

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

Salem Market Corporation,

Appellant,

v.

Case Number: C0207662

Retailer Operations Division,

Respondent.

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 Salem Market Corporation (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the 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 Salem Market Corporation.

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 based on an analysis of EBT transaction data from August 2017 through January 2018. 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 majority or all of an individual recipient's SNAP benefits were exhausted in unusually short periods of time.
- Excessively large purchase transactions were made from recipient accounts.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Salem Market Corporation for SNAP participation as a convenience store on April 21, 2016. In a letter dated May 24, 2018, 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 August 2017 and January 2018. 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 within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In a letter dated June 8, 2018, the Appellant, through counsel, responded to the trafficking charges by explaining that in an effort to help some of its repeat, local, and known customers whose needs extended beyond their monthly finances and ability to pay, the Appellant would allow them to purchase items on a credit basis. At the beginning of the following month, the customers would go to the store and settle their accounts. According to the Appellant these transactions were recorded in a "credit book," and upon payment, the previous credit balance sheet would be destroyed. The Appellant determined that since the purchases were now paid in full there was no need to keep the documentation. The Appellant further stated that it never swiped a card for monies not owed in extended credit and did not conduct any transactions without the customer present.

As to the specific allegations detailed in the charge letter, the Appellant owner claimed that he could not recall all of the names of customers to whom credit was extended, as the store has now been sold and records were not retained once past-due balances were paid in full. The owner did recall three names, but could not recall specific amounts, dates, or items purchased.

Finally, the Appellant insisted that at no time did it commit any fraud; every transaction was legitimate. The Appellant has been involved with SNAP for over 10 years and has never had a problem. According to the Appellant, none of the actions taken by the firm were done with ill intent.

In response to the Appellant's claim that it allowed credit accounts at the store, the Retailer Operations Division sent the firm a letter dated June 26, 2018. In this letter, the Appellant was asked to provide documentation to support its claim of credit accounts. The letter stated that the documentation must identify specific accounts along with corresponding dates and amounts. It should be noted that the practice of allowing SNAP households to purchase food items on credit is prohibited by regulation. If a firm is found to have committed credit account violations instead of trafficking, the firm would be subject to a one-year disqualification from SNAP in accordance with regulations at 7 CFR § 278.2(f).

In response to the June 26 letter, the Appellant, through counsel, submitted an e-mail reiterating that credit was extended to some of the firm's more impoverished customers. In addition, the Appellant submitted a handwritten letter from one customer, who indicated that the firm would "let me go until the next day" if she was "short, money wise."

After reviewing the Appellant's responses 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 August 7, 2018. This 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 regulations, but determined that a CMP was not appropriate in this case 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 August 14, 2018, 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, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant stated: "In addition to the already submitted documents, more 'supporting information will be filed in writing at a later date.' Said support will include, but not be limited to additional documentation regarding credit accounts and beneficiary letters and affidavits and evidence demonstrating that my firm has 'established an implemented an effective compliance policy and program to prevent violations of [SNAP].'"

In a letter delivered to Appellant's counsel on August 24, 2018, the administrative review officer informed the Appellant that any additional information or evidence it wished to submit in support of its request for review must be postmarked by September 17, 2108. As of the date of this final decision, no additional information or documentation has been submitted.

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

ANALYSIS AND FINDINGS

The primary 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 during a March 18, 2018, 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:

