

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

**Nhung's Market,**

**Appellant,**

**v.**

**Case Number: C0199882**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a permanent disqualification of Nhung's Market (hereinafter "Appellant") from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

**ISSUE**

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Nhung's Market.

**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."

**SUMMARY OF CHARGES**

The Appellant was charged with trafficking and subsequently permanently disqualified based on an analysis of EBT transaction data from November 2016 through April 2017. This involved the following transaction patterns which are common trafficking indicators:

- There were an unusual number of transactions ending in a same cents value.

- There were multiple transactions made from individual household benefit accounts within unusually short timeframes.
- The majority or all of an individual recipient's SNAP benefits were exhausted in unusually short periods of time.
- Excessively large purchase transactions were made from recipient accounts.

## **CASE CHRONOLOGY**

The agency's record shows that FNS initially authorized Nhung's Market for SNAP participation as a combination grocery/other store on April 11, 2011. In a letter dated May 31 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred between the months of November 2016 and April 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

On June 13, 2017, the Appellant contacted the Retailer Operations Division by phone and stated that the firm had not trafficked. Instead dry goods sales were the reason for the large transactions. The Appellant further requested a one-week extension to provide a more detailed, written response to include a list of store prices and copies of inventory invoices.

By June 26, 2017, the Retailer Operations Division had not heard back from the Appellant and the brief phone call from June 13 was insufficient to justify the unusual transactions listed in the charge letter. Accordingly, the Retailer Operations Division determined that trafficking had occurred and issued a determination letter dated June 26, 2017. The disqualification took effect June 28, 2017.

On June 29, 2017, the Appellant contacted the Retailer Operations Division and explained that it had e-mailed a response on June 20, 2017. It was then discovered that the Appellant had mistyped the e-mail address, so the information was never received by the Retailer Operations Division. The Appellant then re-sent the e-mail using the correct address.

Giving the Appellant the benefit of the doubt, the Retailer Operations Division decided to rescind the June 26 determination letter, reinstate the firm's SNAP authorization, and consider the Appellant's June 20 e-mail.

In the June 20 e-mail, the Appellant provided additional explanation regarding the unusual transactions. For example, it claimed that the same-cents transactions were the result of the firm selling dried goods ending in zero cents. Transactions in the other attachments were due to customers making large purchases, sometimes multiple times a day or on the following day. In support of these arguments, the Appellant provided a price list of approximately 100 different food items, ranging from coffee to rice to noodles to fresh produce. The Appellant also submitted 48 pages of inventory purchase receipts from a variety of vendors.

In e-mails dated July 13 and 14, 2017, the Appellant provided additional information and documentation regarding its price-markup practices.

After considering the Appellant's replies and all of its documentation and further reviewing the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as originally charged and issued a new determination letter dated September 11, 2017. This determination letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but that a CMP was not appropriate in this case because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked September 14, 2017, the Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted. It should be noted that in three e-mails dated October 12, 2017, the Appellant submitted additional information and documentation for the administrative review officer to consider. This information was added to the case file and all submitted contentions were considered during the administrative review process.

### **STANDARD OF REVIEW**

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

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

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

7 CFR § 278.6(e)(1)(i) states:

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

7 CFR § 271.2 states, in part:

Trafficking means: 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 § 271.2 states, in 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(b)(1) states, in part:

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

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of

the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

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

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

7 CFR § 278.6(b)(2)(iii) states:

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

7 CFR § 278.6(i) states, in part:

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...

### **APPELLANT'S CONTENTIONS**

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant requests administrative review because the store depends on SNAP benefits. It really needs SNAP to sell many products to SNAP customers.
- Appellant provided additional documentation that had not been included in its correspondence with the Retailer Operations Division. This is because the Appellant had misplaced them.

In support of these contentions submitted 48 pages of inventory purchase invoices (103 invoices in all), from wholesale firms such as High Mountain, Inc.; Sun Chong Co., LTD.; K&J Wholesale Co, LTD; and U&M Produce, Inc. The Appellant also provided copies of all previous correspondence that it had with the Retailer Operations Division.

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

## **ANALYSIS AND FINDINGS**

The primary issue for consideration in a case based on suspicious SNAP redemption data is whether or not the Retailer Operations Division adequately established that the Appellant firm engaged in the violation of trafficking. In other words, did the Retailer Operations Division, through a preponderance of the evidence, establish that it is more likely true than not true that the irregular and unusual transactions cited in the charge letter were the result of trafficking?

