

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

Jae’s Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0216536

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a permanent disqualification of Jae’s Market (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Jae’s 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.”

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified based on an analysis of EBT transaction data from September 2018 through February 2019. This involved the following transaction patterns which are common trafficking indicators:

- There were a large number of transactions ending in a same cents value.
- There were multiple transactions made from the accounts of individual SNAP households within a set time period.
- The firm conducted EBT transactions that were large based on observed store characteristics and recorded food stock.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Jae's Market for SNAP participation as a convenience store on May 20, 2003. In a letter dated May 7, 2019, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred between the months of September 2018 and February 2019. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made and supporting documentation submitted within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In a letter dated May 15, 2019, the Appellant responded to the charges, claiming that the firm never sold anything that was against the law or that was not a SNAP-eligible item. The Appellant claimed that the transactions ending in a same-cents value were the result of inventory items that were priced in 25-cent intervals. The Appellant submitted a list of approximately 375 different items with sales prices such as \$0.75, \$1.25, \$2.50, \$4.00, etc. As for multiple transactions from the same household account, the Appellant argued that regular customers who live nearby often visit the store two or three times a day. Regarding large transactions, the Appellant claimed that the store was renovated in May 2016 and several improvements were made, including updates to coolers, refrigerators, and shelving, as well as an expansion of inventory. The Appellant further contended that the price of goods has also increased. Finally, the Appellant argued that if the store loses its ability to accept SNAP benefits, its customers will experience inconvenience.

In support of its response, the Appellant submitted the following documentation:

- Four handwritten statements from SNAP customers attesting to regularly shopping at Jae's Market, sometimes spending large amounts or making frequent trips to the store.
- A price list of approximately 375 different food items available for purchase at Jae's Market. With the exception of a small number of chilies and spices and fresh fruits and vegetables, all items on the list are divisible by \$0.25.
- 271 cash register receipts that correspond to many of the transactions listed in the charge letter. The register receipts do not identify what was purchased, but are simply lists of dollar amounts and transaction totals.
- 83 color photographs of the firm's inventory, with posted prices that appear to correspond to the price list mentioned above.

After reviewing the Appellant's response and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated June 28, 2019. This letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but that a CMP was not appropriate in this case because the

Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. In a letter postmarked July 6, 2019, the Appellant, now through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

7 U.S.C. § 2021(b)(3)(B) states, in part:

...[A] disqualification under subsection (a) shall be...permanent upon...the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards...

7 CFR § 278.6(a) states, in part:

FNS may disqualify any authorized retail food store...if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, **inconsistent redemption data, [or] evidence obtained through a transaction report under an electronic benefit transfer system....** [Emphasis added.]

7 CFR § 278.6(e)(1)(i) states:

FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, in part:

Trafficking means: The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone...

7 CFR § 271.2 states, in part:

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

7 CFR § 278.6(b)(1) states, in part:

Any firm considered for disqualification...under paragraph (a) of this section...shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification.... The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter...

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(b)(2)(ii) states, in part:

Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence... that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).

7 CFR § 278.6(b)(2)(iii) states:

If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such a penalty.

7 CFR § 278.6(i) states, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking ... if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program...

APPELLANT'S CONTENTIONS

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

- After receiving the charge letter, the Appellant contacted the Retailer Operations Division and was advised to submit any documentation it wanted the agency to consider regarding

the three different charges outlined in the charge letter. The Retailer Operations Division did not ask the Appellant to submit documents related to its eligibility for a civil money penalty in lieu of permanent disqualification.

