

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

Fairview Market,

Appellant,

v.

Case Number: C0209424

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of Fairview Market as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Fairview 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.”

CASE CHRONOLOGY

In a letter dated July 9, 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 during the months of December 2017 through May 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated the Appellant had the right to respond to the charges within 10 days of receipt to provide explanations for the irregular SNAP transaction patterns.

The letter also stated that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i). The charge letter was delivered via UPS on July 10, 2018.

In response to the charge letter, the Appellant designated its bookkeeper as its representative in this matter. The firm's bookkeeper requested an extension of time to reply to the charge letter. The Retailer Operations Division granted an extension to July 31, 2018 to respond to the charge letter, but noted that it could not grant an extension of time to request a trafficking CMP. The Appellant's bookkeeper responded by e-mail dated July 31, 2018 and stated that the store had not provided him with any documentation; although he believed the owner was honest, the representative could not express an opinion regarding the charges against the store. The Appellant did not request a trafficking CMP under 7 CFR § 278.6(i).

After considering the Appellant's responses and the evidence in the case, the Retailer Operations Division issued a determination letter dated August 1, 2018. The determination letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(e)(1). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of 7 CFR § 278.6(i). The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP 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 violations of the SNAP.

In a letter postmarked August 10, 2018, the Appellant, no longer represented by the firm bookkeeper, requested an administrative review of the Retailer Operation Division's determination. The request for administrative review was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might 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 covered in the Food & 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 § 271.2 states that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

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 defines trafficking, in part, as:

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 defines eligible food, in part, as:

Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption

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, **evidence obtained through a transaction report under an electronic benefit transfer system...**

[Emphasis added.]

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.

7 CFR § 278.6(b)(2) states, in part:

- (ii) 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 as specified [in § 278.6\(i\)](#), 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)**. [Emphasis added.]
- (iii) **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. [Emphasis added.]

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from December 2017 through May 2017. This involved the following transaction patterns which are trafficking indicators:

- **Charge Letter Attachment 1:** There were an unusual number of transactions ending in a same cents value. This attachment lists 199 transactions [5 U.S.C. § 552 \(b\)\(6\) & \(b\)\(7\)\(C\)](#). [5 U.S.C. § 552 \(b\)\(6\) & \(b\)\(7\)\(C\)](#).
- **Charge Letter Attachment 2:** Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment lists 21 sets of 51 transactions [5 U.S.C. § 552 \(b\)\(6\) & \(b\)\(7\)\(C\)](#) in SNAP benefits. [5 U.S.C. § 552 \(b\)\(6\) & \(b\)\(7\)\(C\)](#).
- **Charge Letter Attachment 3:** Excessively large purchase transactions were made from recipient accounts. This attachment lists 189 SNAP transactions [5 U.S.C. § 552 \(b\)\(6\) & \(b\)\(7\)\(C\)](#). [5 U.S.C. § 552 \(b\)\(6\) & \(b\)\(7\)\(C\)](#).

APPELLANT'S CONTENTIONS

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

- The store denies trafficking in SNAP benefits. The store hired a bookkeeper to help with the initial reply, but he did not even look at the receipts and documents he was provided. The store no longer has any records of purchases but will keep them in the future.
- Not all of the store's transactions end in 89 cents. Those that do end in 89 cents are due to the store's sales method on major sale items which consists of milk, candy, bread, soda, and juice. The store attaches 89 cents to these products as a sales tactic since the store does not charge tax on these items.
- Transactions are high at the beginning of the month when people receive their benefits. The store sells eggs, ham, potatoes, milk, cereal, frozen foods, sodas, juice, coffee, candy, vegetables, onions, rice and other food items. The owner does not

understand why the transactions are cited as being too high if it sells **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** a day in a community with more than 2,800 inhabitants. There are no other stores in the area and the majority of customers walk and don't have transportation.

- The business and the local SNAP community will suffer if the store is permanently disqualified.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Authorization History

The Food & Nutrition Service (FNS) authorized Fairview Market for the SNAP on May 15, 2006. During the review period of December 2017 through May 2017, the Retailer Operations Division classified the store as a convenience store.

Store Visit Report

The case record documents that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an April 30, 2018 store visit conducted by an FNS contractor to observe the nature and scope of the store's operation, stock and facilities. This information was then used to ascertain if there were justifiable explanations for the store's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Fairview Market is approximately 3,000 square feet in size.
- The store did not have any shopping carts or handheld shopping baskets for customer use. There were a couple of shopping carts in a backroom that was not accessible to the public. These shopping carts were likely only for store use.
- The store had one (1) cash register and one (1) point-of-sale device for purchases.
- The store did not have an optical scanner or conveyor belts at the checkout.
- Store personnel confirmed that there was a small food storage area of 200 square feet out of public view, but no food was stored offsite. Photographs of this area show that it was largely stocked with beverages mostly consisting of beer.
- Food items generally had typical retail prices ending in nine (9) cents such as .49, .69 and .99. However, the store did not have a special price structure such as ending most product prices with 89 cents. Store personnel confirmed that the store did not round prices up or down at the checkout.

