

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

M & H Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0212446

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that M & H 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 March 7, 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

By charge letter dated October 3, 2018, Retailer Operations Division informed ownership that Appellant was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 271 – § 278, based on EBT benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm." The charge letter stated, in relevant part, that “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.”

In correspondence dated February 4, 2019, Appellant, through counsel, responded to the charge letter and generally stated that ownership denied the charges of EBT trafficking. Appellant stated that information not known or apparent to the inspector on the date of the August 25, 2018 resulted in an inaccurate impression of M & H Market and the nature of its business. Ownership believes that an understanding of the store's type will make it clear that the patterns of transactions provided in the charge letter are in fact very consistent with the store and the community it serves. Appellant stated that 90 percent of the customers of M & H Market have EBT cards and the majority of the sales occur to those people. The store is located in a building that has low income units and there is a large homeless population in the area as well as a homeless shelter across the street. The homeless tend to purchase large amounts of candy and soda. Ownership stated that some of the homeless population may be passing cards among each other. Many of the families that shop at the store have a large and average family size as is evidenced by the amount of benefits awarded under the SNAP program to the recipient accounts at issue.

Many of the patrons of the church, located across the street, visit the store for breakfast items and will stop by after Sunday mass and use the same EBT twice in a short period of time. The church also holds various clinics and programs through the week and sometimes the patrons stop in multiple times during the same day. Appellant indicated that there was an increase in sales when nearby stores closed down in May or June 2018. M & H Market carries various meat items that are not listed in the Inspector's report and as shown in Exhibit 1. The market carries steaks ranging from \$20-\$70 per package, ground beef ranging from \$7-\$40, rice packets for \$25 per packet, cheesecake for \$7-\$20, cooking oil for \$20 and the price of coffee is wrongly indicated in the report and is actually \$23. Ownership has to re-fill the frozen food containers twice a day due to the increase in sales after closure of nearby markets. Appellant stated that many customers have large families, accounting for large purchases and multiple transactions on the same day and provided affidavits from a number of customers listed as Exhibit 3. Appellant provided 20 color photographs of store stock and around the outside of the store, 47 Statements of EBT Cardholder and Customers of M & H Market and a Declaration Statement from the Owner.

Retailer Operations Division gave consideration to the Appellant's reply and evidence of the case, and issued a determination letter dated March 7, 2019. This 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 March 15, 2019, Appellant, through counsel, 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 ...”

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 CHARGES

The charges on review were based on an analysis of SNAP electronic benefit transfer (EBT) transactions dated during the four-month period of May 2018 through August 2018. This involved two 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. Excessively large purchase transactions were made from recipient accounts.

The first 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. There is no evidence to support the allegations of trafficking.
2. USDA failed to consider the extensive collection of meat products and fresh fruits and vegetables that the firm carries.
3. USDA also failed to consider the firm's location in the center of a major metropolitan city and the significant homeless and low-income families that reside within a rock's throw from the firm. This homeless population comes in multiple times a day and make large transactions of soda and candy on a regular basis.
4. Ownership could easily prohibit families from purchasing large amounts of groceries or making multiple transaction in the same day. The law specifically requires the firm to accept EBT transactions from all customers with a valid card. The law also does not place any specific limitations on the amount a customer may use at the same time or the number of transactions a customer may make in a single day.
5. M & H Market's continued use of the EBT machine is important not only to M & H Market, but also to the neighboring families who may lose an important source of food without access to payment by EBT.

Appellant did not provide any additional information during the administrative review however it referenced documentation that was previously submitted to Retailer Operations Division in its response to the charge letter.

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 originally authorized the business as a convenience store on February 21, 2017. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during an August 25, 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 almost completely obstructed by other smaller items available for sale.
- Estimated to be approximately 1000 square feet.
- Two shopping baskets available but no shopping carts available for customer use.
- No adding machines or optical scanners were available at checkout. No specialty registers present.
- 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.
- No unusual pricing structure such as ending most products with 00 cents and does not round transaction totals.
- Food stored in an area outside of public view in an area that is approximately 60 square feet.
- Store has storage freezers or coolers but 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 Folgers Classic Roast Ground Coffee (\$19.99), Kirkland Signature Lasagna (\$14.99), Oberto Jerky (\$12.99) and Jack Link's Jerky (\$6.79).
- Store stocks a significant amount of non-food items such as but not limited to paper products, household products, tobacco products, health and beauty aids, lottery tickets, housewares, shoes and clothing items, and cleaning products.
- Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products. Limited fresh fruits but no fresh produce, no fresh meat or poultry. Most meats are canned, packaged or frozen.
- Shelves and food cooler appeared haphazardly stocked.
- There is a kitchen/prepared food area with hot foods sold for onsite consumption.
- Food is sold for on-site consumption with a microwave available for heating.
- A deli or prepared food section. Stock is not used in preparation of food.
- Appellant has a freezer which hold items intended for hot food preparation and sales only.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.
- Store layout included a small upper level.

