

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

**New Family Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0201558**

**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 a **Permanent Disqualification** from participation as an authorized retailer in the Supplemental Nutrition Assistance Program<sup>1</sup> was properly imposed against New Family Market (hereinafter “New Family Market” and/or “Appellant”) and its owner of record, by the Retailer Operations Division of the FNS.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a Permanent Disqualification against New Family Market in a letter dated November 29, 2017.

**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 23, 2017, the Retailer Operations Division informed Appellant that it was being charged with violation of the terms and conditions of the SNAP regulations, 7 CFR §§

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<sup>1</sup> Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

270-282, based on Electronic Benefit Transaction (EBT) SNAP benefit transactions considered to “establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm.”

The Retailer Operations Division record indicates Appellant responded twice in writing. Following documented consideration of Appellant’s responses the Retailer Operations Division advised Appellant of a final determination of permanent disqualification from participation in the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1) for trafficking violations, in a letter dated November 29, 2017, documented to have been delivered to Appellant on December 1, 2017.

The determination letter also advised that the 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. The Retailer Operations Division determined that the Appellant was not eligible for the trafficking CMP because the Appellant did not timely submit a request for the alternative sanction or evidence to demonstrate the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated December 11, 2017, received in the offices of the Administrative Review Branch on December 15, 2017, Appellant, through counsel<sup>2</sup>, submitted an appeal of the Retailer Operations Division’s assessment, requesting an administrative review of the action. The appeal was granted.

## **STANDARD OF REVIEW**

In appeals of adverse actions, an 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 AND REGULATIONS**

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)<sup>3</sup>, 7 U.S.C. § 2021 and promulgated through regulation under Title 7 of the Code of Federal Regulations (CFR),<sup>4</sup> part 278. In particular 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.

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<sup>2</sup> The request for appeal dated December 11, 2017, was received from counsel however in an attempt to verify official representation counsel advised, via electronic mail dated January 8, 2018, that Appellant was no longer being represented. The Final Agency Decision in this matter is therefore being routed to Appellant directly.

<sup>3</sup> Effective October 1, 2008, the *Food Stamp Act of 1977* was superseded by the *Food and Nutrition Act of 2008*, as amended through P.L. 110-246.

<sup>4</sup> Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at [https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab\\_02.tpl](https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl)

7 U.S.C. § 2021(b)(3)(B) states, in relevant part:

... a disqualification under subsection (a) shall be ... permanent upon...the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards...

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

“FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.”

7 CFR § 271.2(1) defines trafficking, in relevant part:

“ ... the buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits ... for cash or consideration other than eligible food either directly, indirectly, in complicity or collusion with others, or acting alone:...”

7 CFR § 271.2 states, in relevant part:

“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 § 278.6(a) states, in relevant part:

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

7 CFR § 278.6(c) states, in relevant 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...”

7 CFR § 278.6(b)(2)(ii), states, in relevant 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).**” [Emphasis added]

7 CFR § 278.6(i), states, in relevant part:

“FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in §271.2 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.” [Emphasis added]

### **SUMMARY OF THE CHARGES**

The Retailer Operations Division materials and the charge letter dated August 23, 2017, reveal that charges were based on an analysis of EBT SNAP benefit transaction data during the seven (7) month period of January through July 2017, and involved two (2) patterns of EBT transaction characteristics indicative of trafficking as follow:

- Attachment #1 lists multiple SNAP EBT transactions made from individual benefit accounts in unusually short timeframes.
- Attachment #2 lists excessively large purchase transactions made from the accounts of SNAP recipients.

### **APPELLANT’S CONTENTIONS**

The letter dated December 11, 2017, counsel, on behalf of Appellant, did not provide any basis for review instead asking questions and indicating a formal response would be provided at a later date. Subsequent to being advised by counsel that Appellant was no longer represented by a telephonic discussion was held with Appellant’s ownership. In the March 13, 2018 telephonic discussion it was explained to ownership that an appeal request required a basis. Appellant’s ownership indicated that the basis for appeal had been provided in the responses to the Retailer Operations Division.

Those contentions are therefore being considered and include explanation that:

- SNAP customers had been allowed to run in-store credit accounts which were repaid upon receipt of the new month’s benefits;
- Appellant’s owner was a first time business owner;
- no record of credit accounts was available as written documents were destroyed upon repayment of each debt;
- ownership was unaware that credit allowance was a violation of SNAP regulations;
- ownership offered items in bulk to support more efficient shopping for customers with transportation challenges; and,
- ownership expressed a willingness to provide customer names for contact by FNS; and, to subject to a lie detector test.

