

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

Friends Market,)
)
Appellant,)
)
v.)
)
Retailer Operations Division,)
)
Respondent.)
_____)

Case Number: C0192077

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 Friends Market (Friends 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 August 30, 2016, 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 April 2016 through July 2016. 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 October 5, 2016. Appellant denied trafficking and explained that the transactions were normal based on the unique circumstances of the store. After considering the evidence and the retailer's reply, the Retailer Operations Division issued a determination letter dated December 15, 2016. 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 dated December 21, 2016, 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 April 2016 through July 2016. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were an unusual number of transactions ending in a same cents value.
- There were multiple transactions made from individual benefit accounts in unusually short time frames.
- The majority or all of individual recipient benefits were exhausted in unusually short periods of time.
- 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 appeal request postmarked December 23, 2016, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- Counsel presented more than 1,000 pages to the Retailer Operations Division that refuted every alleged trafficking violation with clear and convincing evidence.
- A cash register receipt was provided for each transaction in the exhibit (1-921).
- It is inconceivable that the determination letter never addressed that fact that more than 1000 documents were supplied.
- If it was trafficking, the backup register tape could not provide the detail that was provided, including the date and time of the transaction and a breakdown of the amount of each item that was purchased which added up to exactly the transaction amounts listed in the charge letter.
- Appellant provided invoices of meat purchases and a copy of the meat plans offered by

- Appellant that explain the large purchase transactions.
- Appellant is the largest and most stocked store within several miles and its customers are greatly affected by the disqualification.

In support of its contentions, counsel provided a copy of its October 5, 2016, reply to the charges that contains the following explanations for the transactions:

- The determination was made without any actual evidence of trafficking and was solely based on the digital record of the transactions based on algorithms.
- Charge Letter Attachment #1
 - Appellant provided copies of each register receipt that shows that the transactions were actual sales made with the date and time and in the amount identified in the charge letter attachment.
- Charge Letter Attachment #2
 - Customers occasionally ask that their purchases be broken up into two or three separate transactions.
 - The receipts provided show that the transactions were for actual sales.
 - Sometimes customers return to the store to purchase additional goods.
- Charge Letter Attachment #3
 - Appellant is unlike any other store in the area.
 - Appellant has meat plans.
 - There are four affidavits of customers identified in the charge letter.
- Appellant denies the allegations and feels that it is being judged by an algorithm and not by the facts.

In support of its contentions, Appellant submitted the following documents:

- Receipts for each of the transactions listed in the charge letter in 15 separate envelopes divided according to page number;
- August 30, 2016, charge letter;
- Photocopies of the receipts originally provided to the Retailer Operations Division;
- Six photographs of the meat plans;
- Seven photographs of store food stock;
- Twenty-one pages of invoices; and
- Four customer affidavits.

Appellant provided the same documents to the Retailer Operations Division with its October 5, 2016, reply to the charges. With the administrative appeal request, counsel also provided the original cash register with the photocopies. The other difference noted between the documentation provided pertains to the photographs submitted. With the reply to the Retailer Operations Division, there were three pages of photographs (Exhibit F) regarding the meat plans that were not submitted with the appeal request, specifically there was a photograph of a Plan D priced at \$199.95.

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 Friends Market as a medium grocery on December 16, 2011. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a July 19, 2016, 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:

- Friends Market is approximately 2500 square feet, with additional food storage in a walk-in freezer.
- There were some shopping baskets but no shopping carts for customer use.
- There was one cash register and two point-of-sale devices.
- There was no optical scanner for the speedy processing of transactions.
- There was fresh meat available and meat packages that sell for \$25.95, \$49.95, \$59.95, \$69.95, \$75.95, \$99.95, \$119.95, and \$129.95.
- The available counter space was limited covered with items for sale and brochures.
- There were some vegetables in the deli case that were likely used for prepared sandwiches.
- There was one rack of limited fresh produce including mangos, bananas, potatoes, and onions.
- There was a freezer with frozen foods including vegetables and some fish.
- Dairy included milk, butter, yogurt, cheese, and ice cream.
- Other staple food available for purchase were eggs, juice, bread, cereal, pasta, rice, a large selection of canned goods, and snack foods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included as tobacco, alcohol, lottery, paper goods and household goods

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 Attachments

Charge Letter Attachment 1. There were an unusual number of transactions ending in a same cents value. 7 USC 2018 (b)(7)(e).

