

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

Best Market & Deli Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0203083

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 a **Permanent Disqualification** from participation as an authorized retailer in the Supplemental Nutrition Assistance Program¹ was properly imposed against Best Market & Deli Inc (hereinafter “Best Market & Deli Inc” and/or “Appellant”) and its owner of record, by the Retailer Operations Division of the FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a Permanent Disqualification against Best Market & Deli Inc in a letter dated October 31, 2017.

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.

¹ Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

CASE CHRONOLOGY

In a letter dated October 11, 2017, the Retailer Operations Division informed Appellant that it was being charged with violation of the terms and conditions of the SNAP regulations, 7 CFR §§ 270-282, based on Electronic Benefit Transaction (EBT) SNAP benefit transactions considered to “establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm.”

The Retailer Operations Division record indicates Appellant responded both telephonically and in writing. Following documented consideration of Appellant’s responses the Retailer Operations Division advised Appellant of a final determination of permanent disqualification from participation in the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1) for trafficking violations, in a letter dated October 31, 2017, documented to have been delivered to Appellant on November 1, 2017.

The determination letter also advised that the 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. The Retailer Operations Division determined that the Appellant was not eligible for the trafficking CMP because the Appellant did not timely submit evidence to demonstrate the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter shipped on November 3, 2017, received in the offices of the Administrative Review Branch on November 7, 2017, Appellant submitted an appeal of the Retailer Operations Division’s assessment, requesting an administrative review of the action. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an 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 AND REGULATIONS

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)², 7 U.S.C. § 2021 and promulgated through regulation under Title 7 of the Code of Federal Regulations (CFR),³ part 278. In particular 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.

² Effective October 1, 2008, the *Food Stamp Act of 1977* was superseded by the *Food and Nutrition Act of 2008*, as amended through P.L. 110-246.

³ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

7 U.S.C. § 2021(b)(3)(B) states, in relevant 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(e)(1)(i) states, in relevant part:

“FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.”

7 CFR § 271.2(1) defines trafficking, in relevant part:

“ ... the buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits ... 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 relevant 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(a) states, in relevant part:

“FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food & 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) states, in relevant 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...”

7 CFR § 278.6(b)(2)(ii), states, in relevant 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).**” [Emphasis added]

7 CFR § 278.6(i), states, in relevant part:

“FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in §271.2 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.” [Emphasis added]

SUMMARY OF THE CHARGES

The Retailer Operations Division materials and the charge letter dated October 11, 2017, reveal that charges were based on an analysis of EBT SNAP benefit transaction data during the six (6) month period of April 2017 through September 2017 and involved three (3) patterns of EBT transaction characteristics indicative of trafficking as follow:

- Attachment #1 lists multiple SNAP EBT transactions made from individual benefit accounts in unusually short timeframes.
- Attachment #2 lists SNAP EBT transactions in which the majority or all of individual recipient benefits were exhausted in unusually short period of time.
- Attachment #3 lists excessively large purchase transactions made from the accounts of SNAP recipients.

APPELLANT’S CONTENTIONS

In the letter shipped on November 3, 2017 Appellant, contends that:

- Appellant has complied with all the requests made by the Retailer Operations Division and it does not believe it was given a chance to prove its position;
- Ownership has worked hard to build business; and,
- Appellant did not intentionally or willfully commit any SNAP violations.

In a subsequent letter received on December 9, 2017, Appellant provided an unsworn affidavit stating that:

- Appellant has been honestly run and ownership has never intentionally violated any SNAP law or regulation;

- Ownership has cooperated in every way requested with the Retailer Operations Division by providing receipts and invoices; and,
- A loss of SNAP will result in the loss of the business.

The preceding represents only a brief summary of Appellant's contentions 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 herein.

ANALYSIS AND FINDINGS

On review, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed.

With regards to Appellant's contentions in explanation of questionable transactions, the issue in review is whether there is sufficient evidence, through a preponderance of that evidence, that it is more likely true than not true that the questionable transactions were the result of trafficking.

Appellant Operations:

The record reveals that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a store visit conducted by FNS contracted personnel on September 27, 2017. The materials from the September 27, 2017 visit describe the nature and scope of Appellant's operation, as well as the stock and facilities. The visit was authorized by a self-identified manager, and resulted in materials reflecting observations made; and, responses received, from the manager during the store visit.

