

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

**Ontario Bakery & Market Inc,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0202936**

**FINAL AGENCY DECISION**

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

**ISSUE**

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

**AUTHORITY**

7 U.S.C. § 2023 and 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**

By Charge letter dated October 17, 2017, Retailer Operations informed the owners that it had compiled evidence that Appellant had violated the SNAP

regulations based on electronic benefit transfer (EBT) transactions that “establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm.” The sanction for trafficking is permanent disqualification. The record shows that Appellant replied to the Charge letter October 23, 2017.

Retailer Operations issued a Determination letter dated November 1, 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. Retailer Operations considered Appellant’s eligibility for a civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. Appellant was not eligible for the CMP because no evidence was submitted timely to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP per the regulations cited.

By letter dated November 9, 2017, one owner appealed Retailer Operations’ determination and requested administrative review. The appeal was granted by letter dated November 15, 2017.

## **STANDARD OF REVIEW**

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

## **CONTROLLING LAW AND REGULATIONS**

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

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

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

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

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

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

## **SUMMARY OF THE CHARGES**

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges were based on an analysis of SNAP EBT transaction data during the period of April 2017 through September 2017. This involved three patterns of EBT transaction characteristics which are indicative of trafficking:

1. There were an unusual number of transactions ending in a same cents value.
2. Multiple purchase transactions were made too rapidly to be credible.
3. Excessively large purchase transactions were made from recipient accounts.

## **APPELLANT’S CONTENTIONS**

The following may represent a brief summary of the contentions in this matter however, in reaching a decision, attention has been given to all contentions presented, including any not specifically or referenced.

- Trafficking did not occur in our establishment. Our business is barely making it. We informed the SNAP investigator that we are

- contemplating discontinuing the business.
- The accusation that we would risk the privilege of being a SNAP retailer to participate in a trafficking scheme insults the obstacles we have travelled to open our business.
  - If you ever examine the total purchase invoices and compare them to the total sales we report, you will see that our profit/percentage markup is within 18% to 26% typical of a bakery/food store. If your suspicions of trafficking were warranted you would see a much higher markup as we wouldn't be able to justify the additional sales through purchase invoices.
  - It seems your computer system takes the guilty until proven innocent approach. There shouldn't be so much reliance on data patterns that can be explained by asking us.
  - We believe the decision was rushed and the unfair conclusion is not based on credible arguments.
  - Your findings are not correct and are based on analytical approach not on facts.
  - You have dismissed a reasonable response. We request a hearing.

## ANALYSIS AND FINDINGS

Retailer Operations presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the Charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant during the review period. As patterns of unusual transactions appear across multiple Attachments the case of trafficking becomes more convincing.

**Attachment 1:** Listed are 263 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. When there are a disproportionate number of transactions that end in same cents values it appears that these transaction amounts are contrived. Therefore, in the absence of any compelling evidence to the contrary, these transactions are indicative of trafficking.

Contentions:

- 98% of the items in my store are non-taxable. Rather than inconvenience customers with change totals I try to keep the majority of the items priced **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.
- The pricing management.

Appellant is typed as a convenience store however, there is a bakery, a full kitchen area, there is interior and exterior dining, and interior and exterior signage promotes hot and cold prepared food menus. Ineligible items include: tobacco products, and health aids. The FNS contractor noted that Appellant did not have an unusual pricing structure, such as items ending in zero cents, and that transaction totals were not routinely rounded up or down at checkout. No change is provided with SNAP

transactions, therefore there is no incentive to price items in a certain way since there is no inconvenience with change.

The responding owner provided no price list of the eligible foods at Appellant. It is not known what is meant by “The pricing management.” The owners have not by a preponderance of the evidence addressed this Attachment as reflective of legitimate SNAP transactions.

**Attachment 2:** Listed are 28 sets of transactions, with the second transaction in each set 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The owner contends:

- A lot of customers are unsure of the value of benefits left on their cards. They ask us to run their SNAP card for their base purchases and depending on how much they have left when we tell them their balance, they buy more items.

The record shows that 25 percent of the flagged transaction sets were conducted by the same SNAP beneficiary. Transaction numbers 739/740, 753/754, 763/764 are each for amounts exceeding 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and do not reflect balance checks. Transaction numbers 747, 749, 757, 771 might have been conducted to assess card balances however, the regulations are clear that purchases are not required for recipients to check their benefit balances. The contention that beneficiaries used the first transaction in a set as a balance inquiry does not apply to 75% of the data sets listed, which were conducted by different households. As such, the owners have not by a preponderance of the evidence demonstrated that these transactions are the result of the exchange of benefits for SNAP eligible foods.

**Attachment 3:** Listed are 245 transactions conducted by 91 different households 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E).

