

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

Consaul Food Market,

Appellant,

v.

Case Number: C0203933

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of Consaul Food Market as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against Consaul Food 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.”

CASE CHRONOLOGY

In a letter dated December 28, 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 during the months of April 2017 through September 2017. The letter noted that the penalty for

trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated the Appellant had the right to respond to the charges within 10 days of receipt to provide explanations for the irregular SNAP transaction patterns. The letter also stated that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i). The charge letter was delivered to the Appellant by UPS on December 29, 2017.

In a letter dated January 14, 2018, the Appellant, through his former counsel, replied to the charge letter and indicated that the store was extending credit to select trusted households and was allowing repayment with SNAP benefits. The Appellant provided a single sheet purporting to be a credit ledger and stated that all other ledgers were destroyed once the credit was paid off. The Appellant denied that the store had trafficked in SNAP benefits. The Appellant did not request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification under 7 CFR § 278.6(i).

After reviewing the Appellant's contentions and the evidence in the case, the Retailer Operations Division issued a determination letter dated February 8, 2018. The determination letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and 7 CFR § 278.6(e)(1). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of 7 CFR § 278.6(i) of the SNAP regulations. The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP 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 violations of the SNAP.

In a letter postmarked February 14, 2018, the Appellant, through new counsel, requested an administrative review of the Retailer Operation Division's determination. The request for administrative review 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 action should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might 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 covered in the Food & 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 § 271.2 states that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

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 defines trafficking, 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

7 CFR § 271.2 defines eligible food, in part, as:

Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption

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(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 § 278.6(b)(2) states, in part:

(ii) 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 as specified in § 278.6(i), 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.]

(iii) **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. [Emphasis added.]

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from April 2017 through September 2017. This involved the following transaction patterns which are trafficking indicators:

- **Charge Letter Attachment 1:** Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment lists 21 sets of 45 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).**
- **Charge Letter Attachment 2:** Excessively large purchase transactions were made from recipient accounts. This attachment lists 198 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

APPELLANT'S CONTENTIONS

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

- The Appellant's former counsel made a mistake in saying that the store was accepting SNAP benefits as repayment on credit accounts. The store did not maintain credit accounts for SNAP customers.
- The Appellant store has been authorized since 1998 without any violations of the SNAP regulations.
- SNAP customers will often make an initial test transaction to determine how much remains on their card and then will make an additional purchase. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The store encourages customers to do this.
- The store owners are not allowed to restrict the number of times that SNAP recipients use their SNAP benefits or how much they purchase with SNAP benefits.
- The store is a fully stocked grocery store with a variety of items that can be bought in bulk packages as well as individually sold items. This contention is supported by the invoices and store pictures submitted by the Appellant. In particular, Monster and energy drinks purchased in bulk can result in SNAP transaction amounts 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The unique circumstances of the impoverished area surrounding the store contributes to larger than normal SNAP transactions. The store is nestled in a location that does not have competitors within walking distance. Therefore all of the residents of the local area rely on the Appellant store for all of their household needs.
- The Appellant cites 7 CFR 278.6(d) in its contention that the store or its employees have not violated the SNAP rules and regulations.
- The Appellant qualifies for a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i)

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Authorization and Compliance History

FNS authorized Consaul Food Market for the SNAP on February 12, 1998. FNS issued a warning letter to the store on September 7, 2007 for exchanging ineligible items for SNAP benefits during an undercover investigation. During the review period of April 2017 through September 2017, the Retailer Operations Division classified the store as a convenience store

The owner signed the most recent reauthorization application for the store on April 1, 2016 and acknowledged that the owner was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible non-food items.

Store Visit Report

The case record documents that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an October 27, 2017 store visit conducted by an FNS contractor to observe the nature and scope of the store’s operation, stock and facilities. This information was then used to ascertain if there were justifiable explanations for the store’s irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Consaul Food Market is approximately 2,400 square feet in size.
- The store had no shopping carts and no handheld shopping baskets for customer use.
- The store had three (3) cash registers and one (1) point-of-sale device.
- The store did not have an optical scanner or conveyor belts at the checkout.
- Store personnel confirmed that there was only a small storage area of 100 square feet and that no food was stored offsite.
- There were no large bulk foods, expensive international or specialty foods that might sell for a high price. There were no fresh meat/seafood bundles or large boxes of fresh fruit and vegetables for sale. The store had no signs advertising bulk purchase deals.
- The checkout area consisted of a countertop cluttered with products with a limited amount of clear space to stack food. The very limited space for stacking food at the checkout area made it not conducive to conducting large transactions.

The SNAP eligible food stocked by the store consisted mainly of inexpensive canned and packaged goods. The store did not carry any fresh meat, poultry or seafood and the only fresh produce sold by the store was a small container of lemons. The store

also sold a large amount of snack foods and other accessory food items such as coffee, tea, condiments, and spices. The stocked ineligible items included tobacco, alcohol, lottery tickets, automotive products, health and beauty products, paper goods, and cleaning products. The store also had an ATM and offered a money transfer service. Store personnel confirmed with the store visit contractor that the most expensive items sold by the store was a 36-can package of soda at \$13.99; a 42 ounce pizza at \$8.99; a 32 ounce package of chicken nuggets at \$7.99 cents; and 3.25 ounces of beef jerky at \$6.49.

