

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

Mini Market,)
)
Appellant,)
)
v.)
)
Retailer Operations Division,)
)
Respondent.)
_____)

Case Number: C0192436

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the permanent disqualification of Mini Market (hereinafter Mini Market or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), 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(a), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

AUTHORITY

7 USC § 2021 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 August 22, 2016, the Retailer Operations Division charged 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 January 2016 through June 2016. 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 Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant replied to the charges by letter on September 1, 2016, and explained the transactions were not unusual based on the unique circumstance of the store and its customers shopping habits. After considering the retailer's reply and the evidence, the Retailer Operations Division issued a determination letter dated October 18, 2016. The determination letter informed Appellant that it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that Appellant was not eligible for a trafficking CMP because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated October 31, 2016, Appellant, through counsel, appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions 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.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) and (e)(1) 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 have engaged in trafficking SNAP benefits.

7 CFR § 271.2 states, in part, that, "Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption."

7 CFR § 271.2 defines trafficking as: "(1) 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; . . ."

7 CFR § 278.6(a) states, inter alia, 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 on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an *electronic benefit transfer system*, . . ." (emphasis added)

7 CFR § 278.6(b)(2)(ii) states, inter alia: “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(e)(1) reads, in part, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.”

7 CFR § 278.6(i) states, inter alia: “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

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from January 2016 through June 2016. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were multiple transactions made from individual benefit accounts in unusually short time frames.
- There were an excessive number of manual key entered EBT transactions made from the store location.
- There were excessively large purchase transactions made from recipient accounts.

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

In its administrative review request dated October 31, 2016, counsel contends that the permanent disqualification is debilitating to this family owned market that relies on the sales and the business income to survive.

In its September 1, 2016, reply to the Retailer Operations Division, counsel provided the following explanations for the transactions:

- The store is a critical outlet for the community.
- The Nasher family has operated the store for over 30 years and it is the source of livelihood for two families.
- Appellant has never been in any trouble with the government.
- Only family members work at the store and all have reviewed the training manuals.
- The short swipes were either consistent with correct purchases or the byproduct of one or two former employees whose rationale for doing so is unclear.

- The excessive purchases are correct.
- The store is the main and primary outlet for goods of this type.
- When clients only shop at Appellant, the transaction amounts will reflect legitimate family needs purchases.
- No inappropriate undertakings are now taking place and the owners will doubly guard this now and in the future.

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

ANALYSIS AND FINDINGS

Store Visit

FNS authorized Mini Market as a small grocery on May 21, 1982. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a June 17, 2016, store visit 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 firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Mini Market is approximately 2000 square feet, with no food storage outside of public view.
- There were no shopping baskets or shopping carts for customer use.
- There were two cash registers but only one was working and one point-of-sale device.
- There was an optical scanner.
- The available checkout space was small and limited with an ice cream cooler placed directly in front.
- There were no meat/seafood specials or bundles that might sell for high prices.
- There was limited fresh meat including chicken, pork, and ground beef.
- There was a limited selection of deli meat.
- There was limited fresh produce including potatoes, onions, scallions, limes, avocado, lettuce, tomatoes, a few cucumbers, some peppers, plums, oranges, and apples.
- Frozen food included potatoes, prepared chicken pieces, and vegetables.
- Dairy included ice cream, sour cream, butter, cheese, cream, infant formula, and milk.
- Other staple food available for purchase were juice, bread, eggs, cereal, pasta, grains, rice, canned goods, and snack foods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included alcohol, tobacco, health and beauty products and cleaning products.

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.

Charge Letter Attachments

Charge Letter Attachment 1. Multiple transactions were made from individual benefit accounts in unusually short time frames. 7 USC 2018 (b)(7)(e).

Appellant contends that these transactions are for actual purchases. 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 SNAP transactions noted in the charge letter are questionable because they display characteristics of use inconsistent with the nature and extent of the store's stock and facilities. It is irregular for a small grocery to have purchases such as those cited, which are more than double the state average. These transaction totals are too large to consist of forgotten items.

7 USC 2018 (b)(7)(e). Appellant offers no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale. Moreover, the Retailer Operations Division determined these households are making what would appear to be normal food purchases at supermarkets or super stores on the same day, day prior, or day after conducting transactions at Appellant.

Appellant did not provide any compelling justification as to why households are conducting multiple transactions at Mini Market or evidence that all the irregular transactions cited in the charge letter were for eligible food items only. Multiple transactions over a short period of time, especially of high dollar value, are indicative of attempts to diminish attention to signs of trafficking.

Charge Letter Attachment 2: An excessive number of manual key entered EBT transactions were made from store location. These transactions significantly exceeded the normal practice for stores in the state. Manual key-entered transactions are normally used when a retailer is unable to complete a transaction by swiping an EBT card (for example, if the card has a damaged magnetic stripe). However, this is a rare occurrence and the vast majority of SNAP transactions use the swipe method. 7 USC 2018 (b)(7)(e).

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

Statistically, manual key-entered transactions tend to be less than one percent of total EBT transactions. However, as demonstrated by the Retailer Operations Division, high dollar transactions were more likely to be manual transactions than lower dollar transactions.

