

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

Marlton Mini Market, LLC,	)	
	)	
Appellant,	)	
	)	
v.	)	<b>Case Number: C0191835</b>
	)	
Retailer Operations Division,	)	
	)	
Respondent.	)	
<hr style="width: 40%; margin-left: 0;"/>	)	

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division (“ROD”) to impose a permanent disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) against Marlton Mini Market, LLC (“Appellant”).

**ISSUE**

The issue accepted for review is whether the ROD took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i) in its administration of SNAP, when it imposed a Permanent Disqualification against Appellant on August 23, 2016.

**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 August 9, 2016, the ROD charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of SNAP transaction patterns that "establish clear and repetitive patterns of unusual, irregular, and inexplicable activity for your type of firm." This letter of charges states, in relevant part, “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.” The letter

also states that “. . . under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of a permanent disqualification of a firm for trafficking.”

The charge letter provided Appellant with ten days to reply to the charges, and the determination letter stated that Appellant did not do so. The record indicates Appellant sent a response to the charge letter via USPS Priority Mail on August 11 with a scheduled delivery date of August 12. However, this letter was not received by the USDA until August 23, after the issuance of the determination letter. Based on the preponderance of evidence, the ROD concluded that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

The ROD issued a determination letter dated August 23, 2016. Based on the preponderance of evidence, the ROD concluded that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments. This letter informed Appellant that it was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6 (c) and 278.6(e)(1) for trafficking violations. The letter also states the ROD considered Appellant’s eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. The ROD determined that Appellant was not eligible for the CMP because Appellant had not submitted sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

On August 25, 2016, Appellant appealed the ROD’s determination and requested an administrative review of this action. The appeal was granted.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means 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 argument asserted is more likely to be true than not true.

### **CONTROLLING LAW**

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented 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 in the event that personnel of the firm engaged in trafficking of SNAP benefits.

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(a) states, in part:

*Any firm considered for disqualification ... under paragraph (a) of this section... shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification . . . . The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter . . .*

7 CFR § 278.6(c) reads, in part:

*The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.*

7 CFR § 278.6(e)(1)(i) reads, in part:

*FNS shall . . . . [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2.*

Trafficking is defined in 7 CFR § 271.2, in part, as:

*The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone . . . .”*

Also at 7 CFR § 271.2, eligible food is defined as:

*Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption . . .*

7 CFR § 278.6(b)(2)(ii) states, in part:

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

7 CFR § 278.6(b)(2)(iii) states:

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

### **SUMMARY OF CHARGES**

The charges under review were based on an analysis of SNAP Electronic Benefit Transfer (EBT) transaction data during the period from January 2016 through June 2015. This analysis identified the following patterns of SNAP transaction activity indicative of trafficking:

- Multiple transactions made from the same accounts in unusually short time frames; and,
- Excessively large transactions.

The attachments furnished with the charge letter specify the questionable and unusual SNAP transactions indicative of trafficking which were conducted at Appellant during the review period.

### **APPELLANT'S CONTENTIONS**

Appellant's contentions regarding this matter are essentially as follows:

- Appellant denies the allegations;
- Appellant is located in a low-income area where customers typically walk in to make purchases;
- Appellant has not been subject to any other regulatory or enforcement actions by any other governmental entity;
- The suspicious transaction activity cited in the charge letter represents only 15% of Appellant's SNAP sales;
- The determination was based only on statistical analysis;
- The owner did not witness any violations, nor were any reported by employees;

- Sometimes customers make a transaction and then decide to buy another item;
- There is no rule forbidding customers from making multiple purchases; and,
- Appellant has no control over how much a customer chooses to spend on a transaction.

The preceding may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any not specifically recapitulated.

## **ANALYSIS AND FINDINGS**

Regarding Appellant's denial of violations, this review examines the relevant information regarding the determination. Once the ROD establishes trafficking occurred, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that it did not engage in trafficking. If this is not demonstrated, the case will be sustained. Assertions that the firm has not violated program rules, without supporting evidence and rationale, do not constitute valid grounds for overturning the determination.