- In responding to the charge letter, the Appellant did not request a CMP because there had not been a finding of violations at that time. The charge letter and the Retailer Operations Division made it clear that the firm was to provide a response and supporting evidence in relation to the three charges, which the Appellant did.
- In the determination letter, the Retailer Operations Division determined that Jae's Market had failed to submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations. There was no mention of the evidence that was submitted by the Appellant in response to the charge letter.
- The agency's determination was based on the assumption that Jae's Market was found to have been in violation of trafficking and that it failed to provide sufficient evidence to apply for a CMP in lieu of disqualification.
- When the charge letter was issued, there was no determination of a violation. There was nothing in the letter or in the relevant SNAP regulations that stated that the firm had to make a request for a CMP at the time it responded to the charge letter. Therefore, USDA's determination was arbitrary and capricious. It is unwarranted in law and without justification in fact because USDA did not follow the regulations. USDA ignored what was submitted by the Appellant and determined that the firm had failed to provide evidence to support its application for a CMP. But Jae's Market was not applying for a CMP at that time because the determination had not been made. Thus, USDA's decision was made in error.

In support of its contentions, the Appellant submitted copies of the charge letter and determination letter as well as an e-mail from the Retailer Operations Division (dated May 13, 2019) and copies of the evidence that it submitted with its original response to the charge letter (minus the photographs).

In a letter dated August 13, 2019, the Appellant, through counsel, submitted the following additional contentions:

- The Appellant owner has been the owner of Jae's Market since November 2001. In that time, he has never had any violations. He is an honest man who has worked diligently to support his family. He has operated the store in compliance with the law as best he can.
- If the firm is permanently disqualified from SNAP, the owner's income will decrease substantially. Not only would it be devastating to his own household, but it would also cause extreme hardship to the families who frequent the store for their household needs.
- Being the sole owner/operator at the store, the Appellant owner has implemented an effective compliance policy and program to prevent SNAP violations in that he strictly adheres to the rules and regulations of the program. He does not know how to operate the store in any other way.
- Appellant requests reconsideration of the determination of trafficking.

In support of this additional response the Appellant submitted the following documentation:

- A letter from the store's owner, which states that when the store originally opened, the firm set its pricing to round numbers since American money was difficult for the owner's wife. Prices have remained that way ever since. The owner further states that in 2016, he purchased a walk-in cooler. Since this purchase, sales have increased substantially. The store also started selling lottery tickets and accepting credit cards. Because of this, sales have increased. The owner's letter also states that after initial purchases, customers will often return to the store with their children and buy more things. This is why there are multiple transactions within a set time period. Finally, the owner states that he is a God-fearing person who conducts his business as honestly as he can.
- An invoice from Eskimo Air-Control Construction Inc., dated March 21, 2016, showing the purchase and installation of a walk-in cooler.
- A letter from the owner's son, explaining that he encouraged his father to increase the inventory at the store, accept credit cards as payment, and sell lottery tickets. As a result, the firm now sells family-sized foods and snacks, baby formula, and many other products that families need. This has resulted in customers purchasing much larger quantities.
- 154 color photographs of the firm's inventory with prices of items prominently posted.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all evidence and contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The primary issue for consideration in a case based on suspicious SNAP redemption data is whether or not the Retailer Operations Division adequately established that the Appellant firm engaged in the violation of trafficking. In other words, did the Retailer Operations Division, through a preponderance of the evidence, establish that it is more likely true than not true that the irregular and unusual transactions cited in the charge letter were the result of trafficking?

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm's EBT transactions, but also information obtained from a February 26, 2019, store inspection which was conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report and photographs documented the following store size, description, and characteristics:

- Jae's Market is a convenience store, roughly 650 square feet in size, operating in the city of Los Angeles, California.
- At the time of the contractor's visit, the firm did not have any shopping carts or hand-held baskets for customer use, which is not unusual for stores of this size. Customers shopping in convenience stores generally purchase only as much food as they can carry in their arms.

