

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

Lily’s Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0215059

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Lily’s Market, (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the program, as initially imposed by the Retailer Operations Division was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant by letter dated April 24, 2019.

AUTHORITY

7 U.S.C. § 2023 and the 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 March 7, 2019, 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 July 2018 through January 2019. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted 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).

In correspondence dated March 15, 2019 and faxed on March 18, 2019, Appellant, through counsel, responded to the charge letter and generally stated that his client categorically denies having violated any of the applicable regulations. Lily's Market is located in a densely populated area and most of the residents of the area do not have vehicles and although public transportation is available they rely upon the local merchants for their groceries and other daily needs. Counsel stated that Lily's Market stocks a variety of grocery products and in a given month, purchases on average a total 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in inventory and realizes sales 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Copies of sales records for December 2018 and inventory receipts for the month of January 2019 were submitted. Counsel indicated that EBT is no longer accepted at an area store and residents that use to shop at that store have come to shop at Lily's Market.

Given that the store does not stock large quantities of any fresh items, many customers, particularly older ones and those who do not drive, prefer to use their EBT benefits to make one or two large-scale purchases each month. Others will visit on multiple occasions over brief period of time to make food and grocery purchases. The fact that customers choose to make their purchases on a monthly schedule and tend to use most of their available benefits on those limited occasions should not be taken as an indication of wrongdoing by my client. The amount of stock on hand at Lily's Market at any given time would easily support the numbers and dollar amounts of the transactions you have listed. Given the characteristics of the neighborhood the loss of such a resource would be most significant.

After giving consideration to Appellant's response and evidence of the case, Retailer Operations Division issued a determination letter dated April 24, 2019. The letter informed Appellant that it was permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also stated that Retailer Operations Division considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, Retailer Operations Division determined that Appellant was not eligible for the CMP because it failed to submit sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated April 30, 2019, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) (c) and (e)(1)(i) 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(a) states, *inter alia*, that “FNS may disqualify any authorized retail food store...from further participation in the program 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(c) reads, in part, “*Review of Evidence.* 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)...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...”

7 CFR § 278.6(e)(1) reads, in part, “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 in part that, “Eligible foods mean: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption.”

SUMMARY OF THE CHARGES

The charges on review were based on an analysis of SNAP electronic benefit transfer (EBT) transactions dated during the seven month period of July 2018 through January 2019. This involved three patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from the accounts of individual SNAP households within a set time period.
2. The bulk of SNAP households’ remaining benefits were depleted within short time frames.
3. Your store conducted EBT transactions that are large based on the observed store characteristics and recorded food stock.

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking.

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its response to the permanent disqualification letter issued by Retailer Operations Division, and its request for administrative review, in relevant part:

1. Counsel requested that its initial response to the charge letter be incorporated into the record and made part of its review request.
2. Appellant is located in a low-income neighborhood and most residents reside in apartments or multi-family homes and are without private transportation. The fact that certain regular customers elect to use their benefits in a single visit or within short time periods is consistent with their proximity of the store and their overall economic circumstances and should not automatically lead to a conclusion that a retailer is somehow not complying with applicable SNAP regulations.
3. My client has operated for almost nine years and has, to my knowledge, had no licensing or disciplinary issues with any state or federal authority prior to the institution of these proceedings.

With its review request, Appellant provided 103 pages of Inventory Purchase Records for the months of November and December 2018 in support of its position that food purchases were made by Appellant on a regular basis and that the volume of such purchases would easily support the transactions identified as large in Attachment 3 of the charge letter. Appellant also provided a petition signed by more than 100 alleged customers indicating that a hardship is caused and requests that Appellant's participation be restored.

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

ANALYSIS AND FINDINGS

The FNS authorized the business as a convenience store on September 1, 2011. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during an October 16, 2018, store visit to the business conducted by a 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 EBT transactions at Appellant that formed patterns indicative of trafficking. The firm review summary documented the following store size, description, and characteristics:

- One cash register and one POS device with a small counter area partially obstructed by other smaller items available for sale.
- Estimated to be approximately 1000 square feet.
- No shopping baskets or carts available for customers.
- No adding machines or optical scanners were available at checkout. A specialty registers present for the sale of lottery.

