

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

Pyramids Tobacco Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0228024

FINAL AGENCY DECISION

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

ISSUE

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

AUTHORITY

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

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified from SNAP based on an analysis of EBT transaction data from September 2019 through February 2020. This involved the following transaction patterns which are common trafficking indicators:

- There were multiple transactions made from the accounts of individual SNAP households within a set time period.
- The firm conducted EBT transactions that were large based on observed store characteristics and recorded food stock.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Pyramids Tobacco Market for SNAP participation on August 26, 2019. In a letter dated March 26, 2020, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred between the months of September 2019 and February 2020. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made and supporting documentation submitted within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In correspondence between March 27, 2020, and April 12, 2020, the Appellant responded to the charge letter by claiming that everyone at the store follows USDA rules and regulations and always will. The Appellant also submitted a number of contentions related to the trafficking charges. For example, the Appellant argued that the store inspection was totally inaccurate because it occurred at a time of high demand due to the COVID-19 pandemic that had affected most retail stores. The Appellant further argued that the store sells expensive, frozen, pre-packaged chicken, which was sold out at the time of the inspection. According to the Appellant, the store is located in a very popular area and is considered the only market in the residential area. The Appellant further stated that many of its customers buy cases of water, juice, noodles, chips, candy, etc., because the store always has hot deals on some products. The Appellant further claimed that some customers buy cases of water or juice with EBT cards and then sell it to people on the street for almost half the price. Finally, the Appellant stated that the store is going through a difficult time due to the pandemic, and customers need to use the store now more than ever because it is the only store in the area and it is safe and convenient for them.

In support of its contentions, the Appellant provided a number of documents, including inventory invoices and receipts from various wholesale vendors; photographs of larger stores with empty shelves due to the pandemic; and photos of the Appellant's inventory, primarily cases of beverages.

After evaluating the Appellant's responses and documentation and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated April 14, 2020. The determination letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but found that a CMP was not appropriate because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked April 22, 2020, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

STANDARD OF REVIEW

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

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

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

...[A] disqualification under subsection (a) shall be...permanent upon...the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards...

7 CFR § 278.6(a) states, in part:

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

7 CFR § 278.6(e)(1)(i) states:

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

7 CFR § 271.2 states, in part:

Trafficking means: The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone...

7 CFR § 271.2 states, in part:

Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption...

7 CFR § 278.6(b)(1) states, in part:

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

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

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

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

7 CFR § 278.6(b)(2)(iii) states:

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

7 CFR § 278.6(i) states, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking ... if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program...

APPELLANT'S CONTENTIONS

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

- Everyone in the store is following USDA rules.
- The time of the inspection was not the right time to evaluate the store because the store was almost empty due to the COVID-19 pandemic. Most other stores were empty just like the Appellant because people were panicking and there was a high demand on groceries. Appellant would like a reassessment of the store for a better evaluation.

In support of its contentions, the Appellant submitted many of the same documents it had submitted before, including an inventory purchase summary from Downey Wholesale, Inc.; 25

pages of inventory purchase information from Restaurant Depot #22; 67 pages of inventory invoices from various wholesale vendors; photographs of larger stores with empty shelves; photos of the Appellant's inventory – mainly beverages – and photos of customers purchasing cases of drinks. New documentation included four additional inventory receipts, another photo of a customer making a large purchase, and three undated videos showing customers making large purchases.

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

ANALYSIS AND FINDINGS

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

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm's EBT transactions, but also information obtained from a March 16, 2020, store visit which was conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report and photographs documented the following store size, description, and characteristics:

- Pyramids Tobacco Market is a small convenience store operating in the city of Compton, Los Angeles County, California.
- The store visit photographs show one cash register and agency records reflect the use of one EBT point-of-sale terminal for SNAP purchases. It appears that the firm does not use an optical scanner to ring up items on the cash register.
- The report indicates that the store has a small number of shopping baskets available for customer use.
- The store's staple food varieties are typical of a convenience store or small corner market, and inventory levels are sufficient for program participation.
- In addition to staple foods, Pyramids Tobacco Market sells a variety of accessory foods, including snack foods, candy, spices, condiments, and carbonated and uncarbonated drinks. The store also sells nonfood items such as lottery tickets, tobacco products, health and beauty products, paper goods, cleaning supplies, and other miscellaneous household merchandise.

