

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

Valdez Food Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0199903

FINAL AGENCY DECISION

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

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Valdez Food Market by letter dated August 9, 2017.

AUTHORITY

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

CASE CHRONOLOGY

In a letter dated July 10, 2017, 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 during the months of November 2017 through April 2017. The letter specifies that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also states that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

In correspondence dated July 19, 2017, Appellant requested a 10 day extension in which to respond to the charge letter. In correspondence dated July 21, 2017, Retailer Operations Division granted Appellant a 10 day extension to July 31, 2017. Appellant was also informed that the time to request a civil money penalty in lieu of permanent disqualification and to provide the documentation to support such a request has not been extended. Appellant, through counsel, replied to the charge letter in correspondence dated July 31, 2017, and generally stated that when the store was authorized to participate in SNAP, the inspection photographs would have revealed that several items throughout the store were priced with even dollar amounts.

Appellant, through counsel, stated that upon authorization, Valdez Food received instructions from the agency setting forth acceptable and not acceptable items that could be purchased through the program and it has fully complied with the instructions. In response to the alleged violation one (1), Valdez Food, since opening, has and continues to price numerous items in even dollar values, particularly meats. There was no requirement or even recommendations from the SNAP program that pricing items with even cents values violated the program or created suspicion of an alleged violation. In response to alleged violation two (2), Valdez Food was never instructed to limit individuals from utilizing their benefits in a short time frame; and in response to alleged violation three (3), Valdez Food is located within a low income neighborhood where residents make their major purchases at the beginning of the month including meats and non-perishables.

Appellant, through counsel, states that the agency has no proof of any violations, no investigation occurred or surveillance of any type to substantiate the alleged violations. Appellant, through counsel, also stated that Valdez Food is not requesting a civil money penalty in lieu of disqualification of the firm for trafficking as no trafficking was done nor any violations regarding the terms of the program.

After giving consideration to the Appellant's reply and evidence of the case, Retailer Operations Division issued a determination letter dated August 9, 2017. This letter informed ownership that they were permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also states that Retailer Operations considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, Retailer Operations Division determined that Appellant was not eligible for the CMP because it failed to submit sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked August 21, 2017, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

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

CONTROLLING LAW

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

7 CFR § 278.6(a) states, in part that, "FNS may disqualify any authorized retail food store...from further participation in the program if the firm fails to comply with the Food and Nutrition Act of 1977, 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...*" (*Emphasis added*)

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

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

7 CFR § 278.6(b)(2)(ii) states, in part, that: "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, 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.”

SUMMARY OF THE CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from November 2016 through April 2017. This involved the following transaction patterns which are trafficking indicators:

1. An unusual number of transactions ended in a same cents value.
2. The majority or all of individual recipient benefits were exhausted in unusually short periods of time.
3. Excessively large purchase transactions were made from recipient accounts.

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

APPELLANT’S CONTENTIONS

In its response to the charge letter and in its request for administrative review, Appellant made the following summarized contentions, in relevant part:

- The USDA letter dated July 10, 2017 set forth allegations of alleged “trafficking” but did not request the firm to set forth the details of effective compliance policy however, made the failure to set forth the procedure as the basis of permanent disqualification.
- The USDA failed to provide the firm due process by making the basis of the permanent disqualification, failing to provide information that was never requested.
- The basis of the disqualification is based on assumptions, speculation, and lacks creditable evidence of any violation. The agency has no proof of any violations, no investigation occurred, nor any surveillance of any type has been presented to substantiate the allegations.

Appellant, through counsel, provided five notarized customer certifications in support of the store maintaining its SNAP authorization. The preceding may represent a brief summary of Appellant’s contentions in this matter however, in reaching a decision, full attention has been given to all contentions presented, including any not specifically recapitulated or referenced herein.

ANALYSIS AND FINDINGS

The FNS authorized the business as a convenience store on June 3, 2016. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during an April 13, 2017, store visit to the business conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- One cash register and one POS device with a small counter area, approximately 2ft x2ft, partially obstructed by other smaller items available for sale and surrounded by a plastic barrier.
- No shopping baskets or carts available for customers.
- No adding machines or optical scanners were available at checkout. No specialty registers present.
- No unusual pricing structure such as ending most products with 00 cents and does not round transaction totals.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- A kitchen/prepared food area with hot foods sold for offsite consumption. Microwave available.
- Store has a deli or prepared food area and stock is being used in the prepared food section (meat and cheese used to make sandwiches)
- Prominent menu board displayed.
- Store sells meat/cheese by the pound but no price lists were available.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.
- Estimated to be 525 square feet with food stored in storage area out of public view approximately 140 square feet.
- No food stored off site and no storage coolers or freezers.
- Store does not take telephone or online orders and does not offer delivery.
- Store operates through a night window or plastic barrier with food stock behind the barrier.
- Store is not a delivery route, farmers' market or specialty food store primarily selling one food type such as meat, poultry, seafood, bread, fruit or vegetables.
- Highest priced items were Enfamil (\$19.99), can meat (\$5.99), Wesson oil (\$5.69), and coffee (\$7.99).
- Store stocks a significant amount of non-food items such as but not limited to paper products, household products, tobacco products, health and beauty aids, cleaning products, pet products, and mobile phones/phone cards.
- Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products.
- Store does not sell any expensive foods or foods in large or bulk packaging.