The owner contends:

- In addition to being a bakery and ethnic food retailer, we sell fresh meats. For example, if someone wants a whole lamb we would charge anywhere 5 U.S.C. § 552 (b)(6) & (b)(7)(C) depending on the current market price. We sell lamb by the pound too. If you would like proof we will contact our vendors for invoices/account statements.
- Type and size of families that patronize our establishment provides reasoning for large purchases. Oftentimes their food stamp amount will not survive the full month of funding.
- The nature of our business is bakery mainly non-taxable.
- Sales/revenue that was generated comparing to our expenses.
- It was common for SNAP beneficiaries to spend their benefits and “stock up” during the first week of each month. This is reflected in the fact that 117 of the 245 flagged transactions occurred during the first week of a month.

The record does not support that Appellant sold whole lambs or meat by the pound. The meat seen is in a frozen unit in the kitchen area that was presumably used to prepare hot cooked foods seen on the posted menus. The owners did not provide proof to support their claim of meat sales by means of vendor invoices of stock for the review months. The owners did not provide any evidence to support “sales/revenue that was generated comparing to our expenses.”

The photographs in the record support that Appellant acts as a bakery and takeout/dine-in restaurant. The limited groceries seen are largely behind a service counter with the exception of one standup refrigerator. The evidence more supports that Appellant is primarily a restaurant/bakery than a convenience store. Hot foods are not allowed for purchase with SNAP benefits. Appellant’s inventory of eligible SNAP grocery items is marginal, and the owners did not provide evidence to support their contention of meat sales or sales of eligible items that would likely total the high dollar amounts seen on this Attachment. More than hundred transactions are at or exceed 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The average SNAP transaction amount for convenience stores in Erie County during the review period was \$7.31. 5 U.S.C. § 552 (b)(7)(E).

There are no hearings included in the administrative review process. The regulations removed the hearing requirement in 2003, and the agency does not hold in-person hearings. Administrative review of FNS determinations against SNAP retailers is authorized under Section 14(a)(5) of the Food and Nutrition Act (Act) of 2008. The SNAP regulations at 7 CFR Part 279 have been promulgated pursuant to the Act. The Administrative Review Officer makes a final determination using the process in Section 14(a)(5) of the Act and the SNAP rules at 7 CFR Part 279. If a retailer feels aggrieved by the decision of the review officer, the retailer can appeal the decision to Federal district court.

SNAP authorization is an administrative privilege, granted upon proof of eligibility and continued proof of compliance with the governing laws and regulations. While due process is honored, the agency is not burdened with proving to Appellant’s satisfaction that Retailer Operations has correctly imposed the sanction at issue. Rather it is Appellant’s burden to demonstrate that it has not engaged in SNAP benefit trafficking by presenting a preponderance of evidence of same. An Appellant that seeks to set aside an agency sanction must focus its probative efforts on providing evidence by a preponderance that the transaction activity at issue is in fact not due to SNAP benefit trafficking. Since permanent disqualification is warranted on the first occasion of trafficking, it is Appellant’s burden to raise material issues of fact as to the transactions set forth as suspicious in the Attachments provided with the Charge letter. This burden has not been met.

While some households may have conducted legitimate transactions at Appellant, insufficient evidence was presented to support this argument. The owners provided

no vendor invoices of eligible items acquired to support Appellant's SNAP redemptions. The owners provided no itemized cash register tapes for the review months. No documentation regarding the sale of whole lambs was furnished. No pricing information was advanced. No customer statements were provided to support that the transactions listed were for eligible foods. No business tax returns or state tax filings were advanced, and no banking statements were provided. Thus, the owners have not provided a preponderance of evidence that the transactions on this Attachment are for eligible foods

### **CIVIL MONEY PENALTY**

Retailer Operations determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations. The owners did not submit documentation to prove that Appellant met the trafficking CMP requirements as stipulated in the regulations at 7 CFR Section 278.6(i). These regulations specify the criteria for a firm's eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. The criteria listed are, as a whole, specifically identified as a minimum standard that firms must meet in order to be eligible for such a penalty. Accordingly, Retailer Operations determined that Appellant did not qualify for a civil money penalty in lieu of a permanent disqualification.

### **CONCLUSION**

Retailer Operations' analysis of Appellant's SNAP transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. Based on empirical data and in the absence of a preponderance of compelling evidence of the legitimacy of the transactions on the Attachments cited, by a preponderance of the evidence, it is more likely true than not true that violations did occur as charged by Retailer Operations. Retailer Operations denial of a trafficking CMP was proper per the applicable regulations. Therefore, the decision to impose a permanent disqualification against Appellant is sustained.

### **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 and to Section 279.7 of the regulations (7 CFR § 279.7) with respect to applicable rights to a judicial review of this determination. 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 Appellant's owners 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, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

M. Viens  
Administrative Review Officer

January 3, 2018