- The checkout counter is cluttered with candy and snacks available for purchase. The small checkout area is not suitable for conducting large or rapid transactions as there is little room to place more than one or two items at a time.
- There is no indication from the store visit report that the firm has an unusual pricing structure, such as most items ending in .00. As with most stores, the prices of most items appear to end with a cents-value of 9.
- There is some evidence that the firm sells food items by the case. For instance, in one area of the store, the firm has stacked a large amount of ramen noodle varieties available for purchase by the case, such as a case of Nissin Cup of Noodles for \$19.99; and a case of Nongshim noodles for \$20.99. Top Ramen is also available by the case. The store also sells Arrowhead water by the case for \$9.99. Soda, Gatorade, and other beverages also appear to be available for purchase by the case.
- While some items are available for purchase by the case, the vast majority of food items in the store are typical of a convenience store and appear to sell for \$5.00 or less.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a convenience store or small corner market. It appears clear from the contractor's report that Pyramids Tobacco Market is the kind of store where households normally purchase a limited number of items to supplement their overall dietary needs. There is little indication that SNAP households would be inclined to regularly visit Pyramids Tobacco Market to purchase large quantities of groceries, especially considering the limited overall inventory, the very constricted checkout area, the absence of shopping carts, and the availability of much larger stores in the area, including seven supermarkets and three superstores within a one-mile radius of Pyramids Tobacco Market. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of similar-sized competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: Multiple transactions were made from the accounts of individual SNAP households within a set time period. This attachment lists 19 sets of transactions (45 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E).

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) – an extraordinary amount for a convenience store with no shopping carts and minimal overall inventory. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Such transactions at a small store like Pyramids Tobacco Market are highly irregular and are often an indication of trafficking. As such, these transactions warrant further explanation.

Unfortunately, the Appellant has offered no clear explanation or evidence as to why households would spend large amounts of SNAP benefits in a repetitive manner over such short periods of time. The Appellant did submit inventory invoices, photographs, and videos, but none of this evidence fully explains what took place between SNAP customers and the store clerks at the point of sale. For example, the firm's inventory invoices show a large amount of food purchased, most of which was snack foods and drinks. But such evidence does not indicate that the specific SNAP transactions in question were legitimate purchases of eligible food. Photos and videos show customers making large purchases, but there is no clear indication that these customers

were even paying with SNAP benefits and there is no evidence that the photos or videos were taken during the six-month review period listed in the charge letter.

Credible evidence might have included itemized cash register receipts or other accounting records to show what the customers purchased with their SNAP benefits. Without compelling evidence from the Appellant, it is reasonable for this review to conclude that trafficking was a likely cause of the transaction patterns listed in Attachment 1.

Charge Letter Attachment 2: The store conducted EBT transactions that were large based on observed store characteristics and recorded food stock. This attachment lists 77 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with a convenience store in the state of California. The Retailer Operations Division has determined that during the review period, the average SNAP transaction for a convenience store in California was \$7.25. In Los Angeles County, the average was even lower, at just \$6.99 per transaction. But the average transaction in Attachment 2 is almost 12 times larger than the average purchase amount for this store type.

Given that the Appellant firm sells a variety of staple foods as well as other SNAP-eligible items, including snacks and drinks, and considering that a small amount of inventory is available for purchase by the case, it is possible that there would be an occasional purchase where the transaction amount is high, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As such, it may be that there are some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 2. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from similar-sized competitors in the area. The substantial number of high-dollar transactions in a six-month period calls into question the legitimacy of these transactions.

Attachment 2 lists 19 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) during the review period, including a high of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering how many food items it would typically take to add up 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and considering that the store has a very small checkout area and only a small number of shopping baskets to help a customer transport large amounts of food, this review finds it difficult to believe that every large transaction listed in Attachment 2 was a legitimate purchase of eligible food.

Unfortunately, the Appellant has offered few contentions or documents to help explain these transaction patterns. As noted earlier, the Appellant has argued that some of its customers purchase food items by the case, and has provided evidence in the form of inventory invoices, photographs, and videos. But these documents do not clarify that the specific transactions listed in Attachment 2 were legitimate purchases of eligible food.

