

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

D & S Market 2,

Appellant,

v.

Case Number: C0204417

Retailer Operations Division,

Respondent.

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 D & S Market 2 (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division, 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 D & S Market 2.

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 May 2017 through October 2017. This involved the following transaction patterns which are common trafficking indicators:

- There were an unusual number of transactions ending in a same cents value.
- Excessively large purchase transactions were made from recipient accounts.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized D & S Market 2 for SNAP participation as a convenience store on June 17, 2010. In a letter dated December 11, 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 May 2017 and October 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 a faxed letter dated December 15, 2017, the Appellant replied to the charges, stating that large SNAP transactions were due to households purchasing food items in bulk, including fresh produce, meat, seafood, rice, etc. The Appellant also stated that sometimes the firm rounds transactions to the nearest whole dollar so as to leave the household with additional benefits on the EBT card for future purchases. The Appellant stated that many of its customers use the store as their primary grocer because many families do not own a vehicle and have limited access to transportation. To support its response, the Appellant included 17 photographs of store inventory to show some of the items that it sells in bulk.

After evaluating the Appellant's response and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated December 29, 2017. 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 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 determined 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 January 5, 2018, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

It should be noted that along with its request for review, the Appellant provided 225 pages of inventory invoices and receipts. Because this evidence had not been provided to the Retailer Operations Division prior to the disqualification determination, the administrative review officer forwarded a copy of the invoices to the Retailer Operations Division for its consideration. On January 17, 2018, the Retailer Operations Division concluded its analysis of the additional evidence and stated that the documentation did not change its position that trafficking had occurred.

In a package postmarked January 25, 2018, the Appellant submitted 139 more pages of evidence for consideration. This included 136 pages of additional inventory records, two pages of a

petition signed by SNAP customers, and an Income Statement for the year 2017. All of the documentation provided by the Appellant has been considered in this review.

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...

APPELLANT'S CONTENTIONS

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

- Appellant sent the written explanation that the Retailer Operations Division was asking for, but the store was disqualified anyway. Now the business is in jeopardy after seven years of serving the community.

- Appellant requests that the administrative review officer take time to look over the firm's invoices and take into consideration that the Appellant has served the community with honor.
- Appellant knows its community well and has served them to the best of its ability. The loss of SNAP will mean that customers will have to travel approximately two miles to the nearest supermarket. Most of the firm's customers do not have vehicles and the elderly will lose their independence of shopping by themselves.

In support of its contentions, the Appellant provided over 350 pages of inventory records for all of calendar year 2017; a petition signed by 19 apparent SNAP customers; and a document entitled "Income Statement," which appears to be a summary of income and expenses for the firm for the 12-month period ending December 31, 2017.

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 suspicious 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 unusual transactions cited in the charge letter were the result of trafficking?

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm's EBT transactions, but also information obtained from a November 14, 2017, store visit which was conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report and photographs documented the following store size, description, and characteristics:

- D & S Market 2 is a convenience store, approximately 1,000 square feet in size, operating in New Bedford, Massachusetts.
- At the time of the contractor's visit, the firm had no shopping carts or shopping baskets, which is not uncommon for stores of this size. Customers shopping in such stores generally do not purchase more food than they can carry in their arms.
- The store visit photographs show one cash register and agency records reflect the use of one EBT point-of-sale device.
- It does not appear that the firm uses optical scanners to process transactions.
- The store's staple food stock is sufficient in each of the four staple food categories. The food selection is typical of a convenience store/corner market, though the firm appears to carry somewhat more inventory than the average convenience store.

