

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

North Hill Asian Mart,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0200835

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that North Hill Asian Mart, (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 September 26, 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

In a letter dated August 23, 2017, 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 during the months of September 2016 through February 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

In a facsimile dated September 11, 2017, the Appellant, through counsel, replied to the charge letter and generally stated that there are records and receipts which clarify the reasons for the suspicion, but these records are not recorded or organized in a way that could be scanned or faxed with explanation. The store has products that sell at even dollar amounts and there is a large volume of different types of rice, which sells for \$35 per bag, that seem to explain the high dollar volume sales in question. Counsel requested additional time to respond to the charge letter due to the language barrier with Appellant. The record reflects that Retailer Operations Division contacted counsel, via telephone conversation, on September 11, 2017, however an extension was not requested. Appellant, through counsel and other representation, provided invoices, via facsimile dated September 15, 2017, and the store's markup information was provided on September 20, 2017.

Retailer Operations Division gave consideration to the Appellant's replies and evidence of the case, and issued a determination letter dated September 26, 2017. The 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 October 10, 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 ...*” (*Emphasis added*)

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 THE CHARGES

The charges on review were based on an analysis of SNAP electronic benefit transfer (EBT) transactions dated during the six month period of September 2016 through February 2017. This involved four patterns of EBT transaction characteristics indicative of trafficking:

1. Unusual number of transactions ending in the same cents value.
2. Multiple transactions were made too rapidly to be credible.
3. Multiple transactions were made from individual benefit accounts in usually short time frames.
4. Excessively large purchase transactions were made from recipient accounts.

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

APPELLANT'S CONTENTIONS

The Appellant, through counsel, 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:

- The records from the suppliers show that the sales from the Asian market are consistent with the amount of product that is supplied to the store for resale as well as the way the product is priced. The suppliers typically charge a flat dollar amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This is the way the products are priced for resale.
- The majority of the market sales and ownerships' livelihood had been generated through the food stamp program and the termination of this program has been devastating to the owner and her family.
- Please review the file and the prior explanation given as well as the attached records.

The Appellant, through counsel, provided an additional 32 purchase invoices. Twelve of those invoices were duplicates and previously reviewed by Retailer Operations Division. Three of those invoices were dated outside of the review period and not considered during this review.

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 authorized the business as a small grocery store on December 23, 2015. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during an October 15, 2016,

store visit to the business conducted by an 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 and one POS device with a small counter area approximately 3.5ft x 2ft partially obstructed by personal items and various food items.
- Estimated to be approximately 800 square feet with very narrow aisles, that were partially blocked, making it difficult to maneuver.
- No shopping baskets or carts available for customers.
- An adding machine but no optical scanners were available at checkout. No specialty registers present.
- 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.
- No unusual pricing structure 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and does not round transaction totals.
- No food stored in an area outside of public view.
- Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
- Store stocks a moderate amount of non-food items such as but not limited to cooking pots and health and beauty aids.
- Store stocks minimal amounts of bread and cereal products, fruit and vegetable products and meat, poultry and fish products. No fresh fruits or produce, no fresh meat or poultry. The contracted store visit reflects that the store was deficient in the dairy products category carrying no products, and in the meats, poultry, and fish category carrying only two varieties.
- No kitchen/prepared food area, no hot food sold and no deli or prepared food section.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.
- Sells bulk bags of rice.
- No fresh meats, no fresh fruits or vegetables and no dairy products.

The 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 the Appellant firm 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 – There were an unusual number of transactions ending in a same cents value.

This attachment lists 113 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits. During the review period, Appellant conducted 750 EBT transactions were conducted during the review period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant, through counsel, contends that the records from the suppliers show that the sales from the Asian Market are consistent with the amount of the product that is supplied to the store for resale as well as the way the product is priced. The suppliers typically charge a flat dollar amount ending 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This is the way the product is priced for resale

With regards to these contentions, when there are a disproportionate amount of transactions ending in same cent value it appears the transactions are contrived and absent any compelling rationale to the contrary it is a strong indicator of trafficking. Especially when item prices end with a standard 5 U.S.C. § 552 (b)(6) & (b)(7)(C) it is implausible that several of these relatively inexpensive items purchased together would routinely total to a purchase amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant's contention of pricing items to resale at the price in which it was purchased from the supplier is plausible however, store visit photographs and documentation did not evidence that all of Appellant's prices ended in 5 U.S.C. § 552 (b)(6) & (b)(7)(C) values. This pricing structure does not explain the transactions that ended in 99 cents and if Appellant priced items to sell at the price of purchase, it is inconceivable that the business would survive as there would be no profit margin.

While some of the transactions in this Attachment may have been for legitimate staple food purchases, particularly those in the lower dollar amounts, there is insufficient evidence that these repeating same cent transactions are legitimate. When many transactions end in a same cents amount, it appears that these transaction amounts were contrived and therefore, in the absence of compelling evidence to the contrary, are suggestive of trafficking. As such, the transactions in Attachment 1 have not been adequately documented as legitimate and therefore do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. Based on the analysis above, it appears that the transactions cited in the charge letter are contrived and therefore, in the absence of plausible evidence to the contrary, are likely the result of trafficking in SNAP benefits.

Attachment 2 – Multiple transactions were made too rapidly to be credible.

