

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

JK Mini Market & Snack Shop,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0227270

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 JK Mini Market & Snack Shop (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by FNS’s 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 JK Mini Market & Snack Shop.

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 from SNAP based on an analysis of EBT transaction data from August 2019 through February 2020. This involved the following transaction patterns which are common trafficking indicators:

- 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 JK Mini Market & Snack Shop for SNAP participation on March 11, 2016. In a letter dated March 31, 2020, 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 August 2019 and February 2020. 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 handwritten reply dated April 4, 2020, the Appellant responded to the charge letter by providing a list of the firm's inventory, including varieties of fresh fruits and vegetables, fruit trays, and prepared drinks and snacks, such as smoothies, ice cream, and shaved ice. The list also included canned foods, grains, drinks, dairy and meat products, and miscellaneous items, such as candy and carbonated drinks. In all, the Appellant's inventory list included roughly 150 different food items available for purchase in the store. However, the Appellant did not offer any contentions or explanations related to the charges of trafficking or the unusual transaction patterns listed in the charge letter.

After evaluating 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 April 15, 2020. The determination 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 found that a CMP was not appropriate 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 April 20, 2020, the Appellant 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....

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 made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant does not agree with the agency's disqualification determination.
- Even though the store is small, it is the only store that offers prepared fruits and snacks that can be purchased with EBT.
- The firm sells large quantities of drinks and chips as well as some items priced as high as \$70.00.
- The store is located near three schools and two churches. The families nearby and from other areas travel to the store to buy snacks and other things for their kids.
- The firm has noticed a group of men over the last year that have become excellent clients. They make purchases **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. They come in many times a day. There are also families that use EBT to buy fruit trays and other snacks to take to their children's school to share with their friends.
- Appellant owner does not speak English and does not know how to explain the transactions. The Appellant has always worked in the correct manner since the business has been opened. When the store first opened, the owner physically went to the Los Angeles FNS office to make sure what the store sold was covered by EBT.

- The store's sales have been increasing with EBT, including the sale of prepared snacks. The firm also provides its clients with the best service.
- It has not been easy for the owner to operate the store. She has put all of her energy into it to contribute to this country that has given her an opportunity to open her own store.
- Appellant owner feels like she is a victim because she does not know English. She has had to hire English-speaking people to run the cash register, and has had to change her staff multiple times.
- These contentions do not mean that the firm is doing anything illegal. The owner just does not agree with the decision. The store is the only income the owner has to support her children, and now with the coronavirus, the firm's sales have been affected.

In support of its contentions, the Appellant submitted 37 color photographs of the store's interior, including photos of inventory and fruit trays that are available for purchase. According to the Appellant, the photographs show items that are sold by the box, by the gallon, and by individual units. Fruit trays with cream are priced between \$30.00 and \$70.00. Ice cream gallons are priced at \$25.00. These items are sold with EBT and are cold and fresh. According to the Appellant, the store is perfectly located near a school, a church, and a daycare, and has a lot of customers.

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

A key 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 11, 2020, store visit 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:

- JK Mini Market & Snack Shop is a small convenience store, roughly 750 square feet in size, operating in the city of Los Angeles, California.
- The store visit photographs show one cash register and agency records reflect the use of one EBT point-of-sale terminal for SNAP purchases. It appears that the firm does not use an optical scanner to ring up items on the cash register.
- The store does not have any shopping carts or shopping baskets for customer use.

- The store’s staple food varieties are typical of a convenience store or small corner market, and inventory levels are sufficient for program participation.
- In addition to canned, boxed, and fresh produce and other staple foods, JK Mini Market & Snack Shop sells a variety of accessory foods, including snack foods, candy, spices, condiments, and carbonated and uncarbonated drinks. The store also sells nonfood items such as health and beauty products, paper goods, cleaning supplies, and other miscellaneous household merchandise.
- The store also offers hot and cold prepared meals, such as made-to-order sandwiches, tostadas, nachos, etc. The store also sells fresh fruit smoothies, freshly-scooped ice cream, shaved ice, and other cold snack foods.
- The checkout counter sits atop a display cooler and is cluttered with candy and snacks available for purchases. The very small checkout area is not suitable for conducting large or rapid transactions as there is little room to place more than a few small items at a time, and little room to maneuver with large amounts of groceries.
- There is no indication from the store visit report that the firm has an unusual pricing structure, such as most items ending in .00. As with most stores, the prices of most items appear to end with a cents-value of 9, such as \$0.79, \$2.29, \$3.49, etc. A few canned goods appear to sell for prices divisible by \$0.25, such as \$0.75 or \$1.00. The report also states that the firm does not round transaction totals up or down at checkout.
- There is no evidence 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 include a 4-pound can of tuna for \$11.00, a case of soda for \$9.99, and a 7.93-ounce container of coffee for \$7.99.