- The store did not sell items in bulk such as fresh meat bundles, fresh seafood specials, or large boxes of fresh produce. The store did not sell any specialty or international foods that would normally sell for a high price.
- The store had shelves that were empty or only partially filled.
- The checkout area consisted of a small countertop with empty space of no more than two (2) feet by two (2) feet in size for stacking items to be purchased. The countertop was surrounded by displays of candy and snack foods such as potato chips. The very limited space for stacking food at the checkout area made it not conducive to conducting large transactions.

The SNAP eligible staple food stocked by the store consisted mainly of inexpensive canned and packaged dry goods with only a limited amount of fresh produce. The store also sold low cost accessory food items such as snack foods, carbonated drinks, coffee, tea, condiments, and spices. The stocked ineligible items included tobacco, alcohol, automotive products, health and beauty products, paper goods, cleaning products, gift items, and general houseware. The store also sold hot tamales out of a crockpot which was ineligible for SNAP purchase because it was hot prepared food not intended for home preparation and consumption. Store personnel confirmed that the most expensive items sold by the store were 12 ounces of coffee at \$11.99; a 35 pack of water at \$8.99; a one-pound 10.8 ounce box of cereal at \$6.49; and a 12-pack of soda at \$6.99. 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 transaction patterns significantly different from similar-sized competitors offering similar food items.

Same Cent Transactions

Out of 2,612 SNAP transactions conducted during the review period, Fairview Market conducted 1,088 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Out of these larger dollar transactions, a total of 199 transactions (18.2 percent) ended in 89 cents. When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits. There is no evidence that the store had a special pricing policy that would cause a disproportionate number of higher dollar transactions to end in 89 cents. Store personnel also stated during the store visit that the firm did not round prices up or round prices down.

The Appellant states that not all of the store's transactions end in 89 cents. However, those that do end in 89 cents are due to the store's sales method on major sale items which consists of milk, candy, bread, soda, and juice. Allegedly, the store attaches 89 cents to these products as a sales tactic since the store does not charge tax on these items.

The Appellant's explanation is not credible. It is recognized that not all transactions end in 89 cents; however, a disproportionate number of high dollar transactions do. The Appellant also does not adequately explain why placing 89 cents on the end of a transaction is a helpful sales tactic.

Based on the store visit report, the Appellant's food inventory contains almost exclusively inexpensive canned and packaged goods, single-serving food items and accessory foods. Due to

the store's mostly low cost foods, the larger dollar transactions cited in the charge letter would normally consist of multiple food products being purchased in one transaction. It is implausible that several of these relatively inexpensive items purchased together would disproportionately result in total purchase prices ending in 89 cents. The store visit report documented that most items in the store had price amounts ending in nine (9) cents. When SNAP customers buy multiple food items ending in nine (9) cents, resulting in higher dollar amounts, the total transaction amount is more likely to result in a random statistical spread of ending cent ranges from 00 to 99 cents.

Consequently, when there are a disproportional amount of transactions that end in a same cents value, it appears that these transaction amounts are contrived and therefore, in the absence of any compelling rationale to the contrary, are a strong indicator that the firm is trafficking in SNAP benefits. A preponderance of the evidence indicates that the irregular transactions cited in Charge Letter Attachment 1 are more likely than not a result of the store trafficking in SNAP benefits.

Multiple Transactions by the Same Household within a Short Time Period

SNAP households have no limit on the number of times they may use their SNAP cards or how much eligible food they may purchase. However, 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 a convenience store's stock and facilities and are thus indicative of trafficking.

Violating stores often conduct multiple split transactions from the same household account as a method to avoid the detection of single high dollar transactions that cannot be supported by the retailer's food inventory and infrastructure. Charge Letter Attachment 2 lists 21 sets of 51 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(7)(E)**. In fact, this average SNAP transaction is larger than the average superstore SNAP transaction in California during the review period. It is not credible that a convenience store with limited staple foods would have suspicious SNAP transactions greater than a supermarket or superstore. It is even less likely that these excessively large transactions would be conducted multiple times by the same household during a short time period.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The store visit pictures show that is unlikely that SNAP customers would want to shop at this store multiple times during a short time frame, or purchase such a large volume of items. In addition, the store's small checkout area and very limited counter space makes it unsuitable for conducting large transactions. The store also had no shopping carts or handheld baskets for customer use. Based on the analysis above, and in the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

Excessively Large Transactions

SNAP households have no limit on the amount of eligible food they may purchase (subject to the remaining balance on the card). However, 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 a convenience store's stock and facilities and are thus indicative of trafficking.