The record indicates that Appellant was authorized in SNAP effective February 21, 2013 as a convenience store, in accordance with FNS definitions.

Appellant is reported to be open from 6AM until midnight on Monday through Friday; and, from 7AM until 1AM on Saturday and Sunday. Appellant is reported to be operating out of a commercial space of approximately 1700 square feet, as reported by store personnel.

Sketch of store provided for reference below:

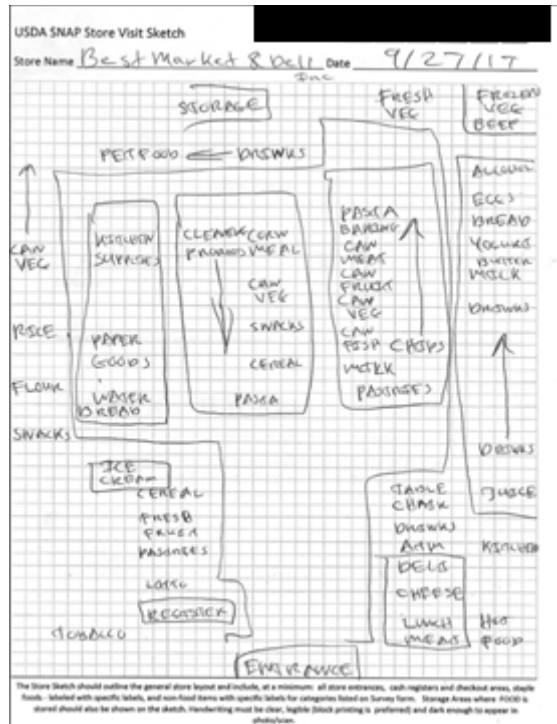


Photo # 8 – Store Sketch

The deli area/kitchen (bottom right on sketch) is shown to be used for preparation of the made-to-order sandwiches and hot food as advertised (menu board photos below). An out of public view storage was declared and depicted in the store visit photographs to include refrigerated back stock of milk and drinks.

The store visit materials describe Best Market & Deli Inc to be operating with one (1) general use cash register that is not equipped with scanning technology; and, one (1) point-of-sale (POS) terminal. The checkout operation is seen in the certified store visit photographs to include limited space for placement of products presented for purchase, further hampered by merchandise and lottery displays.

The store visit materials document that there are four (4) hand-held shopping baskets; and no shopping carts available to support the delivery of purchases to the counter/checkout area for the completion of merchandise price totaling and payment. Notably the four (4) shopping baskets are depicted in the store photographs to be placed on an upper level shelf that is not accessible to the public. (Photo #27 below)

As indicated Appellant’s operation includes a deli advertising cold and hot made-to-order sandwiches together with nine (9) deli meat options and seven (7) deli cheeses sold by weight..

Certified photographs from the September 27, 2017, contracted store visit are presented below:



Photo # 2 – Storefront



Photo # 22 – Checkout Counter (right)



Photo # 15 – Food Preparation Area



Photo # 35 – Deli meats/cheeses & sandwich menu



Photo # 22 – Prepared Chicken Menu Board



Photo #27 – Shopping baskets out of public reach

The inventory checklist completed at the time of the September 27, 2017 store visit identifies food varieties available in each of the four (4) staple food groups as follows:

- Five (5) varieties of dairy products including one (1) unit of butter/margarine; six (6) to 20 units of ice cream and sour cream/yogurt; and more than 20 units of cheese and milk.
- Twelve (12) varieties of fruits and vegetables with four (4) of those varieties available in units of 20 or more. Seven of the varieties were noted to be available in stocking units of between six (6) and 20. Notably the only fresh frozen or refrigerated foods include fruit juices; a few onions; a limited number of bags of potatoes; three (3) bell peppers; and a few apples.
- Eight (8) varieties of breads and cereals were identified with three (3) units of corn meal/grits; rice and flour in units of six (6) to 20; and, the remaining five (5) varieties available in units of 20 or more consisting of bread, cakes/muffins, breakfast cereal, pasta, and snacks.
- Four (4) varieties of meat/poultry/fish staple foods are identified in the store visit materials with six (6) to 20 units of canned meats and eggs; and more than 20 units of deli and canned meats and fish. The deli meats show in the deli case are advertised as sold both by weight and used in the preparation of hot and cold sandwiches as described in the menu boards positioned above the deli area.

