

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

**H & M Market,**

**Appellant,**

**v.**

**Case Number: C0210154**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

The record supports that the H & M Market (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). It is the decision of the USDA that there is sufficient evidence to support that the permanent disqualification of Appellant from participation as an authorized retail food store in the Program, as imposed by the Retailer Operations Division, (Retailer Operations) was appropriate.

**ISSUE**

The issue accepted for review is whether Retailer Operations 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 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

**CASE CHRONOLOGY**

By Charge letter dated August 2, 2018, Retailer Operations informed the owners that it had compiled evidence that Appellant had violated the SNAP regulations based on electronic benefit transfer (EBT) transactions that established clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for the firm type. The sanction for trafficking is permanent disqualification. Counsel responded in writing to the Charge letter on August 30, 2018.

Retailer Operations issued a Determination letter dated September 12, 2018. This letter informed Appellant that it was permanently disqualified as a retail food store in accordance with Sections 278.6(c) and 278.6(e)(1) of the regulations. Retailer Operations considered Appellant's eligibility for a civil money penalty (CMP) according to Section 278.6(i) of the regulations, and found it was not eligible because insufficient evidence was submitted timely to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program to prevent violations.

By letter dated September 21, 2018, counsel appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated October 5, 2018.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant bears the burden of proving, by a preponderance of the evidence, that the administrative action 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 argument asserted is more likely to be true than not true.

### **CONTROLLING LAW AND REGULATIONS**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) 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 § 278.6(e)(1) reads: "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined, in part, in 7 CFR § 271.2, as "the buying or selling of SNAP benefits for cash or consideration other than eligible food."

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

7 CFR § 278.6(a) states: "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."

7 CFR § 278.6(b)(2)(ii) states: "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(i) states: "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**

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. The charges were based on an analysis of SNAP transaction data during the period of December 2017 through May 2018. The patterns of transaction characteristics indicative of trafficking are:

1. Multiple transactions made from individual benefit accounts within a set time period.
2. Excessively large transactions made from recipient accounts.

### **APPELLANT'S CONTENTIONS**

In reaching a decision, consideration has been given to all contentions, including any not referenced.

- There are not any other grocery stores within sight distance. A *Google Maps* search shows that the closest store is approximately three miles away.
- The owner and her son both reviewed the FNS and SNAP regulations prior to operating the EBT machine. Additionally, they are prepared to retrain on the regulations and procedures using the training materials on the FNS website. They will also conduct the same training for anyone who would be hired to work as a cashier.
- Because the loss of SNAP benefits to the store will cause undue hardship on the area residents and the owner and personnel are willing to undergo further training, the market requests that it be allowed to continue using SNAP to provide needed food items to the impoverished area in which it is located.
- Many residents rely on government assistance for basic needs and supplies. Also, numerous households have several family members living under the same roof.
- The store carries various types of merchandise including basic household goods, drinks, meat, and other types of food. The store takes orders for many of the older residents in the area that cannot drive to a grocery store. The store allows those residents to request items which it may not carry. H & M then fulfills those requests and the residents come to the store to pick up needed items. Often the residents will purchase the needed items and then purchase additional items from the store in separate transactions.
- In response to the allegations that H & M is trafficking based on multiple swipes done within a set amount of time, the owner and her son, the two main cashiers for the store informed me that many of their customers make multiple purchases while at the store. While I was at the store, I observed one such customer complete one transaction using his

card and then within seconds the woman he was with brought up more items for purchase. He used his card for both transactions.

- I reviewed card transactions for the store dating back to December 2017 and found multiple transactions like what you are alleging, but for much smaller amounts.
- These 10 examples illustrate, that residents in the area make multiple purchases while in the store. They generally come in with more than one person and each will buy items under the same family card. These transactions also demonstrate that the store is not engaging in trafficking.
- It does not appear that you are alleging H & M has engaged in the exchange of firearms or made purchases for cash consideration or non-eligible food.
- The transactions show a pattern of use by the holders of SNAP cards in which they engage in multiple purchases within a short amount of time. These amounts are minimal and thus would not benefit H & M any because the transactions do not even cover the charge fee for the EBT machine. The owner stated that on some transactions, they lose money because of the fees, but the SNAP regulations prohibit the store from placing restrictions as to minimum purchase amounts for card purchases.
- H & M argues that the transactions detailed in your letter are a result of the same type of spending habits by many of the area residents. Many of the multiple transactions are conducted by the same households. Their transactions are done nearly a month apart and each time they make multiple purchases. This demonstrates that these families are using their benefits to purchase household goods and supplies. Often the transactions are done by different members of the same household.
- Mr. Kim indicated that one person makes purchases for themselves and another family member makes their own purchases using the same household card.
- Because these transactions are a result of the spending habits by card holders and not any direct attempt by H & M to benefit from these transactions, H & M requests that the allegations of trafficking be dismissed.
- Although H & M denies any wrongdoing, should the FNS determine the store has engaged in trafficking, the store requests civil penalties under the statute be imposed instead of disqualification from the program.

