

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

**Philly Boys Market and Deli Inc. #2,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0217551**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the permanent disqualification of Philly Boys Market and Deli Inc. #2 (Appellant or Philly Boys) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), 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(a), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

**AUTHORITY**

7 USC § 2021 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 May 21, 2019, the Retailer Operations Division charged 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 2018 through February 2019. 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 Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant replied to the charges by letter on May 28, 2019. Appellant requested documents under the Freedom of Information Act (FOIA). FNS responded to the FOIA request on June 25, 2019. Appellant, through counsel, submitted replies to the charges on August 19 and August 26, 2019, and denied the allegations and explained that the transactions were for eligible food items only.

After considering the retailer's reply and the evidence, the Retailer Operations Division issued a determination letter dated September 23, 2019. The determination letter informed Appellant that it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that Appellant was not eligible for a trafficking CMP because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

By letter postmarked September 27, 2019, Appellant, through counsel, appealed the Retailer Operations Division's determination and requested an administrative review. The administrative review 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 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.

### **CONTROLLING LAW**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) 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 USC § 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 § 271.2 states that the definition of "coupon" includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

7 CFR § 271.2 states, in part, that, 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 § 271.2 defines trafficking, in part, as:

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 § 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, . . .**” (emphasis added)

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.

7 CFR § 278.6(i) states, inter alia:

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.

7 CFR § 278.6(b)(2) states, in part:

(ii) 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 as specified in § 278.6(i), that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). **This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).** [Emphasis added.]

(iii) **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. [Emphasis added.]

## SUMMARY OF THE CHARGES

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from September 2018 through February 2019. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were multiple transactions made from one or more SNAP households within a short timeframe.
- There were multiple transactions made from individual benefit accounts within a set time period.

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

In its September 27, 2019, administrative review request and subsequent correspondence dated November 8, 2019, Appellant, through counsel, provided the following summarized contentions:

- The USDA did not take into consideration that Appellant sells expensive products such as lobster and crab legs that the ethnically diverse neighborhood demands.
- The multiple transactions from one or more SNAP households in a short timeframe is not due to trafficking but rather due to the purchase of grocery food items and then hot prepared food items prepared separately.
- The menu contains "Everyday Family Specials" for amounts of \$36.95, \$49.95, and \$55.99 that contain pizza, buffalo wings, and cheesesteaks.
- The store is located in a neighborhood where everyone walks.
- There is one comparable store but it is not walkable.
- Customers will place orders over the phone and then may call back to order either more groceries or prepared food.
- The transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** which mean customers were spending the minimum required to get free delivery.
- The USDA has failed to take into consideration the demographics of this neighborhood and the number of residents within walking distance.
- Nearly every customer receives SNAP benefits, which is why nearly every transaction is paid with EBT.
- The volume of EBT transactions will be higher at Appellant than down the street, where the neighborhood is wealthier and there are significantly less EBT transactions.
- The government shutdown caused February benefits to be issued in mid-January causing the uptick in spending to occur in mid-January rather than early February.
- Appellant did not buy sell or otherwise effect an exchange of SNAP benefits issues and accessed via EBT cards or cash or consideration other than eligible food.
- The community that surrounds the firm is very poor and very reliant upon Appellant for hot food and groceries and that is why there are so many EBT transactions, not because

of trafficking.

- Appellant requested that the administrative action be stayed pending disposition of this request.
- The community will negatively impacted if the firm does not accept EBT.
- Appellant would need to know the pin of all the cards which could be impossible.
- Appellant requests a CMP if the determination is made that a permanent disqualification is warranted.
- The owner is the only person who operates the EBT machine and works seven days a week from opening to closing.
- The owner has been operating EBT machines since 2015 in strict adherence with USDA's policies and guidelines.
- This is the firm's first sanction due to trafficking.
- The firm and the community is suffering,

In support of its contentions, Appellant provided the following documents in support of its review request:

- The September 23, 2019, determination letter;
- August 19, 2019, reply to the charges;
- Two affidavits of owner;
- FNS June 25, 2019, response to the FOIA request;
- Philly Boy's Menu; and
- Petition for Continuance of EBT benefits.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced.

## ANALYSIS AND FINDINGS

### Store Visit

FNS authorized Philly Boys as a small grocery on June 15, 2015. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a March 1, 2019, store visit 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 firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Philly Boys is approximately 2700 square feet with an additional 2 square feet of additional storage outside of public view.
- There was one checkout space with one cash register and one point-of-sale device.
- There was no optical scanner for the speedy processing of items at checkout.
- There were no shopping baskets or shopping carts for customer use.

