

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

Susie Farm Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0197319

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 that a permanent disqualification of Susie Farm Inc. (hereinafter “Susie Farm” or “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 took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of SNAP, when it imposed a permanent disqualification against Susie Farm.

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 June 2016 through November 2016. This involved the following transaction patterns which are common trafficking indicators:

- There were multiple purchase transactions made too rapidly to be credible.
- There were multiple transactions made from individual household benefit accounts within unusually short timeframes.
- 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 Susie Farm for SNAP participation as a medium grocery store on August 5, 2009. In a letter dated March 22, 2017, 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 June 2016 and November 2016. 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 March 28, 2017, the Appellant responded to the charge letter, insisting that the firm was 100 percent innocent of any fraud allegations and stating that it would do everything in its power to provide sufficient evidence to support this claim. Along with an explanation for each charge letter attachment, the Appellant submitted a very large number of documents in an attempt to prove that the transactions listed in the charge letter were legitimate purchases of eligible food. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

After considering the Appellant's response to the trafficking charges as well as the documentation it provided, the Retailer Operations Division determined that the Appellant's explanations and evidence were not sufficient to justify the unusual transaction patterns listed in the charge letter. As a result, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated April 20, 2017. This 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 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 April 27, 2017, 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, *inter alia*:

... 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(c) states, *inter alia*:

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(a) 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, [or] evidence obtained through a transaction report under an electronic benefit transfer system....***
[Emphasis added.]

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, *inter alia*:

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, *inter alia*:

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, *inter alia*:

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(b)(2)(ii) states, *inter alia*:

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, *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... In determining the minimum standards

of eligibility of a firm for a civil money penalty in lieu of 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 the 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...

APPELLANT'S CONTENTIONS

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

- The violations of trafficking are charged or declared without any clear proven descriptions.
- In the Appellant's response to the charges, it "logically and groundedly" described how there was no trafficking occurring on the premises.
- Appellant requests that the review officer intensively go over its original response to the charge letter.
- Appellant "ardently beseeches" USDA to review both the charges and the responses with the firm's owner at the store. Appellant is confident that if the review officer sees the firm's operations in person, he would conclude that no trafficking occurred.
- A conclusion of permanent disqualification is a genuine threat to the survival of Susie Farm. The store owner has run the present store for over 28 years and 90 percent of the firm's products are West Indian and over 80 percent of customers are from the West Indian area. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per month will be gone with the firm's disqualification.

In support of these contentions, the Appellant provided many of the same documents that it had earlier submitted to the Retailer Operations Division, along with several new receipts showing the sale of "baby milk products" from April 1 to April 20, 2017. The Appellant also submitted several statements from its merchant services provider showing the amount of SNAP benefits transacted at the store each month.

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 presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The primary issue for consideration in a case based on questionable 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 questionable 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 January 24, 2017 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:

- Susie Farm is a medium grocery store, roughly 1,200 square feet in size, operating in an urban, commercial area of Brooklyn, New York.
- At the time of the visit, the firm did not have any shopping carts, but did have a number of handheld shopping baskets for customer use.
- The store visit photographs show three cash registers and agency records indicate the use of two EBT point-of-sale devices.
- It appears that the store does not use optical scanners to process transactions.
- The store's staple food stock is plentiful in each of the four staple food categories. The store also sells SNAP-eligible, non-staple accessory food items, such as carbonated and uncarbonated drinks, snacks, and condiments. The firm also sells ineligible nonfood items, such as alcoholic beverages and miscellaneous household merchandise.
- There is no indication anywhere in the store that the firm sells any large packages or bundles of meat or cases of other food items.
- The checkout area consists of three small countertops (each roughly 24 inches by 24 inches) where items can be placed to be rung up. The constricted checkout area is not suitable for conducting large or rapid transactions as there is very little space to place more than a few small items and there is no conveyor belt to expedite the purchase.
- There is no indication from the store visit report that the firm has a special pricing structure, although most items appear to end in 9, such as \$1.29, \$3.49, \$4.99, etc.

The available inventory of SNAP-eligible food items at the time of the visit showed stock that would be similar to other medium-sized grocery stores. Based on the size of the store, the lack of shopping carts, and the available space at the checkout area, transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C) would likely be common at this location. There was no

indication, however, that SNAP households would be inclined to visit the store to purchase very large quantities of grocery items.

SNAP Transaction Analysis

Charge Letter Attachment 1: Multiple purchase transactions were made too rapidly to be credible. This attachment lists 41 sets of transactions (82 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

It is acknowledged that the Appellant store has three cash registers and two EBT point-of-sale (POS) devices. According to the Appellant, the store primarily uses two registers, but will open up the third one when the store is particularly busy. Each set of transactions in this attachment corresponds to a single POS device. 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

The Appellant has argued that what actually happens is the cashiers will often use multiple cash registers but the same POS device. For example, while a customer is being rung up on cash register A, a separate customer is being rung up on cash register B. The transactions are then run through the POS device, one immediately following the other. The Appellant notes that almost 80 percent of the transactions listed in the charge letter were run through one particular POS terminal.