- The store visit photographs show one cash register and agency records reflect the use of one EBT point-of-sale terminal for SNAP purchases.
- The store's staple food stock is sufficient for program eligibility in each of the four staple food categories, and is typical of a convenience store.
- The report indicates that the store sells SNAP-eligible, non-staple accessory food items, such as carbonated and uncarbonated drinks, snacks, candy, and condiments. The store also sells ineligible, nonfood items, including alcoholic beverages, tobacco products, lottery tickets, cleaning supplies, and other miscellaneous household merchandise.
- The checkout area is limited to a small opening through a glass barrier. There is no counter space except for a very small surface on the cashier's side of the barrier. The highly constricted checkout area is not suitable for conducting large or rapid transactions as there is limited space to place more than one or two small items at a time and little room for customers to maneuver with large amounts of groceries.
- There is no indication from the store visit report that the firm has a special pricing structure. While there are clearly some items that are priced at even-dollar amounts and others with cents-values of 25, 50, or 75, there also appears to be a large number of items ending with a cents value of 9, such as a jar of hot sauce for \$1.99, or packages of spices for \$0.69 or \$1.29. The report also states that the firm does not round transaction totals up or down at checkout.
- There is no indication from the report that the firm has special food packages for sale or that items are sold in bulk. According to the report, the most expensive food items available for purchase include a 16-ounce jar of honey for \$9.99; a 26.5-ounce jar of Nutella spread for \$9.99; a 3.25-ounce bag of jerky for \$7.00; and a 1.16-pound container of Nesquik for \$6.99.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a convenience store, where households normally purchase a limited number of items to supplement their overall dietary needs. There was no indication that SNAP households would be inclined to regularly visit Jae's Market to purchase large quantities of groceries, especially considering the severely constricted checkout area, the absence of shopping carts and baskets, and the availability of larger grocery stores in the area, including two supermarkets and several small- to medium-sized grocery stores within a one-mile radius of the store. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of similar-sized competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: There were a large number of transactions ending in a same cents value. This attachment lists 99 transactions ending in .00, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits, and 94 transactions ending in .50, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E). At the time of the store visit, the store did not appear to have a consistent pricing structure. As such, the likelihood that so many non-taxed transactions, which would typically consist of random items from the store's shelves, would so frequently and legitimately end in .00 or .50 is very low.

The Appellant has argued that when it originally opened the store, the owner's wife was unfamiliar with American money, so to resolve this issue, the owner decided to price all items in round numbers, such as .00, .50, or .75. To support this argument, the Appellant submitted a price list of approximately 375 items, with the vast majority of prices ending in .00, .25, .50, or .75. The Appellant also submitted a large number of photographs showing the firm's inventory and associated prices.

Unfortunately, this review does not find these arguments to particularly compelling. For example, the photographs submitted by the Appellant have a distinct appearance of being staged – likely after receiving the charge letter. The inventory itself largely resembles the inventory as recorded by the inspector, but in the Appellant's photos, nearly every item in the store has a price visible on the product or on the shelf below the item. The rounded prices (.00, .25, .50, and .75) are prominently displayed in the Appellant's photos. But in the photographs taken by the contractor, much of the merchandise does not have pricing labels on the packaging or on the shelves. The Appellant's pricing list, while supportive of its contentions, does not fully correspond to the information obtained by the contractor, which indicates that many items appear to end with a cents value of 9. The cash register receipts provided by the Appellant show large numbers of items with rounded numbers, but the receipts do not show what was actually purchased during each transaction. As such, it is impossible to determine whether or not the register receipts are legitimate or if the purchases were for eligible food items.

This review does not contest the claim that some transactions at the store legitimately end with a cents value of .00 or .50, but the Appellant's explanation and evidence is insufficient to eliminate trafficking as a primary reason for the unusually large numbers of such transactions.

Charge Letter Attachment 2: Multiple transactions were made from the accounts of individual SNAP households within a set time period. This attachment lists 19 sets of transactions (77 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E).

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), an extraordinary amount for a convenience store with a modest supply of inventory and no shopping carts or baskets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C):

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Such repetitive shopping patterns and dollar amounts in extraordinarily short periods of time at a convenience store like Jae's Market are highly irregular and are often an indication of trafficking. As such, these transactions warrant further explanation and credible evidence to prove that they were legitimate purchases of eligible food.