- There was no fresh unprocessed meat.
- Fresh produce included heads of lettuce, green peppers, oranges, and lemons.
- Dairy included milk, cheese, and two units of butter.
- Other staple foods available for purchase were eggs, juice, rice, bread, beans, cereal, pasta, and a selection of canned goods.
- There was an extensive hot food menu.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.

The SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. The highest priced items noted were shrimp- \$24.99, crab patties - \$14.99; crab legs - \$10.99, and lobster tails - \$11.99. However, these items were sold on the hot food menu and likely sold hot and prepared; therefore would not be eligible for purpose with SNAP benefits. Given the available inventory as noted above, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors.

### **Charge Letter Attachments**

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.

**Charge Letter Attachment 1: Multiple transactions were made from one or more SNAP households within a short timeframe.** This attachment lists 31 sets of transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits.

Considering the fact that this store does not have checkout counter to place items, just one cash register, one EBT point-of-sale device, and no conveyor belt, and considering the number of items that it would typically take to add up to the dollar amounts found in this attachment, it is unlikely that legitimate transactions could have occurred in such short periods of time.

Appellant explains that the transactions are from customers calling in orders. Some of the short times frames as noted in some of the transaction sets would not allow enough time for a customer to complete the above actions. It's not likely a clerk could process a small transaction and the second transaction in 35 or 60 seconds, even if the orders were called in.

**5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Even if these were phone orders, it seems unlikely that the firm could take a verbal order over the phone of eligible food items and run a manual transactions (typing in each card number) within such a small amount of time.

**5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The explanation for these transactions is not convincing.

**Charge Letter Attachment 2: Multiple transactions were made from individual benefit accounts in unusually short time frames.** This attachment documents 55 sets of transactions conducted by 43 different households **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits that

meet the parameters of this scan. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

Counsel explains that it is not unusual for a household to make a purchase of grocery items and then hot food items. However, it is important to note that hot prepared food items are not eligible for purchase with SNAP benefits. In addition, given that there is only one register it is not clear why the transactions for prepared food items and grocery items would not be rung in together. In addition, only four of the 55 transaction sets occurred **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** possibly on the same visit.

The SNAP transactions noted 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 nature and extent of Appellant's stock and facilities and are therefore indicative of trafficking. Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Appellant multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale. Appellant is not set up to provide for all of one's food needs and lacks an abundant depth and breadth of staple foods. The second and third transactions in each set are too large to consist of forgotten items.

Counsel explains that Appellant the store visit reports shows that the firm sells some expensive food items such as shrimp, crab patties, crab legs, and lobster tails. These items were likely used for the hot prepared menu and not sold fresh or frozen to customers. There were no signs advertising the sale of these items. The available inventory of SNAP-eligible food items at the time of the visit showed stock that is primarily of low dollar value staple foods or convenience foods.

The Retailer Operations Division determined that Appellant's total dollar SNAP volume was **5 U.S.C. § 552 (b)(7)(E)** greater than the average for small groceries in the Franklin County. Similarly, Appellant conducted **5 U.S.C. § 552 (b)(7)(E)** more SNAP transactions than the average for small groceries in the county. The question is what customers would want to buy much from Appellant, a store that has little food variety or quantity, few dairy products, and no fresh unprocessed meat. In fact, on the day of the store visit, Appellant did not meet SNAP authorization criteria because it two few items in the dairy staple food category.

The Retailer Operations Division determined that Appellant conducted more transactions in each ten dollar range **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** than the average for small groceries in the county during the review period. Appellant conducted 1, 068 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The Retailer Operations Division considered this an indicator of trafficking considering. Counsel explained that Appellant's menu contains "Everyday Family Specials" for amounts of \$36.95, \$49.95, and \$55.99 that contain pizza, buffalo wings, and cheesesteaks. However, as indicated previously, these hot food menu items are not eligible for purchase with SNAP benefits.

Appellant, through counsel, reports that the majority of customers are large families without cars and the only comparable store is not walkable. It is true that sometimes a firm may have higher than average SNAP transactions amounts due to the lack of access to other SNAP authorized stores. The Retailer Operations Division determined that within a two-mile radius of Appellant there are 21 other authorized stores including ten combination stores, four small groceries, five medium groceries, and two super markets. Moreover, the Retailer Operations Division examined four households identified in the charge letter to analyze their shopping patterns at Philly Boys compared to their shopping patterns at other SNAP authorized stores. Each of the households shopped at several other authorized stores during the review period. Despite access to better stocked stores, each of the other households conducted excessively large transactions at Philly Boys within a short time of shopping at a supermarket or super store. It is questionable as to why households would conduct large transactions at Appellant, when these households had just visited or planned to visit larger stores with a better selection of fresh meat and produce and likely better prices. The inventory and layout at Philly Boys does not support these transactions.