The only prices visible from the store visit photographs are in the meat area. 7 USC 2018 (b)(7)(e).

Counsel contends that because Appellant provided copies of register receipts for each transaction that show that the transactions were actual sales made on the date, time and the amount identified in the charge letter attachment then the transactions must have been legitimate. The Retailer Operations Division reviewed each receipt and determined the following:

- Everything is shown to be paid as cash, not credit card or SNAP.
- The receipts are not itemized and do not show if the items purchased are eligible food items.
- While the hour and minute match in the transactions examined, it seems unlikely that there would be no difference in time from between the cash register transaction and the POS device transaction when the card is physically swiped through the POS device.
- The number sequence of the receipts is off in some instances as seen in the table.
- 7 USC 2018 (b)(7)(e).
- 7 USC 2018 (b)(7)(e)
- Some of the item prices appear contrived, such as the items priced at \$1.02, \$2.21, \$2.38 \$3.21, \$4.01, \$4.02, \$5.57, \$9.01, and \$14.81 that do not seem to align with the pricing structure of other items on the receipt. Most often the odd prices are the last items listed on the receipt and are likely amounts needed to make the receipt end with a certain total.
- Counsel explains the cash register can only record a maximum single entry of \$30.00 for any one item. However, below is a receipt that clearly has an item rung in for \$190.00.

REG 06-15-2016 20:34	
000272	
1000	
1 DEPT001	\$190.00
1 DEPT001	\$9.95
1 DEPT001	\$25.64
1 DEPT001	\$14.05
1 DEPT001	\$18.92
1 DEPT001	\$2.50
1 DEPT001	\$1.59
1 DEPT001	\$1.59
1 DEPT001	\$1.59
1 DEPT001	\$2.49
1 DEPT001	\$2.75
1 DEPT001	\$1.99
1 DEPT001	\$3.99
1 DEPT001	\$3.99
1 DEPT001	\$2.50
1 DEPT001	\$3.49
1 DEPT001	\$0.50
1 DEPT001	\$0.50
1 DEPT001	\$0.79
1 DEPT001	\$0.79
1 DEPT001	\$1.50
1 DEPT001	\$12.39
TL	\$301.50
CASH	\$301.50

- The two receipts below demonstrate that the cash register was reprogrammed and specifically, the date was changed several times. There are multiple examples of this reprogramming throughout the receipts including receipts for transactions # 93, 128, 130, 160, 301, and 514.

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REG 07-21-2016 07:52
                                000021
# / NS .....
PGM 04-10-2016 07:54
                                000022
04-10-2016 07:54
REG 04-10-2016 07:54
                                000023
1 DEPT001 277 $5.00
1 DEPT001 $5.00
TL $10.00
CASH $10.00

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REG 04-05-2016 15:44
                                000159
# / NS .....
REG 04-05-2016 15:44
                                000160
# / NS .....
REG 04-05-2016 15:44
                                000161
# / NS .....
REG 04-05-2016 15:44
                                000162
# / NS .....
PGM 07-08-2016 15:53
                                000163
07-08-2016 15:53
REG 07-08-2016 15:53
                                000164
1 DEPT001 377 $5.00
1 DEPT001 $5.00
TL $10.00
CASH $10.00

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Given the several reasons listed, it appears that the data in the charge letter attachments was used to create what was submitted as “Z tape” evidence and is therefore not credible evidence. Thus, Appellant failed to provide a credible explanation for the same cent transactions listed on Charge Letter Attachment 1.

7 USC 2018 (b)(7)(e). SNAP transactions consisting of multiple products are more likely to result in a random statistical spread of ending cent ranges from 00 to 99 cents. Consequently, when there is a disproportionate amount of transactions that end in a same cent value, it appears that these transaction amounts are contrived and, in the absence of any compelling rationale to the contrary, are likely the result of trafficking.

