA regulations that prohibits transactions that end in a same cents value, or prohibits any particular amount, type or size of an EBT transactions.
3. My client sells large amounts of Red Bull soda, which is a permitted SNAP item, for \$2.00 per can. The purchases of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) other even numbers are for Red Bull. Since these transactions are exempt from Connecticut sales tax the sales all end in round numbers. My client also sells bottles of juice for \$1.00, which would also result in round number transactions. Customers' often choose to round off their transactions for their convenience. The customer can pay whatever extra amount is due in cash and still easily keep track of the balance on their SNAP card.
4. Customers return frequently to the store, sometimes on the same day after they have made an initial purchase. There is no parking available at the store and only limited street parking. By my client's estimate 90 percent of the customers are pedestrians who live close by so multiple daily trips to the store are normal. Customers are also effectively limited to purchasing what they can carry home themselves on any individual visit to the store.
5. Customers purchase as many items as they can while they have credit on their EBT cards at the beginning of the month. Prior to March 2018 my client sold met which customers would purchase in bulk at the beginning of the month. Common staples such as bags of rice are also purchased in quantity at the beginning of the month.

With its review request, Appellant 17 invoices for meat purchases at Athemy Inc., from November 2017 to April 2018. 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 July 20, 2017. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a May 12, 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:

- Estimated to be approximately 1800 square feet.
- Optical Scanners available at checkout. One hand basket and one shopping card available.
- Store does not operate through a night video or plastic barrier and no evidence of wholesale business.
- Store does not have an unusual pricing structure such as most items ending in 00 cents. Store does not round-off totals.
- One cash register and one POS device with a small counter area partially obstructed by other smaller items available for sale. No specialty registers.
- Food stored in an area outside of public view, which is approximately 500 square feet.
- No storage freezers or coolers and not food stored off site.
- Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
- Store takes telephone orders but does not offer delivery
- Highest priced eligible food items were Jumbo Shrimp (\$14.99), Large Shrimp (\$9.99), Red Bull by Case (\$48.00) and Iberia Rice (\$6.79).
- Store stocks a significant amount of non-food items such as but not limited to paper products, household products, tobacco products, alcohol products, health and beauty aids, lottery tickets, and cleaning products.
- Store stocks ample amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products. No fresh meat and some frozen bagged cooked shrimp.
- Store has a kitchen/prepared food area with hot foods sold for onsite consumption. Microwave available.
- Store has a deli or prepared food section with prices posted for meats/cheese. Stock is not used in preparation of food.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.

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 – There were an unusual number of transactions ending in a same cents value.

There were 236 SNAP transactions that met the parameters of this attachment. When such repetitive patterns are unsupported by special pricing structures, they are a strong indicator of trafficking in SNAP benefits.

The store visit documentation indicates that Appellant does not have a special pricing structure that would account for the percentage of transactions that ended in 00 cents. When there are disproportionate amounts of transactions ending in same cent value it appears the transactions are contrived and absent any compelling rationale, to the contrary it is a strong indicator of trafficking. Especially when item prices end with a standard *9, as was evidenced in photographs taken during the store visit, it is implausible that several of these relatively inexpensive items purchased together would routinely total to a purchase amount ending in 00 cents. In addition a store that is rounding prices up or down or an even value would not have any transactions ending in odd values.

It is not normal shopping behavior for an individual with limited financial resources, such as SNAP recipients, to spend so much of their limited income on drinks. It is not plausible that most of the recipients are spending virtually all of their available SNAP balance on Red Bull and juice according to the attorney, which seems to be highly unlikely.

Please note that during the store site visit, the manager stated that the store does not round transactions to a “00” cent value, therefore how is it that customers are requesting to round off purchases. Furthermore, the EBT card is like a credit card and there is no need for recipients to worry about a cent value or to round purchases for the purpose of budgeting benefits. Additionally, when rounding prices either the SNAP recipient will pay more for a purchase rounded up or the retailer will lose money if purchases are consistently rounded down to an even amount. Also, for the purpose of keeping track of any remaining balance, every SNAP transaction receipt has recipients ending balance printed on the receipt or the recipient can request a “balance inquiry” at any time to determine the balance.

