

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

**Spunky Canyon Market,**

**Appellant,**

**v.**

**Case Number: C0202995**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the USDA that the record indicates that Spunky Canyon Market, (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the program, as initially imposed by the Retailer Operations Division was appropriate.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant by letter dated November 29, 2017.

**AUTHORITY**

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

**CASE CHRONOLOGY**

By charge letter dated October 25, 2017, Retailer Operations Division informed ownership that Appellant was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 271 – § 278, based on EBT benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm." The letter of charges stated, in relevant part, that “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.”

In a November 6, 2017, telephone conversation with Retailer Operations Division, Appellant requested an extension to reply to the charge letter. In a letter dated November 6, 2017, received on November 9, 2017, Retailer Operations Division granted Appellant an extension to December 11, 2017 in which to respond to the charge letter. Appellant was also informed that the time to request a civil money penalty in lieu of a permanent disqualification and to provide the documentation to support such a request cannot be extended. In a November 22, 2017, telephone conversation with Retailer Operations Division, Appellant requested to reply to the charge letter orally and not in writing as it was difficult to write due to age. Appellant stated that the store does not have the cash register receipts for the review period but honors all EBT cards and processes the transactions for food purchases only. Appellant stated that the store does not traffic cash and does not take EBT for taxable items.

Retailer Operations Division gave consideration to the Appellant's reply and evidence of the case, and issued a determination letter dated November 29, 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. The letter also stated that Retailer Operations Division considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, Retailer Operations Division determined that Appellant was not eligible for the CMP because it failed to submit sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated December 20, 2017, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted.

## **STANDARD OF REVIEW**

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

## **CONTROLLING LAW**

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

7 CFR § 278.6(a) states, *inter alia*, that "FNS may disqualify any authorized retail food store...from further participation in the program if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site

investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system ...”

7 CFR § 278.6(c) reads, in part, “*Review of Evidence*. The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1)...the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS...”

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

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

### **SUMMARY OF CHARGES**

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

1. Multiple transactions were made from individual benefit accounts in usually short time frames.
2. Excessively large purchase transactions were made from recipient accounts.

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

### **APPELLANT’S CONTENTIONS**

The Appellant made the following summarized contentions in its response to the permanent disqualification letter issued by Retailer Operations Division, and its request for administrative review, in relevant part:

1. My location is very rural where some low income families purchase high dollar amounts of food. We are 20 miles plus to the nearest store.
2. I have been with EBT for seven plus years with no violations.

In subsequent correspondence dated January 31, 2018, Appellant provided a letter from the Cardiologist as Attachment 1, a letter from Internal Medicine Kaiser as Attachment 2, Kaiser Notes from emergency room visits for a recent fall as Attachment 3, a list of appointments from the past two years as Attachment 4 and an employee training plan synopsis (training materials not included) as Attachment 5. The preceding may represent a brief summary of Appellant’s

contentions in this matter however, in reaching a decision, full attention has been given to all contentions presented, including any not specifically recapitulated or referenced herein.

## ANALYSIS AND FINDINGS

The FNS originally authorized the business as a convenience store on July 27, 2006. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a July 17, 2017, store visit to the business 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 EBT transactions at Appellant that formed patterns indicative of trafficking. The firm review summary documented the following store size, description, and characteristics:

- One checkout area with two cash registers and one POS device with a small counter area partially obstructed by other smaller items available for sale.
- Estimated to be approximately 1500 square feet with two shopping baskets but no carts available for customers.
- No adding machines or optical scanners were available at checkout. No specialty registers present.
- Store does not operate through a night window or plastic barrier with food stock behind the barrier.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- No unusual pricing structure such as ending most products **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and does not round transaction totals.
- No food stored in an area outside of public view, no storage freezers or coolers and no food stored off site.
- Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
- Store does not take telephone or online orders and does not offer delivery.
- Highest priced eligible food items were Cheese (\$10.99/2.5 lbs.), Chicken (\$9.99/whole 4lb.), Pizza (\$7.99/28 oz.) and Chicken Breast (\$9.99/3 lbs.).
- Store stocks a significant amount of non-food items such as but not limited to paper products, cleaning products, tobacco products, alcohol product, lottery tickets, gasoline, automotive products, health and beauty aids, gift items, and party goods.
- Store stocks minimal amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products. No fresh fruits or produce, no fresh meat or poultry. Most meats are canned, packaged or frozen.
- No kitchen/prepared food area with hot foods sold for onsite consumption.
- No hot food sold but food is sold for on-site consumption with a microwave available for heating.
- A deli or prepared food section with made to order sandwiches. Stock is not used in preparation of food.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.