Charge Letter Attachment 2. Multiple transactions were made from individual benefit accounts in unusually short time frames. 7 USC 2018 (b)(7)(e).

Appellant, through counsel, contends that customers shop multiple times per day. 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 SNAP transactions noted in the charge letter are questionable because they display characteristics of use inconsistent with the nature and extent of the store’s stock and facilities. The photographs from the store visit offer no legitimate explanation as to why SNAP customers would routinely shop at the store multiple times during a single 24-hour period.

Counsel contends that customers request to break their transactions up. Counsel provides an example using transaction numbers 615 and 616 on the Charge Letter Attachment 2 that were for \$55.21 and \$78.98. Counsel explains that one sale had a meat special of \$75.95 (rung up as \$30 two times and \$15.95 (and two other items) and the other was for 17 miscellaneous items. However, there is only one \$30.00 item and there is no \$15.95 item. Regardless, it is not plausible that a customer is requesting to break up a single meat special.

REG 06-23-2016 14:06
 000123
 1 DEPT001 \$25.95
 1 DEPT001 \$7.99
 1 DEPT001 \$6.68
 1 DEPT001 \$1.49
 1 DEPT001 \$1.79
 1 DEPT001 \$0.89
 1 DEPT001 \$0.89
 1 DEPT001 \$0.49
 1 DEPT001 \$2.24
 1 DEPT001 \$2.36
 1 DEPT001 \$4.44
 TL \$55.21
 CASH \$55.21

REG 06-23-2016 14:08
 000124
 1 DEPT001 \$30.00
 1 DEPT001 \$19.95
 1 DEPT001 \$17.21
 1 DEPT001 \$1.99
 1 DEPT001 \$2.75
 1 DEPT001 \$3.99
 1 DEPT001 \$3.09
 TL \$78.98
 CASH \$78.98

Appellant did not provide any compelling justification as to why households are conducting multiple transactions at Friends Market or evidence that all the irregular transactions cited in the charge letter were for eligible food items only. 7 USC 2018 (b)(7)(e).

Charge Letter Attachment 3. The majority or all of individual recipient benefits were exhausted in unusually short periods of time. 7 USC 2018 (b)(7)(e).

A government report on SNAP shopping patterns¹ indicates that on average, SNAP households have less than one-quarter of their benefits left by the middle of the month. On the day the issuance is distributed, the average household redeemed more than a fifth of its benefits. By the first week, the average household had redeemed over half of its benefits, and by the second week, over three-quarters of it. Households redeemed about an additional 10 percent of benefits by the end of the third week (exhausting 90 percent of benefits) and ultimately redeemed 97 percent of their monthly benefits by the end of the day before receiving their next issuance. Households spent slightly 22 percent of their benefits on the first day of issuance. By day 7, the average household had redeemed 60 percent of its monthly benefit; by Day 14, it had redeemed 80 percent, and by month's end the household redeemed 97 percent of its benefit. Therefore, a pattern of transactions in which SNAP are exhausted in or a few transactions during a short period of time are unusual and suggestive of trafficking.

Counsel reasons that it provided receipts for each of the transactions. Insofar as Appellant's expectation that the register receipts would prove that there was no trafficking in SNAP benefits, register receipts that do not detail specific individual items cannot support a contention that eligible items were rung up on the register. If the retailer had a scanner linked to his cash register and could produce such a detailed list, such a list could possibly begin to explain some of the transactions. However, even these can be contrived. Any kind of transaction can be rung up

¹ Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program, Mathematica Policy Research, by Laura Castner and Juliette Henke, for the U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, February 2011

as eligible food. Moreover, it has been established that the receipts appear to have been recreated for the purpose of responding to the charge letter.

Appellant did not present any valid explanations or documentation that would legitimize these transactions.

Charge Letter Attachment 4: Excessively large purchase transactions were made from recipient accounts. 7 USC 2018 (b)(7)(e). Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

There were some shopping baskets but no shopping carts visible on the day of the store visit. Appellant is not set up to process high-dollar transactions, as indicated by its lack of equipment to facilitate large transactions and limited counter space.