### **Store Characteristics**

The case file supports that in reaching a disqualification determination, the ROD considered information obtained during a February 13, 2016 store visit conducted by a USDA contractor to observe Appellant's operation, stock and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report documented the following store size, description, and characteristics:

- The contractor estimated the store to be about 900 square feet with no food stored outside of public view. It is in an urban, commercial area;
- The available inventory of SNAP-eligible food items showed stock typical of a small grocery store, including being composed predominantly of inexpensive items;
- There were two cash registers and two electronic SNAP terminal devices;
- There were no shopping carts or hand baskets;
- There were also no scanners or conveyor belts;
- There was no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers; and,
- There were no meat or seafood specials or bundles.

In addition, the store's checkout counter space area was cluttered, small and surrounded by Plexiglas affording very little surface area on which to place items for large purchases and precluding the processing of more than one customer at a time.

There was no indication that SNAP households were inclined to visit the store regularly to purchase large quantities of grocery items. The available food was primarily of a low-dollar value and there was no hint that the firm sold items in bulk. Given the available inventory, there

was no sign that Appellant would be likely to have SNAP redemption patterns that differed significantly from those of similarly-sized competitors.

### **Repeat Transactions by the Same Household**

**7 USC 2018 (b)(7)(e)**:

**7 USC 2018 (b)(7)(e)**

**7 USC 2018 (b)(7)(e)**. Appellant contends it is located in a low-income area where customers typically walk in to make purchases. There are much larger stores with more reasonable prices located within one mile of Appellant (Case Analysis Document). There is no basis for customer attraction to Appellant, there being no great price advantage, profusion of ethnic goods, or special or custom services rendered. Oddly, some of these households spent considerably less at the larger stores than at Appellant.

Appellant is correct that customers sometimes forget an item or see something at the checkout and decide to purchase it after already having completed a transaction. In such instances, it is reasonable to expect the subsequent purchase to be for a nominal amount. This is because it is quite rare to find very expensive items positioned at the checkout area, especially in smaller stores. Also, forgotten goods purchased immediately after a prior transaction typically consist of only one or two items. However, in Attachment 1 to the charge letter, the subsequent transactions were for amounts that exceed any minor expense. In some cases, the amounts of subsequent transactions equaled or exceeded the preceding transaction total.

While there are legitimate reasons why a SNAP recipient might return to a small grocery store in a short period of time, the examples in Attachment 1 indicate a series of purchases that total to large amounts. SNAP benefits are intended to supplement the food budget for households whose net income is near or below the Federal Poverty Level. It is difficult to believe customers who must rely on SNAP benefits to make ends meet prefer to pay higher prices and spend the majority of their benefits at a small grocery store. Spending the majority of one's SNAP benefit allotment in a small grocery store when there are larger stores at which one also shops, which carry more variety of foods at a lower cost, is unreasonable customer behavior. Moreover, a number of the households listed in Attachment 1 conducted this strange shopping pattern of shopping at Appellant multiple times during the review period. **7 USC 2018 (b)(7)(e)**. The Appellant's explanation in this regard is neither.

### **Large Transactions**

The food stock and facilities of Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at such stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. It is rare for a small grocery store such as Appellant's to have purchases like those included in

Attachment 2 to the charge letter. 7 USC 2018 (b)(7)(e):

7 USC 2018 (b)(7)(e)

7 USC 2018 (b)(7)(e).

7 USC 2018 (b)(7)(e). The purchase amount of eligible food items typically approximates a random total. 7 USC 2018 (b)(7)(e).

The information in the record regarding Appellant's operations does not explain the suspicious transaction activity. Evidence regarding the firm's inventory, including the store visit documentation, reveals no legitimate basis for SNAP customers' attraction to the firm. There was no superior selection of staple foods, price advantage, package specials, bulk or promotional items, extensive variety of otherwise unavailable ethnic food items, or special services rendered. The store visit pictures show that the store layout is not conducive to these excessively large transactions. The store has no shopping carts or baskets in which the average customer could carry over \$50.00 worth of food purchases to the checkout counter or to a vehicle outside the store. Based on all of these factors, as well as the use and availability of nearby, less-expensive, better-stocked stores, the large volume of transactions for high-dollar amounts is unlikely to indicate a pattern of legitimate food purchases.

#### **No Control Over Benefit Use**

Appellant insists that it has no control over how and when SNAP customers spend their benefits. In truth, 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 SNAP transactions of Appellant are questionable not because they exceed any limits for use. Rather, they display characteristics not typically found at small grocery stores and indicative of trafficking.

#### **Appellant's Responsibilities**

Appellant insists that the owner did not witness any violations, nor were any reported by employees. When the owner signed the FNS application to become an authorized SNAP retailer, this included a certification and confirmation that the owner(s) would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time." The violations listed on this certification document include trafficking. Regardless of whom the ownership of a store may choose to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions.

