

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

Elmwood Variety Market,

Appellant,

v.

Case Number: C0203150

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 Elmwood Variety Market (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 Elmwood Variety Market.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that “[A] food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS.”

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified based on an analysis of EBT transaction data from July 2017 through November 2017. This involved the following transaction patterns which are common trafficking indicators:

- There were multiple transactions made from individual household benefit accounts within unusually short timeframes.
- Excessively large purchase transactions were made from recipient accounts.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Elmwood Variety Market for SNAP participation as a convenience store on August 24, 2016. In a letter dated January 23, 2018, 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 July 2017 and November 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).

Agency records show that the Appellant did not reply to the charge letter.

After further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated February 8, 2018. 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 February 10, 2018, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

It should be noted that in a letter postmarked March 1, 2018, the Appellant submitted additional information to support its request for review, including 33 customer affidavits and roughly 250 cash register and EBT point-of-sale receipts.

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:

- The majority of the firm's customers are low-income residents who rely on SNAP to supplement their budget. Most also rely on public transportation. For most customers, the firm is conveniently located within walking distance of their homes.
- Regarding transactions made in unusually short timeframes:
 - Traffic inside the store increases dramatically on the first day of the month. During this time, there are two or three staff members in the store to help customers get checked out in a smooth manner. While the first clerk is using the EBT machine to help out the first customer, the second clerk is using the cash register to ring up the merchandise for the second customer.
 - Transactions in unusually short timeframes happen when a household consisting of several members use the same EBT card for different items based on personal preference.
 - Appellant does not know why the same household uses the same card multiple times. The Appellant does not ask for ID when an EBT card is used. All that is required is a PIN.
- Regarding excessively large transactions:
 - Appellant sells several expensive items, so it is easy to run a grocery bill **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.
 - Appellant listed 14 different items ranging in price between \$8.00 for a 6-pound bag of flour to \$45.00 for a case of Naked brand juice.

In support of its contentions, the Appellant provided roughly 250 EBT and cash register receipts; 67 pages of credit and debit card "batch reports"; and 33 customer affidavits from appellant

SNAP recipients who claim to be regular customers of Elmwood Variety Market and who always use their EBT card for valid purchases.

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 and evidence 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 September 26, 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:

- Elmwood Variety Market is a convenience store, approximately 2,000 square feet in size, operating in Providence, Rhode Island.
- At the time of the contractor's visit, the firm had no shopping carts, but did have four hand-held shopping baskets for customer use.
- 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 moderate in each of the four staple food categories. The food selection is typical of a convenience store/corner market.
- 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 and 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 canned tuna, fruit juice, eggs, bread, milk, breakfast cereal, peanut butter, and infant foods such as infant formula.
- The checkout area consists of a small cluttered countertop. 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, \$3.99, etc. The report also states that the firm does not round transaction totals up or down at checkout.
- According to the report, the most expensive food items available for purchase include a 12-ounce can of Similac infant formula for \$19.99; a 20-pound bag of rice for \$18.99; a box of espresso-style coffee for \$8.49; and a 64-ounce bottle of canola oil for \$6.99.

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 Elmwood Variety Market to purchase large quantities of groceries, especially considering the absence of shopping carts, the constricted checkout area, and the availability of much larger grocery stores in the immediate 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: Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment lists 18 sets of transactions (37 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E).

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The two transactions totaled 5 U.S.C. § 552 (b)(6) & (b)(7)(C), an extraordinary amount for a convenience store like Elmwood Variety Market, which has no shopping carts and a very small checkout area.

That same day, another household went to the store and also spent 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in two transactions – a curious amount for small store like Elmwood Variety Market. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Considering the amount of food it would take to add up to these transaction totals, and considering that the firm has no shopping carts, it seems very unlikely that these are legitimate transactions. Such transactions are highly unusual and are strongly suggestive of trafficking.

The Appellant contends that transactions made in unusually short timeframes are the result of heavy traffic at the store on the first day of the month. According to the Appellant, during this time, there are two or three staff members in the store to help customers get checked out in a smooth manner. While the first clerk is using the EBT machine to help out the first customer, the second clerk is using the cash register to ring up merchandise for the second customer.

This argument, unfortunately, makes no sense with regard to Attachment 1. This attachment does not suggest that transactions were made too rapidly to be credible. Rather, it questions why the same household would return to the store multiple times in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Multiple cashiers checking out customers in a rapid-fire manner does not explain the transactions listed in this attachment.

The Appellant also claimed that the transactions in this attachment were due to several members of the same household using the same EBT card for different items based on personal preference. Unfortunately, the Appellant offered no evidence to support this contention.