The four (4) most expensive items available for sale at the time of the store visit were identified to include:

- Rice in 10 pound bags selling @ \$13.49;
- Specialty flour selling in 20 pound bags @ \$14;
- Deli turkey selling @ \$7.99 per pound; and,
- Packages of cashews in the 14 ounce size selling @ \$8.99.

No fresh or frozen meats beyond deli meats; no frozen offerings such as individual prepared meals, or frozen vegetable or snacks were identified in the official store visit photographs as available for customer purchase. The only frozen offerings, stored in the chest type freezer, appeared to be available exclusively for in-house food preparation.

Non-SNAP products and services offered at Appellant include hot food, alcoholic beverages (beer), lottery tickets; tobacco products, paper goods, cleaning products; housewares; pet foods; copy services; and, an ATM.

Charge Letter Attachment Analysis:

The data reflected in the letter of charges dated October 11, 2017 is the result of information gained primarily from the Anti-Fraud Locator using Electronic Benefits Transfer (EBT) Retailer Transactions (ALERT) system which is a fraud detection, decision support system designed to monitor and track electronically conducted retail transactions completed by SNAP recipients in authorized meal program and food retailer locations.

The ALERT System facilitates management of the program by providing transaction-level information to Federal personnel charged with the responsibility of SNAP retailer management

and compliance. The system uses pre-defined criteria or patterns for potential fraud detection. Pre-formatted reports provide information on those stores and transactions meeting the criteria. ALERT supports both online analysis and online queries and reports for use by FNS. The system does not make the final determination instead it is used by Retailer Operations Division to develop information and evidence for consideration in support of their development of an ultimate decision.

Attachment #1: Represents **multiple SNAP EBT transactions made from individual benefit accounts in unusually short timeframes** and includes 29 transactions; 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Retailer Operations Division documents that completing multiple transactions within a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) period is a method used by some stores to avoid high dollar transactions that cannot be supported and are indicative of trafficking.

Retailer Operations Division determined that given Appellant's operational information it is not reasonable that households could bring to the counter quantities of SNAP eligible foods, in the amounts identified in the Attachment #1 materials, from the inventory identified at the store visit to support the transaction amounts or the transaction sets as listed.

Appellant has not provided evidence to counter the conclusion drawn by the Retailer Operations Division.

On review it is noted that the transactions listed include characteristics which add to the suspicion of their legitimacy. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Attachment #2: Identifies SNAP EBT **transactions that indicate the majority or all of individual recipient benefits are exhausted in unusually short period of time.** 5 U.S.C. § 552 (b)(6) & (b)(7)(C). In this attachment again it is noted that six (6) transactions are completed outside the reported business hours for Appellant.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The totality of the information leads to a conclusion that the transactions identified in Attachment #2 are indeed suspicious and likely representative of trafficking.

Attachment #3: Represents **excessively large purchase transactions made from the accounts of SNAP recipients** with 127 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Retailer Operations Division indicates that the average convenience store transaction in the State of New York in the focus period was \$9.80; 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Retailer Operations Division documents that review of the store visit materials did not reveal a large variety of specialty food items, no fresh meat, and no individual products that would justify the amounts identified as excessively large in the cited attachment. The photographs

identify some ethnic specialty foods such as flour; and, imported nuts and grains. None of the products identified as specialty were shown to be stocked in significant quantities. Further, the Retailer Operations Division documents that the transactions are suspicious in consideration of the operation and facilities of Appellant. As previously indicated the store visit materials, completed in cooperation with the manager authorizing the September 27, 2017 contracted store visit, reveal that the most expensive item declared at the time of the visit
5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant provided no explanation for the amounts of the transactions listed in the Attachment t#3 of the letter of charges.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Invoice Materials:

In response to the letter of charges, Appellant provided invoices and receipts from vendors for consideration. **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

5 U.S.C. § 552 (b)(6) & (b)(7)(C). When compared to Appellant's SNAP redemptions for the period it can be reasonably considered that the redemptions reported were accounted for with the inventory reported. Despite that being the case the invoices and receipts did not depict any specialty items or high-priced items, beyond those identified by the manager at the store visit.

Comparison/Competitor Store Information:

Retailer Operations Division documents that the subject firm is located in an area that is extremely well served by alternative SNAP authorized retailers. An analysis of the SNAP redemptions, transaction count, average transactions, and incidence of occurrence of suspicious transactions in the same categories as those identified for Appellant was completed. The results are demonstrated in the following table:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Clearly Appellant's results are suspiciously distinct when evaluating the county, and two (2) of its closest competitors documented by the Retailer Operations Division to have similar stock and facilities. **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

Household Analysis:

The Retailer Operations Division reviewed the transactions of four (4) households identified to have suspicious transactions in each of the charge letter attachments.