This review does not doubt that Pyramids Tobacco Market sells eligible food items and conducts some legitimate SNAP business. But when unusually large transactions form patterns that are substantially different from comparable stores in the area, further evidence from the Appellant is warranted to verify that there is not something more, such as trafficking or other program violations, taking place. In this case, the Appellant's evidence does little to help explain what

occurred between the customers and cashiers at the point of sale. Accordingly, it is the finding of this review, through a preponderance of the evidence, that trafficking was a likely cause of the unusual transaction patterns found in Attachment 2.

In an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that trafficking did not occur. With regard to the transaction patterns listed in the charge letter, the Appellant has not met this standard.

Coronavirus Pandemic

In its response to the charge letter as well as in its request for administrative review, the Appellant has made a number of contentions related to the contractor's store visit that took place on March 16, 2020. The Appellant has argued that the timing of the inspection was inappropriate for evaluating the store because it was almost empty due to the coronavirus pandemic. The Appellant argues that most other stores were just as empty due to panic shopping. To support these contentions, the Appellant submitted nine photographs of larger stores with empty shelves.

With regard to these contentions, this review agrees with the Appellant that the timing of the contractor's store inspection was very poor. COVID-19 was declared a global pandemic on March 11, 2020, and by the time the contractor conducted its inspection five days later, most of the United States was in a groceries and supplies buying frenzy. As such, it would generally make little sense that the Retailer Operations Division would rely on the results of such a store visit. However, it must be noted that the questionable transactions in this case all occurred between the months of September 2019 and February 2020, which is before any large-scale panic buying began. It is further noted that another contractor store visit took place at Pyramids Tobacco Market on August 21, 2019, just nine days before the beginning of the review period. A review of that earlier store visit report shows nearly identical stock and inventory levels as in the March 2020 inspection. Additionally, the contractor that conducted the March 2020 store visit noted in its report that the store was out of stock on certain items, including bread and milk. There is no indication that the Retailer Operations Division ignored these facts or failed to take into consideration the limitations of a store visit that occurred during this unusual time. As such, this review finds that the timing of the store visit did not negatively impact the Appellant in this matter.

Hardship to SNAP Recipients and Appellant

In its original reply to the charge letter, the Appellant argued that the store is going through a difficult time due to the pandemic, and claimed that customers need to use the store now more than ever because it is the only store in the area and it is safe and convenient for them. These contentions imply that both SNAP recipients and the firm will experience some level of hardship if the agency's determination of permanent disqualification is upheld.

With regard to the insinuation that SNAP households will be negatively affected by the firm's disqualification, it is recognized that some degree of inconvenience to SNAP households is likely

whenever a SNAP-authorized store is disqualified and households are forced to use their benefits elsewhere. Regulations at 7 CFR § 278.6(f) do allow, in some circumstances, for a civil money penalty to be imposed in lieu of disqualification when there is an absence of other SNAP-authorized retailers in the area. However, the regulations are clear that a CMP for hardship to SNAP households may not be imposed in lieu of permanent disqualification for trafficking.

As to difficulties the firm might experience if it is disqualified from SNAP, it is recognized that some degree of hardship to a store is a likely consequence whenever a store is disqualified from participation in SNAP; however, there is no provision in the statute or regulations for a waiver or reduction of an administrative penalty on the basis of possible economic or other hardship to either the ownership personally or to the firm itself as a result of such a penalty. As such, hardship to the Appellant cannot be a consideration in this matter.

Civil Money Penalty

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

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a CMP to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate supporting documentation within 10 days of receipt of the charge letter. The case record shows that the Appellant did not request a trafficking CMP when it replied to the charge letter and there is no evidence that the Appellant submitted any documentation that would indicate that the firm had a compliance policy or program of any kind.

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

CONCLUSION

An analysis of the Appellant's EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify Pyramids Tobacco Market from SNAP participation. This data provided sufficient evidence for this review to conclude that the questionable transactions and patterns listed in the charge letter were more likely than not the result of trafficking violations committed by the Appellant. Likewise, the Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

Based on a review of all available information in this case, the decision to impose a permanent disqualification against the Appellant, Pyramids Tobacco Market, under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. If a judicial review is desired, the complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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

JON YORGASON
Administrative Review Officer

June 23, 2020