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

Attachment 1 – An unusual number of transactions ended in a same cents value.

This attachment lists 437 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits.

During the review period, Appellant conducted 3,460 EBT transactions. There were 239 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). When there are a disproportionate amount of transactions ending in same cent value it appears the transactions are contrived and absent any compelling rationale to the contrary it is a strong indicator of trafficking. Especially when item prices end with a standard 5 U.S.C. § 552 (b)(6) & (b)(7)(C) it is implausible that several of these relatively inexpensive items purchased together would routinely total to a purchase amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C). In addition a store that is rounding prices up or down, or to an even value, would not have any transactions ending in odd values such as those cited in the charge letter.

The Appellant, through counsel, stated, in its response to the charge letter that, since opening, the store has and continues to price numerous items in even dollar values, particularly meats. With regard to this contention, the store visit report and photographs do not demonstrate that Appellant priced items in even dollar amounts. The information ascertained from the store visit reveals that Appellant's pricing structure ended in the typical 5 U.S.C. § 552 (b)(6) & (b)(7)(C) value and that Appellant did not round transaction totals up or down. Additionally, the store visit report and photographs do not show that Appellant offered for sale fresh or frozen meat or meat packages. Deli meats and cheeses were available for sale however there were no prices posted for these items.

Based on the above analysis, it is therefore more likely true than not true that the irregular transactions cited in the charge letter Attachment 1 are due to trafficking in SNAP benefits.

Attachment 2 of the Charge letter - Multiple transactions were made from individual benefit accounts in unusually short time frames.

This attachment lists 23 sets of 46 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Appellant, through counsel, stated, in its response to the charge letter, that Valdez Food was never instructed to limit individuals from utilizing their benefits in a short time frame.

Regarding this contention, SNAP households have no limit on the number of times they may use their EBT cards; however, the SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of the store's stock and facilities and are indicative of trafficking. The Appellant firm is a convenience store that does not compare in size and stock to the larger supermarkets and or super stores where SNAP households often shop. Sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, the record reflects that there are at least 69 SNAP authorized retailers within a one-mile radius of Appellant's store which include two superstores, 33 small grocery stores, five medium grocery stores, 11 combination stores, and 18 other convenience stores. Therefore, lack of access to other stores does not appear to be an explanation for the Appellant firm's abnormally high SNAP transaction amounts.

Retailer Operations also conducted an analysis of the shopping habits of three of the households identified in the charge letter. This analysis concluded that these households also shopped at other area grocery stores including full-line supermarkets and superstores that offer a much larger quantity and variety of eligible food items for likely better prices either on the same day or within days of visiting Appellant's firm. This again indicates that lack of access to other stores is not at issue. However, despite this access to large supermarkets and superstores, these households consistently conducted much higher transactions at the Appellant firm than at better stocked supermarkets/superstores in and around the Essex County area of New Jersey. This is another strong trafficking indicator.

In conclusion, it is therefore more likely true than not true that the irregular transactions cited in the charge letter Attachment 2 are due to trafficking in SNAP benefits.

Attachment 3 of the Charge letter - Excessively large purchase transactions were made from recipient accounts.

This attachment lists 143 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Based on the results of the contracted store visit, the large transaction amounts are not consistent with the store's inventory of low priced foods. The firm does not offer fresh or frozen meats, no food in bulk or any ethnic or specialty foods that sell for a high price. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Appellant, through counsel, stated, in its response to the charge letter, that Valdez Food is located within a low income neighborhood where residents make their major purchases at the beginning of the month including meats and non-perishables. With regard to this contention, the transaction in this Attachment range from the beginning to the end of the month. Appellant does not offer fresh or frozen meat and has limited amounts of deli meats available for sale. As previously stated, Appellant is a convenience store and the nature and extent of the store's stock and facilities does not justify the excessively large transaction amounts in this Attachment.

Moreover, when purchasing food, people generally do not spend large sums at convenience stores. They usually stop at convenience stores to pick up quick snacks and/or a beverage, or for a few staple food items that they need, such as bread, milk, eggs, or a can or two of some food, but which are not considered worth a trip to the supermarket to get. It is rare for a convenience store to have purchases such as those cited for this Attachment.

Based on the above analysis, the Retailer Operations presented a convincing case that the Valdez Food Market trafficked in SNAP benefits which the Appellant failed to adequately rebut. The attachments furnished with the charge letter identify the irregular patterns of SNAP transactions which indicate that trafficking was taking place at the firm during the review period. As there is more than one pattern of trafficking, a determination that the Appellant firm engaged in trafficking becomes more convincing.

