

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

N & T Market Inc,

Appellant,

v.

**Office of Retailer Operations
and Compliance,**

Respondent.

Case Number: C0221997

FINAL AGENCY DECISION

The record supports that the N & T Market Inc. (Appellant), committed violations of the Supplemental Nutrition Assistance Program (SNAP). It is the decision of the USDA that there is sufficient evidence to support that the permanent disqualification of Appellant from participation as an authorized retail food store in the Program, as imposed by the Office of Retailer Operations and Compliance (Retailer Operations), was appropriate.

ISSUE

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

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7, may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

CASE CHRONOLOGY

By Charge letter dated November 5, 2019, Retailer Operations informed the owner that it had compiled evidence that Appellant had violated the SNAP regulations based on electronic benefit transfer (EBT) transactions that established clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for the firm type. The sanction for trafficking is permanent disqualification.

The owner responded to the Charge letter by letter dated November 12, 2019. Retailer Operations issued a Determination letter dated January 30, 2020. This letter informed Appellant that it was permanently disqualified as a retail food store in accordance with Sections 278.6(c), and 278.6(e)(1) of the regulations. Retailer Operations considered Appellant's eligibility for a civil money penalty (CMP) according to Section 278.6(i) of the regulations, and found it was not eligible because insufficient evidence was submitted timely to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program to prevent violations.

By letter dated February 6, 2020, the owner appealed Retailer Operations' determination, and requested administrative review. The review was granted by letter dated February 13, 2020. No additional information was provided.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing credible, 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 AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e)(1) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 CFR § 278.6(e)(1) states: "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined, in part, in 7 CFR § 271.2, as "the buying or selling of SNAP benefits for cash or consideration other than eligible food."

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

7 CFR § 278.6(a) states: "FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system."

7 CFR § 278.6(b)(2)(ii) states: “Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).”

7 CFR § 278.6(i) states: “FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.”

SUMMARY OF THE CHARGES

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges were based on an analysis of SNAP transaction data during the period of March 2019 through August 2019. The patterns of transaction characteristics indicative of trafficking are:

- There were a large number of transactions ending in a same cents value.
- There were a large number of transactions in repeated dollar values.
- Multiple transactions were made from the accounts of individual SNAP households within a set time period.
- EBT transactions were conducted that are large based on the observed store characteristics and recorded food stock.

APPELLANT’S CONTENTIONS

In reaching a decision, consideration has been given to all contentions as presented, including any not referenced. The owner provided photos, cash receipts, and vendor invoices.

- As a proof any wrong doing we are attaching with this letter the supporting documents of the transactions occurred during the period of March 2019 - August 2019.
- Please note the we have an increase of customers and also increase of sales due to a cease of operation of grocery store near our area of business.
- We are including invoices of product Sold, our register recorded Deli (groceries non-taxable Items, deli and meat) also Taxable Groceries also some pictures of inventory and some purchase invoices of most popular product we sale.
- I am in the process of retaining an attorney.

ANALYSIS AND FINDINGS

Retailer Operations presented a case that Appellant trafficked 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 during the review period. As patterns of unusual transactions appear across multiple Attachments the case of trafficking becomes more convincing.

Attachment 1: Listed are 184 transactions ending in a same cents value of .49, and 394 transactions ending in .99 cent values. Based on the store pricing information gathered from the store visit, it is unlikely that items purchased together would routinely total to these same ending amounts. Consequently, when a large number of transactions that end in a same cent amount are regularly conducted, it appears that in the absence of any compelling rationale to the contrary these transaction amounts are contrived and indicative of trafficking.

FNS conducted an onsite store visit on September 24, 2019. Appellant had one register and one POS device. The report indicates the store had eight handbaskets, but no grocery carts to transport items throughout the store or to the register. The checkout counter is bordered by various displays that restrict available space for conducting transactions. The survey noted Appellant did not round prices up or down at checkout, did not have an unusual price structure, and did not take phone orders or provide delivery service. Store photos show staple food inventory included canned, packaged, and bottled foods, deli meats, dairy products, meat, eggs, fresh produce, frozen foods, a variety of bread/cereal products, and an supply of accessory beverages. The inventory report does not indicate advertised staple food specials or promotional items. The store photos did not show food bundles/packages. The highest priced eligible foods were priced from \$6.99 to \$12.99.

Appellant sells lunch/deli meat and cheese by the pound, and made-to-order hot/cold sandwiches with a posted menu seen that was exclusive of pricing. The contractor noted that the deli lunch meat and cheese for retail sale was also used in making sandwiches. Food sold hot at the point of sale is ineligible to be purchased with SNAP benefits. Appellant stocked a variety of nonfood items including: tobacco products, health and beauty aids, paper products, housewares, pet food, t-shirts, and cleaning supplies.

The record shows that there are more than 90 authorized firms within a two mile radius of Appellant including: six supermarkets, five super stores, one large grocery, six medium groceries, 18 small grocery stores, and 56 additional convenience stores. This supports that there are other nearby authorized retailers at which SNAP recipients could purchase eligible foods. Retailer Operations analyzed SNAP households' transaction histories at Appellant and these confirmed that recipients did access and conduct SNAP transactions at other authorized firms.

Appellant had an average SNAP transaction amount that was 62% higher than a nearby same type convenience stores in the County. Appellant's average SNAP dollar volume was 67% higher than the same store type in the same County. Retailer Operations compared Appellant to a nearby authorized convenience store that had comparable stock, and a higher SNAP dollar volume amount, and found that Appellant had a higher number of transactions flagged on each Attachment. For example, the comparator store had no flags on this Attachment, while Appellant had 578. This is unusual.

