

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

Bangkoknoy Thai Grocery,

Appellant,

v.

Case Number: C0203786

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 a permanent disqualification of Bangkoknoy Thai Grocery (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the 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 Bangkoknoy Thai Grocery.

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 based on an analysis of EBT transaction data from May 2017 through September 2017. This involved the following transaction patterns which are common trafficking indicators:

- There were multiple transactions made from individual household benefit accounts within unusually short timeframes.
- Excessively large purchase transactions were made from recipient accounts.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Bangkoknoy Thai Grocery for SNAP participation as a combination grocery/other store (eligible under Criterion B) on July 28, 2016. In a letter dated November 30, 2017, 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 May 2017 and September 2017. 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 within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In four telephone calls between December 4, 2017, and December 18, 2017, the Appellant, through its bookkeeper, responded to the charge letter, asking what evidence was needed to explain the transactions listed in the charge letter. The Appellant also twice asked for an extension of time to provide information. During the December 18, 2017, phone call, the Appellant's bookkeeper explained that an "agent" went to the store and took some of the firm's paperwork as part of a fraud investigation. Because of this, the Retailer Operations Division granted an additional extension to January 2, 2018. By January 5, 2018, no additional information had been provided.

After considering the Appellant's responses and further reviewing the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated January 5, 2018. 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 that a CMP was not appropriate in this case 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 January 17, 2018, the Appellant, through its bookkeeper, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted. On February 12, 2018, the Appellant also submitted 101 pages of EBT receipts from the review period.

It should be noted that on February 8, 2018, the administrative review officer received an e-mail from **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, an attorney who indicated that he had been hired to represent the firm in this matter. Appellant's counsel stated that officials from the Tulare County District Attorney's office "raided" the store and took numerous items of evidence which counsel claimed would show the Appellant's innocence of the trafficking charges. On February 20, 2018, Appellant's counsel requested a 30-day extension to gather information in support of its request for review. An extension was granted to March 23, 2018, but as of the date of this decision, no additional information has been submitted.

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....** [Emphasis added.]

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 made the following summarized contentions in its request for administrative review, in relevant part:

- The charge letter stated that the firm had 10 days to respond to the allegations of trafficking, but before the 10 days were up, someone sent out officers and investigators to the store. They ransacked the store, forced customers to leave, took the Appellant owners' cell phones, ripped off cashier receipts, broke the cash register, and took papers the owners needed to do their 4th quarter sales tax returns. They also threw paperwork all over the ground and treated the owner like a criminal.
- The owners had no part of what they were being accused of.

- The Appellant asked for an extension to find proof that the firm did not do what it is accused of, but the people who raided the store took part of the Appellant's proof with them.

In support of its request for review, the Appellant submitted 101 pages of EBT receipts (between one and eight receipts per page) from the five-month review period. The receipts were provided without further explanation.

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 primary issue for consideration in a case based on suspicious SNAP redemption data is whether or not the Retailer Operations Division adequately established that the Appellant firm engaged in the violation of trafficking. In other words, did the Retailer Operations Division, through a preponderance of the evidence, establish that it is more likely true than not true that the irregular and unusual transactions cited in the charge letter were the result of trafficking?

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 transactions, but also information obtained from a September 7, 2017, 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:

- Bangkoknoy Thai Grocery is a small grocery store/restaurant, roughly 2,100 square feet in size, operating in Visalia, Tulare County, California.
- At the time of the contractor's visit, the firm did not have any shopping carts, but did have approximately 11 handheld shopping baskets for customer use.
- The store visit photographs show two cash registers and agency records reflect the use of one EBT point-of-sale terminal for SNAP purchases.
- The store does not appear to use optical scanners to process transactions.
- The store's staple food stock is sufficient in three of the four staple food categories. Because the firm carries very few dairy items, it was authorized for SNAP participation under Criterion B (see 7 CFR § 278.1(b)(1)). The store's inventory of staple food appears to be typical of a small Asian grocery store.
- The report indicates that the store sells SNAP-eligible, non-staple accessory food items, such as carbonated and uncarbonated drinks, snacks, candy, and condiments. The store also sells ineligible, nonfood items, including tobacco products, alcoholic beverages, and other miscellaneous household merchandise.

- Additionally, the store sells hot prepared food items, particularly soup. The firm has five tables for in-store dining, and seating for up to 20 customers.
- The checkout area consists of two small countertops. One cash register appears to be primarily for the purchase of hot meals. The EBT machine is located at the larger of the two countertops, which is surrounded by shopping baskets and boxes of candy. The constricted checkout area is not suitable for conducting large or rapid transactions as there is little space on the counter to place more than a few items at a time and little room for customers to maneuver with large amounts of groceries.
- There is no indication from the store visit report that the firm has a special pricing structure, but most prices appear to end in 9, such as \$1.59, \$3.29, etc. The report also states that the store does not round transaction totals up or down at checkout.
- There is no indication from the report that the firm has special food packages for sale or that items are sold in bulk. The firm does, however, have a few expensive items, including a 100-pound bag of rice that sells for \$65.99; a 50-pound bag of rice for \$38.99; and a 25-pound bag of rice for \$19.99. Most other items appear to sell for less than \$5.00.

