

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

Universal Tropical Market,

Appellant,

v.

Case Number: C0206691

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 Universal Tropical Market (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 Universal Tropical Market.

AUTHORITY

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

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified based on an analysis of EBT transaction data from September 2017 through February 2018. 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 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 Universal Tropical Market for SNAP participation as a combination grocery/other store on May 2, 2011. In a letter dated April 23, 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 September 2017 and February 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 phone call on April 26, 2018, and in a letter dated May 7, 2018, the Appellant responded to the trafficking charges, claiming that trafficking was not occurring and stating that customer behavior was the reason for the unusual transaction patterns. For example, the Appellant claimed that sometimes customers will make a purchase and then immediately or a short time later will return to the store saying that they forgot some things and will begin shopping again. In other situations, a customer will separate their items into two or three parts at the checkout counter so that the same EBT card makes multiple transactions in a short period of time. The Appellant further stated that customers will sometimes drive off having made a purchase, only to return to the store in a few minutes, a few hours, or even a day or two.

After reviewing the Appellant's response 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 June 21, 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 June 27, 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 made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant does not agree with the determination that the firm was trafficking. The firm did not violate the rules and requests reconsideration of the disqualification decision.
- Appellant's accountant, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), submitted a letter dated July 27, 2018, which stated the following:
 - Universal Tropical Market has always required that customers show their identification before any purchases (EBT, credit, debit, etc.) are allowed to be finalized.
 - During the review period the store has never allowed group purchases that may have portended any violations in SNAP.
 - The owners display signs that alert customers of their obligations.
 - The store has never colluded nor aided and abetted in group purchases for enrollees in SNAP.

- The store is a mom-and-pop entity that that operates in a poor area of town. As such, it has a responsibility to those persons.
- Regarding transactions that are deemed to have been conducted too rapidly to be credible, Appellant has submitted 22 receipts showing that credit-, debit-, cash-, and check-paying customers make purchases in the same way.
- Appellant requests reinstatement of its SNAP authorization.

In support of these contentions, the Appellant submitted 429 original transaction receipts, the vast majority of which are EBT point-of-sale receipts. Of those, 259 are from outside of the review period, while 170 are from within the review period.

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 from a February 6, 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:

- Universal Tropical Market is a small combination grocery/other store, approximately 1,200 square feet in size, operating in Kansas City, Clay County, Missouri.
- At the time of the contractor's visit, the firm had no shopping carts for customer use, but did have a small number of handheld shopping baskets, 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 register for food purchases and agency records reflect the use of one EBT point-of-sale device.
- It appears that the firm does not use optical scanners to process transactions.
- The store's staple food stock is sufficient in each of the four staple food categories except for dairy. The food selection is typical of a combination grocery/other store selling primarily African ethnic foods. The store sells a small number of items in large packages, such as 25-pound bags of teff flour and 100-pound bags of rice.

- 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 cookware, clothing, and miscellaneous household merchandise.
- The checkout area consists of a single 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 and little room for customers to maneuver with large amounts of groceries.
- There is no indication from the store visit report that the firm has a special pricing structure, and the firm does not round transaction totals up or down at checkout.
- According to the contractor's report, the most expensive food items available for purchase include the flour and rice mentioned earlier (\$50.00 and \$100.00, respectively); cod fish for \$17.99 each; and a bag of frozen snails for \$12.99.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a small ethnic food 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 Universal Tropical Market to purchase very large quantities of groceries, especially considering the absence of shopping carts, the constricted checkout area, and the availability of larger grocery stores in the area, including a supermarket located less than one-tenth of 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 would differ so significantly from those of nearby, similar-sized competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: Multiple purchase transactions were made too rapidly to be credible. This attachment lists 35 sets of transactions (70 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits.

Considering the fact that this store has just one cash register, one EBT point-of-sale device, no optical scanner, and no conveyor belt, and considering the number of items that it would typically take to add up to the dollar amounts found in this attachment, it is unlikely that legitimate transactions could have occurred in such short periods of time.

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Considering how long it takes for a typical clerk to process a transaction for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) without an optical scanner or conveyor belt, it seems highly unlikely that such a large transaction could have legitimately occurred so soon after another customer's transaction.

In short, it does not seem to be logistically possible for the households in Attachment 1 and the store's staff to have conducted the following action steps in the limited timeframes listed:

- Transport a large number of food items by hand to the checkout area without the benefit of a shopping cart;
- Place each item on the limited counter space for processing;
- Separate food items from nonfood items;
- Manually enter the price of each item into the cash register;
- Bag the merchandise and move it off the counter space area; and
- Process the sale on the EBT point-of-sale terminal shortly after the completion of a separate household's transaction.

Unfortunately, the Appellant has offered no explanation for such transactions and has not provided any evidence to verify that the specific transactions in this attachment were for legitimate purchases of eligible food. Such evidence might have included itemized cash register receipts to prove what was purchased during each transaction. Without such evidence, it is reasonable to conclude that the transactions in Attachment 1 were likely due to trafficking.

Charge Letter Attachment 2: Multiple transactions were made from the accounts of individual SNAP households within a set time period. This attachment lists 81 sets of transactions (170 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 small ethnic store like Universal Tropical Market, which has no shopping carts, very few expensive food items, and a cramped checkout area. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The second and third transactions in this set totaled more than 5 U.S.C. § 552 (b)(6) & (b)(7)(C), making it very unlikely that the household had returned to the store for a forgotten item or two. Attachment 2 is filled with similar examples. Considering the amount of food it would take to add up to these transaction totals, and considering that the firm has no shopping carts, it seems very unlikely that these could be legitimate transactions.

