

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

IW IV Inc./Maria Mini Market,

Appellant,

v.

Case Number: C0202904

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 there is sufficient evidence to support a finding that the permanent disqualification of IW IV Inc./Maria Mini Market (Maria Mini 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 December 30, 2017, 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 2017 through September 2017. 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 replied to the charge letter on February 10, 2018, and requested documents under the Freedom of Information Act (FOIA). FNS notified the retailer about the fee associated with its FOIA on March 12, and March 26, 2018. The retailer did not respond to the fee requests. On April 10, 2018, the FNS closed the FOIA request. On September 11, 2018, the Retailer Operations Division notified the store owner that it had ten days to provide any information to support its transactions within ten days. The retailer provided a reply to the charges on September 12, 2018. The retailer denied trafficking and explained that the transactions were normal based on the unique circumstances of the store.

After considering the retailer's reply and the evidence, the Retailer Operations Division issued a determination letter dated October 9, 2018. The determination letter informed Appellant that it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that Appellant was not eligible for a trafficking CMP because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

By letter postmarked October 9, 2018, ownership appealed the Retailer Operations Division's determination and requested an administrative review.

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 USC § 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 § 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, 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 § 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**, . . .” (emphasis added)

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.

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 THE CHARGES

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from April 2017 through September 2017. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were multiple transactions made from individual benefit accounts in unusually short time frames.
- There were an unusual number of manual key entered transactions.
- 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 October 15, 2018, administrative review request, Appellant provided the following summarized contentions, in relevant part:

- Appellant does not have the capacity to show itemized purchases, and it is not aware of any regulation limiting the amount of times a beneficiary can use their card.
- Appellant is not aware of any limit on manually entered transactions.
- Appellant is equipped with a large variety of food and household items for sale.
- Appellant will install a point of sale system in order to properly keep record and better demonstrate the purchases made at its establishment.
- Several businesses have lost their participation rights for various reasons and this has increased its EBT transactions.
- Appellant is very diligent in following SNAP regulations.
- Appellant is the sole owner of the business and the single mother of two children and the business is its only income.

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

- 2017 and 2016 Form 1040 U.S. Individual Income Tax Returns;
- Form 1120S U.S. income Tax Return for an S Corporation;
- Parcel 360 Property View;
- Wells Fargo Combined Statement of Accounts for five months;
- Ten photographs of store;
- 35 pages of invoices;
- Letter from the neighborhood Block Captain; and

- Twelve customer signatures stating that they are regular customer of Appellant.

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 Maria Mini Market as a small grocery on November 1, 2013. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a September 12, 2017, 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:

- Maria Mini Market is approximately 700 square feet with an additional 600 square feet of storage outside of public view.
- The checkout space is small and limited and surrounded by Plexiglas with an ice cream cooler in front.
- There were no shopping baskets and no shopping carts for customer use.
- There was one cash register and one point-of-sale device.
- There was no fresh meat, poultry, or fish
- There were no bulk packages or any advertised specials.
- There was limited fresh produce including onions, potatoes, apples, and a few green peppers.
- There was a deli area that sold hot and prepared food as well as cold cuts by the pound.
- There were hot dogs and bacon in the deli area.
- Dairy included milk, cheese, butter, and a few units of infant formula.
- Frozen food included beef patties, chicken, vegetables, pizza, and entrees.
- Other staple foods available for purchase were eggs, juice, rice, bread, beans, cereal, pasta, and a selection of canned goods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included tobacco, health and beauty products, cleaning products, and paper products.

The SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. The highest priced items noted were –infant formula - \$18.19, \$17.99, and \$17.89; and frozen beef - \$13.99. 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 redemption patterns significantly different from similar-sized competitors.

Charge Letter Attachments

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

Charge Letter Attachment 1. Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment documents eight sets of transactions that meet the parameters of this scan. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

Appellant explained that it was unaware of any limit on SNAP transactions. 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 Appellant's stock and facilities and are therefore indicative of trafficking. Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Appellant multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale. Appellant is not set up to provide for all of one's food needs and lacks an abundant depth and breadth of staple foods. The second and third transactions in each set are too large to consist of forgotten items.

Appellant has not offered any evidence to show that the transactions listed in Charge Letter Attachment #1 were legitimate purchases of eligible food.

Charge Letter Attachment 2: An excessive number of manual key entered EBT transactions were made from store location. There were 36 transactions that met the parameters of this scan. These transactions significantly exceeded the normal practice for stores in the state. Manual key-entered transactions are normally used when a retailer is unable to complete a transaction by swiping an EBT card (for example, if the card has a damaged magnetic stripe). However, this is a rare occurrence and the vast majority of SNAP transactions use the swipe method. Therefore, a high number of manual key-entered EBT transactions is an indication that client account numbers and PINs are being purchased in order to run manual trafficking transactions without the card being present.

The Retailer Operations Division determined that high dollar transactions were more likely to be manual transactions than lower dollar transactions. In fact, 35% of the higher dollar transactions that met the parameters of this scan were manual, whereas only 7% of lower dollar transactions were conducted manually. There is no legitimate explanation for why high dollar transactions at the Appellant store would be over ten times as likely to be a manual key entered transaction in comparison to lower dollar transactions.

The Retailer Operations Division determined ten of the 13 households that conducted these manual transactions at Appellant conducted swiped transactions at other authorized firms on the same days as their manual transaction at Appellant or within a few days. These customers did not appear to have a faulty card. During the same days and times as the suspicious transactions, Appellant was able to swipe several EBT cards successfully, indicating that there was no malfunction of the store's terminal. There are indicators that the key-entered transactions at this store were made without the cards being present and are indicative of trafficking.

