

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

**Jr's Food Store,**

**Appellant,**

**v.**

**Office of Retailer Operations  
and Compliance,**

**Respondent.**

**Case Number: C0203678**

**FINAL AGENCY DECISION**

The record supports that Jr's Food Store (Appellant), committed violations of the Supplemental Nutrition Assistance Program (SNAP). It is the decision of the USDA that there is sufficient evidence to sustain the permanent disqualification of Appellant from participation as an authorized retail food store in the SNAP, as imposed by the Office of Retailer Operations and Compliance (Retailer Operations).

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.6(a), (c), and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

**AUTHORITY**

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

**CASE CHRONOLOGY**

By Charge letter dated November 13, 2017, Retailer Operations informed the owner that it had compiled evidence that Appellant had violated the SNAP regulations based on electronic benefit transfer transactions that established clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for the firm type. Retailer Operations charged Appellant with trafficking. The sanction for trafficking is permanent disqualification.

The owner made a FOIA request in writing on November 15, 2017. The FOIA office provided a FOIA response to the owner dated January 9, 2018. By letter dated April 10, 2018, Retailer Operations noticed the owner that he had ten days to reply to the Charge letter. By email dated April 19, 2018, counsel contacted Retailer Operations as the representative of Appellant, and requested an extension to reply. Counsel indicated that the FOIA reply had not been received. By letter dated April 23, 2018, Retailer Operations noticed counsel that he had to May 23, 2018, to reply to the charges, but that the time to request a civil money penalty (CMP) and to provide the documentation to support such a request had not been extended. Retailer Operations provided the FOIA reply to counsel by email on April 23, 2018.

Counsel appealed the FOIA reply by letter dated May 21, 2018. The FOIA office replied to the appeal on September 25, 2020, misdating the appeal date in that response. On September 30, 2020, Retailer Operations issued counsel a notice to reply to the Charge letter. Counsel provided a reply dated October 13, 2020. Retailer Operations issued a Determination letter dated October 15, 2020. This letter informed Appellant that it was permanently disqualified as a retail food store in accordance with Sections 278.6(c), and 278.6(e)(1) of the regulations. Retailer Operations considered Appellant's eligibility for a CMP according to Section 278.6(i) of the regulations, and found it was not eligible because insufficient evidence had been submitted timely to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program to prevent violations.

Counsel requested administrative review by letter dated October 23, 2020. The review was granted by letter dated November 3, 2020. Counsel provided a reply dated November 24, 2020.

## **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant bears the burden of demonstrating, by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing credible, relevant evidence, which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true.

## **CONTROLLING LAW AND REGULATIONS**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e)(1) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

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

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

7 CFR § 278.6(b)(2)(ii) states: “Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).”

7 CFR § 278.6(e)(1) states: “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.” Trafficking is defined, in 7 CFR § 271.2, as: “(1) The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers, 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;...(4) Purchasing a product with SNAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with SNAP benefits in exchange for cash or consideration other than eligible food; or (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.”

7 CFR § 278.6(i) states: “FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.”

## **SUMMARY OF THE CHARGES**

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true, that the questionable transaction patterns were the result of trafficking. The charges were based on an analysis of SNAP transaction data during the period of June 2017 through August 2017. The transaction patterns indicative of trafficking are:

- Multiple transactions made from individual benefit accounts in unusually short time frames.
- Excessively large purchase transactions made from recipient accounts.

## **APPELLANT’S CONTENTIONS**

In reaching a decision, consideration has been given to all contentions and including any not referenced. Submissions included: vendor invoices; state and federal tax submissions; an April 2016 article, *Know Your Core, Protect Your Core*; a 2011 USDA Final Report, *Benefits*

*Redemption Patterns in the Supplemental Nutrition Assistance Program*; an article, *U.S. Grocery Shopping Trends, 2016*; and a November 2016 USDA article, *Foods Typically Purchased by SNAP Households*.