- SNAP-eligible, non-staple accessory food items available at the store include carbonated and uncarbonated drinks, snacks, candy, and condiments. The store also sells ineligible, nonfood items, including tobacco products, lottery tickets, and other miscellaneous household merchandise.
- At the time of the contractor's visit, the firm was an authorized retail store in the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC). This is reflected in the food items available for purchase with WIC benefits, including fresh produce, fruit juice, eggs, bread, milk, breakfast cereal, and infant foods.
- The checkout area consists of a small countertop, perhaps 24 inches by 24 inches in size. The constricted checkout area is not suitable for conducting large or rapid transactions as there is very little space on the counter to place more than a few small items at a time and little room for customers to maneuver with large amounts of groceries.
- There is no indication from the store visit report that the firm has a special pricing structure, although most items appear to end in 9, such as \$0.99, \$2.99, etc. The report also states that the firm does not round transaction totals up or down at checkout.
- The most expensive food items available for purchase include a 50-pound bag of rice for \$28.99; a 2-pound can of tuna for \$13.99; a 12-pound bag of rice for \$12.99, and a 36-ounce can of coffee for \$8.99.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a convenience store or corner market, where households normally purchase a limited number of items. There was no indication that SNAP households would be inclined to regularly visit D & S Market 2 to purchase large quantities of groceries, especially considering the absence of shopping carts and baskets, the constricted checkout area, and the availability of much larger grocery stores in the area.

Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed significantly from those of nearby, similar-sized competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: There were an unusual number of transactions ending in a same cents value. This attachment lists 409 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). When such transactions are not supported by a specific pricing structure at the store, they are a strong indicator of trafficking in SNAP benefits.

The Appellant has argued that it sometimes rounds transaction totals to the nearest dollar to give customers additional money for future purchases. However, this claim contradicts the contractor's store visit report. During its visit, the contractor spoke with store personnel, who indicated that the firm does not engage in the practice of rounding transaction totals up or down. Unfortunately, the Appellant has offered no evidence, such as itemized cash register receipts, to support its contention or to show that the transactions listed in Attachment 1 were legitimate purchases of eligible food. Without such evidence, this review has little option but to conclude that the transactions listed in this attachment were, more likely than not, the result of trafficking.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 285 SNAP transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with a convenience store in the state of Massachusetts. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a convenience store in Massachusetts was \$7.22. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Given that the Appellant firm does have a moderate inventory of SNAP-eligible foods, and considering that the store sells a few expensive items, such as a 50-pound bag of rice for \$28.99, it is probable that there would be an occasional purchase where the transaction amount is high, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As such, there may be some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 2. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from similar-sized competitors, especially considering the absence of shopping carts and baskets and the severely constricted checkout area. The substantial number of high-dollar transactions in a six-month period calls into question the legitimacy of these transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Appellant has argued that many of its customers do not have transportation and thus use D & S Market 2 as its primary grocery store. The Appellant further argued that many of its customers buy in bulk.

Unfortunately, these arguments are not supported by any evidence, such as itemized cash register receipts, to verify that the specific transactions in question were legitimate purchases of eligible food. Additionally, it is difficult to envision SNAP customers on foot carrying 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of groceries to their homes without shopping carts or some mode of transportation.

Based on the analysis above, it is the determination of this review that D & S Market 2 likely trafficked in SNAP benefits during the review period. The attachments furnished with the charge letter adequately identify irregular patterns of SNAP transactions which indicate that trafficking was likely taking place. Conversely, the Appellant has failed to provide relevant evidence or a rational explanation for why such patterns might exist. As there are multiple unexplained patterns of irregular transactions, the case of trafficking is convincing.

Appellant Evidence

As noted earlier, the Appellant has provided a large amount of evidence to support its assertion that it has not engaged in trafficking violations. This evidence includes more than 350 pages of inventory invoices, a petition signed by SNAP customers, and business income and expenses statement.