The preceding represents only a brief summary of Appellant’s contentions 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

On review, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed.

With regards to Appellant's contentions in explanation of questionable transactions, the issue in review is whether there is sufficient evidence, through a preponderance of that evidence, that it is more likely true than not true that the questionable transactions were the result of trafficking.

### **Appellant Operations:**

The record reveals that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a store visit conducted by FNS contracted personnel on July 11, 2017. The July 11, 2017 visit was authorized by the owner of record and resulted in materials reflecting observations made, and responses received, from the owner during the store visit which describes the nature and scope of Appellant's operation, as well as the stock and facilities.

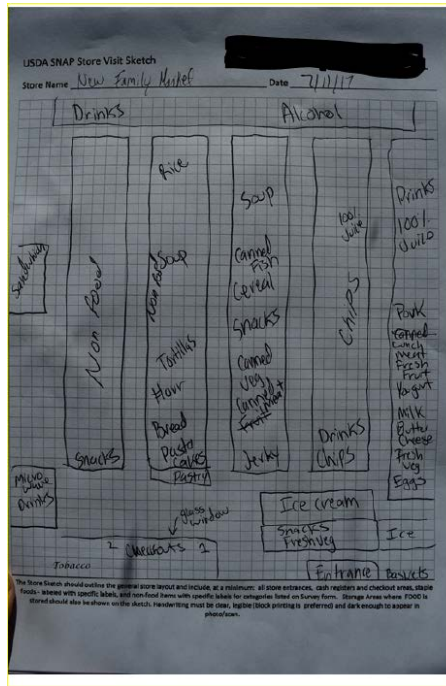
The record indicates that Appellant was initially authorized in SNAP effective January 14, 2016, as a convenience store, in accordance with FNS definitions.

Appellant is currently reported to be open from 9AM until 10PM, from Monday through Saturday; and, from 9AM until 9PM on Sunday; operating out of a commercial space of approximately 2600 square feet at street level. (See photos below)

The material indicates that Appellant's operation includes four (4) two-sided aisles; front opening refrigerated coolers against the back wall; and, one-sided shelving against one (1) side wall. Along the front wall Appellant is shown to include a Plexiglas enclosed checkout area with two (2) cash registers and one (1) point-of-service terminal. The counter space in front of the checkout areas includes merchandise displays and demonstrates limited space for the placement of merchandise presented for purchase. Behind the checkout counter area Appellant is shown to stock various tobacco products and limited health and beauty aids. The materials reference a deli area from which made-to-order sandwiches are prepared, however on review it is determined that there is no deli area (i.e. area for slicing meats/cheeses and preparing sandwiches) instead the photos show a refrigeration/freezer unit stocked with pre-made sandwiches, burritos, waffles, a limited variety of frozen vegetables, and some frozen meat offerings.

No out of public view storage was declared or identified in the sketch of the store layout however the certified store visit photographs show stacks of merchandise, principally drinks, throughout the store floor space.

The store visit materials document that there are three (3) hand-held shopping baskets and no shopping carts available to support the delivery of purchases to the counter/checkout area for the completion of merchandise price totaling and payment.



Store Sketch

Certified photographs from the July 11, 2017, contracted store visit are presented below:



Photo # 19 – Storefront



Photo # 22 – Store Overview



Photo # 1 – Store Overview



Photo #8 – Store Signage



Photo # 18 – Checkout Counter



Photo # 4 – Lottery Display



Photo #24 - Freezer/Refrig Unit

Photo #24 is the freezer/refrigeration unit mistakenly identified in the store visit materials as a “deli” with “Prepared/Made-to-Order Sandwiches”.

The inventory checklist completed at the time of the July 11, 2017 store visit identifies food varieties available in each of the four (4) staple food groups as follows:

- Five (5) varieties of dairy products with more than 20 units stocked in each variety. It is noted that ice cream is being counted as a staple food although it is an accessory food.
- Eleven (11) varieties of fruits and vegetables with seven (7) of those varieties available in units of 20 or more consisting of primarily canned stock. The remaining four (4) varieties indicated stocking units of between six (6) and 20. There is limited fresh/frozen food available consisting primarily of potatoes, onions, garlic, 100% fruit juices, and a handful of frozen vegetables.
- Seven (7) varieties of breads and cereals were identified, all with more than 20 stocking units. Notably the snack items (cookies, crackers, etc.) are being counted as a staple food variety although those foods are considered accessory foods.
- Six (6) varieties of meat/poultry/fish staple foods are identified in the store visit materials with four (4) of those stocking more than 20 units; and, the remaining two (2) units stocking between six (6) and 20 units.