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 transaction patterns significantly different from similar-sized competitors offering similar food items. Although the Appellant says that Consaul Food Market is a grocery store, it is in fact a convenience store under FNS standards.

Multiple Transactions by the Same Household within a Short Time Period

The Appellant states that store owners are not allowed to restrict the number of times that SNAP recipients use their SNAP benefits. It is true that SNAP households have no limit on the number of times they may use their SNAP cards or how much eligible food they may purchase. However, 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 a convenience store's stock and facilities and are thus indicative of trafficking.

Violating stores often conduct multiple split transactions from the same household account as a method to avoid the detection of single high dollar transactions that cannot be supported by the retailer's food inventory and infrastructure. Charge Letter Attachment 1 lists 21 sets of 45 transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C). **5 U.S.C. § 552 (b)(7)(E).** It is even less likely that these excessively large transactions would be conducted multiple times by the same household during a short time period.

The Appellant states that SNAP customers will make an initial test transaction to determine how much remains on their card and then will make an additional purchase. **5 U.S.C. § 552 (b)(6) & (b)(7)(C).** The store encourages customers to do this.

This contention is not credible. First, it is not necessary for SNAP recipients to make a purchase to determine the remaining balance on the card as they may instead perform a balance inquiry at the store. Even, if the SNAP recipient and the store were both not aware of the balance inquiry function, a SNAP recipient would be more likely to conduct a small dollar transaction to determine the balance on the

card before making a large purchase. However, every first transaction in each pair consisted of a large dollar transaction greatly exceeding the average SNAP transaction of an Ohio convenience store during the review period.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is not credible that a SNAP recipient would first select all its food items, transport them to the very limited counter area without the assistance of shopping baskets or carts, and conduct two (2) or more separate large transactions to determine if there were sufficient benefits on the EBT card. Instead, the more likely explanation is that this particular transaction pattern resulted from trafficking in SNAP benefits.

The Appellant provided a signed but otherwise unverified statement from an alleged customer stating that she sometimes makes purchases at the store up to four (4) times a day. These purchases allegedly include Monster drinks, Gatorade, soda and boxes of chips of different varieties. Even if true, this statement from a single customer is insufficient to explain or justify the irregular transactions cited in Charge Letter Attachment 1.

The store visit pictures show that is unlikely that SNAP customers would shop at Consaul Food Market multiple times during a short time frame, or purchase such a large volume of items. In addition, the store's small checkout area and very limited counter space makes it unsuitable for conducting large transactions. The store also had no shopping carts or shopping baskets for transporting food within the store. Based on the analysis above, and 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.

Excessively Large Transactions

The Appellant states that store owners are not allowed to restrict how much customers purchase with SNAP benefits. It is true that SNAP households have no limit on the amount of eligible food they may purchase (subject to the remaining balance on the card). However, 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 a convenience store's stock and facilities and are thus indicative of trafficking.

Charge Letter Attachment 2 cites 198 SNAP transactions
5 U.S.C. § 552 (b)(6) & (b)(7)(C). **5 U.S.C. § 552 (b)(7)(E).**

The substantial number of high dollar purchases atypical of a SNAP authorized convenience store calls into question the legitimacy of these transactions. 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.

The Appellant states that the store is a fully stocked grocery store with a variety of items that can be bought in bulk packages as well as individually sold items. However, a review of the store visit report shows that this is not true. As noted above, Consaul Food Market is a convenience store with a limited selection of staple foods mostly consisting of canned and packaged goods and accessory food items. There is no indication from the store visit photographs that the store has any items for sale in bulk. In fact, store personnel confirmed that the most expensive food item sold by the store was a 36-can package of soda at \$13.99. The store's invoices only show the purchase of items typical for a convenience store including candy, snacks, alcohol, soda, fruit drinks, bagged ice and similar items.

The Appellant provided signed but otherwise unverified statements from two alleged customers that they purchase cases of Monster drinks, soda and chips every month. Even if true, these statements from two customers are insufficient to explain or justify the irregular transactions cited in Charge Letter Attachment 2.

The Appellant states that the unique circumstances of the impoverished area surrounding the store contributes to larger than normal SNAP transactions. Allegedly, the store is nestled in a location that does not have competitors within walking distance. Therefore, all of the residents of the local area rely on the Appellant store for all of their household needs. Regarding these contentions, it is true that sometimes a store may have higher than normal SNAP transactions due to the lack of access to other SNAP authorized stores in the area. However, the Retailer Operations Division determined that within a mile and a half radius of Consaul Food Market there are ten (10) SNAP authorized stores. These authorized stores consist of seven (7) convenience stores, a small grocery store, a large grocery store and a supermarket. None of the other comparison convenience stores exhibited the same irregular transaction patterns as Consaul Food Market. As noted above, the Retailer Operations Division also determined that Consaul Food Market store does not appear to stock any expensive food items or any international or specialty food items not available at other retailers in the area.

