

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

**Broadway Market,**

**Appellant,**

**v.**

**Case Number: C0197174**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division (“ROD”) to impose a permanent disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) against Broadway Market (“Appellant”).

**ISSUE**

The purpose of this review is to determine whether the ROD took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a Permanent Disqualification against Appellant on February 23, 2017.

**AUTHORITY**

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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 February 7, 2017, the ROD charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations. This charge was based on a series of SNAP transaction patterns that “establish clear and repetitive patterns of unusual, irregular, and inexplicable activity for your type of firm.” This letter of charges states: “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.” The letter also

states that “. . . under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of a permanent disqualification of a firm for trafficking.”

Appellant replied to the ROD’s charges in writing. The record reflects that the ROD received and considered the information provided prior to making a determination. The ROD determined that Appellant’s contentions did not outweigh the evidence that the store was trafficking. Based on the preponderance of evidence, the ROD concluded that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

The ROD issued a determination letter dated February 23, 2017. This letter informed Appellant that it was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6 (c) and 278.6(e)(1) for trafficking violations. The letter also states the ROD 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 ROD determined that Appellant was not eligible for the CMP because Appellant had not submitted sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

On March 3, 2017, Appellant appealed the ROD’s determination and requested an administrative review of this action. The appeal was granted.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

### **CONTROLLING LAW**

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented 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 in the event that personnel of the firm engaged in trafficking of SNAP benefits.

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, evidence obtained through a transaction report under an **electronic benefit transfer system** . . . . (Emphasis added.)*

7 CFR § 278.6(a) 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) reads, 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(e)(1)(i) reads, in part:

*FNS shall . . . [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2.*

Trafficking is defined in 7 CFR § 271.2, in part, as:

*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 . . . .”*

Also at 7 CFR § 271.2, eligible food is defined as:

*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)(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.*

### **SUMMARY OF CHARGES**

The charges under review were based on an analysis of SNAP Electronic Benefit Transfer (EBT) transaction data during the period from July 2016 through December 2016. This analysis identified the following patterns of SNAP transaction activity that indicate trafficking:

- Multiple transactions made from the same accounts in unusually short time frames; and,
- Excessively large transactions.

The attachments enclosed with the charge letter specify the questionable and unusual SNAP transactions indicative of trafficking which were conducted at Appellant during the review period.

### **APPELLANT'S CONTENTIONS**

Appellant's responses regarding this matter are essentially as follows:

- Appellant requests a CMP;
- Appellant sells expensive items such as infant formula, frozen fried chicken, corn oil, and pizza;
- Some customers make a purchase and return later in the day to make another purchase;
- Appellant has operated for 17 years without incident;
- Appellant is the only market in the neighborhood; and,
- Appellant provided ~22 pages of receipts.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

### **ANALYSIS AND FINDINGS**

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. Based on this empirical data, and in the absence of any reasonable explanations for such transaction patterns, a

conclusion can be drawn by a preponderance of evidence that trafficking is the most likely explanation for “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges is trafficking. Transactions with these patterns sometimes have valid explanations that support the idea that they were the result of legitimate purchases of eligible food items. This is why opportunities are given to charged retailers to explain the questionable transactions cited. In this case, the ROD determined that Appellant's responses did not outweigh the evidence. Evidence relied upon by the ROD was considered in this administrative review, including SNAP transaction data, store visit observations, location and characteristics of competitor firms, and household shopping patterns. The issue in this review is whether, through a preponderance of evidence, is it more likely true than not true that questionable transactions were the result of trafficking.

### **Store Characteristics**

In reaching a disqualification determination, the ROD considered information obtained during a December 21, 2016 store visit conducted by a USDA contractor to observe Appellant’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 documented the following store size, description, and characteristics:

- Store size is approximately 1,300 square feet with no food stored outside of public view. It is in an urban, commercial area;
- Available inventory of SNAP-eligible food items showed stock composed predominantly of inexpensive items, which is typical of a convenience store;
- Only one cash register and one electronic SNAP terminal device;
- No shopping carts or hand baskets;
- No scanners or conveyor belts;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers; and,
- No meat or seafood specials or bundles.

In addition, the store's checkout counter space area was cluttered and small allowing very little surface area to place large purchases and making it impractical to process more than one customer at a time.

There was no indication that SNAP households were inclined to visit the store regularly to purchase large quantities of grocery items. The available food was primarily of a low-dollar value and there was no hint that the firm sold items in bulk. Given the available inventory, there was no sign that Appellant would be likely to have SNAP redemption patterns that differed significantly from those of similarly-sized competitors.