- Salem Market Corporation is a convenience store, approximately 1,100 square feet in size, operating in the city of Salem, Essex County, Massachusetts.
- At the time of the contractor's visit, the firm did not have any shopping carts or handheld baskets for customer use, which is not unusual for stores of this size. Customers shopping in such stores generally purchase only as much food as they can carry in their arms.
- The store visit photographs show one cash registers for food purchases and agency records reflect the use of one EBT point-of-sale device.
- The report indicates that the firm does not use an optical scanner to process transactions.
- The checkout area consists of a small countertop where items can be placed for purchase. The constricted checkout area is not suitable for conducting large or rapid transactions as there is very little space on the counter to place more than a few items at a time.
- The store's staple food stock is moderate in each of the four staple food categories: dairy; breads/cereals; fruits/vegetables; meat/poultry/fish.
- SNAP-eligible, non-staple accessory food items available at the store include carbonated and uncarbonated drinks, snacks, candy, and condiments. The store also sells ineligible, nonfood items, including tobacco products, personal care items, and other miscellaneous household merchandise. The store also has a large inventory of glass hookah pipes.
- There is no indication from the store visit report that the firm has a special pricing structure. From all indications, most prices appear to end in 9, such as \$1.99, \$2.29, etc.
- According to the store visit report, there were very few expensive food items. The most expensive eligible foods were a 1.5-quart container of ice cream and a 5-pound bag of rice for \$6.99 each. The store did not sell any meat or seafood bundles, fruit or vegetable boxes, or any other bulk items at high prices.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a convenience store, where households normally purchase a limited number of items to complement their overall dietary needs. There was no indication that SNAP households would be inclined to regularly visit Salem Market Corporation to purchase very large quantities of groceries, especially considering the absence of shopping carts and baskets, the constricted checkout area, and the availability of larger SNAP-authorized grocery stores in the vicinity, including a supermarket and two large grocery stores located less than a mile away. 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 nearby, 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 16 sets of transactions (35 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 or baskets and only a moderate supply of staple food inventory. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering the availability of much larger stores in the area, it seems unlikely that SNAP customers would repeatedly visit a convenience store to make such large purchases.

In its original response to the charges, the Appellant argued that Salem Market Corporation had engaged in credit accounts, where it would permit a customer to take food from the store and then pay for it later. Unfortunately, this argument makes little sense when considering the specific transactions listed in Attachment 1. For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). See below:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Which of these transactions, if any, was the credit account payoff? If the first, for 5 U.S.C. § 552 (b)(6) & (b)(7)(C), then why did the customer return to the store for two more large transactions just a short time later? The second and third transactions totaled 5 U.S.C. § 552 (b)(6) & (b)(7)(C), an incredible amount for a typical convenience store. Why would a customer choose to spend 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at such a store when a supermarket with shopping carts and baskets and significantly greater inventory and variety is located just a short distance away? The Appellant's explanations do not answer such questions.

As noted earlier, 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 providing relevant evidence which would support a conclusion that trafficking was not occurring. Because the Appellant has offered little information beyond anecdotes, it is reasonable for this review to conclude that trafficking was a likely cause of the unusual transaction patterns listed in this attachment.

Charge Letter Attachment 2: In a series of transactions, the majority or all of an individual recipient's benefits were exhausted in unusually short periods of time. This attachment lists 31 sets of SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

It is not unusual for violating retailers to conduct trafficking transactions in which a household spends the vast majority of its allotment in a series of transactions over a short period of time. A suspicion of trafficking is reinforced when these balance-depleting purchases occur in small stores such as Salem Market Corporation, where there is minimal overall inventory and a lack of shopping carts or baskets to help facilitate large purchases. It makes little sense that a household would spend almost the entirety of its SNAP allotment in a single transaction or in a series of rapid transactions at this store.

A government report on SNAP shopping patterns indicates that on average, after the first day of benefit issuance, approximately 80 percent of a household's allotment remains unspent. Even after seven days, 40 percent of benefits still remain unspent. It typically takes about two weeks to deplete 80 percent of one's benefits, and three weeks to deplete 90 percent.¹ Depleting a large portion of one's SNAP balance in a very short period of time, leaving little or no benefits for the rest of the month, is inconsistent with normal shopping behavior of SNAP households.

The Appellant has implied that credit accounts are the reason for the unusual transaction patterns listed in the charge letter. Unfortunately, the Appellant has not offered any relevant evidence to show that this is true; neither has it offered other evidence, such as itemized cash register receipts or inventory records to help prove that the transactions were legitimate purchases of eligible food. Without such evidence, it is reasonable for this review to conclude that the transactions in this attachment were likely the result of trafficking violations.

Charge Letter Attachment 3: Excessively large purchase transactions were made from recipient accounts. This attachment lists 162 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These large transactions are not consistent with convenience stores in the state of Massachusetts. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a convenience store in Massachusetts was \$7.45. In Essex County, the average was a bit higher, at \$8.10 per transaction. But the average transaction in Attachment 3 is more than 11 times larger than the average purchase amount for this store type.