The second issue for consideration is whether Retailer Operations Division has presented a convincing case that Appellant likely trafficked in SNAP benefits. Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant's store during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

**Attachment 1 of the Charge letter - Multiple transactions were made from individual accounts in unusually short timeframes.**

There were 24 sets of 67 SNAP transactions that met the parameters of this attachment. Multiple transactions conducted by the same household account within a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) period is a method which violating stores use to avoid the detection of single high dollar transactions that cannot be supported by the retailer's inventory and structure. The transaction sets in this Attachment ranged from two to nine transactions in a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) period.

Appellant did not offer, with its review request, any explanation or related evidence in an attempt to clarify or justify the specific transactional behavior noted in Attachment 1 of the charge letter therefore, based on the analysis above and in the absence of any compelling evidence to the contrary, the irregular and unusual transaction pattern cited in the charge letter is unlikely and a strong indicator of trafficking in SNAP benefits.

**Attachment 2 of the Charge letter - Excessively large purchase transactions were made from recipient accounts.**

There were 160 SNAP transactions that met the parameters of this attachment. Based on the results of the contracted store visit, the large transaction amounts are not consistent with the store's inventory of low priced foods. The firm does not offer food in bulk or any ethnic or specialty foods that sell for a high price. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

Appellant contends that its location is rural where some low income families purchase high dollar amounts of food and that it is more than 20 miles from the nearest store. With regard to this contention, Retailer Operations Division conducted an analysis of the shopping habits of three of the households identified in the charge letter. This analysis concluded that these households also shopped at other grocery stores including full-line supermarkets and superstores that offer a much larger quantity and variety of eligible food items for likely better prices either on the same day or within days of visiting Appellant's firm. Additionally, the analysis indicates that these households traveled in upwards of 30 miles to Appellant's store to conduct these SNAP transactions which most times totaled more than transactions at the larger better stocked stores where the households shopped during the review period. This indicates that lack of access to other stores is not at issue and these shopping patterns are indicative of trafficking.

Appellant contends that it has been with EBT for seven years with no violations. With regard to this contention, it is important to note that a record of participation in 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 present serious charge of trafficking. There is no provision in the Act, regulations, or agency policy that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

The transaction data and overall firm record convincingly demonstrate repetitive patterns of unusual, irregular, and inexplicable SNAP activity for this type of firm indicative of trafficking. Once Retailer Operations Division established the convincing case against Appellant, ownership bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. If this is not demonstrated, the case is to be sustained.

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

Retailer Operations Division has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns in two attachments of EBT transaction data, the inadequacy of the firm's eligible food stock as observed and recorded during the onsite visit to support such large transactions, the lack of evidence of invoices of food in inventory to cover Appellant's reasoning for the SNAP transaction totals for the review months, the lack of explanation for customer spending habits given that household shopped at other SNAP authorized stores and traveled long distances to get to Appellant's store, and the irregular SNAP transaction data of Appellant as compared to other convenience stores in the State.

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Therefore, based on this empirical data, and in the absence of evidence for the legitimacy for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the unusual, irregular, and inexplicable transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation. While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations determined that Appellant's contentions did not outweigh the evidence in the record.

The purpose of the administrative review process is to ensure that firms aggrieved by Retailer Operations Division' adverse actions have the opportunity to have their position fairly considered by an impartial review authority prior to that adverse action becoming final. Appellant has been duly given, and has taken the opportunity to present to USDA through the administrative review process whatever evidence and information it deemed pertinent in support

of its position that Retailer Operations Division' adverse action should be reversed. Therefore, any evidence and information that Appellant presented to Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to Appellant's right to a fair and thorough review.

Ownership has not provided sufficient evidence to rebut the convincing case that Appellant most likely trafficked in SNAP benefits. As such, the SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have trafficked, which is that FNS shall disqualify the firm permanently.

### **CIVIL MONEY PENALTY**

The Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i) even though it was informed of the right to do so in the charge letter dated October 25, 2017. Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program prior to the violations. 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**

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Spunky Canyon Market from participation in the SNAP. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Therefore, based on a review of all the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged by Retailer Operations Division. Based on the discussion herein, the determination to impose a permanent disqualification against Spunky Canyon Market is sustained.

### **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

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

Monique Brooks  
Administrative Review Officer

April 10, 2018