- The Appellants were charged with trafficking SNAP benefits, which the Appellants vehemently deny. The transaction scans are not indicative of trafficking. The Department lacks any study to indicate that they are meaningfully correlated to trafficking, and in the absence of such information, a decision finding trafficking based upon a correlation between transaction categories and the violation of trafficking, is outright arbitrary and capricious.
- The store itself operates as a small grocery store, and is approximately 1,300 square feet.
- A substantial amount of the Store's clients come from the surrounding residential neighborhoods, and my Clients have crafted the store's offerings to cover all of the grocery needs of the average local family. A significant portion of the Store's clients are EBT participants, and accordingly, the vast majority of the store's offerings are qualified items under the EBT regulations. When considering whether or not the Store's EBT transactions are inherently suspicious, it's important to look into the local population with greater detail.
- A fair analysis of this store and its inventory is that it is well supplied. The building isn't in mint condition, and some of the equipment isn't spotless (namely, a single cooler) but there's nothing here that would drive SNAP customers away. There's a lot to like about this store.
- The ALERT System cannot identify fraud. It is designed to identify "suspicious behavior" at most, but the basis for the system is unknown. The statute does not authorize the Department to rely upon a system that inaccurately accounts for what is "consistent" or "inconsistent". Context is king, and the purpose for developing a reliable data model from which to work. It is more likely that the Department has misidentified legitimate transactions as a result of an errant assumption about the Store's inventory and clientele. As such, the Appellants have shown by a preponderance of the evidence that the transactions cited in the Charging Letter are more likely than not innocent transactions rather than trafficking.

## **ANALYSIS AND FINDINGS**

Retailer Operations uses data patterns, onsite store photographs, shopping histories, and other analyses to evaluate the type and extent of potential SNAP violations by authorized retailers. This review encompasses the examination of the information in this case to determine whether the owner demonstrates by a preponderance of the evidence, that the permanent disqualification should be reversed. The compliance history shows that on June 18, 2010, Retailer Operations disqualified the owner and this location for six months due to the sale of ineligible items in exchange for SNAP benefits. This disqualification was sustained on administrative review. The disqualification indicates Appellant does have record of a SNAP violation. Subsequent to the sanction period being served, Appellant was authorized October 6, 2011, and typed as a small grocery store.

### **Store Characteristics**

Contentions:

- The store’s inventory is flush. The Dairy Products category is filled to the maximum extent that the inventory survey permits. Fruits and Vegetables has thirteen varieties, more than half of which have more than twenty units of stock. Breads and cereals are all but completely filled to the brim, with the one exception being infant cereal. The Meats category has nine of ten total varieties, eight with more than twenty units.
- The pictures depict a clean, organized and well stocked inventory. The refrigerated cases in the picture looks well lit, organized and stocked with a variety of meats and cheeses, fruits and vegetables that SNAP participants are likely to be interested in. Furthermore, pictures show the store has an “ABSOLUTELY NO CREDIT” sign, an indication consistent with the two negative RIB reports the store had in the preceding three years.

A contracted FNS-onsite store visit was conducted on April 18, 2017. The freestanding firm is located in an urban, commercial area. No shopping carts or baskets for customer use were recorded. The store does not take telephone, or online orders, or offer delivery. The contractor noted no optical scanner, no adding machine, and no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers. There is one check-out area, enclosed by plexiglass with a window opening to transact business. The limited check-out counter space was surrounded by products and displays. Among other items, nonfood stock included: tobacco products, beer, phone accessories, automotive supplies, lottery tickets, health and beauty aids, diapers, paper and aluminum goods, clothing, pet food, and cleaning products.

The contractor listed the four most expensive SNAP eligible items ranged from \$6.99 to \$17.99. The store visit photos showed posted signs of prices for hot and cold sandwiches ranging in price from \$2.99 to \$5.99. Hot foods are not eligible for purchase with SNAP benefits. The contractor noted the store did not sell meat bundles, seafood specials, and/or fruit and vegetable boxes. Retailer Operations concluded that Appellant’s eligible food inventory, consisted of common food items with no indication of food bundles.

Retailer Operations identified that the store size in the 2017 report was different from the estimate of 2,500 square feet cited in the February 27, 2015 store visit report. Appellant has undergone store visits in 2011, 2012, 2013, 2015 and 2017. There were no store visits in 2014 or 2016. The owner signed the store visit consent form in 2011 and 2013. Based on the estimates listed in store visit reports, it is more likely that the store size is about 1,300 square feet.

The data shows that there are 19 authorized stores located within a one mile radius from Appellant, including two supermarkets. Retailer Operations found that 73% of the SNAP households identified in Attachment 1, and 82% of the households listed on Attachment 2, made SNAP transactions at various authorized stores the same day that they made a transaction(s) at Appellant. Retailer Operations determined that the high percentages indicate the households listed had the ability to and did transact benefits at a range of stores. Households that made a transaction(s) at Appellant did not appear to be reliant on the store as an exclusive food source. Retailer Operations noted that the high percentages of SNAP households transacting benefits on the same day at other store types supports that Appellant may not be a first choice or primary food source for the households listed. Retailer Operations analyzed the the shopping histories of flagged households, and determined that the shopping patterns at Appellant were indicative of trafficking.

## Attachments

Each Attachment furnished with the Charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant during the review period.

