

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

K & M Food Store,

Appellant,

v.

Case Number: C0199362

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of K & M Food Store from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against K & M Food Store.

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.”

CASE CHRONOLOGY

In a letter dated July 7, 2017, 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 during the months of November 2016 through April 2017. The letter noted that the penalty

for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated the Appellant had the right to respond to the charges within 10 days of receipt to provide explanations for the irregular SNAP transaction patterns. The letter also stated that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

The Appellant, through counsel, replied to the charges in a series of contacts including a letter dated July 16, 2017. The Appellant denied that the transactions cited in the charge letter were due to trafficking. Instead, the Appellant stated the transaction patterns were due to local conditions and the shopping habits of its customers. The Appellant requested a trafficking CMP in lieu of a permanent disqualification if the CMP amount was reasonable.

After considering the Appellant's responses and the evidence in the case, the Retailer Operations Division issued a determination letter dated August 8, 2017. The determination letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that 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. The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP 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 violations of the SNAP.

In a letter postmarked August 16, 2017, the Appellant, through counsel, requested an administrative review of the Retailer Operation Division's determination. The request for administrative review was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might 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 covered in the Food & 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(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 or selling of ... [SNAP] benefits for cash or consideration other than eligible food*

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(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, **evidence obtained through a transaction report under an electronic benefit transfer system....** [Emphasis added.]*

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.

7 CFR § 278.6(b)(2) states, in part:

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

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

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from November 2016 through April 2017. This involved the following transaction patterns which are trafficking indicators:

- Multiple transactions were made from individual household benefit accounts within unusually short timeframes.
- Excessively large purchase transactions were made from recipient accounts.

Charge Letter Attachment 1: Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment lists 14 sets of 52 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Violating stores often conduct multiple split transactions from the same household account to avoid the detection of single high dollar transactions that cannot be supported by the retailer's food inventory and infrastructure.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 174 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar purchases atypical of a SNAP authorized convenience store calls into question the legitimacy of these transactions.

APPELLANT'S CONTENTIONS

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

- The Appellant denies that any trafficking has taken place at K & M Food Store.
- K & M Food Store is a convenience store that functions as a grocery store for the local residents.
- K & M Food Store is located in a low income area and many of the stores customers are single women with large families that conduct a number of transactions per day because they cannot or do not plan purchases in advance.
- High dollar transactions are due to people purchasing meat, lunch and dinner with several customers pooling their purchases due to a group living arrangement.
- K & M Food Store customers lack transportation and consequently do not have access to grocery stores that are several miles away.
- K & M Food Store is now limiting the number of transactions that can be made by a household and requests additional guidance from the USDA on how often a transaction can be made.
- The store now has posted its own EBT rules near the cash register.
- K & M Food Store should be eligible for a trafficking CMP.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Authorization History

The Food & Nutrition Service (FNS) authorized K & M Food Store for the SNAP on January 14, 2004. The Retailer Operations Division classified K & M Food Store as a convenience store during the review period.

The owner attended SNAP training on October 30, 2003 and signed a statement acknowledging that he was aware of the SNAP regulations and understood those regulations. The statement further noted that as owner he would "assume full responsibility as an authorized retailer to ensure all current and future owners, partners, corporate offices and clerks ... are properly trained in handling food stamp transactions."

Store Visit Report

The case record documents that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a May

30, 2017 store visit conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock and facilities. This information was then used to ascertain if there were justifiable explanations for the store's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- K & M Food Store is approximately 1,200 square feet in size.
- The store had only one (1) shopping cart and one (1) shopping basket for customer use.
- There was one (1) cash register and one (1) point of sale device.
- The store had no optical scanners and no conveyor belts at the checkout.
- There was no food stored outside of public view in a storage area.
- There were no large bulk foods, international or specialty foods that might sell for a high price. The store does not sell food in bulk such as fresh meat/seafood bundles or large boxes of fruits and vegetables.
- The checkout area consisted of a small countertop with no more than two (2) feet by two (2) feet of empty space for stacking purchases. The countertop was cluttered with some products for sale and there was a large reach-in cooler to the left of the checkout area. Due to the limited space, the checkout area was not conducive to conducting large dollar transactions.

The inventory of staple food items at the time of the store visit was typical of a small convenience store with limited staple food. The food inventory consisted mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. Accessory food items included, but were not limited to: coffee, tea, carbonated and non-carbonated drinks, condiments, and spices. The stocked ineligible items included alcohol, tobacco, lottery tickets, health and beauty products, paper goods, houseware, and household cleaning products. The store also had a kitchen area offering SNAP ineligible hot prepared ready-to-eat food not intended for home preparation and consumption.

