

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

**El Toro Food Market LLC,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0216362**

**FINAL AGENCY DECISION**

The record supports that the El Toro Food Market LLC (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). It is the decision of the USDA that there is sufficient evidence to support that the permanent disqualification of Appellant from participation as an authorized retail food store in the Program, as imposed by the Retailer Operations Division, (Retailer Operations) was appropriate.

**ISSUE**

The issue accepted for review is whether Retailer Operations 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 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

**CASE CHRONOLOGY**

By Charge letter dated March 27, 2019, Retailer Operations informed the owner that it had compiled evidence that Appellant had violated the SNAP regulations based on electronic benefit transfer (EBT) transactions that established clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for the firm type. The sanction for trafficking is permanent disqualification.

The owner responded to the Charge letter April 5, 2019. By letter dated April 10, 2019, Retailer Operations granted an extension to the owner to reply. The owner provided a response dated April 11, 2019.

Retailer Operations issued a Determination letter dated April 16, 2019. This letter informed the owner that Appellant was permanently disqualified as a retail food store in accordance with Sections 278.6(c) and 278.6(e)(1) of the regulations. Retailer Operations considered Appellant's eligibility for a civil money penalty (CMP) according to Section 278.6(i) of the regulations, and found it was not eligible because insufficient evidence was submitted timely to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program to prevent violations.

By letter dated April 23, 2019, the owner appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated April 25, 2019. The owner provided a letter to this office via email on May 15, 2019.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true.

### **CONTROLLING LAW AND REGULATIONS**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) 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 § 278.6(e)(1) states: "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined, in part, in 7 CFR § 271.2, as "the buying or selling of SNAP benefits for cash or consideration other than eligible food."

7 CFR § 271.2 states: "Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food products prepared for immediate consumption."

7 CFR § 278.6(a) states: "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.”

7 CFR § 278.6(b)(2)(ii) states: “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(i) states: “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**

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. The charges were based on an analysis of SNAP transaction data during the period of September 2018 through February 2019. The patterns of transaction characteristics indicative of trafficking are:

1. There were an unusual number of transactions ending in a same cents value.
2. Multiple transactions made from individual benefit accounts within a set time period.
3. Excessively large transactions made from recipient accounts.

### **APPELLANT’S CONTENTIONS**

In reaching a decision, consideration has been given to all contentions, including any not referenced.

- I am adamant that I have not violated any SNAP regulations.
- We review the regulations three times a year to make sure we comply with SNAP and do not violate any rules.
- The grocery store across the street lost privileges and this may also be a reason for the increase in our sales.
- In my business we never committed any fraud with the USDA food and nutrition (EBT).
- I send you proof that we haven’t done anything against our principles or the rule of the food nutrition service that can affect my family, or my business.
- The proof I send was all the receipts for all the companies that we purchase the products we resale in my business all of them were detailed how often we purchase from all of them. Some are everyday some of them 2 times a week, some every two weeks some of them are two or three time a month.
- All the proof were send from my account office by the twentieth of April.
- This situation no only affect business it affect my customers and it affect my family.

- Everyday I receive multiple phone call from my customers asking if they can use they food stamp card to buy groceries, if I'm receiving the food stamp card aging because is temporary out of service until case be review.
- They be having difficulty finding another store where they can use they food stamp card and buy because the store across the street from me don't take it and is another one but they said they can't find all the products they be needing in there.
- I also had ask my landlord if she give me the Permit to make the store bigger because my customers are demanding me more service and more different products but what she offered me sell me the building that was good when this happen. I will give my customers more service and more products.
- As store owner I just want to give the community the best service but without this program it will be a little difficult for me.

### ANALYSIS AND FINDINGS

Retailer Operations presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the Charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant during the review period. As patterns of unusual transactions appear across multiple Attachments the case of trafficking becomes more convincing.