Appellant, through counsel, contends that the basis of the disqualification is based on assumptions, speculation, and lacks creditable evidence of any violation. The agency has no proof of any violations, no investigation occurred, nor any surveillance of any type has been presented to substantiate the allegations. With regard to this contention, the extensive analysis of Appellant's EBT transaction record, upon which charges of violations are based, provides substantial evidence that questioned transactions during the focus period have characteristics that are not consistent with legitimate sales of eligible food to EBT customers at a store of this type and size. Rather, the characteristics are indicative of illegal trafficking in program benefits. In addition to the raw data of suspicious transactions, the file also notes that Appellant has no shopping carts or shopping baskets available for customers to carry the many items no doubt necessary for questioned transactions as large as listed. In addition, Appellant has only one register and one EBT device, very limited counter space, and insufficient stock to explain as legitimate the program redemptions. A review of the record has yielded no indication of error or discrepancy in the reported findings by Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it appears the Retailer Operations has provided substantial evidence of trafficking violations, in the three patterns of EBT transaction characteristics indicated in the letter of charges, and that it is more likely true than not that program violations did, in fact, occur as charged.

CFR § 278.6(a), which establishes the authority upon which FNS may disqualify any authorized retail food store, reads, in part: "Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through ... inconsistent redemption data (and) evidence obtained through a transaction report under an electronic benefit transfer system." Therefore, that the Retailer Operations used computer printouts of transaction data and other reports, in addition to store visit observations and an analysis of household shopping behavior, in rendering a finding that violations indicative of trafficking are occurring, is as valid a means of establishing facts as direct evidence obtained through an on-site investigation and the eye witnessing of trafficking

The Appellant, through counsel, contends that the USDA letter dated July 10, 2017, set forth allegations of alleged "trafficking" but did not request the firm to set forth the details of an

effective compliance policy; and the USDA failed to provide the firm due process by making the basis of the permanent disqualification, failing to provide information that was never requested. With regard to these contentions, it is important to note that the charge letter dated July 10, 2017, states:

“The SNAP regulations also provide that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000.00 in lieu of permanent disqualification of a firm for trafficking. The SNAP regulations, Section 278.6(i), list the criteria that you must meet in order to be considered for a CMP. If you request a CMP, you must meet each of the four criteria listed and provide the documentation as specified within 10 calendar days of your receipt of this letter.

No extension of time can be granted for making a request for a CMP or for providing the required documentation. Your request and all documentation must be postmarked by midnight of the 10th calendar day after you receive this letter, in order to be considered timely. If the 10th calendar day falls on a Saturday, Sunday or legal (Federal) holiday, a request with documentation, will be timely if it is postmarked the next day which is not a Saturday, Sunday or legal (Federal) holiday. If your request and the required documentation are not submitted on time, you will lose your right for any further consideration for a CMP. If it is determined that you qualify for a CMP, the amount of that penalty will be \$31,560.00. Payment in full is due within 30 calendar days after you receive our determination letter. The amount of the CMP was calculated in accordance with SNAP regulations at Section 278.6(j).

If you do not request consideration for a CMP or are determined to be ineligible for a CMP, the permanent disqualification of your firm shall be effective on the date of receipt of the letter informing you of our final decision (SNAP regulations, Section 278.6(c)).”

It is noted that the charge letter also include a link to the applicable regulation that outlines the four criteria required to be eligible for a CMP. In its response to the charge letter, Appellant, through counsel, stated that it was not requesting a civil money penalty in lieu of disqualification as no trafficking was done nor any violations regarding the terms of the program.

Furthermore, the letter of charges provided Appellant the opportunity to reply to the charges and provide explanations for the questionable transactions. Appellant did reply to the charges in writing, denying the charge of trafficking and offering various explanations for the questionable transactions. After considering the evidence of the case and Appellant’s reply, the Retailer Operations Division determined that a permanent disqualification was warranted. But while administrative action is held in abeyance for most adverse actions against firms pending appeal, there can be no stay of action pending an appeal of a permanent disqualification. 7 U.S.C. at 2023(a)(18) of the Food Stamp Act of 2008, as amended, states, in part: “SUSPENSION OF STORES PENDING REVIEW. Notwithstanding any other provision of this subsection, any permanent disqualification ... shall be effective from the date of receipt of the notice of disqualification.” Appellant’s right to due process has not been violated and therefore, the

Appellant's contentions do not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

Summary

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

As noted, 7 CFR § 278.6(a) states that FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 1977, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Retailer Operations has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns identified in the charge letter, the lack of food inventory necessary to support the firm's SNAP redemptions as observed and recorded during the onsite visit, the lack of purchase invoices of foods to cover SNAP redemption totals for the review months, the lack of adequate explanations for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant, and the irregular SNAP transaction data of Appellant as compared to other convenience stores in the State.

While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence in the record. The owner has not provided sufficient evidence to rebut the convincing case that Appellant most likely trafficked in SNAP benefits. As such, the SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have trafficked, which is that FNS shall disqualify the firm permanently.

CIVIL MONEY PENALTY

The Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i) even though it was informed of the right to do so in the charge letter dated July 10, 2017. Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification

because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program *prior* to the violations. Therefore, the Retailer Operations Division's decision, not to impose a trafficking CMP in lieu of disqualification, is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

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

RIGHTS AND REMEDIES

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

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

Monique Brooks
Administrative Review Officer

November 2, 2017