The Appellant contends that after initial purchases, customers will often return to the store with their children and buy more things. This is why there are multiple transactions within a set time period. Unfortunately, this explanation does not adequately explain the patterns listed above. Why, on October 8 for example, would a household make three consecutive transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (none of which have cents values divisible by 25, which the Appellant argues is its standard business practice) for a total amount in excess

5 U.S.C. § 552 (b)(6) & (b)(7)(C)? And why would the same household return to the store the next day and repeat the process? This is not normal shopping behavior at a modestly-stocked convenience store.

Additionally, the Appellant's cash register receipts are not compelling pieces of evidence, as they offer little insight into what transpired at the point of sale.

It is worth noting that the Appellant's transactions in Attachment 2 are substantially different than transactions found in the three nearest SNAP-authorized convenience stores. These nearby stores, comparable in both size and inventory, had only one suspicious transaction set between them. See chart below:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

It is reasonable to presume that customer behavior at four similarly-stocked convenience stores within a quarter-mile of each other would be fairly uniform. Thus, if multiple trips to the store were common at Jae's Market, it stands to reason that they would be common at a nearby store with nearly identical inventory. And yet, only at the Appellant store did customers routinely conduct large, repetitive transactions. It appears to this review that something besides the Appellant's inventory or its customer service was driving such behavior.

It should be made clear that SNAP regulations do not provide limitations on the number of transactions that can be made by SNAP households or how large the individual transactions can be. However, the transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display patterns of use that are inconsistent with the store's documented physical characteristics and in comparison with similar stores in the area. It should be further noted that the transactions identified in the charge letter are not marginally abnormal, but decidedly so. This review does not contend that the EBT transactions detailed in the charge letter are overtly suspicious when they occur on an occasional or intermittent basis. But when such transactions form repetitive and questionable patterns on a consistent basis over a substantial period of time, such activity is considered highly irregular, and a firm's intent to comply with program regulations is called into question.

Because the Appellant's evidence and contentions are not compelling and do not show that the questionable transactions were legitimate purchases of eligible food, it is reasonable for this review to conclude that trafficking was a likely cause of the transaction patterns listed in this attachment.

Charge Letter Attachment 3: The store conducted EBT transactions that were large based on observed store characteristics and recorded food stock. This attachment lists 82 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with a convenience store in the state of California. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a convenience store in California was \$7.29. In Los Angeles County, the average was even lower, at \$6.98 per transaction. The average transaction in Attachment 3 is almost six times larger than the average purchase amount for this store type.

Given that the Appellant firm has a moderate inventory of staple foods and other SNAP-eligible items, such as snacks and drinks, it is probable that there would be an occasional purchase where the transaction amount is high, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As such, there may be some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 3. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from nearby, similar-sized competitors. The substantial number of high-dollar transactions in a six-month period calls into question the legitimacy of these transactions.

Attachment 3 lists six transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) during the review period, including a high of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering how many food items it would typically take to add up 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and considering that the firm does not have any shopping carts or baskets, and given the fact that there are much larger grocery stores in the area with substantially greater inventory and variety, this review finds it unlikely that every transaction in Attachment 3 was a legitimate purchase of eligible food.

It is noted that Jae's Market had many more suspiciously large transactions during the review period than its three nearest comparison stores despite having fewer overall transactions. See chart below:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

It is further notable that many of the transactions listed in Attachment 3 were made by SNAP households who shopped at much larger supermarkets and superstores 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of shopping at Jae's Market. For instance, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

It is difficult for this review to comprehend what was available at Jae's Market that would not have been available at a supermarket or superstore, where overall inventory and variety are substantially greater and where prices are likely lower. It is conceivable that households would visit Jae's Market to supplement their purchases made at the larger stores, but in this case, the household spent substantially more at Jae's Market than at much larger, better stocked grocery store, where shopping carts would have been available to help transport large quantities of groceries. Inexplicable behavior such as this is often indicative of trafficking.