The Appellant store owner states he does not understand why the transactions are cited as being too high if the store sells 5 U.S.C. § 552 (b)(6) & (b)(7)(C) a day in a community with more than 2,800 inhabitants. In explanation, Charge Letter Attachment 3 cites 189 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E). Even the smallest transactions cited in the charge letter had an amount which is three (3) or four (4) times higher than the average SNAP purchase amount for a Kern County convenience store.

The Appellant states that the store sells eggs, ham, potatoes, milk, cereal, frozen foods, sodas, juice, coffee, candy, vegetables, onions, rice and other food items. The store visit report and photographs confirm this; however, these food items are not particularly expensive and do not explain how the store has irregular high dollar transactions which exceed the average for a supermarket or superstore in California. The substantial number of high dollar purchases atypical of a SNAP authorized convenience store calls into question the legitimacy of these transactions. As noted previously, 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 offering similar food items

The Appellant claims that there are no other stores in the area. It is true that sometimes a store may have higher than normal SNAP transactions due to the lack of access to other SNAP authorized stores in the area. However, the Retailer Operations Division determined that during the review period there were 88 SNAP authorized stores located within a two-mile radius of Fairview Market. Among these SNAP authorized stores are larger stores including six (6) superstores and three (3) supermarkets. A government report¹ on SNAP benefit redemption patterns revealed that households most often redeemed their benefits at supermarkets and superstores with only four (4) percent of all households never shopping in a supermarket or superstore. Thus, when a supermarket or superstore is available, it is highly unlikely that a SNAP recipient would conduct excessively large SNAP transactions at a convenience store with a limited selection of staple foods.

The Appellant claims that the majority of its customers walk and don't have transportation. This may, in part, be true, but there is insufficient evidence that any of these customers conducted the irregular transactions cited in the charge letter. In comparison, the case record documents that the Retailer Operations Division conducted a detailed analysis of four (4) households identified in the charge letter to analyze their shopping patterns at Fairview Market compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and

¹ "Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program," report prepared by Mathematica Policy Research for the Food and Nutrition Service, February 2011.

shopped at, larger stores including supermarkets and/or superstores. However, despite this access to better stocked stores, these sampled households often conducted excessively large transactions at Fairview Market on the same day or within a few days of shopping at these larger stores. It is highly unlikely that a convenience store would have legitimate SNAP transactions comparable or larger than these SNAP authorized supermarkets and superstores.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts and shopping baskets support the Retailer Operations Division determination. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on a preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 3 are more likely than not the result of trafficking in SNAP benefits.

Hardship to SNAP Community

The Appellant claims that a permanent disqualification of Fairview Market would be a hardship to the SNAP community that shops at the store. Regarding this contention, there is no provision in SNAP law or regulations that would waive or reduce a permanent disqualification for trafficking due to a purported hardship to SNAP customers.

Where there is a hardship to SNAP households due to a lack of authorized stores in the area, FNS may impose a hardship CMP on a firm in lieu of a **less than permanent** disqualification. However, the regulations at 7 CFR § 278.6(f)(1) clearly state that "a civil money penalty for hardship to SNAP households **may not** be imposed in lieu of a permanent disqualification." [Emphasis added.] Because the Retailer Operations Division has taken action to permanently disqualify the Appellant firm, a hardship CMP in lieu of disqualification cannot be granted.

It should also be noted that there are over 88 SNAP authorized stores located within a two-mile radius of the Appellant store including six (6) superstores and three (3) supermarkets. Therefore, it is unlikely that the local SNAP community will suffer a hardship as opposed to a mere inconvenience due to the permanent disqualification of Fairview Market.

Hardship to Business

The Appellant states that the store will likely have to close if it is permanently disqualified from the SNAP. 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 the SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to either the owner personally or the firm resulting from the imposition of such penalty. To allow stores to be excused from assessed administrative penalties based on a purported economic hardship would

render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

CIVIL MONEY PENALTY

The Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i) even though it was informed of the right to do so in the charge letter.

SNAP regulations at 7 CFR § 278.6(b)(2)(iii) states that “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.” [Emphasis added.]

Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program 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 the Appellant’s EBT transaction record was the primary basis for its determination to permanently disqualify the retailer. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. 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.

In the absence of any reasonable explanations for 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. 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 in fact occur as determined by the Retailer Operations Division. Based on the discussion above, the decision to impose a permanent disqualification against Fairview Market, Appellant, is sustained.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this

determination. Please note that 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 you reside or are 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, FNS is 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.

RONALD C. GWINN
Administrative Review Officer

October 3, 2018