Given the available inventory as noted above, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors.

Multiple Transactions by the Same Household within a Short Time Period

SNAP households have no limit on the number of times they may use their SNAP cards or how much eligible food they may purchase. However, the SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because

they display characteristics of use inconsistent with the nature and extent of a convenience store's stock and facilities and are thus indicative of trafficking. It is

also noteworthy that every single transaction in each group of transactions cited in the charge letter exceeds the average SNAP transaction for a Florida convenience store during the review period.

Violating stores often conduct multiple split transactions from the same household account as a method to avoid the detection of single high dollar transactions that cannot be supported by the retailer's food inventory and infrastructure. Charge Letter Attachment 1 lists 14 sets of 52 transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is not credible that the Appellant store would have suspicious SNAP transactions exceeding the average SNAP transaction of a Florida supermarket.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Appellant states that K & M Food Store is located in a low income area and many of the stores customers are single women with large families that conduct a number of transactions per day because they cannot or do not plan purchases in advance. This statement is insufficient to fully explain why the irregular transactions are occurring. It is not unusual for a SNAP authorized store to be located in a low income area. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Retailer Operations Division compared the Appellant store's transactions to two nearby competitor convenience stores which have a similar or superior food inventory. These nearby competitor convenience stores did not have the irregular transaction patterns exhibited by K & M Food Store even though local conditions should have the same impact on all these stores.

The Retailer Operations Division determined that the transactions cited in Charge Letter Attachment 1 consist of multiple large dollar transactions which cannot be supported by the conditions observed at the store. The store visit pictures show that is unlikely that SNAP customers would want to shop at this store multiple times during a short time frame, or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale. In addition to the store's limited checkout space which is unsuitable for large transactions, K & M Food Store has only one (1) shopping cart and one (1) shopping basket for transporting food within the store. Based on the analysis above, and in the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

Excessively Large Transactions

SNAP households have no limit on the amount of eligible food they may purchase (subject to the remaining balance on the card). However, the SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the

nature and extent of a convenience store's stock and facilities and are thus indicative of trafficking.

Charge Letter Attachment 2 cites 174 SNAP transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As noted previously, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors offering similar food items.

The Appellant states that the high dollar transactions are due to people purchasing meat, lunch and dinner. However, the store visit pictures show that the store's food stock is mostly inexpensive canned and packaged foods and accessory food items. The Appellant also alleges that several customers pool their purchases due to a group living arrangement. However, the Appellant offers no evidence to support this contention.

The Appellant states that K & M Food Store customers lack transportation and consequently do not have access to grocery stores that are several miles away. It is true that sometimes a store may have higher than normal SNAP transactions due to the lack of other SNAP authorized stores in the area. However, the Retailer Operations Division determined that during the review period there were 19 SNAP authorized stores located within a one-mile radius of K & M Food Store. These included 12 convenience stores, five (5) small grocery stores, one (1) medium grocery store and one (1) supermarket. Therefore, a lack of SNAP authorized stores in the area does not explain K & M Food Store's irregular SNAP transactions.

Lastly, the Retailer Operations Division conducted a detailed analysis of three (3) households that were cited in the charge letter to compare their shopping patterns at K & M Food Store to those at other SNAP authorized stores. All of these households had access to, and shopped at, supermarkets and superstores. However, despite this access to larger and better stocked stores, these sampled households conducted excessively large transactions at K & M Food Store on the same day or within one or two days of shopping at these larger stores.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the limited number of shopping carts and baskets support the Retailer Operations Division determination. Based on a preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 2 are more likely than not the result of trafficking in SNAP benefits.

Corrective Action

The Appellant states that it has taken corrective action including limiting the number of transactions that can be conducted at one time. As noted above, SNAP households have no limit on the number of times they may use their SNAP cards or how much eligible food they may purchase. However, the SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of a convenience store's stock and facilities and are thus indicative of trafficking.

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is limited to what circumstances existed at the time that was the basis of the Retailer Operations Division's action. It is not the authority of this review to consider what remedial actions may have been taken or be planned so that a store may begin to comply with program requirements.

