

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

**Express Market LLC,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0169267**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the permanent disqualification of Express Market LLC (Express Market or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

**ISSUE**

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

**AUTHORITY**

7 USC § 2021 and the implementing regulations at 7 CFR § 279.1 provide that “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS.”

**CASE CHRONOLOGY**

In a letter dated February 20, 2014, the Retailer Operations Division charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of September 2013 through November 2013. The letter noted that the penalty for trafficking is permanent disqualification as

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

Appellant, through counsel, replied to the charges by letter dated March 3, 2014. Appellant denied trafficking and explained that the transactions were normal based on the unique circumstances of the store. Appellant also requested documents and information that was considered a request under the Freedom of Information Act. On May 15, 2018, counsel was provided with the Agency's final response to its FOIA request. On June 4, 2018, the Retailer Operations Division provided Appellant ten days to provide additional information in response to the charges. Counsel did not provide anything further.

After considering the evidence and the retailer's reply, the Retailer Operations Division issued a determination letter dated August 23, 2018. The determination letter informed Appellant that it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that Appellant was not eligible for a trafficking CMP because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked August 29, 2018, Appellant, through counsel, appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted.

## **STANDARD OF REVIEW**

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

## **CONTROLLING LAW**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) and (e)(1) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

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

7 CFR § 271.2 defines trafficking as: “(1) The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone; . . .”

7 CFR § 278.6(a) states, inter alia, that “FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an *electronic benefit transfer system*, . . .” (emphasis added)

7 CFR § 278.6(b)(2)(ii) states, inter alia: “Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence . . . that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).”

7 CFR § 278.6(e)(1) reads, in part, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.”

7 CFR § 278.6(i) states, inter alia: “FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.”

### **SUMMARY OF THE CHARGES**

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from September 2013 through November 2013. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were an unusual number of transaction ending in a same cent value.
- There were multiple transactions made from individual benefit accounts in unusually short time frames.
- There were excessively large purchase transactions made from recipient accounts .

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

## APPELLANT'S CONTENTIONS

In its August 28, 2018, administrative review request, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- Appellant was not provided with any definition or basis for determining what constitutes an unusual, irregular, excessively large or illegal transaction as those terms are being applied in this matter.
- There is nothing in the decision that addresses that 274.12(e)(4)(f)(1) of the SNAP regulations specifically authorizes an unlimited number of EBT transactions that the USDA claims are improper.
- There is nothing in the decision that sets forth what constitutes an excessively large transaction.
- There is nothing in the regulations that prohibit transactions with the same cents value.
- As there is nothing in the SNAP regulations that prohibits any particular amount, type, or size of an EBT transaction.
- Appellant did not do anything wrong in processing these transactions.

With its administrative review request, counsel submitted a copy of the August 23, 2018, permanent disqualification letter, and a copy of the March 3, 2014, reply to the charges that contained the following explanations:

- This is the first occasion of any allegations of misuse of the Food Stamp Program.
- There is no evidence of trafficking.
- The allegations are based on some computer analysis rather than an individual analysis or observation of these transactions.
- Some items are priced ending in 99 while the sum of other items will result in a total that end in 99 cents and there is nothing illegal about this.
- Customers frequently return to the store on the same day after they have made an initial purchase and told their family members what specials are available on that day.
- Many customers walk to the store so frequent visits during the same day is no not unusual.
- Mere suspicion cannot serve as the basis for a disqualification for trafficking.
- There has been no previous action taken by FNS to warn Appellant that violations may be occurring.
- There is no evidence of intent by the owners.
- Counsel requests a warning letter.
- Appellant does have an effective training program.
- The owner and employees oversee and implement the policy.
- All persons that work in the store are known by the owner.
- The policy has been in place during the relevant period of time.
- The policy is posted in prominent place for all customer and employees to read.

- Ownership is not aware of any trafficking.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced.

## **ANALYSIS AND FINDINGS**

### **Store Visit**

FNS authorized Express Market as a convenience store on April 5, 2013. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a December 18, 2013, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Express Market is approximately 700 square feet, with no additional food storage outside of public view.
- There were no shopping baskets or shopping carts for customer use.
- There was one cash register and one point-of-sale device.
- The checkout counter is partially behind an ice cream cooler and surrounded by a Plexiglas display case.
- There were no meat/seafood specials or bundles that might sell for high prices.
- There was no fresh meat or poultry.
- There were no price signs for the items in the deli case and the products appear to have also been used in preparing SNAP ineligible hot/cold ready-to-eat foods not intended for home preparation and consumption.
- There was also some heads of lettuce and limes in the deli case that were likely used in the preparation of the hot and prepared food items.
- The only other fresh produce was some onions and potatoes.
- Dairy included milk, cheese, and butter.
- Other staple foods available for purchase were canned goods, cereal, rice, deli/lunch meat/hot dogs, canned fish, canned meat, and eggs.
- The firm does have a deli section and sells prepared foods
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included tobacco, alcohol, and health and beauty aids.

The SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. There was a small amount of fresh produce. Given the available inventory as noted above, there is no indication from the store visit report that the store would be likely to

have SNAP redemption patterns significantly different from similar-sized competitors including small grocery stores.

### **Charge Letter Attachments**

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

**Charge Letter Attachment 1. There were an unusual number of transactions ending in a same cents value.** During the review period, there were 178 transactions ending in a same cents value that meet the parameters of this attachment. When such patterns are unsupported by special pricing structures, they are an indicator of trafficking in SNAP benefits.

Counsel explained that some items are prices ending in 99 cents and there is nothing illegal about this. It is possible that some of the smaller transactions are the result of purchasing some same cent items and this could explain some of the lower dollar same cent transactions. However, the larger transactions cited in the charge letter would most likely consist of the purchase of several relatively inexpensive items and it is unlikely that these purchases would routinely total to an amount ending in 99 or 49 cents. Consequently, when many transactions end in a same cents amount, it appears that these transaction amounts are contrived and in the absence of compelling evidence to the contrary, are suggestive of trafficking.

Appellant failed to provide a credible explanation for the same cent transactions listed on Charge Letter Attachment #1.

**Charge Letter Attachment 2. Multiple transactions were made from individual benefit accounts in unusually short time frames.** This attachment documents 40 sets of transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These transactions were conducted by 23 different households. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The photographs from the store visit offer no legitimate explanation as to why SNAP customers would routinely shop at Appellant multiple times during a single **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale. In addition, Express Market does not have any handheld shopping baskets or shopping carts for transporting food within the store. The second and third transactions are too large to consist of forgotten items.

Appellant contends that 7 CFR § 274.12(e)(4)(f)(1) specifically authorizes an unlimited number of EBT transactions. Appellant appears to be referring to an older version of the regulations dealing with functional and technical EBT system requirements that has since been renumbered

or replaced. However, it is correct 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. Nevertheless, 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 the Appellant store's stock and facilities and are therefore indicative of trafficking.

Counsel explains that most customers walk to the store so frequent visits are common. The Retailer Operations Decision determined that most of these transactions would be too large for a household to carry to their home. Given the store's stock of mostly inexpensive foods, these large transactions would likely consist of many low priced items. Thus, it is unlikely that households are carrying 5 U.S.C. § 552 (b)(6) & (b)(7)(C) canned goods and snack foods around a firm that has not shopping baskets and then carrying these groceries to their home.

Appellant did not provide any compelling justification as to why households are conducting multiple transactions at Express Market or evidence that all the irregular transactions cited in the charge letter were for eligible food items only.

**Charge Letter Attachment 3: Excessively large purchase transactions were made from recipient accounts.** This attachment lists 222 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C), amounts which are at least three times larger than the average transaction made at small groceries in the State during the review period. These large transaction amounts are not consistent with the store's inventory. Based on the store visit report, the firm does not offer food in bulk or any specialty foods that might sell for a high price. There was no fresh meat and limited fresh produce. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

As indicated, Appellant's stock is mainly inexpensive snack foods, canned/package foods and accessory food items. The store photos show only limited amounts of deli meat, cheese, and fresh produce. Furthermore, the store visit pictures show that the store layout is not conducive to these excessively large transactions. There were no shopping carts or handheld shopping baskets for transporting food around the store and the checkout counter space is small and constricted.

The Retailer Operations Division determined that the average SNAP transaction for Express Market was more than 2.6 times the average for convenience stores in the State. Similarly, Appellants total SNAP redemptions during the review period were more than double the average for convenience stores in New Haven County.

The Retailer Operations Division compared SNAP transaction ranges at Appellant with the averages for convenience stores in the State for the review period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The evidence regarding the appearance, quality, and quantity of stock at Appellant does not support that SNAP recipients conducted so many high dollar transactions there. The store visit report documents that Appellant does not sell any unique items that cannot be purchased at other stores in the area. The evidence more supports that Appellant was attempting to keep transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to avoid detection of trafficking.

Sometimes a firm may have higher than average SNAP transactions amounts due to the lack of access to other SNAP authorized stores. However, the Retailer Operations Division determined that within a one-mile radius of Express Market, there are at 20 authorized stores, including three small groceries, one medium grocery, and one super store. It is unlikely the firm's customers would regularly purchase large amounts of merchandise at Appellant when larger, better stocked stores are readily available and in the vicinity of the Appellant firm. There was also no evidence that Appellant stocked sufficient inventory to support these transactions during the review period or that Appellant offered special pricing to draw customers.