**Attachment 1:** Eleven unique households (HHs) conducted 13 sets of two or more transactions within a set time period.

Contentions:

- Multiple transactions occurring **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** are not “inherently suspicious,” as it is not uncommon for a customer to make multiple trips to the same store on the same day. It unclear why FNS found certain close in proximity transactions to be consistent with patterns of trafficking rather than the innocent explanation of a shopper realizing he forgot something or, for example, one household member wanting to make a small purchase while the other household member stays behind to complete a larger purchase.
- All of these transactions are the result of the Store’s business practices, co-shopping, and/or the habits of the SNAP clientele. Different household members will shop separately (using the same account) to pick up different needs, and personal needs, on top of the household’s list; and different household participants will travel to the Store together to make purchases, and then separate their purchases to track what amount each party has used from their benefits account. The first option, that members will shop separately, is actually statistically preferred by consumers to minimize negotiation.
- This is not an adequate number of transactions to support a finding of trafficking, and this particular Scan pattern is no longer in use. In light of the reasonable explanations set forth it is unlikely that the suspicious transaction patterns were the result of trafficking. Here, the transactions at issue consisted of innocent transactions, made **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** at the Store, easily explained by either the participant forgetting an item in his/her prior transaction; co-shopping; the participant making a purchase, returning home, and then returning to the Store to make a second purchase; and/or a reflection of the normal shopping habits of SNAP participants.
- With respect to logistics, the closest in time transactions that the Department identified were 1 through 2, which are separated as outlined **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and are in the amounts of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, respectively. These transactions are examples of pre-tabulated co-shopping purchases. Though the store does not have an optical scanner, transactions like these can involve pre-written orders from the deli department of the store. If there were two separate orders (from two different members of the same household), then the Clerk would only need to read the order slip and enter the amount into the EBT terminal and process the transaction. The only item that would change hands (or move across the counter) would be the paper order slip. Furthermore, given the size of the inventory and it’s contents, the price points don’t appear to be terribly large. This is particularly true when you look at the average transaction size, wherein this store’s averages are much, much lower than the average small grocer. It’s unsurprising that there will still be larger purchases.
- These transactions are not occurring at a convenience store, they’re occurring at a full fledged deli with a fully stocked inventory, according to the Department’s own Store Visit

Report. There can be no logistic question pertaining to sufficiency of inventory.

- The inventory offered by the store is of such a variety that it's reasonable to assume a household could satisfy all of their needs on a single shopping trip. Given the transportation and convenience issues, the store benefits from being able to satisfactorily supply their customers with enough types of food for them to be able to make meals for their families.

The store visit report indicates Appellant does not have hand baskets or shopping carts to assist recipients with the collection of items, it does not offer telephone or internet orders, or stock food bundles. Retailer Operations determined that SNAP eligible stock was comprised of common food items with similar items and brands available at other area SNAP authorized food stores. Retailer Operations noted that the ability to complete rapid legitimate SNAP transactions equaling large dollar amounts was not persuasive, since the ability to process legitimate SNAP transactions does not preclude trafficking activity, which can be done rapidly, since cash is quickly exchanged for benefits rather than eligible foods. Of the 13 data sets listed on Attachment 1, 12 sets 5 U.S.C. § 552 (b)(6) & (b)(7)(C) between the first and last SNAP transactions. Retailer Operations states that if the sets are separate transactions as a result of a preorder, there should be more sets 5 U.S.C. § 552 (b)(6) & (b)(7)(C) between the first and last transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) between the transactions in the sets. As noted, the store visit shows that Appellant did not take telephone, online, or other orders. The FNS photos show that while Appellant had food stock, it also stocked many ineligible items. Appellant presented no detailed cash register tapes to show the sales of eligible foods exchanged for benefits.

Counsel contends that co-shopping is one of the reasons for the number of transactions from the same SNAP account. To support this allegation, the retailer reply references studies and articles that deal with SNAP households' shopping behaviors and retail shopping trends. The cited reports do not directly address the Attachment patterns at Appellant. That SNAP households in the area are in poverty and have children, does not preclude Appellant from participating in trafficking activity with said households. Retailers exchange SNAP benefit amounts electronically with households for a range of cash amounts.

Retailer Operations determined that if co-shopping was occurring, households would be conducting similar transaction sets at other retailers. The data indicate that nine of the 11 flagged households did not repeat similar data sets at other SNAP-authorized food stores. One household flagged, with one listed data set on this Attachment, made one flagged data set at another store that met this Attachment's parameters. This household had an out of state benefits card from a state that did not adjoin Florida. The second household made one data set at another store that met the parameters of this Attachment. Given that 82% of the households listed did not show this shopping pattern at other stores, Retailer Operations did not find the co-shopping explanation to be a persuasive rationale for this Attachment pattern. Also, when a household is certified for participation in the SNAP, if there are multiple families living in one household, and every member of the household purchases, prepares, and eats food together, the SNAP benefits are issued on one card for the entire household. However, if there are multiple individuals living under one roof, and they purchase, store, prepare, and eat separately, their benefits are issued as separate households, each household with its own EBT card. Therefore, the different shopping

priorities and needs of multiple generations residing under one roof are not necessarily portioned out via one SNAP benefits account.