The Retailer Operations Division compared Appellant to three nearby similarly stocked authorized medium groceries. Appellant's average SNAP transaction amount during the review period was greater than the average SNAP transaction amount of each of the other three comparable stores. In addition, each of the four transaction patterns of Appellant, described in each of the charge letter attachments, exceed the other two authorized stores, as seen on the table herein. The number of transactions meeting this pattern during the review period at Appellant is irregular.

7 USC 2018 (b)(7)(e)

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.

Client Affidavits

Counsel provided four customer affidavits in support of its contentions. The Retailer Operations Division reviewed all the transactions conducted during review period using the card numbers provided by these four recipients. There were no transactions conducted at Friends Market with any of the card numbers provided during the review period. One recipient did shop at the other Friends Market but not the Appellant firm.

Receipt Analysis

Counsel provided invoices for meat purchases made by Appellant. The Retailer Operation Division reviewed these meat invoices. Three of the invoices were for the other Friends Market (located at 6101 NW 17th Avenue) and were not included in the analysis. The invoices submitted for March were outside of the review period and were also excluded. The invoices show that Appellant purchased \$11,430.72 in eligible food items during the review period. However,

Appellant's total SNAP redemptions during the review period were \$68,504.02. Even with a generous markup, the purchased inventory does not support the SNAP redemptions. Moreover, cash and credit sales must be considered as all sales would not come from SNAP. Further, the Retailer Operations Division noted that as the total meat purchased by Appellant per month decreased, while Appellant's redemptions increased. Thus, the evidence does not support that the large transactions are the result of the purchase of meat packages.

Evidence

Counsel states that the determination was made without any actual evidence of trafficking and solely based on the digital record of the transactions based on algorithms that flagged Appellant.

7 CFR § 278.6(a), establishes the authority upon which FNS may disqualify an authorized retail food store on the basis of evidence obtained through a transaction report under an EBT system. Consequently, transaction data as a basis for the charges at issue is as valid as evidence obtained through an undercover investigation. **7 USC 2018 (b)(7)(e).**

Appellant must provide a preponderance of evidence that the transactions detailed in the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. The charge letter attachments, the cash register receipts provided were not credible and the invoices furnished did not prove that Appellant stocked adequate eligible foods to cover the SNAP redemption totals. In the absence of compelling information or documentation weighed in comparison to the evidence provided by the Retailer Operations Division the evidence weighs in favor of the Retailer Operations Division's determination that SNAP-benefit trafficking substantially produced the transaction activity at issue in the present case.

Consideration of Appellant's Evidence

Counsel contends that the Retailer Operations Division did not even mention the 1000 pages of evidence it presented in its determination letter. The case record shows that the Retailer Operations Division did, in fact, consider counsel's October 5, 2016, reply and all of the evidence submitted prior to issuing the determination letter. However, after reviewing the evidence of the case and Appellant's reply, the Retailer Operations Division determined that a permanent disqualification was warranted. Although the format used by the Retailer Operations Division determination does not include the details of its final analysis, the case record is well documented and includes a thorough analysis of all the evidence presented.

Household Hardship

Counsel contends that Appellant is the largest and most stocked store within several miles and Appellant's customers are greatly affected by the disqualification. As indicated previously, within a two-mile radius of Friends Market there are 24 other SNAP authorized firms of comparable size or larger, where SNAP recipients can shop. Within a half-mile radius are two supermarkets. Moreover, where there is a hardship to SNAP households, FNS may impose a hardship CMP in lieu of a disqualification where there is a lack of authorized stores in the area. 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." Because the Retailer Operations Division has taken action to permanently disqualify Appellant's

firm, a hardship CMP in lieu of disqualification cannot be granted.

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). 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. Appellant did not 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.

Even if a timely request had been submitted, 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 compliance policy to prevent SNAP 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.

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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

MARY KATE KARAGIORGOS
ADMINISTRATIVE REVIEW OFFICER

February 28, 2017
DATE