

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

**Tony's Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0217925**

**FINAL AGENCY DECISION**

The record supports that Tony's Market (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). It is the decision of the USDA that there is sufficient evidence to support that the permanent disqualification of Appellant from participation as an authorized retail food store in the Program, as imposed by the Retailer Operations Division, (Retailer Operations) was appropriate.

**ISSUE**

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

**AUTHORITY**

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7 may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

**CASE CHRONOLOGY**

By Charge letter dated June 19, 2019, Retailer Operations informed the owner that it had compiled evidence that Appellant had violated the SNAP regulations based on electronic benefit transfer (EBT) transactions that established clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for the firm type. The sanction for trafficking is permanent

disqualification. The owner, via counsel, responded to the Charge letter with information dated July 1, 2019.

Retailer Operations issued a Determination letter dated August 21, 2019. This letter informed Appellant that it was permanently disqualified as a retail food store in accordance with Sections 278.6(c) and 278.6(e)(1) of the regulations. Retailer Operations considered Appellant's eligibility for a civil money penalty (CMP) according to Section 278.6(i) of the regulations, and found it was not eligible because insufficient evidence was submitted timely to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program to prevent violations.

By letter dated August 30, 2019, counsel appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated October 11, 2019. Counsel sent this office an email dated October 25, 2019, requesting an extension to provide information. This office replied by email dated October 25, 2019, granting an extension to November 7, 2019. On November 8, 2019, this office noticed counsel that no further information had been provided, and that the review would proceed.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant 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 credible, relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true.

### **CONTROLLING LAW AND REGULATIONS**

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

7 CFR § 278.6(e)(1) states: "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: "Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food products prepared for immediate consumption."

7 CFR § 278.6(a) states: "FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification

shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system.”

7 CFR § 278.6(b)(2)(ii) states: “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(i) states: “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.”

### **SUMMARY OF THE CHARGES**

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges were based on an analysis of SNAP transaction data during the period of November 2018 through April 2019. The patterns of transaction characteristics indicative of trafficking are:

1. Multiple transactions were made from individual benefit accounts within a set time period.
2. The store conducted EBT transactions that are large based on the observed store characteristics and recorded food stock.

### **APPELLANT’S CONTENTIONS**

In reaching a decision, consideration has been given to all contentions, including any not specifically referenced.

- After examination of the Store’s records, it is our position that the Store did not engage in Trafficking as defined in 7 CFR § 271.2 of the regulations. The Store contests this finding and offers the documents, as conclusive evidence that no violation of SNAP regulations occurred, nor continue to occur at the Store.
- The Store requests a CMP in lieu of any period of disqualification.

Counsel advanced: Exhibit A - a statement from the owner; Exhibit B - store photographs; Exhibit C - an owner statement; Exhibit D - owner’s statement; Exhibit E - photographs of the compliance policy; and Exhibit F - employee statements of training.

## ANALYSIS AND FINDINGS

Retailer Operations presented a case that Appellant trafficked 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 during the review period. As patterns of unusual transactions appear across multiple Attachments the case of trafficking becomes more convincing.

**Attachment 1:** Listed are 57 transactions in 21 sets conducted by 16 unique households (HHs). Multiple transactions within a set time period are a method stores use to avoid high dollar transactions, and are indicative of trafficking.

### Contentions:

- When viewed as a whole, the evidence clearly demonstrates that the Store did not engage in benefit trafficking. It is a combination of the Store's pricing scheme and the behavior of its customer base, coupled with the desire to provide fast and efficient service, which results in the inconsistencies and caused the system to flag the Store for trafficking. The USDA should reverse its initial findings, and clear the Market of any alleged impropriety.
- USDA contends that the SNAP transactions occurred in too short a time frame and thus indicate trafficking, something that couldn't be further from the truth. In actuality, many of the customers are part of a large family who lives in the surrounding community. Since many of the customers live around the Store, they will often visit multiple times a day and make multiple purchases on any given day.
- The Store only has one EBT processing machine, which causes a backup of customers wanting to complete their purchase. When a line of customers waiting to pay for their products forms during a busy period of any given day, the staff at the Store will do their best to ensure prompt service, getting the customers out the door as soon as they can. So you have customers' cards being swiped in somewhat rapid succession, leading to what caused the system to be notified. However, this has absolutely nothing to do with trafficking and is solely the result of normal business practices.
- This practice of attempting to process many customers' cards in a short period of time should not be considered evidence of trafficking, as this practice would not raise any issues with respect to any major convenience or grocery market, and thus should not count against the Store.
- Customers party on birthday, weekends or other events. They visit often bearing the EBT cards and constantly making random purchases. They are a big family and different family members do come often to make purchases. We have one machine and we are constantly busy so people are waiting and we need to swipe the card often.
- We cater to most of the community who do not have transportation which makes our store the preferred store for daily and personal household needs. Most of the customers are foot traffic and absolutely no mean of transportation to reach to go to the bigger stores with large household members including kids. Being 50+ years old store, many people come with their kids and tell them that they used to come with their parents when they were kids. Many times they inform us that this was the only place to hang out, meet and gather their

