

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

**L & M Grocery Market Inc,**

**Appellant,**

**v.**

**Office of Retailer Operations and  
Compliance,**

**Respondent.**

**Case Number: C0221616**

**FINAL AGENCY DECISION**

It is the decision of the USDA that there is not sufficient evidence to support a finding that L & M Grocery Market Inc. (Appellant), should be permanently disqualified from participation in the Supplemental Nutrition Assistance Program (SNAP) for trafficking. The permanent disqualification determination by the Office of Retailer Operations and Compliance (Retailer Operations) is hereby reversed.

**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 its 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 December 4, 2019, Retailer Operations informed the owner that it had compiled evidence that Appellant had violated the SNAP regulations based on electronic benefit transfer (EBT) transactions that established clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for the firm type. The sanction for trafficking is permanent disqualification.

The record supports that Appellant replied to the Charge letter in writing on December 18, 2019, and January 3, 2020. Retailer Operations issued its Determination letter dated February 11, 2020, that informed the owner that Appellant was permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1), of the regulations. Retailer Operations considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the regulations. It deemed the firm was not eligible for a CMP because insufficient evidence was submitted to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

Counsel requested administrative review by letter dated February 21, 2020. The appeal was granted by letter dated March 2, 2019. Counsel requested several extensions from this office due to translation issues, which were granted. Counsel provided additional information by emails all dated April 17, 2020. Retailer Operations provided its assessment of the new information on May 12, 2020.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing relevant, credible 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 in the event that personnel of the firm have engaged in trafficking SNAP benefits.

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 part, in 7 CFR § 271.2 as: "the buying or selling of SNAP benefits for cash or consideration other than eligible food."

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, and 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(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 May 2019 through August 2019.

The patterns of transaction characteristics indicative of trafficking are:

- Multiple transactions made from the accounts of individual SNAP households within a set time period.
- EBT transactions that are large based on the observed store characteristics and recorded food stock.

### **APPELLANT’S CONTENTIONS**

Attention has been given to all contentions presented in rendering this decision, even those that may not be listed. The owner submitted a reply in Spanish along with the translated, notarized reply.

- The store is located in a residential area, and some of our customers come to the store to buy they [sic] daily basic products regularly, eggs, milk, cheese, juices, plantain, yucca, etc. at once, and others come no [sic] that regularly to buy they groceries at once. Many of the customers do not know the balance at the moment that they are paying for their groceries. They pay for some items first, check their balance and then purchase the rest. For example, the transactions from 1 through 4 of attachment 1.
- A situation that usually occurs is that the SNAP households send their children with the card. They buy snacks, sodas, and candies. Later, on the same day comes the SNAP holders to purchases their groceries. So they come to store to buy they [sic] lunch groceries, then come back and buy their dinner groceries. That could be the cases of the transactions 5 through 10 of attachment 1 according to the time frame.

- Our store has customers that buy their groceries daily for the closeness of the store from their houses. We can estimate that 80% of our customers come daily to our store, and many of them do not have a vehicle. In the transactions 11 through 26 in attachment 1.
- Though the prices of our merchandise are very affordable, we have a food combo that includes a rice bag of 50 lbs. and an oil gallon for \$33.99. Also, we regularly sell baby formula for \$19.99. Our store has a few customers that can buy 3 baby formula at once with other products that can sum a reasonable amount. It may be the case for some transactions on attachment 2.
- Sometimes customers have their SNAP card in bad condition, and when we swipe the card, our credit card machine does not read it so we have to manually enter the purchase total.
- We constantly purchase merchandise from our vendors every two days, weekly and monthly, and some of them like Restaurant Depot, we purchase every two days products such as plantains, fruits, and yucca. Other vendors are Genere products, Goya, Yelloglow, Raylicious, etc. that after purchases, we located [sic] the products in the store's racks.
- There are some vendors that we go to the store and do the purchases, but for other vendors, we have to wait for the delivery, like Frito-Lay and Hershey.
- We try that everything is under the law and following the rules. If you send an inspector to observe the movements of the store, we are willing to cooperate and facilitate all the information required in order to show our transparency in the EBT transactions.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) denies commission of the alleged SNAP violations. She has otherwise never been charged with a violation of the SNAP regulations nor received any prior disciplinary action from the USDA. My client denies that she, her store, or her employees, have participated in the trafficking of SNAP benefits or any other knowing violations of the SNAP regulations. My client's policy is to adhere to all relevant regulations with regard to the SNAP. Her employees have been trained and are directed to follow the same.
- When not in the store, my client monitors activity via surveillance cameras to make sure that the employees are properly running the store in compliance with all applicable laws.
- My client has not bought, sold, stole or otherwise exchanged SNAP benefits for any items or consideration beyond the allowed food products covered by the regulation. She has no knowledge of any violations of any sort taking place in her store.
- My client has been the owner of the store for just over two years. She runs the business with her husband and employs four others, only one of whom is allowed to work at the counter in the store and handle transactions.
- I have included Affidavits from both of those employees, together with one from 5 U.S.C. § 552 (b)(6) & (b)(7)(C), denying any wrongdoing in regard to this matter. My client has only been a SNAP participant at this location since 2018.
- It is my client's strong desire to clear her business of these allegations. To that effect, she has directed me to produce as much documentation as possible and she wishes to be totally cooperative and transparent. It is our hope that this voluminous amount of documentation will demonstrate that there has been no trafficking by my client. The inventory receipts provided contain a large portion of the inventory purchased by my client. We have not included receipts for purchases of non-eligible items such as tobacco products, unless those items were purchased on a receipt from a similar vendor. However, let me be clear that my client does not sell tobacco or other ineligible products through use of SNAP benefits.
- My client runs a busy neighborhood grocery store. The receipts provided, which are those