In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of alleged or planned after-the-fact corrective actions implemented subsequent to findings of program violations. Therefore, the Appellant's contention that corrective action has taken place or that further remedial actions are planned does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

The Appellant asks for reconsideration for a trafficking CMP in lieu of a permanent disqualification. The Appellant states that the store did not have a written board or books with compliance policies because there are only four (4) people that work in the store and everyone knows what to sell and what not to sell for SNAP benefits. The Appellant also states that it has posted a notice of what can and cannot be purchased with SNAP and provided a copy of this document. It should be noted that this posted notice is undated and does not mention violations such as the exchange of SNAP benefits for cash or the repayment of credit accounts with SNAP benefits.

The Retailer Operations Division denied a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i) because there was insufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. The criteria for a trafficking CMP in lieu of disqualification is defined under 7 CFR § 278.6(i) which reads, in part:

In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the

*firm shall, at a minimum, establish by **substantial** evidence its fulfillment of each of the following criteria:*

*Criterion 1. The firm shall have developed an **effective** compliance policy as specified in §278.6(i)(1); and*

*Criterion 2. The firm **shall establish** that both its **compliance policy and program were in operation** at the location where the violation(s) occurred **prior to the occurrence of violations** cited in the charge letter sent to the firm; and*

*Criterion 3. The firm had developed and instituted an **effective** personnel training program as specified in §278.6(i)(2); and*

*Criterion 4. **Firm ownership** was not aware of, did not approve, **did not benefit from**, or was not in any way involved in the conduct or approval of trafficking violations; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm [Emphasis added.]*

Regarding standards for an effective compliance policy, 7 CFR 278.6(i)(1) further states, in part:

*As specified in Criterion 1 above, in determining whether a firm has established an effective policy to prevent violations, **FNS shall consider written and dated statements** of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with this part 278 of current [SNAP] regulations*

*.... As required by Criterion 2, **such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation.** In addition, in evaluating the effectiveness of the firm's policy and program to ensure FSP compliance and to prevent FSP violations, **FNS may consider the following:***

*(i) **Documentation** reflecting the development and/or operation of a **policy to terminate the employment** of any firm employee found violating FSP regulations;*

*(ii) **Documentation** of the development and/or continued operation of firm policy and procedures resulting in **appropriate corrective action following complaints of FSP violations or irregularities** committed by firm personnel;*

*(iii) **Documentation** of the development and/or continued operation of **procedures for internal review** of firm employees' compliance with FSP regulations [Emphasis added.]*

Regarding training program standards, 7 CFR 278.6(i)(2) further states, in part:

*A firm which seeks a civil money penalty in lieu of a permanent disqualification **shall document its training activity** by submitting to FNS its dated training curricula and records of dates training sessions were conducted; a record of dates of employment of firm personnel; and contemporaneous documentation of the participation of the violating employee(s) in initial and any follow-up training held prior to the violation(s). [Emphasis added.]*

A review of the case record establishes that the Retailer Operations Division properly determined that the documentation submitted by the Appellant did establish its eligibility for a trafficking CMP in lieu of a permanent disqualification as it did not meet the criteria listed above. For example, the Appellant did not provide any of the following:

- Documentation reflecting the development and/or operation of a policy to terminate the employment of any firm employee found violating the SNAP regulations.
- Documentation of the development and/or continued operation of firm policy and procedures resulting in appropriate corrective action following complaints of SNAP violations or irregularities committed by firm personnel
- Documentation of the development and/or continued operation of procedures for internal review of firm employees' compliance with SNAP regulations:
- Dated training curricula and records of dates training sessions were conducted; the record of dates of employment of firm personnel; and contemporaneous documentation
of the participation of the violating employee(s) in initial and any follow-up training in initial or follow-up training.

Lastly, regarding Criterion 4, in an EBT system, settlements are made directly to an owner's bank account, and therefore, the owner has benefited from the violations even if he/she did not have knowledge or approve of the violations. The Appellant has provided no evidence that this fund settlement did not go to the owner's bank account or that the owner did not benefit from the violative transactions.

In summary, a preponderance of the evidence shows that the Appellant did not establish its eligibility for a trafficking CMP in lieu of a permanent disqualification. Therefore, the Retailer Operation Division's denial of a trafficking CMP is sustained as appropriate.

CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify the retailer. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges.

In the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges indicate that trafficking as the most likely explanation. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did in fact occur as determined by the Retailer Operations Division. Based on the discussion above, the decision to impose a permanent disqualification against K & M Food Store, Appellant, is sustained.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this determination. Please note that 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 you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

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

RONALD C. GWINN
Administrative Review Officer

October 17, 2017