friends, take a break from their crowded homes, and by bringing their kids at this store gives them pleasure.

- Sometimes kids insist their parents and they visit the store five six times in the same evening, which gives us the joy to see the example of good parenting. This store provide safe neighborhood for kids to visit with or without adults. We have earned mutual respect of kids, adults, parents those who happened to be the customers of this store.

FNS made a change in the store type of appellant from a medium grocery to a convenience store late in the review period. Much of the stock seen in the onsite FNS photos appears to be accessory foods such as snacks and beverages. The owner's 2018 reauthorization application shows that the owner estimated that 20% of total gross retail sales were in accessory foods, while 18% were in staple foods. The application shows that 31% of the store's retail sales were for alcohol, and lottery, tobacco, and other non-food items comprised 31% of the store's stated sales. The evidence under review supports that Appellant is a convenience store. The highest priced item recorded by FNS during the onsite store visit was a 16 oz. container of honey for \$11.99. Retailer Operations determined that Appellant had more sets of transactions flagged on this Attachment's parameters than a small grocery store located less than a mile away from Appellant. Appellant had 21 flagged data sets, while the other small grocery had just two data sets flagged for the same timeframe. Thus, Appellant's activity was unusual and suspicious.

During the review months, Appellant had 42% higher SNAP dollar volume than medium groceries in the State, and 32% higher SNAP dollar volume than medium groceries in Los Angeles County. The store's average SNAP transaction amount was 5.6% higher than medium groceries in LA County. Appellant had 5 U.S.C. § 552 (b)(7)(E) higher SNAP dollar volume than convenience stores in the state, and 5 U.S.C. § 552 (b)(7)(E) higher SNAP volume than convenience stores in Los Angeles County. The store's average SNAP transaction amount was 5 U.S.C. § 552 (b)(7)(E) higher than convenience stores in LA County. Appellant had 5 U.S.C. § 552 (b)(7)(E) higher SNAP dollar volume than small groceries in California, and 5 U.S.C. § 552 (b)(7)(E) higher SNAP dollar volume than small groceries in Los Angeles County. The store's average SNAP transaction amount was 37% higher than small groceries in LA County. This is irregular.

Counsel argues that payment by card typically takes under one minute to complete. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Retailer Operations found the pattern of transaction sets unreasonable based on the store's limited eligible food stock and transaction amounts, more so than the speed at which the store clerks were able to process the transaction sets as described by the owner. Retailer Operations determined that Appellant's stock had few perishable foods and only a limited variety of canned and packaged eligible food items. Therefore, Retailer Operations found that it was not credible that members from the same household would make multiple large SNAP dollar transactions within the timeframes recorded on this Attachment.

Counsel referred to the store's pricing scheme, but no pricing information for eligible food inventory was advanced. Furthermore, the firm did not submit receipts and invoices to demonstrate that it purchased enough eligible food stock to cover the SNAP dollar redemptions during the review period. Retailer Operations noted that although the photos of the store

submitted by the owner showed some additional store stock as compared to the FNS store visit photos, the limited variety of staple foods and accessory food items appeared consistent.

No customer statements were advanced to support the statements that large families shop at the store, have no transportation, go to the store multiple times a day, or that the transactions listed are for eligible foods. No itemized cash register tapes were provided that list eligible foods sold at Appellant to SNAP beneficiaries. No federal or state business tax records were advanced. No business banking records were provided. It is Appellant's burden to provide credible, relevant evidence to rebut the trafficking charges. That burden has not been met.