A government report¹ on SNAP benefit redemption patterns revealed that households most often redeemed their benefits at supermarkets and superstores with only four (4) percent of all households never shopping in a supermarket or superstore. Thus, when a supermarket or superstore is available, it is highly unlikely that a SNAP recipient would conduct excessively large SNAP transactions at a convenience store with a limited selection of staple foods like Consaul Food Market.

Lastly, the case record documents that the Retailer Operations Division conducted a detailed analysis of three (3) households identified in the charge letter to analyze their shopping patterns at Consaul Food Market compared to their shopping

¹ "Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program," report prepared by Mathematica Policy Research for the Food and Nutrition Service, February 2011.

patterns at other SNAP authorized stores. All of these households had access to, and shopped at, supermarkets and superstores. However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at Consaul Food Market on the same day or within a few days of shopping at supermarkets and superstores. It is highly unlikely that a convenience store with limited staple foods would have legitimate SNAP transactions comparable or larger than these SNAP authorized supermarkets and superstores.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts and shopping baskets support the Retailer Operations Division determination. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on a preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 2 are more likely than not the result of trafficking in SNAP benefits.

Basis for Determination

The Appellant cites 7 CFR § 278.6(d) in its contention that the store or its employees have not violated the SNAP rules and regulations. The Appellant also states that the Appellant store has been authorized since 1998 without any violations of the SNAP regulations. The SNAP regulation at 7 CFR § 278.6(d) states, in part, that in making a disqualification determination FNS shall consider:

- (1) The nature and scope of the violations committed by personnel of the firm,
- (2) Any prior action taken by FNS to warn the firm about the possibility that violations are occurring, and
- (3) Any other evidence that shows the firm's intent to violate the regulations.

With regard to the nature and scope of the violations, trafficking in SNAP benefits is an extremely serious violation and both 7 U.S.C. § 2021(b)(3)(B) and 7 CFR § 278.6(e)(1)(i) state that **a first time violation warrants a permanent disqualification**. Therefore, whether or not the store had any prior violations is not relevant in this case. However, it should be noted that contrary to the Appellant's assertion, the store did receive a warning letter in 2007 for violations during an undercover investigation.

Regarding prior warnings, 7 CFR § 278.6(d) simply requires FNS to **consider** any prior warnings when determining a sanction. However, the SNAP regulations **do not require** the Retailer Operations Division to give prior warnings before issuing a

charge letter for trafficking. SNAP regulations at 7 CFR § 278.6(e)(7) states that FNS will “send the firm a warning letter if violations are too limited to warrant a disqualification.” Trafficking transactions are not considered to be “violations that are too limited to warrant a disqualification.”

Lastly, the definition of trafficking contained in the SNAP regulations at 7 CFR § 271.2 does not require an element of intent on the part of the violator. Therefore, whether or not the owner or store employees intended to commit SNAP trafficking violations is not relevant in this case. In addition, the store owner signed a certification that he would accept responsibility on behalf of the store and its employees for any violations; therefore, whether or not the store owner was aware of the violations, the store owner is ultimately responsible and accountable for violations committed at the store.

CIVIL MONEY PENALTY

The Appellant contends that it should qualify for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i). However, the Appellant did not timely request consideration for a trafficking CMP under 7 CFR § 278.6(i) even though it was informed of the right to do so in the charge letter. SNAP regulations at 7 CFR § 278.6(b)(2)(iii) states that “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.” [Emphasis added.]

Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program **prior** to the violations as required in 7 CFR § 278.6(i). Approximately two (2) months after the trafficking CMP deadline had passed, the Appellant provided copies of signed but undated SNAP agreements for three (3) alleged store employees. Regarding compliance policy standards, 7 CFR § 278.6(i)(1) states, in part:

... in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written **and dated** statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with this part 278 of current SNAP regulations
[Emphasis added.]

The Appellant also provided two signed letters from alleged store employees dated February 12, 2018, stating that the employees were trained on SNAP rules and regulations at initial hire and were reminded to follow the SNAP rules all the time. Even if these statements had been submitted timely, they would not have been sufficient to document the training program standards for a trafficking CMP. Regarding training program standards, 7 CFR § 278.6(i)(2) states, in part:

A firm which seeks a civil money penalty in lieu of a permanent disqualification **shall document its training activity** by submitting to FNS its **dated training curricula** and **records of dates training sessions were conducted**; a record of dates of employment of firm personnel; and **contemporaneous documentation** of the participation of the violating employee(s) in initial and any follow-up training held prior to the violation(s). [Emphasis added.]

Based on the above analysis, the Retailer Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify the retailer. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. 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.

In the absence of any reasonable explanations for 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. 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 in fact occur as determined by the Retailer Operations Division. Based on the discussion above, the decision to impose a permanent disqualification against Consaul Food Market, Appellant, is sustained.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this determination. Please note that 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 you 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, FNS is 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.

RONALD C. GWINN
Administrative Review Officer

May 1, 2018