

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

**F & L Mini Market Corp,**

**Appellant,**

**v.**

**Case Number: C0204222**

**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 F & L Mini Market Corp. (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 F & L Mini Market Corp.

**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 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 F & L Mini Market Corp. for SNAP participation as a medium grocery store on June 19, 2014. In a letter dated December 7, 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 letter dated December 18, 2017, the Appellant responded to the charge letter and provided several explanations as to why the transactions listed in the charge letter might have occurred. For example, the Appellant argued that multiple transactions in short timeframes were due to family members from the same household shopping at separate times. As for excessively large transactions, the Appellant argued that this was due to the high cost of food.

The Appellant argued that it relies on SNAP and stated that if the firm was disqualified it would likely be forced to close. Finally, the Appellant requested that a CMP be imposed in lieu of permanent disqualification.

In support of its response to the charges, the Appellant submitted several documents, including photos of the store, inventory invoices, sales records (primarily of cigarettes and other nonfoods), and copies of two employee training agendas for SNAP transactions.

After considering the Appellant's reply and documentation and further reviewing the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated March 22, 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 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 March 28, 2018, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

## **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... In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of permanent disqualification for trafficking, the firm shall, at a minimum, establish by substantial evidence 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 the 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...

## **APPELLANT'S CONTENTIONS**

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

- Appellant is very disappointed with the Retailer Operations Division's decision to permanently disqualify the firm from SNAP participation.

- The firm is located in a “highly residential and business area.” Because of its location, many people in the area use the store as their sole source for groceries.
- Appellant previously sent invoices and photos to show the many different types of products available for purchase at the store.
- The store has always been a rule-abiding business and has always observed the rules and regulations of SNAP. Under no circumstances would the Appellant violate the rules.
- The firm would not survive a disqualification, and the Appellant would have no alternative but to close the store.
- Appellant again requests that a civil money penalty be imposed in lieu of permanent disqualification.
- Appellant requests that all previous information that it provided be taken into consideration.

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 an October 25, 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:

- F & L Mini Market Corp. is a small corner market, approximately 1,000 square feet in size, operating in New York City, New York.
- At the time of the contractor’s visit, the firm had no shopping carts or shopping baskets for customer use, 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 for purchases of merchandise and agency records reflect the use of one EBT point-of-sale device.
- The store does not appear to use optical scanners to process transactions.
- The store’s staple food stock is moderate in each of the four staple food categories. The firm also has a deli counter where hot and cold prepared food items can be purchased.

- Available nonfood items at F & L Mini Market Corp. include alcoholic beverages, tobacco products, lottery tickets, and miscellaneous household merchandise.
- The checkout area consists of a small glass countertop where items can be placed to be rung up. 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. According to the contractor, store personnel claimed that transaction totals are not rounded up or down at checkout.
- The store sells a few expensive food items, including lunchmeats for \$8.99 per pound; sliced cheese for \$7.99 per pound; and a 2.5-pound bag of frozen shrimp for \$19.99.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a small corner market, where households normally purchase a limited number of items to supplement their overall dietary needs. There was very little indication that SNAP households would be inclined to regularly visit the store to purchase large quantities of groceries, especially considering the overall limited staple food inventory, the absence of shopping carts and baskets, and the availability of larger supermarkets and superstores in the immediate vicinity.

Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of 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 27 sets of transactions (67 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).

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Such repetitive transaction totals are a strong indicator that the firm was likely engaged in trafficking.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

A nearly identical incident occurred on 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Attachment 1 is filled with very similar examples. Such transaction patterns are highly irregular and strongly suggestive of trafficking. It is noted that four comparable stores located within a quarter-mile of F & L Mini Market Corp. had only one such transaction set. See chart below:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Why such repetitive transactions would occur at the Appellant store and not at other comparable stores is unknown. Unfortunately, the Appellant has offered no evidence, such as itemized cash register receipts, to show that the specific transaction sets in Attachment 1 were legitimate purchases of eligible food. Without such evidence, it is reasonable for this review to conclude that that the questionable transactions were more likely than not the result of trafficking violations.

**Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts.** This attachment lists 59 SNAP transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with a medium grocery store in the state of New York. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a medium grocery store in New York was \$15.20. In New York City, the average was even lower, at just \$12.40 per transaction. The average transaction in Attachment 2 is more than six times larger than the average purchase amount for this store type.

Given that the Appellant firm does have a moderate inventory of staple and other eligible foods, and considering that the firm does sell a few expensive items, 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 well be some legitimate SNAP purchases 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, the limited overall inventory, and the extremely constricted checkout area. The substantial number of high-dollar transactions in a six-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 typically take to add up to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or more, and considering that the store does not have any shopping carts or baskets, and given the fact that there are much larger supermarkets and superstores in the area with substantially greater inventory and variety, this review finds it unlikely that SNAP households would legitimately choose to spend large portions of their benefit allotments at a small store such as F & L Mini Market Corp.

As with Attachment 1, the Appellant firm had many more suspicious transactions in Attachment 2 than nearby comparable stores. See below:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

It is presumed that the same external factors, such as the high cost of food, would impact the comparable stores just as much as F & L Mini Market Corp. Why, then, would the Appellant store have so many more large transactions than other stores with similar, or even greater inventory? Unfortunately, the Appellant's evidence and explanations do not answer this question.

The transactions identified in the charge letter are highly unusual and substantially different from comparable stores in the area. As noted earlier, in an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be

reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that trafficking did not occur. Unfortunately, the Appellant's evidence is not compelling and does not verify that the specific transactions listed in the charge letter were legitimate purchases of eligible food. Without reasonable evidence, it is the conclusion of this review that the transactions listed in the charge letter were, more likely than not, the result of trafficking violations committed by the Appellant.

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

### **No Prior Violations**

The Appellant contends that the firm has always been a "rule abiding business" and that it has always observed the rules and regulations of SNAP. Unfortunately, this contention does not provide a valid basis for dismissing the charges or for modifying the disqualification penalty. The law requires that when serious violations, such as trafficking, occur, permanent disqualification is the required penalty, even on the first occasion, as noted in 7 U.S.C. § 2021(b)(3)(B).

### **Hardship to Appellant**

The Appellant has argued that the firm would not survive a SNAP disqualification. It claims that if the disqualification determination is upheld, the store will have no option but to close.

With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty. To allow store ownership to be excused from being assessed administrative penalties based on a purported economic hardship to the store's ownership or to the firm itself would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with Program regulations, but also to those retailers who have been disqualified from the Program in the past for similar violations.

Therefore, the Appellant's claim that the firm may incur economic hardship as a result of an administrative sanction 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 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 the firm 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. Regulations further state that a firm shall establish “by substantial evidence” that it is eligible for a CMP and that it meets the four criteria outlined in 7 CFR § 278.6(i).

The case record shows that the Appellant timely requested a CMP in its reply to the charge letter, and also submitted two training documents – one dated December 9, 2016, and the other dated June 9, 2017. The two training documents are virtually identical – a one-page summary of topics discussed during a SNAP training meeting conducted by the Appellant owner. Unfortunately, this one-page summary does not constitute “substantial evidence” of an effective compliance policy and training program. For example, the training documents are signed by the Appellant owner and only one employee. However, the contractor’s store visit photos show at least three people working at the store. The Appellant also failed to submit a record of dates of employment of firm personnel as required by 7 CFR § 278.6(i)(2). The Appellant also submitted no evidence to suggest that firm ownership was not aware of, did not approve of, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations (see 7 CFR § 278.6(i), Criterion 4).

Therefore, it is the determination of this review that the Appellant’s documentation is insufficient to demonstrate that the firm had an effective compliance policy and training program in effect at the time of the alleged trafficking violations. As such, a civil money penalty in lieu of permanent disqualification for trafficking cannot be granted 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 F & L Mini Market Corp. 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 and evidence in this case, the decision to impose a permanent disqualification against the Appellant firm, F & L Mini Market Corp., 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

October 3, 2018