## ANALYSIS AND FINDINGS

Retailer Operations presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the Charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant during the review period. As patterns of unusual transactions appear across multiple Attachments the case of trafficking becomes more convincing.

**Attachment 1:** Listed are 106 transactions in 34 sets by 13 unique households. Multiple transactions within a set time period are a method stores use to avoid high dollar transactions and are indicative of trafficking. The data shows that 69% of the households flagged conducted a SNAP transaction(s) at another larger authorized store within one day of making a transaction at Appellant. Thus, there are other authorized stores in the vicinity where SNAP benefits are used.

An onsite visit was conducted on June 18, 2018, that supports that Appellant sells pre-packaged food items such as canned vegetables and fruit, canned soup, boxes of cereal and various snack items. There were no promotional, special, bulk, or package deal offers advertised. There is no evidence of wholesale business such as posted prices or separate entrances for wholesale customers. Appellant's checkout counter space was small affording little surface area on which to place many items for large purchases, and precluding the processing of more than one customer at a time. There was one cash register, and no shopping carts or shopping baskets for use by customers to transport items to the checkout area. There was no conveyor belt to expedite high dollar or rapid consecutive purchases. This makes large transaction amounts for as cited in the Attachments questionable and suspect.

No itemized cash register tapes to support eligible food sales, or vendor invoices to support the acquisition of SNAP eligible foods were advanced. The owner provided no recipient statements regarding shopping behavior at the store. No evidence was provided to support the claim that the owners procured specific items on order for recipients. No business banking records were provided. No federal business tax submissions or state tax submissions were advanced.

The owner has not by a preponderance of the evidence demonstrated that these transactions are the result of the exchange of benefits for SNAP-eligible foods rather than the result of trafficking.

**Attachment 2:** Listed are 143 transactions by 32 households for amounts that exceed the average transaction amount for the same store type in the same state by at least three times. The data shows that Appellant's SNAP dollar volume for the review months was 96% higher than the average SNAP dollar volume for state convenience stores. Appellant's average SNAP transaction amount was 22% higher than the state convenience store SNAP average transaction amount. Retailer Operations compared Appellant to four other convenience stores within a two mile radius. Appellant's average SNAP transaction dollar amount, total transaction dollar volume, and total purchase transaction count were higher than at any of the other four stores. **5 U.S.C. § 552 (b)(7)(E)**. This is unusual.

The data shows that there are at least 28 other authorized SNAP retailers within a two mile radius of Appellant, to include other convenience stores, three small grocery stores, and two super stores. Thus, there are other shopping options for SNAP households. The data confirms that 81% of the households flagged on this Attachment conducted a transaction(s) at a large store, supermarket or super store within one day of making a transaction at Appellant.

While some households may have conducted legitimate SNAP transactions at Appellant, insufficient evidence was presented to support this argument. No vendor invoices of eligible items acquired in inventory to support Appellant's SNAP dollar redemptions were advanced. The owners provided no itemized cash register tapes for the review months. No pricing information for eligible items stocked was advanced. No federal business tax returns or actual state tax filings were advanced, and no business banking statements were provided. Thus, the owners have not provided a preponderance of evidence that the transactions on the Attachments are for eligible foods rather than the result of trafficking.

## **CIVIL MONEY PENALTY**

The regulations at 7 CFR Section 278.6(i) specify the criteria for a firm's eligibility for a CMP in lieu of permanent disqualification for trafficking. The owners failed to submit documentation timely to show that they met the four criteria to qualify for a CMP. Accordingly, Retailer Operations determined that Appellant was not eligible for a trafficking civil money penalty.

## **CONCLUSION**

Retailer Operations' analysis of Appellant's SNAP transaction data was the primary basis for its determination to permanently disqualify Appellant. The record provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. Based on empirical data and in the absence of a preponderance of evidence presented by Appellant of the legitimacy of the transactions, it is more likely true than not true that violations did occur as charged by Retailer Operations. Retailer Operations denial of a trafficking CMP was also proper per the applicable regulations. Therefore, the decision to impose a permanent disqualification against Appellant is sustained.

## **RIGHTS AND REMEDIES**

Attention is called to Section 14 of the Food and Nutrition Act of 2008 and to 7 CFR § 279.7 of the regulations with respect to applicable rights to judicial review of this Decision. 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 Appellant's owners 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, 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.

M. Viens  
Administrative Review Officer

November 9, 2018