This attachment lists 65 sets of transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These types of rapid transactions,

in the amounts indicated, at a firm with only one register and limited counter space are indicative of trafficking in EBT benefits. Retailer Operations considered this to be a strong indicator because the second purchase of items would have to be transported to the limited counter area without shopping carts, keyed at the register, a card swiped, a pin entered, and approval indicated and a receipt printed.

Appellant, through counsel, did not offer, with its review request, any explanation or related evidence in an attempt to clarify or justify the specific transactional behavior noted in the Attachment 2 of the charge letter therefore, based on the analysis above and in the absence of any compelling evidence to the contrary, the irregular and unusual transaction pattern cited in the charge letter is unlikely and a strong indicator of trafficking in SNAP benefits.

Attachment 3 of the Charge Letter - Multiple transactions were made from individual accounts in unusually short timeframes.

During the review period, this attachment lists 60 sets of 133 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). In this Attachment households conducted anywhere from two to four large transactions within a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) period.

It must be noted that SNAP households have no limits on the number of times they may use their SNAP cards or how much eligible food they may purchase. The transactions in this Attachment do not contain the characteristics associated with a recipient purchasing forgotten items a short time after checking out or households returning to purchase a forgotten item or two. It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) period however it is unusual that the second transaction amount would be for more than a nominal amount. The SNAP transactions in this Attachment are not consistent with shopping patterns of someone who may have forgotten an item or two during the first trip nor are they consistent with Appellant's available stock. In fact, the store visit report and photographs document that the Appellant firm was deficient in the dairy products category, carrying no products, and in the meats, poultry, and fish category. This is not consistent with the Appellants argument that it had food inventory which would support average to expensive shopping trips. In fact, the store visit report tends to indicate that the firm may not have been eligible to maintain SNAP authorization on the day of the store visit.

Appellant, through counsel, did not offer, with its review request, any explanation or related evidence in an attempt to clarify or justify the specific transactional behavior noted in the Attachment 3 of the charge letter therefore, based on the analysis above and in the absence of any compelling evidence to the contrary, the irregular and unusual transaction pattern cited in the charge letter is unlikely and a strong indicator

of trafficking in SNAP benefits. In conclusion, it is therefore more likely true than not true that the irregular transactions cited in the charge letter Attachment 3 are due to trafficking in SNAP benefits.

Attachment 4 of the Charge Letter - Excessively large purchase transactions were made from recipient accounts.

This attachment lists 215 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Based on the results of the contracted store visit, the large transaction amounts are not consistent with the store's inventory of low priced foods. The firm does not offer food in bulk or any ethnic or specialty foods that sell for a high price. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant, through counsel, provided, with its response to the charge letter and with its review request, purchase receipts for the review period. There were 12 receipts considered duplicates as they were previously reviewed by Retailer Operations Division and three were dated outside of the review period and considered ineligible for review. All other receipts were considered during this review. Based on an analysis of the eligible receipts and utilizing Appellant's claim of a 15 percent markup, it was determined that Appellant's purchases for the review period were insufficient to substantiate the transactions as cited in the charge letter. Appellant's total SNAP redemptions were 18 percent higher than its eligible food expenses.

Retailer Operations Division compared the Appellant's SNAP transactions with the average small grocery store in Summit County Ohio. The average purchase amount at small grocery stores in Summit County during the review period was \$19.01. Appellant's largest purchase amount, during the review period, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Additionally, Appellant's SNAP redemption was twice that of other small grocery stores in the county.

Retailer Operations Division also conducted an analysis of the shopping habits of three of the households identified in the charge letter. This analysis concluded that these households also shopped at other area grocery stores including full-line supermarkets and superstores that offer a much larger quantity and variety of eligible food items for likely better prices either on the same day or within days of visiting Appellant's firm. This again indicates that lack of access to other stores is not at issue. However, despite this access to large supermarkets and superstores, these households consistently conducted much higher transactions at the Appellant firm than at better stocked supermarkets and superstores in and around the Summit County area of Ohio. This is another strong trafficking indicator.

As an example it does not seem credible that:

- 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

- 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Based on this empirical data, 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 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 Attachments. Retailer Operations Division determined that Appellant’s contentions did not outweigh the evidence that the store was trafficking and concluded, through a preponderance of evidence, that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

The transaction data and overall firm record convincingly demonstrate repetitive patterns of unusual, irregular, and inexplicable SNAP activity for this type of firm indicative of trafficking. Once Retailer Operations Division established a 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 four attachments of EBT transaction data, the inadequacy of the firm’s eligible food stock as observed and recording during the onsite visit to support such large transactions, the lack of evidence of invoices of foods in inventory to cover SNAP redemption totals for the review months, the lack of explanation for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant, and the irregular SNAP transaction data of Appellant as compared to other small grocery stores in the State.

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 the letter of charges 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 Division 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 deems 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.

CIVIL MONEY PENALTY

Appellant was notified in the charge letter dated August 23, 2017, that it had 10 calendar days upon receipt of the charge letter to provide required documentation in order to be considered for the trafficking CMP. Appellant failed to provide Retailer Operations Division with the required documentation to be considered for a trafficking CMP in lieu of disqualification. Therefore, Retailer Operations Division correctly determined that Appellant was not eligible for a trafficking CMP as set forth in the SNAP regulations.

CONCLUSION

Ownership has not provided sufficient evidence to rebut the 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.

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify North Hill Asian Mart from participation in the SNAP. This data provided substantial evidence that the

questionable transactions 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 North Hill Asian Mart 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

December 28, 2017