The four (4) most expensive foods identified include:

- 24 count case of Dr Pepper selling @ \$9.99;
- Breyer's Ice Cream selling @ \$6.49 for 1.5 quarts;
- Nescafe coffee in a seven (7) ounce jar selling @ \$8.99; and
- Pre-packaged sausage selling @ \$9.99 per 2.5 pounds.

Non-SNAP products and services offered at Appellant include tobacco products; alcoholic beverages (beer); lottery tickets; health and beauty aids; paper goods; cleaning products; automotive products; and, housewares. New Family Market also has an ATM/money transfer service machine on site.

### **Charge Letter Attachment Analysis:**

The data reflected in the letter of charges dated August 23, 2017 is the result of information gained primarily from the Anti-Fraud Locator using Electronic Benefits Transfer (EBT) Retailer Transactions (ALERT) system which is a fraud detection, decision support system designed to monitor and track electronically conducted retail transactions completed by SNAP recipients in authorized meal program and food retailer locations.

The ALERT System facilitates management of the program by providing transaction-level information to Federal personnel charged with the responsibility of SNAP retailer management and compliance. The system uses pre-defined criteria or patterns for potential fraud detection. Pre-formatted reports provide information on those stores and transactions meeting the defined criteria. ALERT supports both online analysis and online queries and reports for use by FNS. The ALERT system does not make the final determination instead it is used by Retailer Operations Division to develop information and evidence for consideration in support of their development of an ultimate decision.

**Attachment #1:** Represents **multiple SNAP EBT transactions made from individual benefit accounts in unusually short timeframes** and includes 93 transactions; grouped in 35 sets; where 21 households redeemed SNAP benefits in sets of two (2) to seven (7) transactions; 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Retailer Operations Division documents that completing multiple transactions within a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) period is a method used by some stores to avoid high dollar transactions that cannot be supported and are indicative of trafficking.

Retailer Operations Division determined that given Appellant's operational information it is not reasonable that households could bring to the counter quantities of SNAP eligible foods, in the amounts identified in the Attachment #1 materials, from the inventory identified at the store visit to support the transaction amounts or the transaction sets as listed.

In response to the letter of charges Appellant's owner, in a letter faxed on September 1, 2017, explained to the Retailer Operations Division that as a first time business owner, he had allowed SNAP customers to charge SNAP eligible foods throughout the month, with repayment made

from SNAP benefits received in the new month. Appellant further explained that he was compelled to allow credit because morally he “couldn’t sit by and watch kids go hungry for day because their benefits had not come in yet.”

The Retailer Operations Division routed a letter to Appellant, dated September 22, 2017 informing Appellant that the acceptance of SNAP benefits as payment for items sold to a household on credit was a violation of SNAP regulation at 7 CFR § 278.2(f). The letter also requested evidence of the credit accounts including specific dates, amounts, and products purchased.

In a letter faxed on October 3, 2017 Appellant’s owner indicated that no credit account records were available for presentation because the charges were simply written on a piece of paper which was disposed of when the debt was repaid. Appellant’s owner indicated that the practice of credit allowance had been ceased upon receipt of the Retailer Operations letter of September 22, 2017. The Retailer Operations Division found that, absent evidence of credit accounts, the transactions listed in Attachment #1 were being considered potential evidence of SNAP trafficking.

On review it is noted that the transactions listed include characteristics which add to the suspicion of their legitimacy. Of the 21 households identified in the suspicious transaction pattern only six (6) were identified to have recorded multiple transactions in multiple months. The remaining 15 households had repeated transactions in only one (1) of the seven (7) months in the review period.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Similarly repayment of credit accounts does not reasonably explain the transactions of a second household that recorded five (5) transactions sets in five (5) of the seven (7) review months with 14 individual transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Five (5) of the transactions listed in Attachment #1 are recorded to have occurred outside of business hours for Appellant of 8AM until 10PM. Four (4) of those five (5) transactions were recorded by the same household as identified in example #1 above.