The second 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 Appellant's store 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.

During the review period there were 16 sets of 38 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 USDA failed to consider the extensive collection of meat products and fresh fruits and vegetables that the firm carries, the market carries steaks ranging from \$20 to \$70 per package, ground beef ranging from \$7 to \$40, rice packets for \$25, cheesecake for \$7 to \$20 and that the coffee is wrongly indicated in the report and is actually \$23. With regard to this contention, the record reflects that the prices of items on the store visit documentation were provided by the owner to include the price of the coffee. It is also noted that the owner stated that fresh fruits and vegetables are stocked in greater quantity at the beginning of the month but after the 10th of the month there is not much demand so they are not replenished until the beginning of the next month. The store visit photographs only show a small basket of a few apples and bananas however Appellant did not provide any invoices or receipts to corroborate Appellant's statement that fresh fruits and vegetables are purchased in large quantity in the beginning of each month.

Additionally, store visit photographs do not show any evidence of T-bone steaks or large rounds of beef. The freezer showed items that are cooked as hot foods available in the store. Upon close inspection of the photograph provided by Appellant of the steaks the label indicated that the meat was packaged on October 14, 2018, which is an indication that this meat could not have been in Appellant's store at the time of the store visit or anytime prior. Furthermore, the label on the steaks priced at \$35.99 shows an approximate weight of 2.07 pounds which would mean that Appellant's mark-up of the steaks would be \$17.99 per pound which is extremely high. There were no packages in that photograph priced at \$70. In fact the owner informed the contractor, who performed the store visit, and photographed the original freezer contents, that the items in the freezer were intended for hot food preparation and sales only. The highest priced item in the store was Folgers Classic Roast Ground Coffee at \$19.99. Again, Appellant did not provide any invoices or receipts to evidence that it normally purchased beef and steaks for sale to customers prior to or during the review period.

Appellant, through counsel, contends that ownership could easily prohibit families from purchasing large amounts of groceries or making multiple transaction in the same day. The law specifically requires the firm to accept EBT transactions from all customers with a valid card. The law also does not place any specific limitations on the amount a customer may use at the same time or the number of transactions a customer may make in a single day.

With regard to this contention, 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 Appellant's stock and facilities and are therefore indicative of trafficking. Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts.

The photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Appellant multiple times during a set time period 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. Appellant is not set up to provide for all of one's food needs and lacks an abundant depth and breadth of staple foods. The second and third transactions in each set are too large to consist of forgotten items. Furthermore SNAP clients who conducted high dollar multiple transactions at Appellant also shopped at larger retailers with a wider variety and volume of product, indicating that these customers did not rely solely on Appellant for all of its food needs. Yet, these households often transacted more at Appellant than at the large retailers. It is questionable why a household would chose to spend the majority of its SNAP benefits at Appellant, a convenience store with no fresh meat, no fresh produce, limited amounts of fresh fruits, two shopping baskets and no shopping carts, when it had access to a supermarket with a better selection of food items and likely better prices.

Based on the analysis above and Appellant's failure to adequately show that all of the transaction sets were as a result of legitimate SNAP purchases, a conclusion can be drawn, through a preponderance of evidence that the "unusual, irregular, and inexplicable" transaction patterns cited in Attachment 1 evidence trafficking as the most likely explanation.

Attachment 2 of the Charge letter - Excessively large purchase transactions were made from recipient accounts.

During the review period, there were 131 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.

Appellant, through counsel, contends that two nearby stores were closed down and all of those SNAP customers started shopping at M & H Market. With regard to this contention, one store was disqualified in June 2018 and the other had not been SNAP authorized since August 2016. Nonetheless, the increase in customers due to a nearby retailer closing may have increased Appellant's redemptions however it does not provide evidence that the transactions in the charge letter are not trafficking. In addition, with multiple methods of transportation being readily available, it is questionable that SNAP recipients would chose to shop at a convenience store instead of a fully stocked supermarket or superstore with better variety, selection and pricing.