Charge Letter Attachment 3: Excessively large purchase transactions were made from recipient accounts. This attachment lists 123 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These large transaction amounts are questionable because they are not consistent with the store's inventory with no fresh unprocessed meat and limited fresh produce. The SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, and snack foods. The frequency of high-dollar purchases in a six-month period calls into question the legitimacy of these transactions.

The Retailer Operations Division compared Appellant to four nearby small groceries. The other four stores did not have any SNAP transactions sets that met the parameters of Charge Letter Attachment #1. The other four stores combined conducted 60 SNAP transactions that met the parameters of Charge Letter Attachment #3, whereas Appellant conducted 123 SNAP transactions that met the parameters of this scan. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. As such, the Retailer Operations Division considered this an indicator of trafficking considering Appellant's eligible food stock, infrastructure, and proximity to larger, better stocked stores.

Appellant provided photographs of its food stock. These photographs are not much different from the contractor report and photographs. There appears to be some more stock added to the recent photographs. However, the photographs do not sufficiently explain these large dollar transactions.

When a supermarket or super store is available, it is unlikely that a SNAP recipient would conduct excessively large SNAP transactions at a small grocery with a limited selection of staple foods like Appellant. The Retailer Operations Division determined that within a one-mile radius of Appellant there were three supermarkets and one super store. The Retailer Operations Division also determined that the majority of households shopped at larger stores such as large groceries, supermarkets and/or super store son the same day, or within a few days, of its flagged transaction at Appellant. Thus, households who shop at Appellant have access to and do shop at large grocery stores, supermarkets and super stores, among all other types of authorized stores.

The Retailer Operations Division examined three households identified in the charge letter to analyze their shopping patterns at Maria Mini Market compared to their shopping patterns at other SNAP authorized stores. However, despite this access to better stocked stores, each of the three households conducted excessively large transactions at Maria Mini Market within a short time of shopping at a supermarket or super store. It is questionable as to why households would conduct large transactions at Appellant, when these households had just visited or planned to visit larger stores with a better selection of fresh meat and produce and likely better prices. The inventory and layout at Maria Mini Market does not support these transactions. The firm has

limited staple foods, does not sell fresh meat, with no shopping baskets or carts, and has minimal counter space. There is no compelling reason for customers to consider Appellant, as a first choice destination to fulfill large purchases of food.

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

Invoices/Bank Statements/Tax Returns

Appellant submitted invoices to support its SNAP transactions. There were invoices and summary sheets from Jetro Cash and Carry and ZBY Brother Sales were for the calendar year of 2017. The items were not itemized and therefore it cannot be determined whether the items purchases were for eligible food items only. A list from J & L Frozen Foods was also provided. Some of the invoices were clearly for the hot and prepared food items that are not eligible for purchase with SNAP benefits. In addition, many of the invoices were dated for after their review period and thus were excluded from any further analysis. The Retailer Operations Division determined that the submitted invoices were not sufficient to determine if Appellant purchase sufficient inventory to support its SNAP redemptions.

Of the five bank statements submitted, two were for months within the review period including August and September 2017. These statements show several purchases from Restaurant Depot and Jetro Cash and Carry. However, the Retailer Operations Division determined that because there were no invoices provided to match the payments, it cannot be determined whether the purchases were for SNAP eligible foods or ineligible items.

Appellant also provided its tax return forms. The Retailer Operations Division reviewed the forms and determined that according to these forms Appellant may have purchase sufficient inventory to support the SNAP redemptions. However, the Retailer Operations Division determined that sufficient inventory alone does not explain the suspicious patterns of SNAP transactions, such as rapid and consecutive transactions by individual during the same store visit or in a single day. The large dollar transactions remain questionable even when there is sufficient food inventory to support such transactions when consideration is made of there being only a limited variety of stock in the store, no fresh meat and limited fresh produce, a greater variety of foods at lower prices at other stores, including supermarkets at which many customers also shop, no shopping baskets or carts, and very little counter space to place food for purchase at the checkout counter. Even with sufficient food stock at Appellant to mathematically support high dollar transactions, there does not appear to be anything that would reasonably attract SNAP households to shop there, a convenience store/liquor store, and spend substantial amounts of their SNAP benefits.

Customer Statements

Twelve customers signed a document indicated that they were regular customers at Appellant. Eleven of the 12 households provided their EBT card numbers. The Retailer Operations Division reviewed the transaction history of each of the 11 households. Five of the households did not conduct any SNAP transactions at Appellant during the review period. Six households did conduct SNAP transactions at Appellant during the review period; however, none of these transactions were listed on the Charge Letter Attachments. Thus, the customer statements do not provide any evidence that the questionable transactions listed were for eligible food items only.

Evidence

The transactions reports are derived from the ALERT system, a computerized fraud detection tool to identify SNAP transactions that form patterns having characteristics indicative of trafficking. However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still conduct an extensive analysis of the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether the questionable transactions were, more likely than not, the result of trafficking.

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

The documentation and evidence provided by the Retailer Operations Division was thoroughly examined. From all indications, the Retailer Operations Division obtained the EBT data (provided by ALERT), found it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough investigation before concluding that trafficking was likely occurring.

Appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed and 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. Appellant offered no relevant evidence to prove that the transactions listed in the charge letter were legitimate purchases of eligible food. 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.

Economic Hardship

Appellant states that it is the sole owner of the business and the single mother of two children and this is its only income. It is recognized that 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 a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty.

To excuse ownership from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement 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, Appellant's contention that the firm will incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposition.

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.

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

RIGHTS AND REMEDIES

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

MARY KATE KARAGIORGOS
Administrative Review Officer

May 7, 2019