### **Repeat Transactions by the Same Household**

Attachment 1 to the charge letter documents the same household conducting back-to-back transactions in unusually short time frames. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). There are 47 repeat transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) included in this document.

The record reflects that customers conducting rapid, repetitive, and large transactions at Appellant frequently spent SNAP benefits at better-stocked and more competitively-priced grocery stores, sometimes on or about the same day they shopped at Appellant.

Appellant contends it is the only market in the neighborhood. The Case Analysis Document identifies much larger stores with more reasonable prices located within one mile of Appellant. There is no basis for unusually high customer attraction to Appellant, there being no great price advantage, profusion of ethnic goods, or special or custom services rendered. Oddly, some SNAP households spent considerably less at the larger stores than at Appellant.

Appellant stated some customers make a purchase and return later in the day to make another purchase. While there are legitimate reasons why a SNAP recipient might return to a convenience store in a short period of time, the examples in Attachment 2 indicate a series of purchases that total to large amounts. 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 convenience store. Spending sizable portions of one's SNAP benefit allotment in a convenience store - when there are larger stores at which one also shops that carry more variety of foods at a lower cost - is unreasonable customer behavior. Moreover, households listed in this attachment conducted this strange shopping pattern of making substantial purchases at Appellant multiple times during the review period. Given the common practice of violating retailers breaking up large, suspicious transactions into multiple, smaller transactions to avoid detection, a firm's explanation and evidence for why these transactions are occurring 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in a convenience store should be both rational and compelling. Appellant's explanation is neither.

### **Large Transactions**

The food stock and facilities of Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at convenience stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. It is rare for a convenience store such as Appellant's to have purchases like those included in Attachment 2 to the charge letter. This attachment cites 262 EBT transactions during the three-month period of investigation 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

These transactions significantly exceed the state's average SNAP transaction, which was \$7.61 for this type of store during the three months of the review period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant's average transaction is significantly higher than the state's average transaction. As previously stated, Appellant has a limited food stock typical of a convenience store and does not have any features that would induce people to spend substantially more than the typical convenience store purchase amount.

Based on the store layout, infrastructure, and available inventory, it is not credible that the Appellant would so frequently conduct large transactions closely resembling those typically found at a supermarket or superstore. It is not plausible that the firm's customers would regularly carry very large amounts of merchandise around the store without the benefit of shopping carts or shopping baskets, especially since larger, better stocked stores are readily available and in the vicinity of the Appellant firm. Appellant is not set up to process high-dollar transactions, as indicated by its lack of equipment to facilitate large transactions and limited counter space. There are no legitimate bases for SNAP customers' unusual attraction to the firm such as a superior selection of staple foods, price advantages, package specials, bulk or promotional items, an extensive variety of otherwise unavailable ethnic food items, or special services rendered. Appellant failed to provide convincing evidence to establish the legitimacy of these excessively large transactions, such as itemized cash register receipts. Based on all of these factors discussed in this section, the large volume of transactions for high-dollar amounts is unlikely to indicate a pattern of legitimate food purchases.

### **Infant Formula**

Appellant contends that high transaction amounts are due in part to offering an excellent price on infant formula. However, it would be unusual for a SNAP household to purchase baby formula with SNAP benefits, as households who participate in SNAP are eligible to participate in the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). WIC has a more lenient income threshold for participation - and a higher participation rate of eligible participants - than SNAP. WIC provides participants with vouchers for baby formula as well as other staple items, such as orange juice and cereal.

### **Expensive Items**

Appellant asserts it sells expensive items which explain the large purchases. Appellant stated it sells ground beef burgers for \$14.99, frozen fried chicken for \$10.99 (in a letter dated February 17, 2016) or \$9.99 (in a letter dated April 1, 2016), corn oil for \$12.99, and pizza for \$9.99. The evidence does not support this contention. During the December 21, 2016 store visit, Appellant did not carry beef, had ~4 large containers of corn oil, ~3 frozen pizzas, and ~3 packages of frozen fried chicken. Appellant did not provide any invoices to support its contention that expensive items explain the large purchases.

While there may have been occasions when Appellant sold expensive items, based on the inconsistent information provided about the price of the chicken, evidence from the store visit, low inventory, and lack of corroborating evidence from invoices, it is more likely true than not true that the sale of expensive items does not explain the large SNAP transactions that occurred at Appellant. Trafficking is a more likely explanation for the unusual and irregular pattern of high-dollar transactions.