The Appellant has argued that the larger transactions are the result of remodeling that took place in 2016 as well as changes in business practices, such as accepting credit cards, selling lottery tickets, and offering family-sized food items. The Appellant contends that these changes have resulted in customers purchasing much larger quantities than before.

A review of SNAP transactions during the same six-month period three years earlier (September 2015 to February 2016, which is just prior to the remodeling that took place) shows that only a modest increase in SNAP redemptions occurred over the next three years. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). While physical changes to the store may have resulted in a slight increase in

transaction size and customer traffic, such an explanation does little to justify the specific transactions in Attachment 3.

As to the four handwritten customer statements, such documentation is largely unconvincing. Customers engaging in trafficking violations are unlikely to admit to such conduct. Even if well-intentioned, affidavits and declarations do not typically represent a household's actual shopping behavior, as households generally do not retain records of transactions and often do a poor job of recalling spending patterns at a particular location.

The transactions identified in the charge letter are highly irregular and substantially different from comparable stores in the area. In an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that trafficking did not occur. Unfortunately the Appellant's documentation does not meet this standard. Accordingly, the Appellant has not proven by a preponderance of the evidence that trafficking did not take place during the review period.

Civil Money Penalty / Response to Charge Letter

One of the Appellant's key arguments relates to the firm's eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. The Appellant offers a number of contentions pertaining to this issue:

- In an e-mail to the Appellant after issuance of the charge letter, the Retailer Operations Division requested documentation related to the three trafficking charges, but did not ask for documents related to the firm's eligibility for a CMP.
- In its response to the charge letter, the Appellant did not request a CMP because there had not been a finding of violations at that time.
- In its determination letter, the agency did not address any of the evidence that was submitted by the Appellant, and which the agency had specifically requested. The determination letter did mention, however, that the firm had failed to submit sufficient evidence of a compliance policy and program to prevent SNAP violations, and thus was not eligible for a CMP. But the Appellant had not even asked for a CMP at the time of its response to the charge letter because a trafficking determination had not yet been made.
- There was nothing in the charge letter or SNAP regulations that stated that the firm had to make a request for a CMP at the time it responded to the charge letter.
- USDA's determination is arbitrary and capricious and is unwarranted in law and without justification in fact because USDA did not follow the regulations. USDA ignored what was submitted by the Appellant and determined that the firm had failed to provide evidence to support its application for a CMP.

With regard to these contentions, it must be made clear that in order for a civil money penalty to be considered by FNS, a firm must not only request consideration of a trafficking CMP, but it must also submit appropriate supporting documentation of its eligibility of a CMP. Both the request and evidence must be submitted within 10 days of receiving the charge letter. If a firm fails to request consideration of a CMP and submit documentation of its eligibility within the

required timeframe, the firm shall not be eligible for this alternative penalty. This is clearly explained in regulations found at 7 CFR § 278.6(b)(1) and (b)(2)(i), (ii), and (iii). The regulations at § 278.6(i) provide details on the four criteria that must be met and the “substantial evidence” that must be submitted in order to be eligible for a trafficking CMP.

In addition to the regulations, the May 7, 2019, charge letter is very clear that the firm must request consideration of a CMP and must submit evidence of its fulfillment of each of the four criteria within 10 days of receipt of the charge letter (see last paragraph on p. 1 of the charge letter and first full paragraph on p. 2).

There are no exceptions to this 10-day requirement, and there is nothing in the charge letter or in regulations which would suggest that a firm is allowed to wait until after a determination is made before deciding whether or not to request a CMP in lieu of disqualification.

