

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

Nkem African Caribbean Market Inc,

Appellant,

v.

Case Number: C0203160

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Nkem African Caribbean Market Inc., (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the program, as initially imposed by the Retailer Operations Division was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant by letter dated November 27, 2017.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provide that “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS.”

CASE CHRONOLOGY

By charge letter dated November 13, 2017, Retailer Operations Division informed ownership that Appellant was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 271 – § 278, based on EBT benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm."

The letter of charges stated, in relevant part, that “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.”

In a November 15, 2017, telephone conversation with Retailer Operations Division, Appellant's attorney stated that he was in receipt of the charge letter and would fax a response. In correspondence dated November 21, 2017, Appellant, through counsel, stated that it has instructed the sales clerk to make sure the customer has completed all their shopping before checking them out. African foods are expensive because of the cost of shipment from Africa. We will do our best to advise them to buy as needed instead of buying in bulk like most do.

In a facsimile dated December 5, 2017, Appellant, through counsel, replied to the charge letter and generally stated that the content in the charge letter was reviewed in line with SNAP regulations Section 271.2 and no violations were found on the part of the client. SNAP regulations do not provide for the maximum number of swipes a beneficiary is allowed within a specific time frame neither does it provide for a maximum amount per purchase. We also disagree that the alleged activities are unusual and irregular considering the shopping habits of people who make up beneficiary demographics and the entire citizenry.

Appellant, through counsel, stated that it is common for shoppers to remember to add one or two forgotten items such as salt or spices after checking out. This is not an unusual or irregular buying pattern in the African refugee community or citizenry at large. Appellant, through counsel, also stated that some of the beneficiaries have large families and purchase food items in bulk to avoid the cost of frequent shopping. Moving forward, our client pledges to take all necessary steps to be in compliance of any regulation regarding number of swipes and amount per purchase if you could provide a guide. Our client shall, among other measures, will print a bold notice and display it in a conspicuous view regarding the number of swipes a beneficiary is allowed within a time frame and the maximum amount of a purchase allowed per day.

Retailer Operations Division gave consideration to the Appellant's replies and evidence of the case, and issued a determination letter dated November 27, 2017. This letter informed Appellant that it was permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also stated that Retailer Operations Division considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, Retailer Operations Division determined that Appellant was not eligible for the CMP because it failed to submit sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated December 5, 2017, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

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

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

7 CFR § 278.6(c) reads, in part, “*Review of Evidence.* The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1)...the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS...”

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

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

SUMMARY OF CHARGES

The charges on review were based on an analysis of SNAP electronic benefit transfer (EBT) transactions dated during the six month period of April 2017 through September 2017. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from individual benefit accounts in usually short time frames.
2. Excessively large purchase transactions were made from recipient accounts.

The first issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking.

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its response to the permanent disqualification letter issued by Retailer Operations Division, and its request for administrative review, in relevant part:

1. It is common, after checking out at the point of sale, for a shopper to remember to add one or two forgotten items such as salt or spices and have two or three swipes within a short time frame. This is not an unusual or irregular buying pattern in the African refugee community or citizenry at large. We are not aware of any regulation that prohibits more than one swipe.
2. The excessively large purchase transactions were due to SNAP households having large families and purchasing food items in bulk. We don't know the regulation and what it prohibits.

In subsequent correspondence dated December 11, 2017, Appellant, through counsel, reiterated the previously stated contentions and stated that the Appellant pledges to take necessary steps to comply with all SNAP regulations regarding number of swipes, amount of purchase, quantity of purchase; Appellant shall display a Notice to that effect. The preceding may represent a brief summary of Appellant's contentions in this matter however, in reaching a decision, full attention has been given to all contentions presented, including any not specifically recapitulated or referenced herein.

ANALYSIS AND FINDINGS

The FNS originally authorized the business as a combination grocery/other store on May 27, 2015. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a June 16, 2017, store visit to the business conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock and facilities. This information was then used to ascertain if there were justifiable explanations for the EBT transactions at Appellant that formed patterns indicative of trafficking. The firm review summary documented the following store size, description, and characteristics:

- One cash register for groceries and two POS devices. One small counter area mostly obstructed by other smaller items available for sale. One specialty register and two check-out areas. According to the manager, the office area is used as a checkout area with a computer used for sending money to other sources.
- Estimated to be approximately 1500 square feet.
- Less than 10 shopping baskets were available but no shopping carts available for customers.
- No adding machines but an optical scanner is available at checkout.
- Store does not operate through a night window or plastic barrier with food stock behind the barrier.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.

- Store has unusual pricing structure such as ending most products **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.
- No food stored in an area outside of public view.
- Store has storage freezers or coolers but no food stored off site.
- Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
- Store does not take telephone or online orders and does not offer delivery.
- The most expensive SNAP/EBT eligible food items were listed as Nido Powdered Milk (\$39.99), Parboiled Rice (\$30.00), Frozen Goat Meat (\$12.99) and Frozen Smoked Peeled Boni Fish (\$10.00).
- Store stocks minimal amounts of non-food items such as but not limited to health and beauty aid items, jewelry and clothing items.
- Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products.
- Store was deficient in the dairy products category and the report indicated there were dusty cans or packages.
- No kitchen/prepared food area with hot foods sold for onsite consumption.
- No hot food sold, no food is sold for on –site consumption and no deli or prepared food section.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.
- Store is an ethnic store selling ethnic foods.

The second issue for consideration is whether Retailer Operations Division has presented a convincing case that Appellant likely trafficked in SNAP benefits. Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant’s store during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

Attachment 1 of the Charge letter - Multiple transactions were made from individual accounts in unusually short timeframes.