## **No Applicable Mitigating Factors**

Appellant asserts that this is the first time there has been an issue related to SNAP and that it did not receive prior warnings. A record of program participation with no documented previous violations, however, does not constitute valid grounds for mitigating the impact of the present serious determination of trafficking.

Neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be extremely serious, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, 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, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS must disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved.

## **Receipts**

Appellant provided ~22 pages of receipts to support the validity of its transactions. Two of the register receipts are from the review period. However, the register receipts provided by Appellant contain unusual characteristics that call into question the legitimacy of these receipts. Appellant also provided EBT receipts and daily register summaries. Neither provide any information that would support the legitimacy of the unusual EBT transactions. The receipts do not explain the questionable transactions at Appellant.

## **Summary**

The ROD determined that Appellant likely trafficked in SNAP benefits. The charges of violations were based on the ROD's assessment that substantial evidence exists that the questionable transactions occurring during the review period displayed patterns inconsistent with legitimate sales of eligible food to SNAP participants. The evidence the ROD considered in support of its determination included:

- The irregular SNAP transaction data of Appellant as compared to similar stores;
- Observations made during an store visit by a USDA contractor, including the inadequacy of the firm's staple food stock to support such large transactions;
- The availability of other SNAP-authorized stores located close to Appellant; and,
- Shopping behaviors of Appellant's customers.

The transaction data and overall firm record demonstrate the patterns of unusual, irregular, and inexplicable SNAP activity for this firm is likely the result of trafficking.

Upon review, Appellant failed to prove by a preponderance of the evidence that the administrative action should be reversed. Appellant provided inadequate explanations for the suspicious transactions and insufficient evidence to legitimize its transaction data. It has not convincingly rebutted the ROD's determination that Appellant most likely trafficked in SNAP benefits. 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 must disqualify the firm permanently.

### **CIVIL MONEY PENALTY**

Appellant requested a civil money penalty (CMP) contending that it had established and implemented an effective compliance policy and program to prevent SNAP violations. According to 7 CFR § 278.6(i) of the SNAP regulations, FNS may impose a CMP in lieu of permanent disqualification for trafficking.

For an Appellant's request for a CMP to be considered, the regulations at 7 CFR § 278.6(b)(2) require that Appellant submit supporting documentation within ten days of receipt of the charge letter. Appellant was advised of this provision in the charge letter of February 7, 2017. A review of the administrative record indicates Appellant did not submit documentation to support its eligibility for this alternative sanction by this deadline.

7 CFR § 278.6(i) sets forth the eligibility requirements for a CMP:

*The firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:*

*Criterion 1: The firm shall have developed an effective compliance policy as specified in Section 278.6(i)(1); and,*

*Criterion 2: The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and,*

*Criterion 3: The firm had developed and instituted an effective personnel training program as specified in Section 278.6(i)(2); and,*

*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 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 by the firm . . . .*

In support of Appellant's contention that it is eligible for a CMP, it provided no documentation. In this regard, the various statements made by Appellant is not "substantial evidence" that fulfills each of the four criteria of 7 CFR § 278.6(i), demonstrating "that the firm had established and implemented an effective compliance policy and program to prevent violations."

The standards of eligibility for a trafficking CMP are high. They require substantial proof that a compliance policy and program was established and implemented prior to the occurrence of violations. These standards exist to thwart attempts to falsely present compliance policies and programs that were not actually implemented prior to violations. As Appellant did not provide the required supporting documentation, the ROD did not assess a CMP. According to the requirements stated in 7 CFR § 278.6(b)(1), § 278.6(b)(2)(ii and iii), and § 278.6(i), Appellant is not eligible for a CMP in lieu of a permanent disqualification from participation as an authorized retailer in SNAP. The determination by the Retailer Operations Division to deny Appellant a civil money penalty is sustained.

### **CONCLUSION**

The record has yielded no indication of error in the finding by the Retailer Operations Division that Appellant trafficked in SNAP benefits. A review of the evidence supports that it is more likely true than not true that program violations occurred as charged. Based on the discussion above, the determination by the Retailer Operations Division to impose a permanent disqualification against Broadway Market from participating as an authorized retailer in SNAP 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 Appellant desires a judicial review, 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.

RICH PROULX  
Administrative Review Officer

December 14, 2017