The owner submitted cash register tapes to support that the transactions listed were for eligible foods. Every tape shows a list of items reportedly acquired as “DELI.” There is no detailed description of what was allegedly purchased on any of the tapes. Retailer Operations noted that several of the transactions had 0.01 cents subtracted from the amount so that the total would equal an amount ending in 0.49 or 0.99 cents. No explanation was offered to clarify these register receipts. Retailer Operations determined that the tapes were contrived so as to match the transaction amounts listed on the Attachments. The FNS onsite store visit report did not indicate a special pricing structure at Appellant, or have comments regarding amounts subtracted at the register. The store photos do not reveal that there was signage posted in the store for the customers to indicate an amount to be subtracted at the register. Retailer Operations also found it usual that no non-food items were listed on any of the submitted tapes. Since there is no cash transacted with SNAP benefits it seems unusual that refunds of one cent were seen so often on the tapes.

Attachment 2: Listed are 21 transactions in repeated dollar values:

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The owner provided sausage photos that show the price stickers as \$26.99 and \$27.00. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Retailer Operations noted discrepancies in these transactions and noted they could be contrived. Retailer Operations expounded that this could be an attempt by the owner to explain the transactions in this Attachment by elevating the prices.

The photos submitted by the owner appear to be for the same sausage packages and the stickers show “grocery 2699” and “grocery 2700.” Upon review, the data listed in this Attachment is not persuasive to support a pattern of trafficking that is different from patterns in the other Attachments.

Attachment 3: Listed are 37 transactions in 17 data sets made from the accounts of ten individual SNAP households within a set time period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The high dollar transaction amounts seen in the second transactions in these sets do not appear to represent the purchase of one or two forgotten items.

Retailer Operations noted that the cash tapes advanced for transactions 602 and 603 appeared suspect. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The tape for transaction 602 shows three items were subtracted to achieve the total that matches the transaction amount listed on the Attachment. This is irregular. Furthermore, almost all the DELI items listed end in .00 cents, which was not noted as a pricing structure during the store visit, or seen on the photos of the store signage. The household that conducted transactions 602 and 603 consistently transacted high dollar amounts at Appellant while on the same day or proximate to the same day, it transacted benefits at supermarkets and super stores which were for lower amounts. The data supports that this client’s transactions at Appellant are indicative of trafficking rather legitimate food purchases.

Attachment 4: Listed are 188 transactions that are large based on the observed store characteristics and recorded food stock. The amounts listed exceed the average transaction amount for the same store type in the same state by three times or more. The record supports that 67% of the households listed on this Attachment made a transaction(s) at a super store, or supermarket within one day of making a SNAP transaction(s) at Appellant. Appellant had many

more transactions that met the parameters of this scan at 188, as compared to a nearby same type comparator store that had 71 flags.

The owner submitted five vendor invoices for deli and meat products from one vendor. Four of these invoices were for items purchased during June and July of 2019, and one was dated in October 2019, two months outside of the review period. No other invoices were submitted for Retailer Operations to compute if sufficient food was purchased by the owner to cover Appellant's SNAP redemptions for the review period.

The retailer also stated that his business increased due to a cease of operation of a grocery store near its area of business. Retailer Operations determined that it was possible the an authorized store that voluntarily withdrew from SNAP during the timeframe may have contributed to Appellant's resulting increase in redemptions. However without the name of the store, this could not be confirmed.

Retailer Operations conducted a review of several households' shopping patterns at Appellant. These patterns show that households made transaction(s) at larger store types on dates proximate to or on the same date as at Appellant, while conducting lower dollar SNAP transactions at the larger store types. While some households may have conducted legitimate SNAP transactions at Appellant, insufficient evidence was presented to support this argument. No detailed itemized cash register receipts were provided. As noted, all the tapes only listed DELI for each item supposedly acquired. No business banking records were provided. No federal business tax returns or state tax returns were advanced. Insufficient vendor receipts to support stock of eligible foods to cover Appellant's SNAP redemptions were advanced.

The regulations at 7 CFR § 278.6(a) state 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, and that 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. The owner has the burden of providing credible, 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. The owner has not provided a preponderance of evidence to support that the transactions listed in three of four Attachment patterns were for eligible foods. The overall documentation and explanation the retailer provided was insufficient to prove that the transactions cited in three Charge letter Attachments were for legitimate food purchases.

CIVIL MONEY PENALTY

The regulations at 7 CFR Section 278.6(i) specify the criteria for a firm's eligibility for a CMP in lieu of permanent disqualification for trafficking. The four criteria listed at the cited regulation are identified as a minimum standard that firms must meet in order to be eligible for CMP consideration. The owner did not request or submit substantive documentation to support a trafficking civil money penalty in lieu of permanent disqualification as required by the regulations.

Given the lack of a substantial evidence submission which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations, the owner did not meet the criteria for a CMP. Retailer Operations properly denied it.

CONCLUSION

Retailer Operations' analysis of Appellant's SNAP transaction data was the primary basis for its determination to permanently disqualify Appellant. The record also included onsite store photographs, an onsite store report, and household shopping analyses that provided evidence that the questionable transaction patterns during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. Attachment 2 was not deemed more persuasive as to trafficking than not.

Based on empirical data, and in the absence of evidence of the legitimacy of the transaction patterns presented by Appellant, the preponderance of the evidence in three Attachments supports that violations did occur as charged by Retailer Operations. Retailer Operations denial of a trafficking CMP was also proper per the applicable regulations. Therefore, the decision to impose a permanent disqualification against Appellant is sustained. This decision is effective 30 days from delivery to Appellant.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008, and to 7 CFR § 279.7 of the regulations, with respect to applicable rights to judicial review of this decision. If 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 Appellant's owner resides or is 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 delivery of this Decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

April 30, 2020