- Store does not operate through a night window or plastic barrier with food stock behind the barrier.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- Report indicates that the store has pricing structure such as ending most products with 00 cents but does not round transaction totals however photographs show most end in the *9 value.
- No food stored in an area outside of public view.
- Store has no storage freezers or coolers and no food stored off site.
- Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
- Store does not take telephone or online orders and does not offer delivery.
- Highest priced eligible food items were Similac Infant Formula (\$18.99), Milo Powdered Milk (\$9.99), Mazola Corn Oil (\$10.00) and Banquet Frozen Chicken (\$9.99).
- Store stocks a significant amount of non-food items such as but not limited to paper products, household products, tobacco products, automotive products, health and beauty aids, lottery tickets, clothing items, mobile phone/phone cards and cleaning products.
- Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products. No fresh fruits or produce, no fresh meat or poultry. Most meats are canned, packaged or frozen.
- Store had expired/outdated or spoiled food.
- Some cans/packages contained a layer of dust.
- No kitchen and no deli or prepared food area.
- No hot food sold.
- Food is sold for on-site consumption with a microwave available for heating.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.

The issue for consideration is whether Retailer Operations Division has presented a convincing case that Appellant likely trafficked in SNAP benefits. Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

Attachment 1 of the Charge Letter – Multiple transactions were made from the accounts of individual SNAP households within a set time period.

There were 28 sets of 69 SNAP transactions that met the parameters of this attachment. Multiple transactions conducted by the same household account within a set time period is a method which violating stores use to avoid the detection of single high dollar transactions that cannot be supported by the retailer's inventory and structure.

Appellant, through counsel, contends that SNAP clients do not have vehicles at their disposal in order to transport the goods they purchase. They usually live very close to the store and therefore, make multiple trips. With regards to these contentions, it must be noted that SNAP households have no limits on the number of times they may use their SNAP cards or how much

eligible food they may purchase. The transactions in this Attachment do not contain the characteristics associated with a recipient purchasing forgotten items a short time after checking out or households returning to purchase a forgotten item or two. It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a set time period. For example, mothers may shop and later send a child to the store to pick-up a forgotten item nonetheless; it is unusual that the second transaction amount would be for more than a nominal amount. The SNAP transactions in Attachment 2 of the Charge letter are not consistent with shopping patterns of someone who may have forgotten an item or two during the first trip.

Though it may be true that some SNAP recipients do not have vehicles, and may live close to the store, the assertion that they make multiple trips in order to get the goods they need because they cannot carry them does not provide evidentiary proof if it cannot be corroborated with register receipts to show the purchases of food. Additionally, the record reflects that households shopped at other retailers, traveling up to 16 miles from Appellant's store. This contradicts Appellant's contentions that most SNAP customers must fulfill their grocery shopping on foot or shop only at Appellant's store because they do not have access to transportation. It is questionable that households would shop at larger better stocked supermarkets and superstores with seemingly better pricing, yet expend larger amounts of SNAP benefits at a minimally stocked convenience store.

Based on the analysis above, it appears that the transactions cited in the charge letter are contrived and therefore, in the absence of plausible evidence to the contrary, are likely the result of trafficking in SNAP benefits.

Attachment 2 of the Charge Letter - The bulk of SNAP households' remaining benefits were depleted within a short time frame.

There were 16 sets of 53 SNAP transactions that met the parameters of this attachment in which individual recipient benefits were exhausted or nearly exhausted. Studies of historical transaction data shows that SNAP recipients do not normally exhaust their benefits in one or two transactions on the same day. A government report¹ on SNAP shopping patterns indicates that after the first day of benefit issuance, on average, 80 percent of a household's allotment remains unspent. Even after seven days, 40 percent of benefits still remain unspent. It takes two weeks to deplete 80 percent of one's benefits, and three weeks to deplete 90 percent. Although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefits in only a few transactions or in a single day. Depleting one's entire allotment in one or two days, or in a single large transaction, leaving no benefits for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP benefit households.

Based on the store visit documentation the store's stock does not appear to be able to support a single transaction or a series of transactions that would deplete a SNAP household's benefits.

¹ U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program*, by Laura Castner and Juliette Henke. Project officer: Anita Singh, Alexandria, VA: February 2011

Retailer Operations also conducted an analysis of the shopping habits of six of the households identified in the charge letter. This analysis concluded that these households also shopped at other area grocery stores including full-line supermarkets and superstores that offer a much larger quantity and variety of eligible food items for likely better prices either on the same day or within days of visiting Appellant's firm. This again indicates that lack of access to other stores is not at issue. However, despite this access to large supermarkets and superstores, these households consistently conducted much higher transactions at the Appellant firm than at better stocked supermarkets/superstores in and around the Suffolk County area of Massachusetts. This is another strong trafficking indicator

Attachment 3 of the Charge Letter - Your store conducted EBT transactions that are large based on the observed store characteristics and recorded food stock.

