

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

**Cedar Food Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0202092**

**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 the permanent disqualification of Cedar Food Market (Cedar Food Market or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

**AUTHORITY**

7 USC § 2021 and the 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.”

**CASE CHRONOLOGY**

In a letter dated September 19, 2017, the Retailer Operations Division charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of February 2017 through June 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7

CFR § 278.6(e)(1). The letter also noted that Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant replied to the charges by letter dated September 27, 2017. Appellant denied trafficking and explained the transactions were normal based on the unique circumstances of the store. Appellant did not request a trafficking CMP in lieu of a permanent disqualification but explained that the store provided SNAP training to staff.

After considering the retailer's reply and the evidence, the Retailer Operations Division issued a determination letter dated October 10, 2017. The determination letter informed Appellant that it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that Appellant was not eligible for a trafficking CMP because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked October 18, 2017, Appellant, through counsel, appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted.

### **STANDARD OF REVIEW**

In appeals of adverse actions, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions should be reversed. That means the 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**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) and (e)(1) 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 have engaged in trafficking SNAP benefits.

7 CFR § 271.2 states, in part, that, "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 § 271.2 defines trafficking as: "(1) 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 § 278.6(a) states, inter alia, that “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(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(e)(1) reads, in part, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.”

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.”

### **SUMMARY OF THE CHARGES**

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from February 2017 through June 2017. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were multiple transactions made from individual benefit accounts in unusually short time frames.
- There were excessively large purchase transactions made from recipient accounts.

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking.

### **APPELLANT’S CONTENTIONS**

In its appeal request postmarked October 18, 2017, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- The decision is not supported by substantial evidence, see *Affum v. United States* 566 F.3d 1150(D.C. Cr. 2009)
- The conclusion of trafficking defies the evidence submitted on September 27, 2017, and October 20, 2017.
- Cedar Market has erroneously been accused of trafficking.
- The evidence does not support any reasonable factual finding of benefits being exchanged for cash.
- The unusual spike in volume on s transactions during the three month period was a direct result of the installation of special promotions at reduced prices.
- Compliance training resulted in employees confronting those individuals and they took preventative actions.
- The customer base at Cedar Market is composed of low-income and often disabled individuals who make sporadic purchases on account of their lack of transportation and their inability to carry heavy packages back and forth to their household.
- The store has been plagued by a spike of burglaries and violent crimes.
- The declarations of three employees submitted demonstrate that they were actually given the appropriate training consistent with the training guide for retailers that were attached to the declaration **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.
- The evidence submitted demonstrate the firm's practice in its usual manner was appropriate training and preventative measure making employees aware how to detect, prohibit, and prevent any kind of transactions that hinted at trafficking.
- The evidence demonstrates that appropriate training program was implemented and undertaken in a community that was rife with criminal activity that made Cedar Market personnel more vigilant and more active in trying to prohibit any trafficking.
- There is no evidence of any on-site investigation or any inconsistent redemption data, or a transaction report under the electronic benefit transfer system
- The fact that no fair notice was given that written contemporaneous records of training was required is arbitrary.
- The declaration of employees evidencing training should be conclusive.
- Appellant requests that the permanent disqualification be reversed.

In support of its contentions, counsel submitted a newspaper article describe the recent burglaries in the area and copy of the SNAP Retailer Training Guide.

The preceding may represent only a brief summary of the Appellant's contentions presented 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.

## ANALYSIS AND FINDINGS

### **Store Visit**

FNS authorized Cedar Food Market on June 25, 2001. On December 29, 2015, its store type was changed from a medium grocery to a small grocery. The case file indicates that in reaching a

disqualification determination, the Retailer Operations Division considered information obtained during a May 11, 2017, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions.

The store visit report and photographs documented the following store size, description, and characteristics:

- Cedar Food Market is approximately 1800 square feet, with 325 square feet of additional food storage outside of public view.
- There were no shopping baskets or shopping carts for customer use.
- There was one cash register and one point-of-sale device.
- The available checkout area space was limited.
- There were no meat/seafood specials or bundles that might sell for high prices.
- There was no fresh unprocessed meat, poultry, or fish.
- There was a deli area that sold meat by the pound and prepared and hot food.
- There was limited fresh produce including five containers of cut watermelon, cucumbers, tomatoes, celery, potatoes, onions, and bananas.
- Dairy included milk, butter, cheese, and ice cream.
- Other staple food items included eggs, juice, cereal, rice, pasta, and a selection of canned goods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included hot food, lottery, paper goods, cleaning products, and health and beauty aids.