The Appellant also submits that non-EBT transactions are completed in a similar manner. The Appellant submitted several credit card receipts from the same terminal to show that non-EBT purchases also occur very quickly.

With regard to these arguments, this review concedes that it is possible, even likely, that multiple cash registers could have been used simultaneously, followed by a single POS device being utilized, one transaction right after another. Accordingly, the charge of trafficking based on the transactions listed in Attachment 1 is dismissed.

Charge Letter Attachment 2: Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment lists 89 sets of transactions (206 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

The Appellant has argued that customers tend to make multiple trips to the store to purchase items that they may have forgotten on their first visit or to simply obtain additional food. The Appellant contends that it is easier for local residents to make repeat visits to Susie Farm than to drive a long distance to purchase the items that they need. Finally, the Appellant argues that it cannot control how SNAP customers purchase their groceries.

With regard to these arguments, it is true that SNAP regulations do not govern or mandate how a SNAP household spends its benefit allotment, including how many times a household may use its EBT card at a particular location or how large a transaction can be. However, the transactions

noted in Attachment 2 are questionable not because they exceed any limits for use, but because they display patterns of use that are inconsistent with the store's documented physical characteristics and food inventory. It should be further noted that the transactions identified in Attachment 2 are not marginally abnormal, but decidedly so, especially in comparison with other nearby SNAP-authorized stores. This review does not contend that repetitive EBT transactions are overtly suspicious when they occur on an occasional or intermittent basis, but when such transactions form questionable patterns on a consistent basis over a substantial period of time, such activity is considered highly irregular, and a firm's intent to comply with program regulations is called into question.

What is particularly unusual about the transactions in Attachment 2 is the size of the transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Similar transactions are scattered throughout Attachment 2. Such large, repetitive transactions in short periods of time are highly unusual and give a very strong indication that violations of some kind were occurring at the Appellant store.

Given the common practice of violating retailers breaking up large, suspicious transactions into multiple, somewhat smaller transactions to avoid detection, a firm's explanation for why these repetitive SNAP transactions are occurring should be both rational and compelling. The Appellant's contentions in this regard are neither.

Charge Letter Attachment 3: 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 151 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

The Appellant has argued that its customers purchase large amounts of Enfamil infant formula, which is priced at \$5.79 for ready-to-drink liquid or \$17.99 for a 12.5-ounce can of powder. The topic of infant formula will be addressed below.

Charge Letter Attachment 4: Excessively large purchase transactions were made from recipient accounts. This attachment lists 376 SNAP transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with a medium grocery store in the state of New York. The Retailer Operations Division has determined that during the review period, the average SNAP purchase amount for a medium grocery store in New York was \$15.56. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Given that the Appellant firm does sell a large amount of staple food as well as some eligible accessory food, such as soft drinks and snacks, 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). However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar-sized competitors, especially considering the fact that Susie Farm has no shopping carts. Because a hand-held shopping basket is the only method

available for carrying food around the store, a customer is limited to what it can fit in the basket. It would be very unusual for a person to fit several hundred dollars' worth of food in a single hand-held basket or even two baskets. The substantial number of high-dollar purchases in a six-month period calls into question the legitimacy of these transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Based on the characteristics of the store it is simply not credible that the Appellant would so frequently conduct transactions that more closely resemble those of a supermarket or superstore. In reviewing the contractor's store visit photos and report, it is difficult to comprehend what, other than trafficking, would lure a household to spend large amounts of SNAP benefits in a medium-sized grocery store with no shopping carts rather than going to a nearby supermarket or superstore where prices are likely lower, where inventory is significantly larger, and where shopping carts or baskets would help facilitate the purchase of large numbers of items.

It is also notable that there are many transactions with repetitive purchase amounts.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). As with Attachment 3, the Appellant has argued that its customers purchase large amounts of infant formula, and such purchases account for many of the large transactions listed in Attachment 4. The topic of infant formula will be addressed in detail below, but suffice it to say that this review is not convinced that extreme purchasing of infant formula is a legitimate argument for the transactions listed in this attachment.

Stores caught in trafficking violations, both during onsite investigations and in EBT analysis cases, consistently display particular characteristics or patterns. These patterns often include frequent, large transactions that cannot be supported by the retailer's inventory, store type, and structure. It is the conclusion of this review that Susie Farm, with its lack of shopping carts and its constricted checkout area cannot support the large numbers of high-dollar transactions identified in Attachment 4. Therefore, the most logical explanation for such repetitive transactions is trafficking.