It is true that in its May 13, 2019, e-mail to the Appellant, the Retailer Operations Division did not mention a CMP or request documentation from the Appellant to support a request for a CMP. However, it must be made clear that after receipt of a charge letter, the responsibility for requesting a CMP in lieu of permanent disqualification lies solely with the Appellant. It is not the responsibility of FNS in subsequent communications to remind a retailer to request a CMP or provide evidence of its eligibility for a CMP.

As to the Appellant’s claim that the Retailer Operations Division ignored the firm’s explanation and documentation provided in response to the charge letter, this review does not agree. In accordance with 7 CFR § 278.6(c), the Retailer Operations Division is required to consider and evaluate all evidence and responses provided by the Appellant. However, the agency is under no legal obligation in its determination letter to expound, point-by-point, on every contention or piece of evidence presented. In this case, the determination letter clearly states that consideration was given to the information and evidence available to the Retailer Operations Division and to the reply made by the Appellant. Substantial documentation in the case record supports the agency’s claim. After an evaluation of all information, the Retailer Operations Division determined that the violations cited in the charge letter occurred at Jae’s Market. Implied in the determination letter is a conclusion that the evidence or response by the Appellant was either irrelevant or was insufficient to prove that trafficking had not taken place. While the determination letter may not have been as comprehensive as the Appellant wishes, this review cannot find any evidence that the Retailer Operations Division ignored or disregarded the Appellant’s response.

Accordingly, this review finds that the agency’s determination was neither arbitrary nor capricious, but rather fully conforms to the law and regulations. Further, the case record shows that the Appellant did not request a trafficking CMP when it replied to the charge letter and there is no evidence that the Appellant submitted any documentation that would indicate that the firm had a compliance policy or training program of any kind. Therefore, a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

No Prior Violations

The Appellant argues that the firm has never had any violations and contends that the owner is an honest man who has operated the store in compliance with the law as best he can. This contention implies that because of the Appellant's prior history of program compliance, the disqualification penalty should be reconsidered.

Unfortunately, the law does not agree. SNAP regulations at 7 CFR § 278.6(e) require that when trafficking occurs, permanent disqualification is the necessary penalty, even on the first occasion, regardless of a firm's prior compliance with program rules. In this case, the sanction imposed by the Retailer Operations Division fully conforms to SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar first-time violations.

Hardship to Appellant and SNAP Recipients

The Appellant argues that if the firm is permanently disqualified from SNAP, the owner's income will decrease substantially, which would be devastating to his own household. The Appellant further contends that a disqualification would cause extreme hardship to the families who frequent the store for their household needs.

With regard to the contention that the community will experience hardship if the firm is disqualified, it is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and a household is forced to use its benefits elsewhere. Regulations at 7 CFR § 278.6(f) do allow, in some circumstances, for a civil money penalty to be imposed in lieu of disqualification when there is an absence of other SNAP-authorized retailers in the area. However, the regulations are clear that a CMP for hardship to SNAP households may not be imposed in lieu of permanent disqualification for trafficking.

As for the assertion that the firm's owner would suffer financially if the disqualification were to be upheld, Federal statute at 7 U.S.C. § 2021(b)(3)(B) makes it clear that disqualification for trafficking shall be permanent. It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty.

To allow store ownership to be excused from being assessed administrative penalties based on a purported economic hardship to the store's ownership or to the firm itself would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA. Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with Program regulations, but also to those retailers who have been disqualified from the Program in the past for similar violations.

Therefore, the Appellant's contentions regarding hardship do not provide a valid basis for dismissing the charges or for modifying the penalty imposed.

CONCLUSION

An analysis of the Appellant's EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify Jae's Market from SNAP participation. This data provided sufficient evidence for this review to conclude that the questionable transactions and patterns listed in the charge letter were more likely than not the result of trafficking violations committed by the Appellant. Likewise, the Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

Based on a review of all available information in this case, the decision to impose a permanent disqualification against the Appellant, Jae's Market, under the ownership **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. If a judicial review is desired, the complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

JON YORGASON
Administrative Review Officer

October 15, 2019