Given that the Appellant firm has a moderate inventory of staple foods and other SNAP-eligible items, it is probable 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, there may well be some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 3. However, it must be remembered that Salem Market Corporation is a typical convenience store with limited overall inventory. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from nearby, similar-sized competitors.

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 does not have any shopping carts or baskets, and given the fact that there are much larger grocery stores in the area with substantially greater inventory and variety, including a supermarket, this review finds it unlikely that SNAP households would legitimately choose to spend large portions of their benefit allotments at a small store such as Salem Market Corporation.

As with the previous two attachments, the Appellant has failed to offer any evidence to justify as legitimate the specific transactions listed in the charge letter. Without compelling documentation to prove otherwise, it is reasonable for this review to conclude that the transactions listed in this attachment were likely the result of trafficking as the transactions listed in Attachment 3 are highly unusual in comparison with nearby stores of similar size.

¹ See U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program*, by Laura Castner and Juliette Henke. Project officer: Anita Singh, Alexandria, VA: February 2011.

It is the finding of this review that the attachments furnished with the charge letter adequately identify the irregular patterns of SNAP transactions which indicate that trafficking was likely taking place. The transactions listed in the charge letter are highly unusual and substantially different from comparable stores in the area. Based on these and other factors, such as the store's physical characteristics and inventory, the case of trafficking is convincing.

Credit Accounts

The chief contention offered by the Appellant as an explanation for the unusual transaction patterns is a claim that the firm has a practice of allowing a SNAP customer to shop on credit and then settle its account when the household's benefit allotment has been replenished. According to the Appellant, credit was offered to some of the firm's loyal customers whose needs extended beyond their monthly finances and ability to pay. According to the Appellant these transactions were recorded in some kind of credit ledger, but upon full payment, the balance sheet was destroyed. The Appellant further claims that because the store has now been sold, it cannot recall all of the names of customers to whom credit was extended, including specific amounts, dates, or items purchased.

In support of its argument regarding credit, the Appellant submitted one hand-written letter from a customer who claimed to occasionally shop on credit.

Unfortunately, the Appellant's explanation and evidence is inadequate to prove that trafficking was not occurring. When a retailer claims that credit accounts are a reason for the irregular SNAP transactions and data patterns, FNS requires a level of detail regarding the legitimacy of the claim. This is because retailers have often made false admissions of credit in an attempt to obtain a lesser one-year disqualification penalty after committing more egregious violations such as trafficking. Credit transactions must be accounted for with substantive evidence such as the dates credit was extended, to whom, for what amount, and for what items. Such proof should also correspond with the transactions identified in the letter of charges. Unfortunately, the documentation provided by the Appellant falls far short of these expectations. The handwritten statement does not specify any dates on which food items were obtained on credit, nor does it identify the dates or amounts of payoffs that corresponds to the transactions listed in the charge letter.

The documentation provided by the Appellant is not nearly enough for this review to conclude that the firm was, more likely than not, committing credit account violations rather than trafficking. Based on all information in the case record, it is certainly possible that credit account activity was taking place at the Appellant firm to some degree. But the Appellant's evidence in this case is not adequate enough for this review to eliminate trafficking as the primary reason for the unusual transaction patterns identified in the charge letter.

No Prior Violations

The Appellant contends that it has been involved with SNAP for over 10 years and has never had a problem. Additionally, the Appellant argues that none of the actions taken by the owner were done with ill intent. This contention implies that because the firm does not have a history of

program violations, the permanent disqualification determination should be overturned or reduced.

Unfortunately, this contention does not provide a valid basis for dismissing the charges or for modifying the disqualification penalty. The law states that when serious violations, such as trafficking, occur, permanent disqualification is the required penalty, even on the first occasion, as noted in 7 U.S.C. § 2021(b)(3)(B).

Civil Money Penalty

As noted earlier, 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 training program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a civil money penalty 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 documentation within designated timeframes. The case record shows that the Appellant did not request a civil money penalty when it originally 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 training 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 Salem Market Corporation 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 and evidence in this case, the decision to impose a permanent disqualification against the Appellant, Salem Market Corporation, under the ownership **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.

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

February 25, 2019