#### **No Applicable Mitigating Factors**

Appellant asserts it not been subject to any other regulatory or enforcement actions by any other governmental entity. A record of compliance with other governmental bodies with no documented previous violations does not constitute valid grounds for mitigating the impact of

the present serious determination of trafficking.

Appellant contends that the suspicious transaction activity cited in the charge letter represents only 15% of Appellant's SNAP sales. Any retailer charged with trafficking presumably also engaged in legitimate SNAP transactions. Every example included in the attachments to the charge letter was included because it was suspicious and indicative of trafficking. That 15% of Appellant's transactions were flagged as suspicious is substantial. However, neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be most serious, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification "shall be permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store." In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS must disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved.

### **Evidence of Trafficking**

Appellant argues that the determination was based only on statistical analysis. As previously stated, 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.)

Government analyses of stores caught in trafficking violations during on-site investigations found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include those cited in the letter of charges. FNS employs a computerized fraud detection tool to identify these patterns. This tool does not determine that trafficking has occurred. The ROD must still analyze the transaction patterns, along with other information such as store visit observations, customer shopping patterns, and comparative data from nearby stores. Only then does the ROD conclude whether questionable transactions were, more likely than not, the result of trafficking. Nevertheless, transactions having such characteristics sometimes have valid explanations that support that they were the result of legitimate purchases of eligible food items, which is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, based on the empirical data of past trafficking investigations, the number of suspicious patterns displayed, the other evidence in the file, and in the absence of any reasonable explanations for such transaction patterns, the preponderance of the evidence supports that the "unusual, irregular, and



inexplicable” transactions and patterns cited in the letter of charges are the result of trafficking.

### **Summary**

The ROD determined that Appellant likely trafficked in SNAP benefits. The charges of violations were based on the ROD’s assessment that there was substantial evidence that the questionable transactions occurring during the review period displayed patterns inconsistent with legitimate sales of eligible food to SNAP participants. The evidence the ROD considered in support of its determination included the irregular SNAP transaction data of Appellant as compared to similar stores, observations made during an official USDA store visit including the inadequacy of the firm’s staple food stock to support such large transactions, the availability of other SNAP-authorized stores located close to Appellant, and shopping behaviors of Appellant’s customers. The transaction data and overall firm record demonstrate the patterns of unusual, irregular, and inexplicable SNAP activity for this firm is likely the result of trafficking.

Appellant has not provided sufficient evidence to legitimize its transaction data as outlined in the charge letter. It has not convincingly rebutted the ROD’s determination that Appellant most likely trafficked in SNAP benefits. 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 must disqualify the firm permanently.

### **CIVIL MONEY PENALTY**

For a firm to have the opportunity to be considered for a civil money penalty (CMP), it must notify FNS that it desires the agency to consider the sanction of a CMP in lieu of permanent disqualification and submit supporting documentation within ten days of receipt of the charge letter. Appellant was advised of these provisions in the charge letter of May 18, 2012. The regulations specify that such supporting evidence must be substantial to demonstrate the firm had established and implemented an effective SNAP compliance policy and training program prior to the occurrence of violations. A review of the administrative record indicates Appellant did not, at any time, request a CMP. Appellant also did not submit any documentation to support its eligibility for this alternative sanction, before or after the deadline.

In the absence of a request for a CMP and any supporting documentation, a CMP was not assessed by the ROD. According to the requirements stated in 7 CFR § 278.6(b)(1), § 278.6(b)(2)(ii and iii), and § 278.6(i), Appellant is not eligible for a CMP in lieu of a permanent disqualification from participation as an authorized retailer in SNAP. The determination by the Retailer Operations Division to deny Appellant a civil money penalty is sustained.

### **CONCLUSION**

The record has yielded no indication of error in the finding by the Retailer Operations Division that Appellant trafficked in SNAP benefits. A review of the evidence in this case supports that it is more likely true than not true that program violations did occur as charged. Based on the

discussion above, the determination by the Retailer Operations Division to impose a permanent disqualification against Marlton Mini Market, LLC from participation as an authorized retailer in SNAP is sustained.

#### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released could constitute an unwarranted invasion of privacy.

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RICH PROULX  
ADMINISTRATIVE REVIEW OFFICER

October 11, 2016  
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DATE