Appellant has not offered any evidence to show that the transactions listed in Charge Letter Attachment #2 were legitimate purchases of eligible food.

### **Government Shutdown**

Counsel explains that there were more benefits issued to clients in January than normal due to the early issuance of February benefits related to the government shutdown. There is no evidence that the Retailer Operations Division considered Appellant's increased SNAP activity in January as evidence of trafficking.

### **Household Hardship**

Counsel stated that a permanent hardship presents an extreme hardship to the surrounding community. As indicated, the Retailer Operations Division determined that within a two-mile radius of Appellant there are 21 other authorized stores including ten combination stores, four small groceries, five medium groceries, and two super markets. Moreover, where there is a hardship to SNAP households, FNS may impose a hardship CMP on a firm in lieu of a disqualification where there is a lack of authorized stores in the area. However, 7 CFR § 278.6(f)(1) clearly states that "a civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a permanent disqualification." Because the Retailer Operations Division has taken action to permanently disqualify Appellant's firm, a hardship CMP in lieu of disqualification cannot be granted.

### **Appellant Hardship**

Counsel stated that a permanent hardship presents an extreme hardship to Appellant. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To excuse ownership from assessed administrative penalties based



on purported economic hardship to the firm would render virtually meaningless the enforcement 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, Appellant's contention that the firm will incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposition.

### **No previous Violations**

Appellant, through counsel, contends that it has not had any previous violations. Regarding this contention, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

### **Lesser penalty**

Appellant requests a lesser penalty instead of the permanent disqualification. With regards to this contention, neither the Food and Nutrition Act of 2008, as amended, nor the regulations provide for a term disqualification for violations related to trafficking of SNAP benefits. Trafficking is always considered to be the "most serious" of SNAP violations. This is reflected in the Act, which reads, in part, that disqualification shall be "permanent upon ... the first occasion of a disqualification based on ... trafficking ... by a retail food store." In keeping with this legislative mandate, section 278.6(e)(1)(i) of the regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked.

### **Evidence**

The transactions reports are derived from the ALERT system, a computerized fraud detection tool to identify SNAP transactions that form patterns having characteristics indicative of trafficking. However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still conduct an extensive analysis of the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether the questionable transactions were, more likely than not, the result of trafficking. The legality of this method is supported by 7 CFR §278.6(a) which states, inter alia, "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 . . .** ." [Emphasis added.]

The documentation and evidence provided by the Retailer Operations Division was thoroughly examined. From all indications, the Retailer Operations Division obtained the EBT data (provided by ALERT), found it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough investigation before concluding that trafficking was likely occurring.

Appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed and that the transactions detailed in the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. Appellant offered insufficient evidence to prove that the transactions listed in the charge letter were legitimate purchases of eligible food. In the absence of compelling information or documentation weighed in comparison to the evidence provided by the Retailer Operations Division, the evidence weighs in favor of the Retailer Operations Division's determination that SNAP-benefit trafficking substantially produced the transaction activity at issue in the present case.

### **Summary**

In summary, Appellant's layout, business structure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. Therefore, in the absence of evidence to legitimize 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.

### **CIVIL MONEY PENALTY**

Counsel did request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i). However, Appellant did not submit any documentation in support of its request. Counsel reports that the owner is the only employee and the owner is the only person who operates the EBT machine and works seven days of week from opening to closing. The owner has been operating EBT machines since 2015 in strict adherence with USDA's policies and guidelines.

The criteria for a trafficking civil money penalty in lieu of disqualification is defined under 7 CFR §278.6(i) which reads, "In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:

- Criterion 1. The firm shall have developed an effective compliance policy as specified in §278.6(i)(1); and
- Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and
- Criterion 3. The firm had developed and instituted an effective personnel training program as specified in §278.6(i)(2); and

Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations ....”

Even if Appellant was in fact the only employee of the firm, it does not excuse it from documenting its training program. Moreover, if ownership did strictly adhere to SNAP policies and regulations as alleged, then the firm would not be selling hot food items in exchange for SNAP benefits. Therefore, the Retailer Operations Division’s decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

### **CONCLUSION**

The Retailer Operations Division’s analysis of Appellant’s EBT 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. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did occur as charged by the Retailer Operations Division. The determination to impose a permanent disqualification against Appellant is sustained.

The Retailer Operations Division also determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations. Under review, the denial of a trafficking CMP was deemed correct and proper.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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’s owner resides or is 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.

MARY KATE KARAGIORGOS  
Administrative Review Officer

February 26, 2020