my client still has in her possession, demonstrate purchases of nearly 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in inventory for her store. This level of inventory, which is not an exhaustive or audited accounting, clearly demonstrates a stock which supports the volume of transactions at the store.

- My client is only able to provide detailed sales reports for electronic payment transactions which include credit, debit and SNAP/EBT transactions. My client does not have a statement showing all transactions, but we have an estimated gross revenue of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in total sales.
- My client operates a store in a majority minority working class urban neighborhood. Many of the residents of the area are SNAP participating households. In 2019, my client's store realized 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in total electronic payments and approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in total sales. It is not surprising that her store averages approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in monthly SNAP transactions.
- A further review of the figures provided in the electronic payment statements and spreadsheet reveals that the SNAP transactions and the other electronic payments compare favorably. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These reports provide a snapshot of the total electronic payments in the store and can give you a complete picture of the nature of the transactions conducted.
- Within those transactions, you certainly have larger transactions. As noted in the initial response, there are patrons of the store that visit multiple times per day, are unaware of their balances and therefore will break up there transaction into multiple payments to make sure they have enough of a balance to cover their purchase, and then there are those who buy in larger quantities.
- My client sells bulk size items that are popular in the community she serves such as rice, oil and baby formula. Those items range from \$19.99 to \$39.99. It is not uncommon to have a customer purchase more than one of these items when they come in for their grocery shopping, which accounts for the large transactions noted in the December letter. While these transactions are larger than the majority of the transactions that the store sees on a monthly basis, they do occur and were not an abuse of the program.
- The business is a busy store in a high traffic area. We believe that these records demonstrate that the volume of EBT transactions is not out of line for a store with this amount of total inventory. It is my reading of the letter and the regulations that part of the issue suspected is that the EBT shoppers are buying products in large quantities and reselling them elsewhere. My client has absolutely no knowledge of that practice transpiring in her store. If the USDA would point out the particular beneficiaries they believe are participating in that behavior, my client is happy to aid that investigation in any way possible.
- My client has committed no violation. The employees have submitted sworn statements to the same effect. In the event that the USDA has information that suggests that any employee has misled my client, it is our hope you will inform us so we can take action to protect her business. In the event you disagree that the information presented demonstrates sufficient inventory to justify the EBT sales at the store, it is my hope that the consequence would be a warning for a business owner who has no knowledge of any wrongdoing and has never run afoul of any regulations.

## **APPELLANT'S EVIDENCE**

- The owner submitted vendor invoices for June, July and August 2019, and ten photos of food stock.
- Counsel submitted an owner affidavit, as well as two employee statements, all signed under penalty of perjury.
- A spreadsheet of electronic payments for January to December 2019.
- Sixty pages of processing statements for each month of 2019.
- 300 pages of vendor receipts for the review period, and the entire 2019 year.
- An estimated 2019 federal tax return for an S Corporation.

## **ANALYSIS AND FINDINGS**

The primary issue for consideration in this case is whether or not Retailer Operations established by a preponderance of the evidence, that Appellant engaged in trafficking which warrants a permanent disqualification. There is no way for this review to definitively conclude that trafficking did not, at any point, occur at the firm. Based on an assessment of the evidence in the record, this reviewer finds that there are more likely legitimate explanations other than trafficking, that could account for the two transaction patterns at Appellant.

## **CONCLUSION**

It is the determination of this review that the Appellant has met its burden, by a preponderance of the evidence, to support that the transaction patterns listed in the Charge letter were more likely than not the result of allowable SNAP purchases of eligible foods. The determination to impose a permanent disqualification against Appellant for trafficking is therefore reversed. Please contact Elizabeth Rivas at (213) 330-2441 regarding reinstatement and operations questions.

## **RELEASE OF INFORMATION**

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

May 20, 2020