

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

**Brothers Food Mart,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0197679**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is not sufficient evidence to support the Retailer Operations Division's determination to permanently disqualify Brothers Food Mart (hereinafter "Appellant") from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). Therefore, the permanent disqualification decision is reversed.

**ISSUE**

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of SNAP, when it imposed a permanent disqualification against Brothers Food Mart.

**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 August 2016 through January 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 Brothers Food Mart for SNAP participation as a convenience store on June 3, 2014. In a letter dated March 17, 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 August 2016 and January 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 two mailings dated March 22, 2017, and April 13, 2017, the Appellant responded to the charge letter, generally stating that it has never committed any violations. It also stated that the store is located very close to a large Section 8 housing apartment complex and explained that it was the only store in the neighborhood that accepted SNAP benefits. The Appellant argued that many of the nearby residents walk to the store because of limited transportation. It also contended that the store sells a lot of cold cut deli meats, sandwiches, frozen foods, raw frozen chicken, and frozen pizza, as well as snacks, soft drinks, milk, and juice.

In support of its response, the Appellant submitted more than 100 pages of inventory receipts and summaries of products ordered from wholesale food businesses. It also submitted six undated color photographs of the store.

After reviewing the Appellant's response and further considering the evidence in the case, the Retailer Operations Division determined that the Appellant's explanations and documentation were insufficient to justify the unusual transaction patterns listed in the charge letter. The Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated July 11, 2017. This determination 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 July 19, 2017, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

Shortly after the Appellant's request for administrative review, the administrative review officer received a letter dated August 23, 2017, from attorney 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of the law firm 5 U.S.C. § 552 (b)(6) & (b)(7)(C). She indicated that the firm had been retained to represent the Appellant in this case. In the letter, Appellant's counsel also submitted a request for a copy of the Retailer Operations Division's case file. This request was made under the Freedom of Information Act (FOIA). The FOIA request was forwarded by the administrative review officer to FNS's FOIA office, which issued its response on October 16, 2017.

On November 3, 2017, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), an attorney also with 5 U.S.C. § 552 (b)(6) & (b)(7)(C), notified the administrative review officer that attorney 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was no longer with the firm, and that he had inherited some of her cases, including the Brothers Food Mart case. Because of this change in counsel, the administrative review officer granted an extension to November 30, 2017, to submit any contentions the Appellant wanted considered in this case.

On November 29, 2017, the Appellant, through attorney 5 U.S.C. § 552 (b)(6) & (b)(7)(C), submitted a five-page document outlining its contentions in this case.

## **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, *inter alia*:

*... 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, *inter alia*:

*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, *inter alia*:

*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, *inter alia*:

*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, *inter alia*:

*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, *inter alia*:

*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, *inter alia*:

*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, *inter alia*:

*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...*

7 CFR § 279.4(a) states, *inter alia*:

*Upon receipt of a request for review of administrative action, the administrative action shall be held in abeyance until the designated reviewer has made a determination. However, permanent disqualifications for trafficking shall not be held in abeyance and shall be effective immediately as specified in 278.6(b)(2) of this chapter. If the disqualification is reversed through administrative or judicial review, the Secretary shall not be held liable for the value of any sales lost during the disqualification period...*

## **APPELLANT'S CONTENTIONS**

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- To establish that a store violated the SNAP regulations, FNS must provide records that show that the store accepted SNAP for ineligible items, cash or consideration other than eligible food. It must be proven that the transactions fall within the trafficking criteria to disqualify it from SNAP.
- Regarding multiple transactions from the same household account in short periods of time (Attachment 1 of the charge letter), there is not a pattern of “unusually short time frames.” 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The store is within close proximity to low-income, Section 8 government housing. Many of the firm’s customers walk to the store and purchase items for their family, and there are multiple family members who use the accounts. As such, this cannot be deemed a pattern of transactions in “unusually short time frames,” and there is no direct proof that the transactions were unlawful.
- Regarding excessively large transactions (Attachment 2), out of 629 transactions, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- As the photos of the store indicate, there are several aisles of dry goods, including cereal, bread, baking ingredients, pasta, cookies, and cans of vegetables. The store also sells milk, juice, and soft drinks. It also has produce, a deli counter, and sells chicken wings and pre-made pizzas.
- The store visit survey shows that the chicken wings sell for \$15.00 and pizza for \$17.00. A photo shows a sign for accepting EBT in exchange for pizza, which shows that the firm is in compliance with SNAP requirements. The store also sells Similac for \$17.00. This item is obviously a necessity for a family with an infant child.
- The patterns of purchases show that the cards were often used around the same time each month, indicative of the time of the month when the SNAP benefits were refreshed for that household.

- Low-income households with multiple children purchase food at the store and it is not uncommon for total purchase amounts to increase based on the price of the items that are purchased. If a family purchases only one pizza and just one can of Similac, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These types of purchases are clearly within the rules of the program.
- There is no proof that the purchases in Attachment 2 show a pattern of unlawful use of SNAP benefits.
- The assessment of a permanent disqualification is arbitrary and capricious and an abuse of agency discretion. There is nothing in the charge letter that specifically supports the allegations of trafficking under the statute. To be a valid sanction, it must not be arbitrary and capricious, and a sanction is arbitrary and capricious if it is unwarranted in law or without justification in fact.

The Appellant did not submit any additional evidence or documentation in support of its contentions beyond what had already been submitted to the Retailer Operations Division in response to the charge letter.

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 contentions presented, including any not specifically summarized or explicitly referenced herein.

## **ANALYSIS AND FINDINGS**

The primary issue for consideration in a case based on questionable 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 questionable transactions cited in the charge letter were the result of trafficking?

After a thorough review of all evidence in this case, it is the determination of this review that the transactions listed in the charge letter were neither unusual nor excessive. The Retailer Operations Division's case does not reach a level of persuasiveness to conclude that trafficking was the most likely reason for the transaction patterns listed in the charge letter. There is not a way for this review to definitively conclude that trafficking did not, at any point, occur at the Appellant firm; nor would it be possible to do so in a case based on inconsistent redemption data. However, a determination of permanent disqualification must be supported to such a degree as to conclude that trafficking is the most plausible explanation. In light of the evidence and information that was provided by the Retailer Operations Division, it is the determination of this review that there are other legitimate theories, besides trafficking, for the unusual transaction patterns listed in the charge letter.

## **CONCLUSION**

It is the determination of this review that the Retailer Operations Division has not met the burden of proving, by a preponderance of the evidence, that the transactions listed in the charge letter were, more likely than not, the result of trafficking. Therefore, it is the conclusion of this review that trafficking was likely not committed by the Appellant firm. As such, the determination to impose a permanent disqualification against Brothers Food Mart is hereby reversed.

## **RELEASE OF INFORMATION**

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

January 18, 2018