As an example, Retailer Operations also conducted an analysis of the shopping habits of three 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 corroborates the notion that adequate transportation was available. 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 Pierce County area of Washington. This is another strong trafficking indicator.

Homeless Population

The Appellant, through counsel, contends that USDA also failed to consider the firm's location in the center of a major metropolitan city and the significant homeless and low-income families that reside within a rock's throw from the firm. This homeless population come in multiple times a day and make large transactions of soda and candy on a regular basis. With regard to this contention, although some SNAP recipients may be homeless, transient and homeless households do not generally have the capability of transporting and/or storing more than a few food items. Although shelters provide some meals, they do not provide long term storage or cooking facilities; therefore, it is reasonable to expect that homeless households would tend to purchase food on an "as needed" basis, making many small purchases over the month rather than one, two or three very large purchases. Additionally, it is not logical that SNAP recipients, that are homeless, would spend large amounts of SNAP benefits on candy and soda in single transactions, or that they would purchase large amounts of frozen foods or meats without anywhere to store those items.

Additionally, Appellant, through counsel, provided 47 customer statements regarding their shopping habits at M & H Market. With regard to these 47 signed customer statements, Retailer Operations Division identified 26 in the Washington Admin Terminal and of those 26, only four (4) conducted single transactions, listed in Attachment 2 only, in Appellant's store during the review period. The majority of the statements are not applicable for the review period in question and are therefore not considered during this review.

No Evidence of Trafficking

Appellant, through counsel, contends that there is no evidence of trafficking. The extensive analysis of Appellant's EBT transaction record, upon which charges of violations are based, provides substantial evidence that questioned transactions during the focus period have characteristics that are not consistent with legitimate sales of eligible food to EBT customers at a store of this type and size. Rather, the characteristics are indicative of illegal trafficking in program benefits. In addition to the raw data of suspicious transactions, the file also notes that Appellant has no shopping carts or shopping baskets available for customers to carry the many items no doubt necessary for questioned transactions as large as listed. In addition, Appellant has only one register and one EBT device, very limited counter space, and insufficient stock to explain as legitimate the program redemptions. A review of the record has yielded no indication of error or discrepancy in the reported findings by Retailer Operations that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it appears the Retailer Operations has provided substantial evidence of trafficking violations, in the two patterns of EBT transaction characteristics indicated in the letter of charges, and that it is more likely true than not that program violations did, in fact, occur as charged.

CFR § 278.6(a), which establishes the authority upon which FNS may disqualify any authorized retail food store, reads, in 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." Therefore, that the Retailer Operations used computer printouts of transaction data and other

reports, in addition to store visit observations and an analysis of household shopping behavior, in rendering a finding that violations indicative of trafficking are occurring, is as valid a means of establishing facts as direct evidence obtained through an on-site investigation and the eye witnessing of trafficking.

More incriminating is that fact that the record reflects that the State Law Enforcement Agency received a complaint that Appellant was trafficking SNAP benefits at 50 cents on the dollar with SNAP recipients. It appears that the complaint came in after the store was charged with trafficking and prior to its permanent disqualification.

Summary

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 the 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 two attachments of EBT transaction data, the inadequacy of the firm's eligible food stock as observed and recorded during the onsite visit to support such large transactions, the lack of evidence of invoices of food in inventory to cover Appellant's reasoning for the SNAP transaction 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.

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. Therefore, based on this empirical data, and in the absence of evidence for the legitimacy 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 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 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' 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 deemed pertinent in support of its position that Retailer Operations Division' 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.

Ownership has not provided sufficient evidence to rebut the convincing 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.

CIVIL MONEY PENALTY

The Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i) even though it was informed of the right to do so in the charge letter dated October 3, 2018. Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program prior to the violations. Therefore, the Retailer Operations Division' decision, not to impose a trafficking CMP in lieu of disqualification, is sustained as appropriate pursuant to 7 CFR § 278.6(i).

Appellant, through counsel, contends that M & H Market's continued use of the EBT machine is important not only to M & H Market, but also to the neighboring families who may lose an important source of food without access to payment by EBT. With regard to this contention, in further regard to civil money penalty assessments in lieu of disqualification, Part 278.6(f)(1) of the SNAP regulations provides for such assessments in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs. However, this regulation also sets forth the following specific exception to assessments thereunder: "A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification." Therefore, this civil money penalty provision is not applicable in the present case.

CONCLUSION

Retailer Operations Division' analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify M & H 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 M & H 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

August 12, 2019