During the review period there were 16 sets of 34 SNAP transactions that met the parameters of this attachment. Multiple transactions conducted by the same household account within a **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** period is a method which violating stores use to avoid the detection of single high dollar transactions that cannot be supported by the retailer’s inventory and/or structure.

Appellant, through counsel, contends that it is common, after checking out at the point of sale, for a shopper to remember to add one or two forgotten items such as salt or spices and have two or three swipes within a short time frame and that this is not an unusual or irregular buying pattern in the African refugee community or citizenry at large. With regard to this contention, it is important to note that the SNAP transactions identified in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the store’s layout, the extent of the Appellant’s stock and facilities and are indicative of trafficking. It is acknowledged that customers will sometimes forget an item or two

and decide to purchase it after they've already completed their transaction. In such instances, it is reasonable to expect the subsequent purchase to be for a nominal amount however, in a number of the questionable transactions in this Attachment, the subsequent transactions were for amounts that exceed any nominal, afterthought purchase. In some cases the amounts of subsequent transactions exceeded the preceding transaction amount which is unusual and questionable.

More importantly, though the store visit documentation indicates that there are two check-out counter areas; the store photographs and documentation show that one is located to the right of the store entrance and the other is stated as being inside of the store's office space. The checkout area, located near the front door, is extremely small with no room to place large amounts of merchandise. There is also merchandise surrounding this check-out area, including items on top of an already limited counter space making it difficult to purchase large amounts of food items. The store visit report annotates that the manager indicated the second checkout area was in the office and the computer was used for sending money to other sources, it is kept in the back office for safekeeping since the front counter was too small therefore it is questionable that this area is used for legitimate SNAP purchases. Although the store has an optical scanner, given the condition of the front checkout counter area and the fact that Appellant only has a small number of hand baskets and no shopping carts in which to gather the number of items no doubt needed to total the transaction amounts in this Attachment or to transport those items to the counter, it would be physically impossible to conduct most of the transaction sets in this Attachment, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant, through counsel, did not provide any additional documentation to support its claim that shoppers were making purchases of forgotten items and to justify all of the transaction sets in this Attachment. Based on the analysis above and Appellant's failure to adequately show that all of the transaction sets were as a result of legitimate SNAP purchases, a conclusion can be drawn, through a preponderance of evidence that the "unusual, irregular, and inexplicable" transaction patterns cited in Attachment 1 evidence trafficking as the most likely explanation.

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

During the review period, there were 40 SNAP transactions that met the parameters of this attachment. Based on the results of the contracted store visit, the large transaction amounts appear consistent with the store's inventory which consists of ethnic or specialty foods, in bulk, at seemingly high prices. The SNAP transactions in this Attachment range from 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant, through counsel, contends that the excessively large purchase transactions were due to SNAP households having large families and purchasing food items in bulk.

As Appellant is an ethnic store selling ethnic or specialty foods and meats, in bulk at seemingly high prices, it is more likely than not that the transaction amounts listed in this Attachment were legitimate SNAP purchases. Appellant, through counsel, offered no further explanation for this transaction pattern however, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Therefore, it is determined that

the transactions cited in Attachment 2 of the charge letter do not establish trafficking by a preponderance of the evidence.

Based on the data presented in Attachment 1, and in the absence of sufficient evidence as to the legitimacy of such transactions, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in Attachment 1 of the charge letter evidence trafficking as the most likely explanation. In this case, ownership did not provide sufficient evidence to legitimize Appellant’s transaction data as outlined in the Attachment 1.

The transaction data in Attachment 1 convincingly demonstrate repetitive patterns of unusual, irregular, and inexplicable SNAP activity for this type of firm indicative of trafficking. Once Retailer Operations Division established the convincing case against Appellant, ownership bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. If this is not demonstrated, the case is to be sustained.

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

Retailer Operations Division has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns in one attachment of EBT transaction data and the lack of evidence of customer purchase receipts of the food in inventory to cover Appellant’s reasoning for the SNAP transactions for the review months.

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Therefore, based on this empirical data, and in the absence of evidence for the legitimacy for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the unusual, irregular, and inexplicable transactions and patterns cited in Attachment 1 of the charge letter evidence trafficking as the most likely explanation. While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations determined that Appellant’s contentions did not outweigh the evidence in the record.

The purpose of the administrative review process is to ensure that firms aggrieved by Retailer Operations Division’s adverse actions have the opportunity to have their position fairly considered by an impartial review authority prior to that adverse action becoming final. Appellant has been duly given, and has taken the opportunity to present to USDA through the administrative review process whatever evidence and information it deemed pertinent in support

of its position that Retailer Operations Division's adverse action should be reversed. Therefore, any evidence and information that Appellant presented to Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to Appellant's right to a fair and thorough review.

Ownership has not provided sufficient evidence to rebut the convincing case that Appellant most likely trafficked in SNAP benefits. As such, the SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have trafficked, which is that FNS shall disqualify the firm permanently.

CIVIL MONEY PENALTY

The Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i) even though it was informed of the right to do so in the charge letter dated November 13, 2017. Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program prior to the violations. Therefore, the Retailer Operations Division' decision, not to impose a trafficking CMP in lieu of disqualification, is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Nkem African Caribbean Market Inc. from participation in the SNAP. This data provided considerable evidence that the questionable transactions, in Attachment 1, during the review period had characteristics that are consistent with trafficking in SNAP benefits. Therefore, based on a review of all the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged by Retailer Operations Division. Based on the discussion herein, the determination to impose a permanent disqualification against Nkem African Caribbean Market Inc. is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

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

Monique Brooks
Administrative Review Officer

March 8, 2018