The SNAP eligible food stocked by the store was generally of a low dollar value, consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. Given the available inventory as noted above, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors.

### **Charge Letter Attachments**

Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

**Charge Letter Attachment 1. Multiple transactions were made from individual benefit accounts in unusually short time frames.** This attachment documents 17 sets of transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

Counsel explained to the Retailer Operations Division that it is quite common for household members to legitimately appear and enter into several swipe transactions during the day. The SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of Appellant's stock and facilities and are therefore indicative of trafficking. Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The photographs from the store visit offer no legitimate explanation as to why SNAP customers would routinely shop at Appellant multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale. In addition to the store's limited checkout space which is unsuitable for large transactions, Cedar Food Market has no shopping carts and no shopping baskets for transporting food within the store.

Counsel contends that customers who frequent their store are often older or disabled and often come several times a day to complete their purchases because of their inability to transport large packages from the store to their household. They do not own motor vehicles. The Retailer Operations Division determined that clients shopping 5 U.S.C. § 552 (b)(6) & (b)(7)(C) are also shopping at area supermarkets and super stores that offer a larger quantity and variety of eligible food items for better prices. Based on these shopping patterns, transportation to other stores is not an issue for these SNAP customers. Within a quarter of mile from Cedar Food Market, there are four convenience stores, two other small groceries, one medium grocery, and two combination grocery stores.

In its reply to the charges, Appellant explained that there were household members selling their SNAP benefits outside of the store and that is what these transactions are from. Appellant did not submit any evidence to support this allegation. The Retailer Operations Division determined that it is unlikely that there would be multiple households selling their benefits outside Appellant (and not nearby similar type stores) for hours on end to account for the multiple transactions over the listed time periods.

The Retailer Operations Division properly determined that the evidence submitted by the Appellant was insufficient to justify the irregular transactions cited in Charge Letter Attachment 1. In the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

**Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts.** This attachment lists 119 SNAP transactions, conducted by 69 different households, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transaction amounts are not consistent with the store's inventory with no fresh meat and limited fresh produce. As noted previously, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors offering similar food items. Appellant did not have any shopping carts or shopping baskets. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

Counsel contends that the unusual spike in volume on s transactions during the three month period was a direct result of the installation of special promotions at reduced prices. However, there was no evidence submitted to support this contention. Furthermore, on the day of the store visit, there was no evidence of any special promotions nor did the employee indicate this in the report of the store visit.

The Retailer Operations compared Appellant to three nearby similar store types. The transaction pattern of Appellant exceeded the other six authorized stores, as seen on the table. The Retailer Operations Division considered this an indicator of trafficking.

#### 5 U.S.C. § 552 (b)(7)(E)

The Retailer Operations Division determined that Appellant also had a higher number of SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as compared to the average for small groceries in Atlantic County, New Jersey. Appellant conducted 97 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which is almost three times the county average for small groceries and 57 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which is two times the county average. The Retailer Operations Division also compared Appellant to the same three similar stores. Appellant conducted more SNAP transactions in this range than each of the competitor stores. Considering Appellant's eligible food stock, infrastructure, and proximity to larger, better stocked stores this is highly unlikely and likely indicative of trafficking.

Counsel explained that many of its customers do not have a car and rely on Appellant. However, the Retailer Operations Division determined that there are 18 similar or larger SNAP authorized stores within a one-mile radius of Appellant. These include eleven small groceries, six medium groceries, and one supermarket. Therefore, it would be highly unlikely that SNAP recipients would regularly purchase large amounts of merchandise at Appellant when larger, better stocked stores are readily available and in the vicinity of the Appellant firm. In fact, the Retailer Operations Division determined there were 24 households during the review period that conducted a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at Appellant within three days of conducting a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at a large grocery store, supermarket, or super store.