**Attachment #2:** Represents **excessively large purchase transactions made from the accounts of SNAP recipients** with 300 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Retailer Operations Division indicates that the average convenience store transaction in the State of Arizona, county of Maricopa, in the focus period was \$6.39; 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Retailer Operations Division documents that review of the store visit materials did not reveal an specialty food items, no fresh meat, and no individual products that would justify the amounts identified as excessively large in the cited attachment. Further, the Retailer Operations Division documents that the transactions are suspicious in consideration of the operation and facilities of

Appellant. As previously indicated the store visit materials, completed in cooperation with the owner authorizing the July 11, 2017 contracted store visit, reveal the four (4) most expensive SNAP eligible items priced above \$5 sell for \$6.49, \$8.99, and \$9.99. There are notably only three (3) hand-held shopping baskets, and no shopping carts to support the presentation of multiple items for purchase at the checkout register. The checkout area is surrounded by Plexiglas with only two (2) small openings afforded to pass through items presented for purchase; and, no place to stage or bag purchased products.

In the faxed material provided on October 3, 2017 Appellant's owner explained that he had been trying to help some SNAP customers buy items in bulk to support them getting more for their benefits, partially because some customers suffered transportation challenges precluding more efficient purchases. However, the Retailer Operations Division noted that the store visit materials from July 11, 2017 report that no meat bundles, seafood specials, fruit and vegetable boxes, or any other items are advertised or reported sold in bulk.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

### **Comparison/Competitor Store Information:**

Retailer Operations Division documents that the subject firm is located in an area with nine (9) comparative or better stocked SNAP authorized convenience stores located within a one-mile radius. Retailer Operations Division also documented that a Safeway, located 2.75 miles from Appellant was routinely used by the same households that were shown to demonstrate suspicious shopping patterns at Appellant. An analysis of the SNAP redemptions, transaction count, average transactions, and incidence of occurrence of suspicious transactions in the same categories as those identified for Appellant was completed. The results are demonstrated in the following table:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

On review the availability of alternative shopping venues was affirmed with review of the FNS Retailer Locator at <https://www.fns.usda.gov/snap/retailerlocator>.

### **Household Analysis:**

The Retailer Operations Division documents that it is not normal shopping behavior for a SNAP beneficiary to make a large SNAP purchase, or a series of SNAP purchases at a convenience store, immediately before or after conducting SNAP purchases at supermarkets or superstores with superior stock, variety of items, pricing and ease of checkout. Nonetheless the Retailer Operations Division identified five (5) households exhibiting such behavior on multiple occasions in multiple months in the focus period.

### **Civil Money Penalty**

Part 278.6(f)(1) of the SNAP regulations provides for civil money penalty 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 Food Stamp [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.

As previously indicated the November 29, 2017 determination letter advised Appellant of the ineligibility for consideration for a trafficking civil money penalty (CMP) according to the terms of Section § 278.6(i) of the SNAP regulations. The letter of charges dated August 23, 2017 advised Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The record does not document any request for the imposition of a CMP in lieu of permanent disqualification was provided.

7 CFR §278.6(i) specifies the criteria for a firm’s eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. The criteria listed therein are, as a whole, specifically identified as a *minimum* standard that firms must meet in order to be eligible for such a penalty. Given these considerations, it is clear that the statute and the regulation allow no flexibility below the level of this stated standard. In the instant case the record fails to support any request and/or documentation or evidence provided by Appellant requesting the alternative penalty considerations. Therefore, on review the Retailer Operations Division’s determination that Appellant firm is ineligible for the imposition of civil money penalties in lieu of disqualification is affirmed.

## **CONCLUSION**

The Retailer Operations Division analysis of Appellant’s EBT transaction records, upon which charges of violations are based, together with observations made during the contracted store visit provide substantial evidence that questionable transactions during the focus period have characteristics that are not consistent with legitimate sales of eligible food to SNAP customers at a store of the nature and scope as described in the preceding materials. Rather, the characteristics are indicative of illegal trafficking in program benefits.

Therefore, based on a review of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged and that the Retailer Operations Division has provided substantial evidence of trafficking violations.

Based on the discussion above, the decision to impose a permanent disqualification from participation in the SNAP against New Family Market 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, 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.

NANCY BACA-STEPAN  
Administrative Review Officer

June 4, 2018