**Attachment 1:** Listed are 144 SNAP transactions each ending in a same cents value of 99. The onsite store visit report conducted March 9, 2019, supports that Appellant had a pricing structure were most products appeared to end in x9 cent values. The store report shows the four most expensive items at Appellant ended in x9 cent values. It is implausible that items ending in x9 cent values purchased together would total to amounts ending in 99 cents. When a large number of transactions that end in a same cent amount are conducted, that would not be expected based on store pricing information gathered from an onsite store visit, it appears that these transaction amounts are contrived. As such, in the absence of compelling evidence to the contrary, this evidence is indicative of trafficking.

Contentions:

- With regards to the claims that the amounts of the transactions show consistency, I have attached the invoice for a wholesaler of mine, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), so you can see most of these packages have fixed prices with similar denominations and are sold for small markups.
- I have also attached invoices for one of the major distributors that I use, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), that show my monthly purchases amount.
- My sales from the food stamps have been consistently around 3500 per month. I keep my store fully stocked to meet these demands.

Retailer Operations considered only the invoices for the review period, and ineligible items were subtracted from the invoice total. All of the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) invoices provided by the owner have an identical format 5 U.S.C. § 552 (b)(6) & (b)(7)(C) None of the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) invoices list food items or detail of items purchased. The 5 U.S.C. § 552

(b)(6) & (b)(7)(C) invoices were identical in format, and detailed items purchased by Appellant. Retailer Operations found the invoices at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for the review months 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The retailer did not provide a markup percentage. Retailer Operations applied a markup of 52% to the retailer invoices. Based on this markup, Retailer Operations determined that the invoice evidence was not sufficient to cover the SNAP redemption total amount for the period 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The store report states that Appellant does not have any shopping baskets or carts available for customer use in order to assemble large numbers of eligible items. Appellant has the burden to provide relevant evidence to rebut the trafficking charges. The owner provided no pricing information of eligible SNAP items. The owner provided no business banking records, federal business tax returns or state tax submissions to support his contentions that he was not trafficking.

**Attachment 2:** Listed are 132 transactions in 58 sets conducted by 36 unique households (HHs). Multiple transactions within a set time period are a method stores use to avoid high dollar transactions and are indicative of trafficking.

Contentions:

- In this neighborhood families visit our store multiple times a day and I cannot limit clients to spend a specific amount to avoid patterns.
- The surrounding area is all very low-income families that include many members in each household and my store is most readily accessible to these clients.

The data shows that within a one mile radius of Appellant there are more than 80 other authorized retailers classified as convenience stores, small grocery stores, medium grocery stores, large groceries, supermarkets, and super stores. The data supports that 69% of the HHs listed on this Attachment shopped at a large grocery, a supermarket, or super store within two days of making a transaction(s) at Appellant. Thus, recipients did use other authorized shopping options to transact SNAP benefits.

Retailer Operations compared Appellant's data to three nearby authorized stores, two small groceries and one convenience store. Appellant had 58 data sets flagged on this Attachment whereas the two small groceries had no flags, and the convenience store had five data sets flagged. Thus, Appellant's transaction activity was unusual.

No itemized cash register tapes to support SNAP eligible food sales at Appellant were provided. Insufficient vendor invoices to support the acquisition of SNAP eligible foods were advanced by the owner to support the dollar volume of SNAP redemptions during the review period. The owner provided no recipient statements regarding their shopping behavior at the store. No federal tax records or state sales tax reports were advanced to counter the trafficking charge. No business banking records were offered to support the owner's contention that trafficking was not occurring at Appellant.

**Attachment 3:** Listed are 467 transactions conducted by 148 unique households, for amounts that exceed the average transaction amount for the same store type in the same state by three

times or more. 5 U.S.C. § 552 (b)(7)(E). Appellant's SNAP dollar volume was 81% higher than stores in the state typed as medium groceries. Retailer Operations determined that three nearby stores, within a 0.5 mile distance from Appellant, each had fewer large transactions flagged at 0, 68, and 20, as compared to the 467 transactions flagged at Appellant. This is unusual.

Of the households flagged on this Attachment, 64% conducted a transaction(s) at a large grocery, supermarket, or super store within one day of making a transaction(s) at Appellant. Within two days of transaction(s) at Appellant, the percentage of households making transactions at the larger stores rose to 74%. This indicates that the households were aware of other nearby authorized retailers, and transacted benefits at larger stores.