- **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**
- **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**
- **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

- 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The households identified shopped at Appellant, spending large amounts, in successive transactions, while clearly accessing larger, presumably more well stocked superstores and supermarkets. Retailer Operations Division did not identify any specialty or high cost items that could account for the anomalous shopping behavior displayed at Appellant. Notably the transactions completed at alternative SNAP authorized firms do not display the suspicious transaction types identified in the shopping behavior at Appellant.

Appellant has complied with all the requests made by the Retailer Operations Division:

On appeal Appellant indicates that it believes it has complied with all the requests made by the Retailer Operations Division; and, it does not believe it was given an opportunity to prove its position. The record shows that Appellant provided both telephonic and written responses to the October 11, 2017 letter of charges; and, that those responses were fully considered by the Retailer Operations Division prior to a final determination of permanent disqualification. There is no inference in the record to support that Appellant's ownership attempted to provide further materials for consideration; or that the Retailer Operations Division inhibited the provision of any such materials. As such the contention as presented does not form a basis to mitigate or reverse the current charges of trafficking.

Hard work to Build Business:

Appellant's ownership indicates that it has worked hard to build Appellant business. This statement is not doubted as operating any business requires commitment and hard work. Nevertheless, hard work to build does not impact consideration of the current charges of SNAP trafficking violations.

No Intentional or Willful SNAP violations:

Appellant's contention that the violations identified were not the result of intentional or willful actions cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. Appellant's ownership is liable for all violative transactions handled by store personnel whether willful or the result of simple error. Regardless of whom the ownership of a store may utilize to handle store business, whether employee or family member helping out, full-time, part-time, paid or unpaid, ownership is accountable for the proper handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA. The Food and Nutrition Act of 2008, as amended, is specific that disqualification shall be "permanent upon ... the first occasion of a disqualification based on ... trafficking ... by a retail food store." 7 CFR §278.6(e)(1)(i) of the SNAP regulations also states that FNS shall "disqualify a firm permanently if personnel of the firm have trafficked." There is no requirement for the violations to be conducted willfully or with intent.

Economic Hardship:

Appellant indicates that loss of SNAP retailer authorization will result in a loss of Appellant business. It is recognized that some degree of 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 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 allow store ownership from being excused 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.

Affidavit:

The provision of an unsworn affidavit provided by ownership for consideration is found to have no value as evidence that the transactions identified in Attachments #1, #2, and #3 to the letter of charges did not occur. The document is being discounted from consideration.

Civil Money Penalty

Part 278.6(f)(1) of the SNAP regulations provides for civil money penalty assessments in cases where disqualification would cause “hardship” to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs. However, this regulation also sets forth the following specific exception to assessments thereunder: “A civil money penalty for hardship to Food Stamp [SNAP] households may not be imposed in lieu of a permanent disqualification.” Therefore, this civil money penalty provision is not applicable in the present case.

As previously indicated the October 31, 2017 determination letter advised Appellant of the ineligibility for consideration for a trafficking civil money penalty (CMP) according to the terms of Section § 278.6(i) of the SNAP regulations. The letter of charges dated October 11, 2017 advised Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days.

The record documents that no request for the imposition of a CMP in lieu of permanent disqualification has been provided by Appellant; therefore, on review the Retailer Operations Division’s determination that Appellant firm is ineligible for the imposition of civil money penalties in lieu of disqualification is affirmed.

CONCLUSION

The Retailer Operations Division analysis of Appellant’s EBT transaction records, upon which charges of violations are based, together with observations made during the contracted store visit provide substantial evidence that questionable transactions during the focus period have characteristics that are not consistent with legitimate sales of eligible food to SNAP customers at

a store of the nature and scope as described in the preceding materials. Rather, the characteristics are indicative of illegal trafficking in program benefits.

Therefore, based on a review of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged and that the Retailer Operations Division has provided substantial evidence of trafficking violations. Based on the discussion above, the decision to impose a permanent disqualification from participation in the SNAP against Best Market & Deli Inc is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR §279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

NANCY BACA-STEPAN
Administrative Review Officer

March 28, 2018