There were 160 SNAP transactions that met the parameters of this attachment. Based on the results of the contracted store visit, the large transaction amounts are not consistent with the store's inventory of low priced foods. The firm does not offer food in bulk or any ethnic or specialty foods that sell for a high price. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant, through counsel, contends that it stocks a variety of grocery products and in a given month, purchases on average a total 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in inventory and realizes sales 5 U.S.C. § 552 (b)(6) & (b)(7)(C). With regard to this contention, the invoices provided do not support the claim of an average monthly inventory purchase 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or the purported monthly sales amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant provided, with its review request, purchase receipts mainly for November 2018 and December 2018, however there were a few dated for September 2018 and invoices for January 2019 were provided to Retailer Operations Division. A review of all invoices and an analysis of eligible food purchases is outlined in the table below and it was determined that Appellant's purchases for the review period were insufficient to substantiate the transactions as cited in the charge letter.

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Additionally, Appellant's contentions, through counsel do not provide a convincing explanation for repeated large transactions or that a SNAP household would deplete its SNAP balance at Appellant's store purchasing SNAP eligible foods when Appellant does not sell any bulk or high prices items, no ethnic or specialty foods or any fresh meat or seafood with very limited produce. Based on the store visit documentation, photographs, and an analysis of the purchase invoices and receipts, it is questionable that Appellant has staple food stock to support single transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or multiple transactions with the same household 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Moreover, Retailer Operations Division compared the Appellant's SNAP transactions with six other convenience stores within a half mile radius of Appellant, it was found that Appellant's transactions far exceeded those of the comparable stores during the review period.

It is also important to note that even if the invoices were sufficient to demonstrate that Appellant purchased enough inventory to support the amounts of its SNAP transactions. There still is not enough information to determine whether they would account for the sum of Appellant's SNAP and non-SNAP transaction activity. While the overall dollar amount of SNAP activity is relevant, the charge letter did not cite as evidence Appellant's SNAP sales total. Rather, the Retailer Operations Division identified a series of different suspicious transaction patterns.

Based on this empirical data, and in the absence of sufficient evidence as to the legitimacy of such transactions, a conclusion can be drawn, through a preponderance of evidence that the "unusual, irregular, and inexplicable" transactions and patterns cited in the charge letter evidence trafficking as the most likely explanation. In this case, ownership did not provide sufficient evidence to legitimize Appellant's transaction data as outlined in the Attachments. Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence that the store was trafficking and concluded, through a preponderance of evidence, that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

The transaction data and overall firm record convincingly demonstrate repetitive patterns of unusual, irregular, and inexplicable SNAP activity for this type of firm indicative of trafficking. Once Retailer Operations Division established a convincing case against Appellant, ownership 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 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. If this is not demonstrated, the case is to be sustained.

As noted, 7 CFR § 278.6(a) states 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, or this part. 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.

Retailer Operations Division has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns in three attachments of EBT transaction data, the inadequacy of the firm's eligible food stock as observed and recording during the onsite visit to support such large transactions, the lack of evidence of invoices of foods in inventory to cover SNAP redemption totals for the review months, the lack of explanation for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant, and the irregular SNAP transaction data of Appellant as compared to other convenience stores in the State.

Generally, stores caught in trafficking violations consistently display particular characteristic transaction patterns including those cited in the charge letter and, in the absence of evidence for the legitimacy of such transaction patterns, based on information submitted by the Appellant and a comparison of the store's characteristics and available stock to the transaction patterns cited in the charge letter, a conclusion can be drawn, through a preponderance of evidence, that the

unusual, irregular, and inexplicable transactions and patterns evidence trafficking as the most likely explanation. While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence in the record.

The purpose of the administrative review process is to ensure that firms aggrieved by Retailer Operations Division's adverse actions have the opportunity to have their position fairly considered by an impartial review authority prior to that adverse action becoming final. Appellant has been duly given, and has taken the opportunity to present to USDA through the administrative review process whatever evidence and information it deems pertinent in support of its position that Retailer Operations Division's adverse action should be reversed. Therefore, any evidence and information that Appellant presented to Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to Appellant's right to a fair and thorough review.

CIVIL MONEY PENALTY

Appellant was notified in the charge letter dated March 7, 2019, that it had 10 calendar days upon receipt of the charge letter to provide required documentation in order to be considered for the trafficking CMP. Appellant failed to provide Retailer Operations Division with the required documentation to be considered for a trafficking CMP in lieu of disqualification. Therefore, Retailer Operations Division correctly determined that Appellant was not eligible for a trafficking CMP as set forth in the SNAP regulations.

CONCLUSION

Ownership has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. As such, the SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have trafficked, which is that FNS shall disqualify the firm permanently.

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Lily's Market from participation in the SNAP. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Therefore, based on a review of all the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged by Retailer Operations Division. Based on the discussion herein, the determination to impose a permanent disqualification against Lily's Market is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to 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 (FOIA), 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.

Monique Brooks
ADMINISTRATIVE REVIEW OFFICER

October 23, 2019