### **Contractor Store Visit**

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm's EBT transactions, but also information obtained from an April 5, 2017, store visit which was conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report and photographs documented the following store size, description, and characteristics:

- Nhung's Market is a market booth, approximately 200 square feet in size, operating in Honolulu, Hawaii.
- At the time of the contractor's visit, the firm had no shopping carts and no shopping baskets for customer use.
- The store visit photographs show one cash register and agency records reflect the use of one EBT point-of-sale device.
- The store does not appear to use optical scanners to process transactions.
- The store's staple food stock consists primarily of dried goods, such as noodles and rice, and fresh produce. The store qualifies for SNAP participation under Criterion B (see 7 CFR § 278.1(b)(1)).
- The store visit report also indicates that the store sells SNAP-eligible, non-staple accessory food items, such as sauces and condiments. Additionally, the store sells a very small amount of nonfood, including fingernail clippers and scissors.
- According to the report, the most expensive items in the store were 25-pound bags of rice, priced at \$22.00 per bag. There were seven bags in the store on the day of the store visit. No other individually packaged item exceeded \$5.00. All fresh produce in the store appeared to be \$5.99 or less per pound.
- The checkout area consists of a very small, very cluttered countertop. In order to reach the cashier (where a scale is located), customers have to reach across boxes of produce. The severely constricted checkout area is not suitable for conducting large or rapid transactions as there is very little space to maneuver.
- There is no indication from the store visit report that the firm has a special pricing structure. Most items appear to end in 9, such as \$1.09, \$3.59, etc., but there are also some items that end in .50 or .00. The report also indicates that the firm does not round transaction totals up or down at checkout.

The available inventory of SNAP-eligible food items at the time of the store visit showed stock that would be typical of a small fruit and vegetable stand. There was no indication that SNAP households would be inclined to regularly visit Nhung's Market to purchase large quantities of grocery items, especially considering the absence of shopping carts and baskets and the extremely constricted checkout area. It is noted that the available food at the store was primarily of a low-dollar value. Aside from bags of rice, there was no evidence that the firm sold any high-priced bulk or specialty items, such as meat or seafood bundles.

Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed significantly from those of similar-sized competitors.

### **SNAP Transaction Analysis**

**Charge Letter Attachment 1:** There were an unusual number of transactions ending in a same cents value. This attachment lists 339 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). When such transactions are not supported by a special pricing structure at the store, they are a strong indicator of trafficking in SNAP benefits.

As noted earlier, there is evidence that some of the firm's inventory is priced in even-dollar amounts, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Assuming that some customers went to the store and purchased only those items that were priced in even-dollar increments, it is reasonable to conclude that some of the transactions listed in Attachment 1 may have been legitimate purchases of eligible food. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Because of that pricing structure, and because most customers, when shopping for groceries, purchase a variety of foods, it stands to reason that most transactions should end in something other than an even-dollar amount.

The fact that 339 transactions ended in an even dollar amount over the course of six months is highly unusual. Unfortunately, the Appellant has not offered any evidence, such as itemized cash register receipts, to prove that the transactions listed in Attachment 1 were legitimate purchases of eligible food. Without such evidence, this review has little option but to side with the Retailer Operations Division, as the transactions listed in Attachment 1 are sufficiently unusual to reasonably conclude that trafficking is the likely cause.

**Charge Letter Attachment 2:** Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment lists 29 sets of transactions (63 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), an extraordinary amount for a small produce stand with no shopping carts or shopping baskets and selling primarily low-priced merchandise.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These sorts of repetitive transactions are remarkably unusual for a small produce stand that primarily sells low-priced merchandise.

Agency records show that the vast majority of households who shop at Nhung's Market also shop at supermarkets and superstores in the area and do so on a regular basis, so there seems to

be very little need for a household to spend hundreds of dollars in such a repetitive fashion at a small produce market rather than shopping at a much larger store nearby, where shopping carts and shopping baskets would help facilitate the purchase of large numbers of food items.

The Appellant has not offered any explanations or evidence that directly relate to the specific transactions listed in Attachment 2. As such, it is reasonable for this review to conclude that trafficking was likely occurring at the Appellant store.

**Charge Letter Attachment 3: In a series of transactions, the majority or all of an individual recipient's benefits were exhausted in unusually short periods of time.** This attachment lists 48 sets of SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

**5 U.S.C. § 552 (b)(6) & (b)(7)(C).** A suspicion of trafficking is reinforced when these balance-depleting purchases occur in small stores such as Nhung's Market, where there is limited inventory and a lack of shopping carts or baskets to help facilitate large purchases. It makes little sense that a household would spend almost the entirety of its SNAP allotment in a single transaction or in a series of rapid transactions at this store.