While some of the transactions in this Attachment may have been for legitimate staple food purchases, particularly those in the lower dollar amounts, there is insufficient evidence that these repeating same cent transactions are legitimate. When many transactions end in a same cents amount, it appears that these transaction amounts were contrived and therefore, in the absence of compelling evidence to the contrary, are suggestive of trafficking. As such, the transactions in Attachment 1 have not been adequately documented as legitimate and therefore do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

Based on the analysis above, it appears that the transactions cited in the charge letter are contrived and therefore, in the absence of plausible evidence to the contrary, are likely the result of trafficking in SNAP benefits.

Attachment 2 of the Charge Letter - Multiple transactions were made from individual accounts in unusually short timeframes.

During the review period, there were 19 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, contends that customers return frequently to the store, sometimes on the same day after they have made an initial purchase. There is no parking available at the store and only limited street parking. By my client's estimate 90 percent of the customers are pedestrians who live close by so multiple daily trips to the store are normal. Customers are also effectively limited to purchasing what they can carry home themselves on any individual visit to the store.

With regards to these contentions, it must be noted that SNAP households have no limits on the number of times they may use their SNAP cards or how much eligible food they may purchase. The transactions in this Attachment do not contain the characteristics associated with a recipient purchasing forgotten items a short time after checking out or households returning to purchase a forgotten item or two. It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a set time period. For example, mothers may shop and later send a child to the store to pick-up a forgotten item nonetheless; it is unusual that the second transaction amount would be for more than a nominal amount. The SNAP transactions in Attachment 2 of the Charge letter are not consistent with shopping patterns of someone who may have forgotten an item or two during the first trip.

Though it may be true that some SNAP recipients do not have vehicles, and may live close to the store, the assertion that they make multiple trips in order to get the goods they need because they cannot carry them does not provide evidentiary proof if it cannot be corroborated with register receipts to show the purchases of food. Additionally, the record reflects that there are 17 authorized stores within a 1 mile radius of Appellant's store, including a supermarket, superstore and medium grocery stores. SNAP benefits are intended to supplement the food budget for households whose net income is near or below the Federal Poverty Level. It is difficult to believe customers who must rely on SNAP benefits to make ends meet prefer to pay higher prices and spend considerable amounts of their benefits at a small grocery store or on large amounts of drinks like Red Bull.

In conclusion, it is therefore more likely true than not true that the irregular transactions cited in the charge letter Attachment 2 are due to trafficking in SNAP benefits.

Attachment 3 of the Charge Letter - Excessively large purchase transactions were made from recipient accounts.

There were 96 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, provided 17 invoices for meat purchases from November 2017 through April 2018 and contends that during the review period SNAP recipients purchased meat in bulk. With regard to Appellant's contention, a review of the invoices provided indicates that fresh meat only comprised a small percentage of Appellant's SNAP redemptions as indicated in the table below. Counsel contends that fresh meat purchases in bulk, during the beginning of the month support the Attachment 3 transactions. Although meat purchases could have accounted for some of the transactions in Attachment 3, it is important to note that the allowable purchases **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** were considerably less than the total amount of redemptions in this Attachment. Additionally, if SNAP recipients were budgeting benefits or even purchasing large amounts of Red Bull or drinks then it would be unlikely that they were purchasing large quantities of meat as well. Therefore, the meat invoices provided do not adequately explain all of the SNAP transactions in Attachment 3 of the charge letter. It is also questionable as to why, on March 1, 2018, Appellant would have stopped the practice of selling fresh meat in bulk if purchases were substantial and advantageous to the business.

5 U.S.C. § 552 (b)(7)(E)

Retailer Operations Division also conducted an analysis of the shopping habits of five 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 and superstores in and around the Hartford County area of Connecticut. This is another strong trafficking indicator.

Based on this empirical data, and in the absence of sufficient evidence as to the legitimacy of such transactions, a conclusion can be drawn, through a preponderance of evidence that the "unusual, irregular, and inexplicable" transactions and patterns cited in the charge letter evidence trafficking as the most likely explanation. In this case, ownership did not provide sufficient evidence to legitimize Appellant's transaction data as outlined in the Attachments. Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence that the store was trafficking and concluded, through a preponderance of evidence, that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

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 a 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 three 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 letter of charges. 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's 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

Appellant was notified in the charge letter dated July 2, 2019, that it had 10 calendar days upon receipt of the charge letter to provide required documentation in order to be considered for the trafficking CMP. Appellant failed to provide Retailer Operations Division with the required

documentation to be considered for a trafficking CMP in lieu of disqualification. Therefore, 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 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 Athemy Inc. 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 Athemy Inc. 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

May 9, 2019