Based on the above analysis, it is the determination of this review that the Retailer Operations Division has satisfactorily demonstrated that Susie Farm likely trafficked in SNAP benefits. Similarly, the Appellant has failed to sufficiently rebut such a claim. The attachments furnished with the charge letter adequately identify the irregular patterns of SNAP transactions which indicate that trafficking was likely taking place at the firm during the review period. Conversely, the Appellant has failed to provide a rational explanation as to why such patterns might exist. As there are multiple unexplained patterns of irregular transactions, the case of trafficking is convincing.

Infant Formula

The vast majority of the Appellant's contentions and its supporting evidence appear to be centered on the claim that local households purchase very large amounts of infant formula, especially the 12.5-ounce cans of Enfamil formula at \$17.99 each. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**

The Appellant has provided a large number of cash register receipts showing repetitive entries of \$17.99. The cash register receipts do not actually list the names of the items purchased, only the amount. The Appellant has apparently gone back through its receipts and has identified several large transactions and has pointed to these transactions as purchases of infant formula.

The Appellant also provided an undated photograph of a small shelving unit located behind the checkout counter. The two shelves contain several cans of powdered formula as well as bottles of ready-to-drink formula. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Among the many food items on each inventory sheet is a listing of Enfamil infant formula. Such inventory purchases by a WIC-authorized store make sense, since infant formula is part of the WIC food package for eligible mothers with infants.

There are no inventory purchase records of infant formula for Susie Farm, which is not authorized to accept WIC vouchers. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

There are several reasons why this review finds the Appellant's documentation and explanations regarding infant formula to be very problematic.

First, according to the contractor's store visit record, the only storage area at Susie Farm is a small walk-in cooler. At the time of the visit, there were no boxes or cases of formula in the storage area. As best as could be determined, the only formula in the store was on the two small shelves behind the checkout counter where only a cashier had access. This strongly suggests that the firm does not sell hundreds of cans of formula as the "transfer sheets" imply.

Second, if it was truly normal practice for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to transfer some of its grocery inventory to Susie Farm, it would stand to reason that it would be a much more varied assortment of groceries than the 10 or so items (besides formula) listed on the transfer sheets. The fact that infant formula was always one of the items transferred gives a strong appearance that the transfer sheets may have been fabricated to give an impression that Susie Farm sells much more formula than it actually does.

Third, the Appellant provided 12 videos of checkout counter activity during the month of March 2017. In most cases, evidence that is dated after the review period is considered inconsequential and not relevant to the case. However, it was startling to discover that in more than two hours of video footage over a several day period, not a single can of infant formula was purchased. This is known because at no point during the filming did the cashier reach back and grab a can of formula for a customer, let alone six or 12 or 18. The stack of formula cans remained exactly the same from the beginning of the footage to the end. Of course, this review does not have footage of every moment during those few days in March, but the footage implies that infant formula was not the frequent seller that the Appellant suggests.

Fourth, the likelihood that SNAP recipients would use their Program benefits to buy infant formula is very low. The vast majority of households that participate in SNAP and contain infants and children under the age of five are eligible for participation in WIC. As a result, most of the items contained in the WIC food package, including infant formula, are ordinarily purchased with WIC vouchers rather than SNAP benefits. The likelihood that a SNAP household would

legitimately use its benefits to purchase many (sometimes a dozen or more) cans of formula is exceptionally low. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Fifth, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This review also finds inconsistency in the fact that the Appellant offered no credit or debit card transaction receipts to show that non-SNAP households were also purchasing large amounts of formula.

In short, the huge amount of baby formula (and often nothing else) supposedly being purchased at Susie Farm by SNAP recipients is extraordinarily unusual and very unlikely. Because Susie Farm is not authorized to accept WIC, there is very little reason for the firm to sell formula in the vast quantities claimed by the Appellant. This review finds it much more likely that the firm was engaged in trafficking.

It should also be noted that this review is well aware of scams involving SNAP benefits and infant formula in which SNAP households purchase large amounts of formula from authorized stores and then re-sell it for cash or consideration other than eligible food. In accordance with 7 CFR § 271.2, such schemes are forms of trafficking, and any recipient or retailer involved in such activity, whether directly or indirectly, or in complicity or collusion with others is guilty of trafficking.

Charges Based on EBT Data

The Appellant has argued that the violations of trafficking are charged or declared without any clear proven descriptions.

With regard to this contention, this review acknowledges that a conclusion of trafficking cannot be drawn from EBT data alone, nor would it be possible to do so in a case based primarily on inconsistent redemption data or transaction data under an EBT system. It is noted that FNS employs a computerized fraud detection tool to identify EBT 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 analyze the transaction data and patterns with other factors, such as observations from a store visit, an analysis of customer shopping behavior, and a comparison with similar stores in the area, and then render a determination as to whether or not the questionable transactions were, more likely than not, the result of trafficking.