Retailer Operations determined that the larger stores stocked similar and/or identical food items and brands at comparable or lower prices than Appellant. The record included shopping histories of several households that Retailer Operations found unusual. For example, on September 4, 2018, a HH transacted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at a super store and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) later it made a larger transaction at Appellant 5 U.S.C. § 552 (b)(6) & (b)(7)(C). On October 4, 2018, this same HH transacted more 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at Appellant in a series of transactions, while only transacting 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at a super store that it visited that same date.

While some households may have conducted legitimate SNAP transactions at Appellant, insufficient evidence was presented to support this argument. The vendor invoices of SNAP eligible items acquired in inventory to support Appellant's SNAP redemptions were not sufficient to cover the high SNAP redemption total for the review months. The owner provided no itemized cash register tapes of SNAP sales for the review months. No customer affidavits were advanced. No federal business tax returns or state tax filings were provided, and no business banking statements were submitted. Thus, the owner has not provided a preponderance of evidence that the transactions on the Attachments are for eligible foods rather than the result of trafficking.

A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations. There is no provision in the Act, or regulations, that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees. The evidence that Appellant violated the SNAP regulations is furnished in the Charge letter Attachments. SNAP transaction data is provided to FNS via each State's EBT processor on a daily basis in a single layout and format that is standardized nationwide. The USDA uses pre-defined criteria or patterns for potential fraud detection. A computer system provides a series of reports that compare a specific store's data to the average for its firm type or to user-selected comparison stores. While the system identifies a retailer for further investigation, the actual case of trafficking is made by Retailer Operations staff on the basis that the transaction patterns cannot be explained based on the store size, layout, inventory, and other factors.

Based on Appellant's data, and in the absence of compelling evidence for such transaction patterns, a conclusion can be drawn, that the patterns cited in the letter of charges evidence trafficking as the most likely explanation. Nevertheless, transactions having such characteristics

are sometimes the result of legitimate purchases of eligible food items, and opportunities are therefore afforded to charged retailers to provide evidence of the legitimacy of the questionable transactions cited.

The regulations at 7 CFR §278.6(a), establish the authority upon which FNS may disqualify any authorized retail food store. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through inconsistent redemption data and evidence obtained through a transaction report under an electronic benefit transfer system. In this case, Retailer Operations determined that the owner's contentions and evidence, did not outweigh the evidence in the record. Retailer Operations used transaction data and system reports, in addition to an onsite store visit report, and an analysis of household shopping behavior, in rendering a finding that violations indicative of trafficking were occurring at Appellant, and it acted to permanently disqualify Appellant.

### **CIVIL MONEY PENALTY**

The regulations at 7 CFR Section 278.6(i) specify the criteria for a firm's eligibility for a CMP in lieu of permanent disqualification for trafficking. The owner failed to submit substantial documentation timely to show that he met the four regulatory criteria to qualify for a CMP. Accordingly, Retailer Operations determined that Appellant was not eligible for a trafficking civil money penalty.

### **CONCLUSION**

Retailer Operations' analysis of Appellant's SNAP transaction data was the primary basis for its determination to permanently disqualify Appellant. The record also included onsite store photographs, an onsite inventory and store visit report, HH shopping analyses and other reports that provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits.

Based on empirical data and in the absence of a preponderance of evidence of the legitimacy of the transactions presented by Appellant, it is more likely than not that violations did occur as charged by Retailer Operations. The record confirms that Retailer Operations' denial of a trafficking CMP was also proper per the applicable regulations. Therefore, the decision to impose a permanent disqualification against Appellant is sustained.

### **RIGHTS AND REMEDIES**

Attention is called to Section 14 of the Food and Nutrition Act of 2008 and to 7 CFR § 279.7 of the regulations with respect to applicable rights to a judicial review of this decision. 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 Appellant's owner resides or is 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.

M. Viens  
ADMINISTRATIVE REVIEW OFFICER

June 3, 2019