Lastly, the Retailer Operations Division examined four households identified in the charge letter to analyze their shopping patterns at Express Market compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at supermarkets and super stores. However, despite this access to better stocked stores, all of the four sampled households conducted excessively large transactions at Express Market 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of shopping at a supermarket or super store. Many of these transactions were larger than the transactions conducted at the supermarkets or super stores. It is unlikely that a convenience stores with limited staple foods would have legitimate SNAP transactions comparable to supermarkets or super stores which have a superior breadth and depth of stock at likely better prices.

In summary, Appellant's layout, business structure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Therefore, based on this empirical data, and in the absence of evidence to legitimize such transaction patterns, a conclusion can be drawn, through a preponderance of evidence that the "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation.

## **Evidence of Trafficking**

Appellant contends that there is no direct evidence of trafficking as the charges were based on computer analysis rather than an individual analysis or observation of the store's transactions. Appellant further states that mere suspicion cannot serve as a basis for a permanent disqualification for trafficking.

With regard to these contentions, it should be noted that FNS employs a computerized fraud detection tool to identify EBT transactions that form patterns having characteristics indicative of trafficking. However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still analyze the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether questionable transactions were, more likely than not, the result of trafficking.



The legality of this method is supported by 7 CFR § 278.6(a) which states, inter alia, “FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, **evidence obtained through a transaction report under an electronic benefit transfer system . . .**” [Emphasis added.]

Regarding the denial of the trafficking allegations, this review encompasses and documents the examination of the primary and relevant information in this case to determine whether Appellant demonstrates by a preponderance of the evidence that the permanent disqualification should be reversed. Assertions that the firm has not violated program rules, by themselves and without sufficient supporting evidence, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

### **No Previous Violations**

Appellant contends that it has not had any previous violations. Regarding this contention, 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 or for mitigating the impact of the violations upon which they are based. There is no provision in the Act, regulations, or agency policy that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

### **Basis of Determination**

Appellant contends that the Retailer Operations Division did provide Appellant with a warning nor did it consider its intent. Therefore, Appellant requests a warning letter. SNAP regulations 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.*

7 CFR § 278.6(d) does not require the Retailer Operations Division to give prior warnings or to show the firm’s intent to violate. The Retailer Operations Division only has to *consider*, when rendering a final determination, any prior warnings or intent to violate that might be evident if applicable. Intent to violate is not applicable in this case as the definition of trafficking at 7 CFR §271.2 does not require an element of intent on the part of the violator.

It is true that SNAP regulations allows for the issuance of warning letters in some cases. Specifically, 7 CFR § 278.6(e)(7) states “send the firm a warning letter if violations are too limited to warrant a disqualification.” However, in this case, a warning letter was not issued because the violations were not limited and trafficking is always considered to be the “most serious” of SNAP violations. This is reflected in the Act, which reads, in part, that

disqualification shall be “permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store.” In keeping with this legislative mandate, section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. Therefore, because the sanction is based on trafficking, the sanction warranted is a permanent disqualification and there is no authority to provide a lesser penalty.

In conclusion, Appellant’s contentions do not constitute valid grounds for dismissal of the trafficking charges or for mitigating the impact of those charges through a warning letter or lesser penalty.

### **Civil Money Penalty**

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR §278.6(i) in lieu of a permanent disqualification. Appellant was informed that it would need to provide both the request and supporting evidence within ten calendar days of receiving the charge letter and that no extension of time could be granted for making the request or for providing the required evidence. In its response to the charge letter, Appellant did not specifically request a trafficking CMP but it did state that the store had a training program for its employees and a SNAP compliance policy. Appellant did not provide any documents or evidence supporting its claim.

The criteria for a trafficking CMP in lieu of permanent disqualification is defined under 7 CFR §278.6(i) which reads, *inter alia*:

*In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by **substantial evidence** [emphasis added] its fulfillment of each of the following criteria:*

*Criterion 1. The firm shall have developed an effective compliance policy as specified in §278.6(i)(1); and*

*Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and*

*Criterion 3. The firm had developed and instituted an effective personnel training program as specified in §278.6(i)(2); and*

*Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm ....*

The Retailer Operations Division determined that Appellant was not eligible for a CMP because it failed to submit substantial information to establish that the firm had an effective personnel training program to qualify for a trafficking CMP under 7 CFR § 278.6(i).

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

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

## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. If a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant's 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.

Mary Kate Karagiorgos  
Administrative Review Officer

February 28, 2019