Lastly, the Retailer Operations Division examined four households identified in the charge letter to analyze their shopping patterns at Cedar Food Market compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at supermarkets and super stores. However, despite this access to better stocked stores, each of the four households conducted excessively large transactions at Cedar Food Market 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of shopping at a supermarket or super store. There is no legitimate reason why households would conduct large transactions at Appellant when these household had just visited or planned to visit larger stores with a better selection of staple foods including fresh meat and produce and likely better prices.

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. Therefore, based on this empirical data, and in the absence of evidence to legitimize such transaction patterns, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation.

## **Evidence**

Counsel contends that there is no evidence of any onsite investigation or any inconsistent redemption data, or a transaction report under the electronic benefit transfer system. However, the charge letter attachments are in fact derived from transaction reports under the electronic benefit transfer system. Specifically, the ALERT system is a computerized fraud detection tool to identify SNAP transactions that form patterns having characteristics indicative of trafficking. However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still conduct an extensive analysis of the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether the questionable transactions were, more likely than not, the result of trafficking. Lastly, Appellant is always given a chance to explain the specific transaction patterns before the determination letter is issued and during the administrative review.

The legality of this method is supported by 7 CFR §278.6(a) which 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, **evidence obtained through a transaction report under an electronic benefit transfer system . . .**” [Emphasis added.]

Appellant must provide a preponderance of evidence that the transactions detailed in the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. In the absence of compelling information or documentation weighed in comparison to the evidence provided by the Retailer Operations Division, the evidence weighs in favor of the Retailer Operations Division’s determination that SNAP-benefit trafficking substantially produced the transaction activity at issue in the present case.

## **Case Law**

Appellant cites case law in its request for administrative review. It should be noted that considerations of legal precedent through case law, or the lack thereof in relation to the present case, is beyond the scope of this review. Instead this administrative review is limited to whether the Retailer Operations Division appropriately followed the Food and Nutrition Act of 2008, as amended, and the regulations promulgated under the Act, and whether the action taken is sustainable by a preponderance of the evidence. Therefore, any application of a supposed judicial



precedent would best be addressed in a judicial review in a court of law. Accordingly, no further findings or conclusions are rendered in this regard.

## **Requests Reversal**

Appellant requests reconsideration of the permanent disqualification. Neither the Food and Nutrition Act of 2008, as amended, nor the regulations allow discretion in this matter nor provide for a lesser penalty or a term disqualification for violations related to trafficking of SNAP benefits. Trafficking in SNAP benefits is an extremely serious violation and both 7 USC § 2021(b)(3)(B) and 7 CFR § 278.6(e)(1)(i) state that even a first time violation warrants a permanent disqualification.

## **CIVIL MONEY PENALTY**

Appellant did not specifically request a trafficking CMP but did it state that it had an effective training program. Counsel submitted a copy of the SNAP Retailer Training Guide and a declaration of ownership that training was conducted. The criteria for a trafficking civil money penalty in lieu of disqualification is established under 7 CFR § 278.6(i) which reads, inter alia:

“In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, 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 §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 § 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 only 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 . . .”

The Retailer Operations Division determined that Appellant was not eligible for a trafficking civil money penalty in lieu of a disqualification under 7 CFR § 278.6(i) because 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. For example:

- There is no contemporary documentary evidence that employees were provided SNAP compliance training on their initial hire date or at any time during their employment.
- There is no contemporary documentary evidence that employees were required to watch the FNS training video.

- There is no contemporary evidence of training agendas, training logs, signed training certificates or other evidence of employee training.
- There is no indication that quizzes or tests were conducted to insure that the employees understood any training that was provided to them.

Appellant contends that the fact that no fair notice was given that written contemporaneous records of training was required is arbitrary. However, all SNAP retailers were sent a notice in 2013 about how to document the firm's training program. This notice can be found on the FNS website using the following link:

<http://fnscs/fns/snap/rpmd/Training%20and%20Reources%20New/SNAP%20-%20General%20Training%20Expectations.pdf>

The Retailer Operations Division's decision not to impose a civil money penalty in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

### **CONCLUSION**

The Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did occur as charged by the Retailer Operations Division. The determination to impose a permanent disqualification against Appellant is sustained.

The Retailer Operations Division also determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations. Under review, the denial of a trafficking CMP was deemed correct and proper.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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's owners reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it 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.

Mary Kate Karagiorgos  
ADMINISTRATIVE REVIEW OFFICER

February 8, 2018