**Attachment 2:** Listed are 24 transactions, that are excessively large purchase transactions, conducted by 17 unique HHs. Each of these transactions is at least three times larger than the average transaction made at a the same store type during the period.

Contentions:

- These transactions are the result of the Store's inventory, co-shopping, and/or are the normal reflections of a SNAP participant's shopping habits. Though certainly the large transactions are not common, the retailer has no ability to decline EBT transactions for eligible items.
- Furthermore, in some instances, SNAP participants purchase eligible food items for multiple other persons. It is not uncommon for sales of Red Bull cases, chips, sodas and other items to be bought in bulk by the participant, who likely intends to distribute the items amongst a number of other persons.
- Many of these transactions are the result of households that are larger than the average family. With more mouths to feed, food purchases increase. Larger families also value convenience at a higher rate, which makes the Appellant's store more likely to conduct these transactions.

The FNS photos and store inventory do not show that Appellant stocked fresh meats or poultry. The store inventory shows that Appellant had a variety of deli meats, sausages, and canned meat and fish. It also had some vegetables and some prepared foods in the deli display counter. Retailer Operations determined that given the small window checkout area, the lack of shopping baskets or carts, and that hot foods are not eligible for SNAP purchase, the larger transaction amounts were less likely the result of legitimate food purchases than of trafficking benefits for cash. The store has also been previously sanctioned for selling ineligible items.

The owner advanced vendor invoices and tax documents. Retailer Operations determined that the invoices include duplicates, some were dated outside of the review period, and some lacked item descriptions to identify SNAP eligible foods from SNAP ineligible items. Retailer Operations applied a 52% markup to the accepted invoices, and determined that the invoice evidence did not tally so as to show sufficient eligible foods were purchased to cover Appellant's SNAP redemptions during the review months. The federal tax forms show that Appellant acquired inventory, however the information is not detailed as to SNAP eligible and ineligible items. The state tax submissions indicate that greater monthly sales were recorded for taxable items than the sale of eligible foods, which are not taxed for SNAP. The tax information supports sales at Appellant, however the reports do not demonstrate that trafficking did not occur as charged.

As to the court cases cited by counsel, the administrative review process should determine whether FNS followed the Food and Nutrition Act and the regulations issued under the Act when it took action against the retailer. The administrative review officer is not responsible for determining whether cited legal cases apply to Appellant's situation. If the final agency decision is appealed to the federal district court, the judge is responsible for determining whether case citations are on point and applicable to Appellant's case.



Appellant has the burden to provide evidence in support of its position. The regulations at 7 CFR § 278.6(a) state that FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, and that such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system. The owner has the burden of providing credible, relevant evidence, which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true. The owner has not provided a preponderance of evidence to support that the patterns represent transactions for eligible foods rather than the charged trafficking.

### **CIVIL MONEY PENALTY**

The regulations at 7 CFR Section 278.6(i) specify the criteria for a firm's eligibility for a CMP in lieu of permanent disqualification for trafficking. The criteria are identified as a minimum standard that firms must meet to be eligible for CMP consideration. The owner did not submit substantive documentation which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. Given the lack of a substantial evidence submission to support a trafficking CMP in lieu of permanent disqualification, the owner did not meet the criteria for a CMP.

### **CONCLUSION**

Retailer Operations' analysis of Appellant's SNAP transaction data was the primary basis for its determination to permanently disqualify Appellant. The record also included onsite store photographs, an onsite store report, households' shopping histories, and other data that provided evidence that the questionable transaction patterns during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. Based on the entirety of the record, the preponderance of the evidence supports that violations did occur at Appellant as charged by Retailer Operations. Retailer Operations denial of a trafficking CMP was also proper per the applicable regulations. Therefore, the decision to impose a permanent disqualification against Appellant is sustained. This decision is effective 30 days from its delivery to Appellant.

### **RIGHTS AND REMEDIES**

Attention is called to Section 14 of the Food and Nutrition Act of 2008, and to 7 CFR § 279.7 of the regulations, with respect to the applicable rights to judicial review of this decision. If judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which Appellant's owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of delivery of this decision.

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

M. Viens  
ADMINISTRATIVE REVIEW OFFICER

January 27, 2021