Inventory Records

When the Appellant submitted its request for administrative review, it provided 225 pages of inventory invoices and receipts. Of those, 139 pages were either outside of the six-month review period or had no eligible food items listed. The remaining 86 pages were evaluated by the Retailer Operations Division, which determined that the total value of SNAP eligible merchandise purchased by the firm was 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

On January 25, 2018, the Appellant submitted an additional 136 pages of inventory information. These additional pages show every purchase made during 2017 from the following vendors: Poultry Products Northeast; Lisbon Sausage Co., Inc.; and BJ's Wholesale Club, Inc. According to these records, the Appellant purchased 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of SNAP-eligible foods from these three vendors during the six-month review period. Of that amount, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of inventory was purchased at BJ's Wholesale Club. Unfortunately, the records from BJ's do not give a complete picture of the transactions. For example, there are a number of items listed, such as alcoholic beverages and clothing, that are not sold at D & S Market 2. It is difficult to determine, therefore, whether all of the items purchased at BJ's – both food and nonfood – were solely for use at the Appellant store or if there were some items purchased for personal use as well.

Assuming that all of the food purchased at BJ's was for resale at D & S Market 2, this review will concede the possibility that the firm had enough inventory to cover its SNAP and WIC redemptions during the review period. However, inventory records alone do not prove, by a preponderance of the evidence, that trafficking did not occur. Inventory records by themselves give little, if any, insight into the specific transactions listed in the charge letter. Even after a thorough review of the inventory records, this review does not know what was purchased during the transactions in question and whether or not those transactions were legitimate purchases of eligible food. Without more specific evidence relating more directly to the transactions in question, this review finds that trafficking was, more likely than not, the cause of the highly unusual transaction patterns listed in the charge letter attachments.

Income and Expenses Statement

This one-page document provides a summary of all income and expenses for the year 2017. Unfortunately, this document is little more than an accounting overview for tax purposes and does not give any insight into the specific transactions listed in the charge letter. Accordingly, this review finds this evidence to be of little relevance to the case at hand.

Customer Petition

As noted earlier, the Appellant submitted a petition bearing the names of 19 apparent SNAP recipients who want D & S Market 2 to remain authorized to accept SNAP benefits. The petitioners further claim that they have never used their EBT cards illegally at the Appellant store.

With regard to this petition, this review finds such a document to be of little evidentiary value. Experience has shown that SNAP recipients rarely admit to trafficking, especially when such an

admission could potentially expose them to administrative and/or criminal charges. Customer declarations, affidavits, and petitions routinely attest to irregular transactions being legitimate even when there is strong evidence to suggest otherwise, and they routinely claim that they will experience hardship if the firm is disqualified even when the evidence shows that the households very often frequent other SNAP-authorized stores in the area. Such is the case here.

Therefore, a signed petition does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Hardship to SNAP Recipients

The Appellant has argued that a disqualification of the firm would cause hardship to SNAP households who shop at the store. It claims that the loss of SNAP will mean that customers will have to travel approximately two miles to the nearest supermarket. It further claims that most of its customers do not have vehicles and that the elderly will lose their independence of shopping by themselves.

With regard to these claims, it is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and households are forced to use their benefits elsewhere. Regulations at 7 CFR § 278.6(f) do allow, in some circumstances, for a civil money penalty to be imposed in lieu of disqualification when there is an absence of other SNAP-authorized stores in the area. However, the regulations are clear that a civil money penalty for hardship to SNAP households may not be imposed in lieu of permanent disqualification for trafficking.

Therefore, the Appellant's contention that SNAP households will be adversely affected as a result of the firm's disqualification does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Civil Money Penalty

As noted earlier, the Retailer Operations Division determined that the Appellant firm was not eligible for a civil money penalty in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and training program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a civil money penalty to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate documentation within designated timeframes. The case record shows that the Appellant did not request a CMP when it responded to the charge letter and there is no evidence that the Appellant submitted any documentation that would indicate that the firm had a compliance policy or training program of any kind.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

An analysis of the Appellant's EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify D & S Market 2 from SNAP participation. This data provided sufficient evidence for this review to conclude that the questionable transactions and patterns listed in the charge letter were, more likely than not, the result of trafficking violations committed by the Appellant. Likewise, the Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

Based on a review of all available information in this case, the decision to impose a permanent disqualification against the Appellant, D & S Market 2, under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

June 28, 2018