**Attachment 2:** Listed are 154 transactions conducted by 95 unique HHs, that are large based on the observed store characteristics and recorded food stock. The Attachment lists amounts that exceed the average transaction amount for the same store type in the same state by three times or more. The data shows that 63 percent of the households flagged on this Attachment conducted a SNAP transaction(s) at a supermarket, or super store within one day of making a transaction at Appellant. Appellant had many more flags on this Attachment as compared to one nearby small grocery which had 27 transactions flagged for the same time period. The comparison store appeared to have more staple foods, including fresh meat and poultry and fresh produce than Appellant. Nevertheless, Retailer Operations determined that Appellant's SNAP dollar volume was 5 U.S.C. § 552 (b)(7)(E) higher than the comparison store, the total SNAP purchase count was 5 U.S.C. § 552 (b)(7)(E) more than the comparison store, and the average SNAP transaction dollar amount was 23% higher. Retailer Operations found that this data was indicative of trafficking.

#### Contentions:

- A review of the pertinent case law and evidence presented demonstrates that the Store engages in a lawful pricing scheme, consistent with other markets and stores within the confines of the Los Angeles metro area market.
- The Store regularly services SNAP customers who spend upwards of \$100, if not more. These purchasing patterns by their customers are further evidence that the Store has not engaged in any form of trafficking. The regulations do not prohibit a firm from engaging in a high dollar value pricing scheme.
- The SNAP regulations do not prohibit a firm from changing large dollar amounts, see *Fells v. United States*, No. 08- C-782, 2010 U.S. Dist. LEXIS 4806, (E.D. Wis. Jan. 5, 2010).
- The reason the system became activated is due to the practices of the Store's customer base. The customers will routinely purchase large quantities of candy, soda, juice, and other party/picnic items, which the Store specializes in stocking. This, along with large bags of rice and other canned goods, is what comprises the alleged high-value transactions.
- The alleged high-value transactions are not only due to regular festivities being held by its customer base, but also that most of its customer base does not have regular access to a vehicle. When a customer does gain access to a vehicle, they often buy in bulk, stocking up on canned goods, juices, cases of water, and other grocery items. The complained of transactions are not the product of trafficking, but rather that of a lawful pricing scheme.
- High value transactions are due to parties these people hold at their place. They plan to save money on EBT for special dates to buy in bulk. Most of the neighborhood people do

not have cars to go to the big store for their groceries so they make big purchases at this store.

Appellant, a convenience store, sells nonfood, ineligible items including: lottery tickets, tobacco products, alcohol, automobile products, health and beauty aids, paper goods, cleaning products, gift items, party goods, and housewares. The check-out counter space in is narrow and not long. The store visit report shows Appellant had no shopping carts and only six handheld baskets. Based on the store visit report, Retailer Operations found that the store did not offer specialty food items, or meat or bulk food bundles that would support high dollar SNAP transactions. The data shows that within two days of a transaction(s) at Appellant, 74% of the households listed on the Attachment made a transaction(s) at a super store or supermarket.

The data shows there are 13 authorized store located within a one mile radius of Appellant including two supermarkets and a super store. Retailer Operations determined that if households could make large dollar transactions such as #58 and #59, at Appellant, with or without a vehicle, they could obtain the same groceries from a supermarket or super store located within proximity from Appellant. Retailer Operations conducted a review of several HHs' shopping patterns at Appellant. These show that indeed households did shop at supermarkets and super stores on the same date or within a day or two after conducting multiple and some larger SNAP transaction totals at Appellant. Some of the larger stores were at a distance from Appellant, supporting that the HHs had transportation options to get to other authorized retailers with greater staple food stock, with better or comparable costs.

As to the court case cited by counsel, the administrative review process should determine whether FNS followed the Food and Nutrition Act and the regulations issued under the Act when it took action against the retailer. The administrative review officer is not responsible for determining whether any legal case cited by counsel applies to Appellant's situation. If the final agency decision is appealed to the federal district court, the judge is responsible for determining whether case law cited by counsel is on point and applicable to Appellant's case.

While some households may have conducted legitimate SNAP transactions at Appellant, insufficient evidence was presented to support this argument. No vendor invoices of eligible food items acquired in inventory were advanced to support that Appellant had sufficient foods to cover its SNAP redemptions for the period. The owner provided no itemized cash register tapes for the review months depicting sales of eligible items to SNAP recipients. No pricing information for eligible items was advanced, nor was a pricing scheme detailed. No beneficiary statements were provided to support the alleged shopping behaviors of recipients at Appellant. No federal business tax returns or state tax filings were provided, and no business banking statements were submitted. Thus, the owner has not provided a preponderance of evidence that the transactions on the Attachment patterns are for eligible foods rather than the result of trafficking.