The Appellant did submit a large number of cash register and EBT receipts as evidence that the transactions listed in Attachment 1 were valid purchases. These receipts will be addressed in a separate section below.

Without compelling evidence to prove that the transactions listed in Attachment 1 were legitimate purchases of eligible food, it is reasonable for this review to conclude that that they were likely the result of trafficking violations.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 241 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 Rhode Island. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a convenience store in Rhode Island was \$7.47. 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 20-pound bag of rice for \$18.99, 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 the severely constricted checkout area. The substantial number of high-dollar transactions in a five-month period calls into question the legitimacy of these transactions.

Attachment 2 lists 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering how many items it would take to add up to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or more, and considering the store's characteristics, this review finds it probable that trafficking violations were occurring.

The Appellant has argued that it sells several expensive items, so it is easy to run a grocery bill 5 U.S.C. § 552 (b)(6) & (b)(7)(C). To support this claim, the Appellant provided a list of 14 different items, ranging in price from \$8.00 to \$45.00. Below is a list of the items as provided by the Appellant:

- Naked Case Natural Juice: \$45.00
- Sugar 25 lb.: \$27.00
- Enfamil (21 oz. powder): \$25.50
- Enfamil (12 oz. powder): \$18.50
- Formula liquid (32 oz.): \$13.00

- Nido – Small Size: \$18.50
- Ketchup – Libra big size: \$15.00
- Flour – 18 lb.: \$23.00
- Flour – 12 lb.: \$14.75
- Flour – 6 lb.: \$8.00
- Sliced Bacon – 12 oz.: \$8.50
- Olive Oil – 25 libra: \$13.00
- Corn Oil – 3 gallons: \$21.00
- Corn Oil – 1 gallon: \$14.00

While the purchase of several of these items could conceivably result in large transaction amounts, this review finds it highly unlikely because most of the items listed are not actually available for purchase at Elmwood Variety Market. This list appears to be entirely fabricated.

For example, according to the store visit report, the only bottles of Naked brand juice in the store were found in a cooler, and were sold individually, not as a case. Additionally, there is no evidence at all that the store sells sugar in 25-pound bags. The same goes for 21-ounce cans of Enfamil, liquid formula, Nido, 12- and 18-pound bags of flour, sliced bacon, and corn oil in 1 and 3 gallon containers. The largest ketchup bottle in the store was 24 ounces, and typically sells for less than \$5.00.

Additionally, none of the prices listed here match the general pricing structure of the store, which is that most prices end in 9 – usually 99. Further, none of the receipts provided by the Appellant include items that match the prices in the Appellant’s list. As such, this list of expensive food items, which is not supported by any evidence, is not likely a legitimate reflection of merchandise available in the store.

Based on the analysis above, it is the determination of this review that Elmwood Variety Market 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 compelling 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 approximately 250 pages of EBT and cash register receipts and 33 affidavits signed by alleged SNAP customers.

Receipts

One of the very peculiar elements of this case is the large number of repetitive transaction amounts. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This is highly unusual for a convenience store with standard food offerings. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Considering the contractor's store visit report, it is very difficult for this review to imagine what \$19.99 food item was so popular that SNAP customers would eagerly spend large portions of their benefits to get their hands on this food.

Unfortunately, none of the receipts show what was actually purchased. Every item on every cash register receipt is listed as "Dept. 13." The Appellant offered no explanation as to what this means. Accordingly, there is no way to know whether the items purchased were eligible or ineligible or whether any food items were purchased at all.

According to the contractor's store visit report, the only item in the store priced at \$19.99 was a 12-ounce can of infant formula. It is extraordinarily unlikely that SNAP customers would visit Elmwood Variety Market and purchase large quantities of infant formula. The vast majority of households that participate in SNAP and contain infants and children under the age of five are also eligible for participation in WIC. As a result, most of the items contained in the WIC food package, including infant formula, are ordinarily purchased with WIC vouchers rather than SNAP benefits. The likelihood that a SNAP household would legitimately use its benefits to purchase many cans of expensive formula – and nothing else – is exceptionally low.

The receipts provided by the Appellant do not, in any respect, prove that the transactions were legitimate purchases of eligible food. Rather, they only serve to strengthen the theory that the firm was likely engaged in trafficking.

Customer Affidavits

As noted earlier, the Appellant submitted 33 affidavits signed by apparent SNAP recipients. Each affidavit says the same thing: the affiant is a regular customer of Elmwood Variety Market and has always used its EBT benefits for valid purchases.

With regard to these affidavits, this review finds such documentation 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.

Therefore, signed affidavits without compelling supporting evidence do 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 respond 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 Elmwood Variety Market from SNAP participation. This data provided ample 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, Elmwood Variety Market, 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

August 1, 2018