

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

Cardenes Market,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0225225

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 Cardenes Market (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was improperly imposed by FNS’s Office of Retailer Operations and Compliance (formerly Office of Retailer Operations and Compliance).

ISSUE

The issue accepted for review is whether or not the Office of Retailer Operations and Compliance, 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 Cardenes Market.

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 from SNAP based on an analysis of EBT transaction data from July 2019 through December 2019. This involved the following transaction patterns which are common trafficking indicators:

- There were multiple transactions made from the accounts of individual SNAP households within a set time period.

- The firm conducted EBT transactions that were large based on observed store characteristics and recorded food stock.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Cardenes Market for SNAP participation as a small grocery store on December 28, 2009. In a letter dated January 30, 2020, the Office of Retailer Operations and Compliance 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 July 2019 and December 2019. 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 and supporting documentation submitted within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

The record shows that the Appellant did not reply to the charge letter.

After further considering the evidence in the case, the Office of Retailer Operations and Compliance concluded that trafficking had occurred as charged and issued a determination letter dated February 24, 2020. 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 Office of Retailer Operations and Compliance considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but found that a CMP was not appropriate 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 February 25, 2020, the Appellant appealed the agency's determination by requesting an administrative review. The request was granted. It is noted that in a letter postmarked March 19, 2020, the Appellant submitted a four-page letter detailing its contentions in this matter as well as 66 pages of documentation, including cash register data, sales summaries, and an inventory price list.

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....

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...

7 CFR § 279.4(a) states, in part:

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

- The transactions may appear as trafficking, when in fact they are not.
- Appellant owner has operated his business for over 25 years and has never encountered issues with USDA or any other government entities. He has run his business in accordance with all government and city processes.
- Regarding the claim that multiple transactions were made in a short period of time:
 - Appellant was able to run all 25 transactions through its system and was able to match the transactions to specific EBT card numbers. Appellant found that each of these households were frequent shoppers, or regulars of Cardenes Market.
 - To support this discovery, the Appellant submitted transaction printouts for each of the eight different households listed. For 2019, each household visited the business consistently for at least four months and made purchases with their EBT card. The reports prove that these customers have a habit of making multiple

transactions per month, including timeframes outside of the transactions identified by USDA. This shows that they rely heavily on Cardenes Market for their groceries.

- Based on 25 years of running the store, Appellant believes that multiple transactions in a short period of time could occur for a range of reasons. For example, many customers do not have transportation and visit the store on foot. They make multiple trips in order to carry home their groceries.
- Sometimes they will make a purchase and leave the items in the store and go out and find transportation. They then return to the store to pick up the groceries they paid for and may purchase additional goods since they now have the means to carry them home.
- Sometimes a customer will make an initial purchase without complete assurance of their account balance. Once they obtain a receipt with their remaining balance, they follow up with another purchase.
- Many customers live in the neighborhood and have established a relationship with the owner and the business. It is very common to see the same faces multiple times a day. The store is located in a heavily residential area and it is easy to establish a network of regular customers.
- Since the records show that the households are regular customers, Appellant would like to know how and why USDA selected these specific instances.
- If the firm is unable to conduct SNAP transactions from the same EBT card more than once per day, Appellant would like to know so that it can change its process accordingly.
- Regarding the claim that the firm made large transactions:
 - Appellant has provided reports proving that these purchases are not uncommon for its store or its inventory. These include reports comparing credit and debit card sales to EBT sales, and a list of all SNAP-eligible items and their sales prices. These reports prove that the business has the food stock for large purchases.
 - The reports show EBT sales account for 40 to 60 percent of the firm's sales. Sales by debit and credit cards are similar to EBT sales, which signifies that the store has the food stock to make large purchases. It is not out of the ordinary for customers to make large purchases.
 - The transactions listed are mostly in the summer and fall. The store makes the most profit during these months. This is because the firm relies on foot traffic. The store does not provide private parking and is located in a residential area.
 - During these months, customers visit the store in larger group and are able to carry more bags of food.
 - Other transactions listed are during holiday periods, such as Thanksgiving or Christmas, when families are accommodating visitors.
 - The majority of the firm's customers have a Spanish diet, and they purchase large quantities of rice, canned goods, meat products, cooking oils, dairy products, and produce. The list of available inventory shows that the store is equipped to accommodate such customers. If inventory receipts are needed, Appellant will provide them.

- Appellant has responded to the charges to the best of its ability and has provided supporting documentation proving that the transactions in question are not out of the norm and are certainly not trafficking.
- It will be highly disappointing and devastating if the trafficking charges are upheld.
- Appellant believes that the transactions listed in the charge letter were misinterpreted to be something they are not. USDA is welcome to contact households or members of the community and ask about the firm's record and reputation.
- If the firm is making mistakes or following processes incorrectly, Appellant would like to be made aware so that it can act accordingly and set the correct standards.

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

A key issue for consideration in a case based on suspicious SNAP redemption data is whether or not the Office of Retailer Operations and Compliance adequately established that the Appellant firm engaged in the violation of trafficking. In other words, did the Office of Retailer Operations and Compliance, 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?

After a thorough review of all evidence in this case, it is the determination of this review that the Office of Retailer Operations and Compliance'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. After considering the evidence and information that was provided by the Office of Retailer Operations and Compliance as well as the documentation and explanation provided by the Appellant, it is the determination of this review that there are other legitimate theories, besides trafficking, to explain the unusual transaction patterns listed in the charge letter.

CONCLUSION

It is the determination of this review that the Office of Retailer Operations and Compliance 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. As such, the determination to impose a permanent disqualification against Cardenes Market 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

June 3, 2020