The vast majority of food items in the store appear to sell for \$5.00 or less. The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a convenience store or small corner market. It appears clear from the contractor’s report that JK Mini Market & Snack Shop is the kind of store where households normally purchase a limited number of items to supplement their overall dietary needs. There is little indication that SNAP households would be inclined to regularly visit JK Mini Market & Snack Shop to purchase large quantities of groceries, especially considering the limited overall inventory, the very constricted checkout area, the absence of shopping carts and baskets, and the availability of much larger stores in the area, including a full-service supermarket less than half a mile away. 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: Multiple transactions were made from the accounts of individual SNAP households within a set time period. This attachment lists 27 sets of transactions (57 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 no shopping carts or baskets and minimal overall inventory. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Such transactions at a small store like JK Mini Market & Snack Shop are highly

irregular and are often an indication of trafficking. As such, these transactions warrant further explanation.

With regard to these patterns, the Appellant has offered no explanations that address the specific transactions listed in the charge letter. It did state that the store is conveniently located near schools and churches and that families nearby and from other areas travel to the store to buy snacks and other things for their kids. The Appellant further claims that over the last year, it has noticed a group of men that have become excellent clients. According to the Appellant, these customers make purchases **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and visit the store many times a day.

Unfortunately, no credible supporting evidence was provided to prove that the transactions in question were legitimate purchases of eligible food. Such evidence might have included itemized cash register receipts or other accounting records to show what the customers purchased with their SNAP benefits. Without compelling evidence from the Appellant, it is reasonable for this review to conclude that trafficking was a likely cause of the transaction patterns listed in Attachment 1.

Charge Letter Attachment 2: The store conducted EBT transactions that were large based on observed store characteristics and recorded food stock. This attachment lists 402 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 for a convenience store in California was \$7.21. In Los Angeles County, the average was even lower, at just \$6.96 per transaction. But the average transaction in Attachment 2 is almost eight times larger than the average purchase amount for this store type.

Given that the Appellant firm sells a variety of staple foods as well as other SNAP-eligible items, including snacks and drinks, it is possible 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, it may be that there are some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 2. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from similar-sized competitors in the area. The substantial number of high-dollar transactions in a seven-month period calls into question the legitimacy of these transactions.

Attachment 2 lists 15 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)**. Another 73 transactions **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 store has a very small checkout area and no shopping carts or baskets to help a customer transport large amounts of food, this review finds it difficult to believe that every large transaction listed in Attachment 2 was a legitimate purchase of eligible food.

Unfortunately, the Appellant has offered few contentions or documents to help explain these transaction patterns. The Appellant did provide a handwritten list of the inventory available in

the store and claims that it sells a few expensive items, such as trays of fresh fruit or large containers of ice cream, but it offered no evidence to show how frequently such purchases were made and whether or not such purchases were actually made by customers using SNAP benefits. Likewise, the photographs provided by the Appellant offer little additional insight, as they largely resemble the photos taken by the contractor during the February 11, 2020, store visit, and offer no clues about what transpired between the customers and the store clerks at the point of sale.

It is also notable that the Appellant has offered no evidence that directly relates to the transactions in question. Such evidence might have included itemized cash register receipts to prove that the transactions were legitimate purchases of eligible food or inventory records to show that the firm had sufficient inventory to cover its SNAP transactions over the seven-month review period.

This review does not doubt that JK Mini Market & Snack Shop sells eligible food items and conducts some legitimate SNAP business. But when unusually large transactions form patterns that are substantially different from comparable stores in the area, further evidence from the Appellant is warranted to verify that there is not something more, such as trafficking or other program violations, taking place. In this case, the Appellant has offered no persuasive evidence to help explain what occurred between the customers and cashiers at the point of sale. Accordingly, it is the finding of this review that trafficking was a likely cause of the unusual transaction patterns found in Attachment 2.

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. With regard to Attachments 1 and 2, the Appellant has not met this standard.

Hardship to Appellant

The Appellant contends that it has not been easy for the owner to operate the store. She has put all of her energy into it to contribute to this country that has given her an opportunity to open her own store, but feels like she is a victim because she does not know English. She has had to hire English-speaking people to run the cash register and has had to change her staff multiple times. According to the Appellant, the store is the only income the owner has to support her children, and now with the coronavirus, the firm's sales have been affected.

With regard to these contentions, it is recognized that some degree of hardship to ownership is a likely consequence whenever a store is disqualified from participation in SNAP; however, there is no provision in the statute or regulations for a waiver or reduction of an administrative penalty on the basis of possible economic or other hardship to either the ownership personally or to the firm itself as a result of such a penalty. As such, hardship to the Appellant cannot be a consideration in this matter.

Civil Money Penalty

The Retailer Operations Division determined that the Appellant firm was not eligible for a civil money penalty in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a CMP to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate supporting documentation within 10 days of receipt of the charge letter. 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 program of any kind.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

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 JK Mini Market & Snack Shop 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, JK Mini Market & Snack Shop, under the ownership of 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. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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

June 10, 2020