The legality of this method is identified in 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, [or] evidence obtained through a transaction report under an electronic benefit transfer system” [Emphasis added.]

Prior to a disqualification determination, the accused firm is given an opportunity to reply to the charges and provide any information it deems appropriate in justifying as legitimate the transaction activity detailed in the charge letter.

It is the determination of this review that the decision made by the Retailer Operations Division was neither arbitrary nor unsubstantiated. As noted earlier, the attachments furnished with the charge letter adequately identify the irregular patterns of SNAP transactions which indicate that trafficking was likely taking place at the firm during the review period. Conversely, the Appellant has failed to provide a rational explanation as to why such patterns might exist. As such, the Appellant's contention regarding the agency's use of EBT data provides no basis for dismissing the charges or for mitigating the penalty imposed.

Request for an In-Person Review

The Appellant has requested that the administrative review officer visit the store in person and review the trafficking charges and the Appellant's response to the charges with the store owner at that time. The Appellant is confident that if the review officer sees the firm's operations first-hand, a conclusion would be made that no trafficking has occurred.

With regard to this request, it is noted that in September 2003, revisions to parts 278 and 279 of the SNAP Regulations eliminated in-person hearings as part of the administrative review process. In general, administrative reviews conducted in accordance with 7 CFR § 279 are done in writing. Neither the Food and Nutrition Act of 2008, as amended, nor Department regulations contemplate formal discovery procedures or an in-person hearing as part of the administrative review process. However, due process rights are protected by the provision within the Act which provides for judicial review. Once an administrative review decision has been made, if the Appellant is dissatisfied with the determination, 7 U.S.C. § 2023 provides for the right to a judicial review and a trial de novo.

In this case, the Appellant was given ample opportunity to provide any written evidence or documentation in support of its positions, and the Appellant has taken advantage of this opportunity by providing a large volume of documentation. The final decision in this case is based on all information and evidence available to the review officer.

Hardship to Appellant and SNAP Recipients

The Appellant has stated that a conclusion of permanent disqualification would be a genuine threat to the survival of Susie Farm. The Appellant further claims that 90 percent of the firm's inventory is merchandise from the West Indies and over 80 percent of its customers are from the West Indian area.

With regard to the implication that the community would experience hardship if the firm was disqualified, it is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and a household is forced to use its 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 agency records reflect many comparable or larger SNAP-authorized stores located within a half-mile radius of the Appellant firm. The regulations are also clear that a civil money penalty for hardship to SNAP households may not be imposed in lieu of permanent disqualification for trafficking.

As for the assertion that the firm would suffer financially if the disqualification were to be upheld, Federal statute at 7 U.S.C. § 2021(b)(3)(B) makes it clear that disqualification for trafficking shall be permanent, even on the first occasion. It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty.

To allow store ownership to be excused from being assessed administrative penalties based on a purported economic hardship to the store's ownership or to the firm itself would render virtually meaningless the 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, the Appellant's implications that the community will be adversely affected and that the firm may incur economic hardship based on the assessment of a disqualification do not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Civil Money Penalty

As noted earlier, the Retailer Operations Division determined that the firm was not eligible for a civil money penalty in lieu of permanent disqualification pursuant to 7 CFR § 278.6(i) because it did not submit sufficient evidence to demonstrate that the firm 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 civil money penalty to be considered, a firm must not only notify FNS that it desires the agency to consider a CMP in lieu of permanent disqualification, but the firm must also submit appropriate documentation within designated timeframes. Based on a review of the case record, there is no evidence that the Appellant requested a CMP in lieu of disqualification when it responded to the charge letter. As best as can be determined, the Appellant also made no mention of a trafficking CMP nor submitted any documentation to support its eligibility of a CMP in any portion of its request for administrative review. Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii), the Appellant is not eligible for a civil money penalty in lieu of permanent disqualification for trafficking.

CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Susie Farm from SNAP participation. As noted earlier, the trafficking charge based on Attachment 1 is dismissed. However, the data in Attachments 2, 3 and 4 provided sufficient evidence that the questionable transactions during the review period had characteristics that were consistent with trafficking in SNAP benefits. Government analyses of stores caught in trafficking violations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges.

In the absence of any reasonable explanation for such transaction patterns, a conclusion can be drawn through a preponderance of the evidence that the "unusual, irregular, and inexplicable" transactions and patterns cited in the charge letter point to trafficking as the most likely explanation. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that trafficking violations did occur as determined by the Retailer Operations Division. As such, the decision to impose a permanent disqualification against the Appellant, Susie Farm, under the ownership of Shee Chun Lee, 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

November 7, 2017