The Retailer Operations Division also determined that some households conducted manual transactions at Appellant while also conducting another SNAP transaction at another location in a short period of time. Due to the distance between Appellant and these other stores, it was implausible that the EBT card was in hand for both transactions. For example, there was a manual transaction conducted at Appellant that would have required the customer to drive over

70 mph to make the trip to Appellant to conduct the manual transaction after it conducted a swiped transaction at another firm. While some of the transactions cited may be a result of defective EBT cards, there are indicators that the key-entered transactions at this store were made without the cards being present and are indicative of trafficking.

Charge Letter Attachment 3: Excessively large purchase transactions were made from recipient accounts. 7 USC 2018 (b)(7)(e).

Counsel explains that these excessively large purchases are correct and they are the result of Appellant being the main and primary outlet for goods of this type. Counsel explains that when clients only shop at Appellant the amounts will reflect legitimate family needs purchases. 7 USC 2018 (b)(7)(e). Furthermore, the firm does not have any shopping carts to transport such large orders and it has limited space at the check-out counter to place items for purchase.

The Retailer Operations Division determined that the total SNAP redemptions for Appellant were two times greater than the average SNAP redemption amount for small groceries in Alameda County, California during the review period. The Retailer Operations Division considered this a strong indicator of trafficking.

Sometimes a firm may have higher than average SNAP transactions amounts due to the lack of access to other SNAP authorized stores. However, the Retailer Operations Division determined that within a one-mile radius of Mini Market, there are 44 other SNAP authorized firms, including two supermarkets and a super store.

The Retailer Operations Division also conducted a shopping analysis of five of the households with transactions identified in the charge letter. These shopping analyses indicate that that these households are making what would appear to be normal food purchases at supermarkets, super stores, or other ethnic stores on the same day, day prior, or day after conducting transactions at Appellant. The Retailer Operations Division determined that this pattern is indicative of trafficking given that Appellant's inventory and layout do not support such transactions.

The Retailer Operations Division also noticed that after the June 17, 2017, store visit, there was a significant decrease in the violatiove transactions. As such, unexplained and drastic declines in SNAP redemptions or transaction patterns as a result of receiving compliance related visits or correspondence are often indicative of trafficking.

In summary, Appellant's layout, business structure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. 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 to legitimize 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.

Owner not involved with Transactions

In its reply to the Retailer Operations Division, counsel suggests that the transactions were conducted by one or two employees that are no longer at Appellant. Although ownership was allegedly not involved in the violations, it cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. Regardless of whom the ownership of a store may utilize to handle store business, the ownership is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Ownership signed the FNS application to become a SNAP authorized retailer on May 21, 1982. Since then it has been reauthorized several times, including the most recent reauthorization that occurred on July 20, 2013. There were multiple reauthorization applications completed and signed by the owner, which included a certification and confirmation that the owner 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 include accepting SNAP benefits for cash and as payment for ineligible items, a violation of the SNAP rules and regulations. The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations. FNS sends all firms the SNAP Retailer Training Guide and instructional video in their approval package and requires ownership to share it with all employees to ensure compliance with rules and regulations. Firms are required to read the SNAP Retailer Training Guide and watch the instructional video.

No Previous Violations

Appellant contends that it has not had any previous violations. Regarding this contention, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. **7 USC 2018 (b)(7)(e)**. Moreover, the record shows that the Retailer Operations Division issued two warning letters to Appellant on May 23, 2016 and October 10, 2014, for exchanging ineligible items for SNAP benefits.

Corrective Action

Counsel reports that there are no inappropriate undertakings now taking place and the owners will doubly guard this now and in the future. With regard to these contentions, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of Retailer Operations. This review is limited to what circumstances existed at the time that was the basis of the Retailer Operations Division’s action. It is not the authority of this review to consider what subsequent remedial actions may have occurred or be planned so that a store may begin to comply with program requirements. **7 USC 2018 (b)(7)(e)**. Therefore, Appellant’s contention that corrective action has taken place or that further remedial actions are planned does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Household Hardship

Appellant contends that Mini Market provides a critical outlet for the community. As indicated previously, within a one-mile radius of Mini Market there are 44 other SNAP authorized firms, where SNAP recipients can shop. Moreover, where there is a hardship to SNAP households, FNS may impose a hardship CMP in lieu of a disqualification where there is a lack of authorized stores in the area. However, the regulations at 7 CFR § 278.6(f)(1) clearly state that “a civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a permanent disqualification.” Because the Retailer Operations Division has taken action to permanently disqualify Appellant’s firm, a hardship CMP in lieu of disqualification cannot be granted.

Appellant Hardship

Appellant contends that the permanent disqualification is debilitating to this family owned market that relies on the sales and the business income to survive. With regards to the Appellant’s contention that it needs the SNAP, it is recognized that economic hardship is a likely consequence whenever a store is permanently disqualified from participation in SNAP. **7 USC 2018 (b)(7)(e)**. To excuse ownership from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant’s contention that the firm will incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposition.

Civil Money Penalty

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR § 278.6(i). Appellant was informed that it would need to provide both the request and supporting evidence within ten calendar days of receiving the charge letter and that no extension of time could be granted for making the request or for providing the required evidence. The Retailer Operations Division determined that Mini Market was not eligible for a CMP because there was insufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program prior to the SNAP violations in this case. The determination by the Retailer Operation Division that the Appellant did not meet the standards for a trafficking CMP under 7 CFR § 278.6(i) is sustained.

CONCLUSION

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

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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 the Appellant's owners 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), 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.

MARY KATE KARAGIORGOS
ADMINISTRATIVE REVIEW OFFICER

February 7, 2017
DATE