The Appellant has claimed that customers will sometimes make a purchase and then immediately or a short time later will come back because they forgot to purchase something. The Appellant claims it is not unusual to see the same faces in the store only a day or two after they had shopped there. The Appellant further argues that customers will sometimes separate their items into two or three parts at the checkout counter so that the same EBT card makes multiple transactions in a short period of time. The Appellant contends that such behavior is common among all of its customers, not just SNAP households. To support these contentions, the Appellant submitted 22 receipts in an effort to show that credit-, debit-, cash-, and check-paying customers make purchases in the same way.

With regard to the receipts provided by the Appellant, it must be noted that all of them are dated after the firm received the April 23, 2018, charge letter, and thus cannot be considered a reliable representation of transactions that occurred during the review period in question. Perhaps more importantly, the receipts give no indication as to what was actually purchased. The receipts provide only very basic information, including the date of purchase, the amount, the method of

payment, and occasionally the name on the credit card account. It should also be noted that with a credit card, a customer can purchase anything it wants, including both food items and nonfood items. Conversely, a person shopping with SNAP benefits is limited to purchasing only eligible foods. Without additional details, such as a listing of items purchased during each transaction, the credit card receipts offer very little insight into the general shopping habits of customers at this store.

As to the remaining 407 receipts that were provided by the Appellant, these also have little evidentiary value, as the vast majority of them are EBT receipts, which is information already available to the agency. None of the receipts provide an itemized list of what was purchased during each transaction. Among the 407 receipts, just two were credit card receipts from within the review period, and they totaled less than 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Thus, the Appellant's receipt evidence does not adequately show why the patterns in Attachment 2 might have occurred.

As to the claim that customers will sometimes forget items and make a return trip to the store shortly after their initial visit, or the claim that households will split their purchases into separate transactions, none of these explanations are supported by any kind of evidence. Without compelling evidence from the Appellant, it is reasonable for this review to conclude that the unusual transaction patterns in Attachment 2 were likely the result of trafficking violations.

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 35 sets of SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(7)(E). 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. Unfortunately, the Appellant has not offered any explanation or evidence related to the transactions listed in Attachment 3. Such evidence might have included itemized cash register receipts or inventory records to help prove that the transactions were legitimate purchases of eligible food. The transactions listed in this attachment are highly unusual, especially in comparison with nearby comparable stores. Without compelling evidence to demonstrate that the transactions were valid, it is reasonable for this review to conclude that they were likely the result of trafficking violations.

Charge Letter Attachment 4: Excessively large purchase transactions were made from recipient accounts. This attachment lists 210 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with other combination grocery/other stores in the state of Missouri. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a combination grocery/other store in Missouri was \$33.26. In Clay County, the average was a bit higher, at \$50.21 per transaction. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Given that the Appellant firm has a moderate inventory of staple foods and other SNAP-eligible foods, and considering that it sells a few large-ticket items, such as large bags of rice and flour, 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 4. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from nearby, similar-sized competitors, especially considering the absence of shopping carts and the limited checkout area. The substantial number of high-dollar transactions in a six-month period calls into question the legitimacy of these transactions.

Attachment 4 lists nine transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) during the review period, including a high of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering how many food items it would typically take to add up 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and considering that the store does not have any shopping carts, and given the fact that there are much larger grocery stores in the area with substantially greater inventory and variety, 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 Universal Tropical Market.

The transactions in Attachment 4 are very unusual and warrant further explanation. Unfortunately, the Appellant has not offered any contentions or evidence to demonstrate that the transactions in question were legitimate purchases of eligible food. Without credible evidence it is reasonable for this review to conclude that trafficking was a likely cause of the unusual transaction patterns.

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.

In an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that trafficking did not occur. Unfortunately, the Appellant's evidence is inadequate and its contentions do not sufficiently address the specific transactions listed in the charge letter. Therefore, it is the conclusion of this review that the transactions listed in the charge letter were, more likely than not, the result of trafficking violations committed by the Appellant.

Hardship to SNAP Recipients

The Appellant has stated that the store is a mom-and-pop entity that operates in a poor area of town. As such, it has a responsibility to those persons. This contention implies that if the disqualification is upheld, the community will experience some level of hardship because customers will not be able to use their SNAP benefits at Universal Tropical Market.

With regard to this contention, it is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and households are forced to use their benefits elsewhere. However, there are no provisions within the regulations that would allow for a dismissal or reduction of the charges due to hardship to SNAP households. Regulations at 7 CFR § 278.6(f) do allow, in some circumstances, for a hardship civil money penalty to be imposed in lieu of disqualification when there is an absence of other SNAP-authorized retailers in the area. However, the regulations are clear that a hardship CMP may not be imposed in lieu of permanent disqualification for trafficking.

Therefore, the Appellant's claim that the community will be adversely affected does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Trafficking 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 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 Universal Tropical Market from SNAP participation. This data provided sufficient evidence for this review to conclude that the questionable transactions and patterns listed in the charge letter were more likely than not the result of trafficking violations committed by the Appellant. Likewise, the Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

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

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. If a judicial review is desired, the complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision.

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

December 14, 2018