The available inventory of SNAP-eligible food at the time of the store visit showed food stock that would be typical of a small Asian grocery store, where households normally purchase a limited number of ethnic food items to supplement their dietary needs. Based on the absence of shopping carts and the limited variety of foods, there was little indication that SNAP households would be inclined to regularly visit the store to purchase large quantities of groceries. 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 individual benefit accounts in unusually short time frames. This attachment lists 260 sets of transactions (630 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits, a 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E).

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Attachment 1 also lists a large number of strangely repetitive amounts. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

That these sorts of repetitive transactions occurred at a small store like Bangkoknoy Thai Grocery is highly unusual and a strong indication that 5 U.S.C. § 552 (b)(7)(E).

Unfortunately, the Appellant has not offered any kind of evidence that would show that the transactions listed in Attachment 1 were legitimate purchases of eligible food. The 101 pages of EBT receipts offer no insight beyond what was already known to the Retailer Operations Division through its electronic monitoring of transactions. Without relevant evidence to counter the allegations of trafficking, this review has little option but to conclude that trafficking was likely occurring.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 255 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These large transactions are not consistent with a combination grocery/other store in the state of California. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a combination grocery/other store in California was \$17.00. In Tulare County, the average was even lower, at \$13.42 per transaction. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

Given that the Appellant firm does have a moderate inventory of staple foods, including some expensive bags of rice, and given that the firm does have a handful of shopping baskets for customer use, it is possible that there would be an occasional purchase where the transaction amount is high. As such, there may well be some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 2. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from nearby, similar-sized competitors. The substantial number of high-dollar transactions in a five-month period calls into question the legitimacy of these transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering how many items it would take to add up to **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** or more, and considering the store's characteristics, this review finds it probable that trafficking violations were occurring.

Unfortunately, the Appellant has not offered any kind of evidence, such as itemized cash register receipts, that would prove that the transactions listed in Attachment 2 were legitimate purchases of eligible food.

The transactions identified in the charge letter are highly irregular and substantially different from comparable stores in the area. As noted earlier, 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. Without relevant evidence from the Appellant, it is reasonable for this review to conclude that the transactions listed in the charge letter were, more likely than not, the result of trafficking violations committed by the Appellant.

Based on the above analysis, it is the determination of this review that Bangkoknoy Thai Grocery likely trafficked in SNAP benefits during the review period. The attachments furnished with the charge letter adequately identify the irregular patterns of SNAP transactions which indicate that trafficking was likely taking place. Conversely, the Appellant has failed to provide any explanation as to why such patterns might exist. As there are multiple unexplained patterns of irregular transactions, the case of trafficking is convincing.

Execution of a Search Warrant

The Appellant, through counsel, has stated that after receipt of the charge letter, the firm was subject to a search of the premises. This search, which Appellant's counsel stated was conducted by the Tulare County District Attorney's office, resulted in the removal of paperwork and

equipment. The Appellant has argued that it was unaware of any reason why such a raid might be conducted and contended that the evidence of its innocence in this trafficking case was taken during the raid.

Unfortunately, these claims have no bearing on the case at hand. FNS was neither aware of the raid nor had any involvement in it. The search of the business appears to be wholly unrelated to the trafficking allegations against the firm. It should be noted that both the Retailer Operations Division and the administrative review officer offered multiple extensions of time for the Appellant to gather any evidence to support its claim that it was not engaged in SNAP trafficking violations. Other than the submission of 101 pages of EBT receipts, the Appellant has offered no explanation or evidence to prove that it had not committed trafficking violations. As noted earlier, the EBT receipts do not offer any insight, as all of the information on the receipts was already known to FNS.

Accordingly, the claim that the firm was subjected to an unannounced raid on the business does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Civil Money Penalty

As noted earlier, the Retailer Operations Division determined that the 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 the firm had established and implemented an effective compliance policy and training program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a civil money penalty to be considered, a firm must not only notify FNS that it desires the agency to consider a CMP in lieu of permanent disqualification, but it must also submit appropriate documentation within designated timeframes. In this case, the Appellant did not request a civil money penalty in its reply to the charge letter and it provided no evidence which would indicate that the firm had a compliance policy or training program of any kind. Therefore, in accordance with 7 CFR § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking cannot be granted 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 Bangkoknoy Thai Grocery from SNAP participation. This data provided ample 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, Bangkoknoy Thai Grocery, under the ownership **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, 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.

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

July 10, 2018