Moreover, a government report on SNAP shopping patterns indicates that on average, after the first day of benefit issuance, approximately 80 percent of a household's allotment remains unspent. Even after seven days, 40 percent of benefits still remain unspent. It typically takes about two weeks to deplete 80 percent of one's benefits, and three weeks to deplete 90 percent.<sup>1</sup> Depleting a large portion of one's SNAP balance in a very short period of time, leaving little or no benefits for the rest of the month, is inconsistent with normal shopping behavior of SNAP households.

Unfortunately, the Appellant has not offered specific contentions relating to the transactions found in Attachment 3. Without a valid argument or credible evidence from the Appellant to demonstrate what was actually purchased during the transactions listed in this attachment, this review has little option but to conclude that the transactions were, more likely than not, the result of trafficking.

**Charge Letter Attachment 4: Excessively large purchase transactions were made from recipient accounts.** This attachment lists 397 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C).** These large transactions are not consistent with a combination grocery/other store in the state of Hawaii. **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

Given that the Appellant firm does have a moderate inventory of staple foods, particularly fresh fruits and vegetables, and large bags of rice, it is probable that there would be an occasional purchase where the transaction amount is high, **5 U.S.C. § 552 (b)(6) & (b)(7)(C).** As such, there may well be some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 4. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar-sized competitors,

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<sup>1</sup> See U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program*, by Laura Castner and Juliette Henke. Project officer: Anita Singh, Alexandria, VA: February 2011.



especially considering the lack of shopping carts and baskets and the severely constricted checkout area. The substantial number of high-dollar transactions in a six-month period calls into question the legitimacy of these transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering how many items it would take to add up to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or more, it seems very unlikely that the Appellant firm's customers would carry large amounts of merchandise around the store without the benefit of shopping carts, especially since the evidence shows that the firm's customers regularly shop at larger, better stocked stores in the area, where shopping carts and baskets help facilitate the purchase of large numbers of items.

There are also some extremely unusual transactions with similar amounts.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is the finding of this review that such transactions are almost certainly, if not obviously, trafficking violations. 5 U.S.C. § 552 (b)(7)(E).

Unfortunately, the Appellant has not provided any evidence to prove that the transactions in question were legitimate purchases of eligible food. Such evidence could have included itemized cash register receipts, which show exactly what was purchased during each transaction. The Appellant did provide inventory invoice records and price lists for its merchandise, but such evidence, by itself, is insufficient to prove that the specific transactions listed in the charge letter were legitimate SNAP purchases.

Stores caught in trafficking violations, both during onsite investigations and in EBT analysis cases, consistently display particular characteristics or patterns. These patterns often include frequent, large transactions that cannot be supported by the retailer's inventory, store type, and structure. It is the conclusion of this review that Nhung's Market, with its primarily low-dollar inventory, its lack of shopping carts and baskets, and its severely constricted checkout area cannot support the large numbers of high-dollar and repetitive transactions identified in Attachment 4. Therefore, the most logical explanation for such transactions is trafficking.

Based on the above analysis, it is the determination of this review that Nhung's Market likely trafficked in SNAP benefits during the review period. The attachments furnished with the charge letter adequately identify the irregular patterns of SNAP transactions which indicate that trafficking was likely taking place. Conversely, the Appellant has failed to provide a rational explanation or any evidence as to why such patterns might exist. As there are multiple unexplained patterns of irregular transactions, the case of trafficking is convincing.

### **Hardship to Appellant**

The Appellant has argued that the store depends on SNAP benefits and really needs its SNAP authorization to sell products and produce to SNAP customers.

With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no

provision in the SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty.

To allow store ownership to be excused from being assessed administrative penalties based on a purported economic hardship to the store's ownership or to the firm itself would render virtually meaningless the 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, the Appellant's contention that the firm may incur economic hardship based on the assessment of an administrative sanction does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Civil Money Penalty**

As noted earlier, the Retailer Operations Division determined that the Appellant firm was not eligible for a civil money penalty in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and training program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a civil money penalty to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate documentation within designated timeframes. The case record shows that the Appellant did not request a trafficking CMP when it responded to the charge letter and there is no evidence that the Appellant submitted any documentation that would indicate that the firm had a compliance policy or training program of any kind.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

### **CONCLUSION**

An analysis of the Appellant's EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify Nhung's Market from SNAP participation. This data provided ample evidence for this review to conclude that the questionable transactions and patterns listed in the charge letter were more likely than not the result of trafficking violations committed by the Appellant.

Based on a review of all available information in this case, it is the determination of this review that the Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed. As such, the decision to impose a permanent disqualification against the

Appellant, Nhung's Market, under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is sustained.

## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON  
Administrative Review Officer

March 22, 2018