#### **CIVIL MONEY PENALTY**

The regulations at 7 CFR Section 278.6(i) specify the criteria for a firm's eligibility for a CMP in lieu of permanent disqualification for trafficking. The four criteria listed at the cited regulation are, as a whole, specifically identified as a minimum standard that firms must meet in order to be eligible for CMP consideration. Given these considerations, it is clear that the statute and the regulation allow no flexibility below the level of this stated standard.

Contentions:

- As an owner I always make sure that the staff is fully aware of the store's compliance policy. The compliance and training programs have been in place since the day the store opened.
- Store ownership and management does not and would never condone any unethical and unlawful behavior by its employees. Store ownership and management would never condone the Market profiting off any unlawful actions by its employees.
- The only employee I have is my mother who helps me to manage the store and day to day operations. We are very capable to manage the store and avoid illicit activities.
- There are only two employees who work at the store, including the owner herself.
- The store takes SNAP compliance very seriously. The store has had both a compliance policy and training program in place since late 2013.
- The compliance program consists of numerous posters and placards through the Store, including right at the point of sale terminal reminding customers that unlawful actions taken with respect to SNAP accounts will not be tolerated and is unlawful.
- The Store has always had in place a training program for all employees. Each of the Store's two employees, including ownership, regularly review SNAP training protocols and continue to refresh themselves as necessary.
- Each employee is well aware of the dangers of SNAP misuse. Ownership is firmly aware of the damage SNAP misuse can cause and would in no way ever wish to profit off any unlawful activities.

The owner did not provide any detailed documents as evidence that the store had a compliance policy in place prior to the Charge letter issuance. No documentation of the development and/or operation of a policy to terminate violating employees was advanced. No documentation of development and/or operation of procedures/policy to implement corrective action in response to complaints of violations was provided. No documentation of development and/or operation of procedures providing for internal review of employees' compliance was provided. As such Criterion 1 was not met.

Appellant did not provide documentary evidence which establishes that the firm's compliance policy and program were in operation prior to the occurrence of the violations at issue. The owner submitted photos of a warning poster, which appears to be posted in the store, regarding the prohibition to buy and sell SNAP benefits, and how to report abuse of these programs. Retailer Operations found that, based on the FNS store visit photos in the record, these signs were not present in the store when the store visit was conducted. The photos submitted by the owner are not dated, and therefore, Retailer Operations could not determine when the signs were posted. Furthermore, their veracity as to an established store SNAP compliance policy was not sufficient given the regulatory requirements for substantial evidence in order to support a CMP in lieu of disqualification.



Two written statements, one from an employee and one from the owner, state how long they have worked at or owned Appellant. Neither statement reflects how often the owner and the employee reviewed the firm training program, what the training program consists of, or otherwise elaborated on the store's actual compliance policy. The owner also failed to submit any documentation or details on Appellant's training program. The owner did not provide documentation of dated training curricula and dates of training sessions prior to the violations, records of dates of employment of all firm personnel, or contemporaneous documentation of participation of violating personnel in initial and follow-up training prior to violations.

Thus, Retailer Operations determined that the retailer's evidence and documentation was not adequate to support the claim that an effective SNAP compliance policy and training program was in place prior to the Charge letter issuance. Upon review it is determined that the firm did not meet the criteria for a trafficking CMP. The record supports that Appellant's submission as to a CMP request was inadequate to meet the regulatory standards for such submission.

### **CONCLUSION**

Retailer Operations' analysis of Appellant's SNAP transaction data was the primary basis for its determination to permanently disqualify Appellant for trafficking. The record also included onsite store photographs, an onsite store inventory report, and HH shopping analyses that provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits.

Based on empirical data, and in the absence of evidence of the legitimacy of the transaction patterns presented by Appellant, the preponderance of the evidence supports that violations did occur as charged by Retailer Operations. Retailer Operations denial of a trafficking CMP was also proper per the applicable regulations. Therefore, the decision to impose a permanent disqualification against Appellant is sustained. The decision shall take effect 30 days after the date of delivery to the firm.

### **RIGHTS AND REMEDIES**

Attention is called to Section 14 of the Food and Nutrition Act of 2008, and to 7 CFR § 279.7 of the regulations with respect to applicable rights to judicial review of this decision. If 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 Appellant's owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

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

M. Viens  
ADMINISTRATIVE REVIEW OFFICER

December 4, 2019