

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

Wilmington Community Market,

Appellant,

v.

Case Number: C0223888

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 Wilmington Community Market (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by FNS’s 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 Wilmington Community 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 from SNAP based on an analysis of EBT transaction data from July 2019 through November 2019. This involved the following transaction patterns which are common trafficking indicators:

- There were multiple transactions made from the accounts of individual SNAP households within a set time period.
- The firm conducted EBT transactions that were large based on observed store characteristics and recorded food stock.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Wilmington Community Market for SNAP participation on February 10, 2014. On November 24, 2018, the firm's authorization was withdrawn due to its failure to respond to a required reauthorization process. On March 22, 2019, the firm reapplied for SNAP and was reinstated on June 5, 2019. In a letter dated January 2, 2020, 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 July 2019 and November 2019. 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 and supporting documentation submitted within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In a telephone call on January 17, 2020, the Appellant responded to the charge letter by stating that the unusual transactions were the result of the firm allowing customers to shop on credit and then make payment with SNAP benefits at a later date. However, the Retailer Operations Division noted that after being informed that credit accounts were a violation of SNAP regulations, the Appellant recanted the claim.

In an e-mail dated January 19, 2020, the Appellant provided a written response to the allegations, stating that all transactions in the charge letter were valid purchases. According to the Appellant, on the day of the store inspection, the store was "completely empty." This was because many customers buy their daily groceries from the store, such as large bags of onions, potatoes, and other vegetables. The Appellant claimed that it normally had much more other inventory, such as dairy items, meat products, frozen food, bags of rice, and cases of water and soda. The Appellant argued that if it was given "a little bit of time," then it could prove these claims. Finally, the Appellant stated that the cash register in the store is old and it does not print out proper receipts. As such, most of the proof is handwritten. The Appellant said that it has customers that stand by these claims. It is noted that the Appellant did not provide any evidence to support its reply and did not request a CMP in lieu of permanent disqualification.

After evaluating 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 February 25, 2020. The letter was delivered to the firm on March 11, 2020. The 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 found that a CMP was not appropriate 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 March 16, 2020, 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:

- For the last year, business at Wilmington Community Market has been very down. Because of this, the Appellant owner is unable to purchase a new cash register. The current register is very old and the receipts do not print correctly. So the firm is unable to print anything that shows what customers purchased; it only lists the amount.

- There is a large homeless population around Wilmington Community Market, and they always buy their monthly groceries from there. The Appellant allows them to store their food in its coolers. This arrangement helps both the store and the homeless customers.
- The Appellant has many customers who will testify.
- The owners have had the store for a long time and some customers are like family. They shop in large quantities and the firm lets them use the refrigerator and coolers.
- When the store inspection occurred, the store was empty. The store has a lot of items, such as large bags of onions, potatoes, and rice, as well as cooking oil, frozen foods, dairy products, meat, and fish.
- The Appellant is now working at another job and has one of its employees taking care of the store.
- It would have been helpful if the firm had been given another chance and not had its SNAP authorization canceled at this hard time.
- The old cash register now does not work at all, so the store does not have any receipts. Even the EBT point-of-sale receipts only show the amount, so the Appellant does not know how to prove what items were purchased. The Appellant did write down in a notebook some items that were purchased by customers, but that is all the proof it has.
- The firm has never had any issues with SNAP before.
- Appellant hopes that FNS will reconsider its decision, because with Covid-19, the store will be out of business by the end of the 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 evidence and contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

A key 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 November 13, 2019, 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:

- Wilmington Community Market is a small convenience store, roughly 750 square feet in size, operating in the city of Compton, Los Angeles County, California.

- The store visit photographs show one cash register and agency records reflect the use of one EBT point-of-sale terminal for SNAP purchases. It appears that the firm does not use an optical scanner to ring up items on the cash register.
- The store does not have any shopping carts or shopping baskets for customer use.
- The store's staple food varieties are typical of a convenience store or small corner market, but inventory levels at the time of the store visit were very poor. Had the firm not been disqualified for program violations, it likely would have been withdrawn for failure to meet basic inventory requirements – particularly in the dairy staple food category (see SNAP regulations at 7 CFR § 278.1(b)(1)).
- In addition to staple foods, Wilmington Community Market sells a variety of accessory foods, including snack foods, candy, condiments, and carbonated and uncarbonated drinks. The store also sells nonfood items such as tobacco products, alcoholic beverages, paper goods, cleaning supplies, and other miscellaneous household merchandise.
- The checkout area is located behind a Plexiglas barrier, and transactions are conducted through a small window. The very small checkout area is not suitable for conducting large or rapid transactions, as there is little room to place more than a few small items at a time, and little room to maneuver with large amounts of groceries.
- There is no indication from the store visit report that the firm has an unusual pricing structure, such as even-dollar prices. As with most stores, the prices of most items appear to end with a cents-value of 9, such as \$3.49, \$4.99, etc. The majority of food items had no prices posted. The report also states that the firm does not round transaction totals up or down at checkout.
- There is no evidence that the firm has special food packages for sale or that items are sold in bulk. According to the report, the most expensive food item is a 10-pound bag of basmati rice for \$11.99. The vast majority of food items in the store appeared to sell for \$5.00 or less.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a convenience store, although most certainly on the meager side. It appears clear from the contractor's report that Wilmington Community Market is the kind of store where households normally purchase a limited number of items to supplement their overall dietary needs. There was little indication that SNAP households would be inclined to regularly visit Wilmington Community Market to purchase large quantities of groceries, especially considering the limited SNAP-eligible inventory, the very constricted checkout area, the absence of shopping carts and baskets, and the availability of much larger stores in the area, including three large grocery stores, three supermarkets and one superstore within a one-mile radius of the store. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of similar-sized competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: Multiple transactions were made from the accounts of individual SNAP households within a set time period. This attachment lists 19 sets of transactions (51 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 convenience store with no shopping carts or baskets and minimal overall inventory. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Such transactions at a small store like Wilmington Community Market are highly irregular and are often an indication of trafficking. As such, these transactions warrant further explanation.

Unfortunately, the Appellant has offered no valid explanation or evidence to justify these unusual transaction patterns. The Appellant has argued that it does not have cash register receipts to prove that the transactions were legitimate because its cash register is too old and broken to print such receipts. Instead, the Appellant claims that it writes down some purchases in a notebook. While this may be true, no evidence, such as copies of the notebook pages, was submitted. The Appellant also offered no inventory records to show that the firm even had sufficient inventory to cover its SNAP transactions over the five-month review period.

Without compelling evidence from the Appellant, it is reasonable for this review to conclude that trafficking was a likely cause of the transaction patterns listed in Attachment 1.

Charge Letter Attachment 2: The store conducted EBT transactions that were large based on observed store characteristics and recorded food stock. This attachment lists 114 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with a convenience store in the state of California. The Retailer Operations Division has determined that during the review period, the average SNAP transaction for a convenience store in California was \$7.08. In Los Angeles County, the average was even lower, at just \$6.83 per transaction. But the average transaction in Attachment 2 is more than eight times larger than the average purchase amount for this store type.

Given that the Appellant firm has a small inventory of staple foods as well as other SNAP-eligible items, including snacks and drinks, it is possible 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, it may be that there are some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 2. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from similar-sized competitors in the area. The substantial number of high-dollar transactions in a five-month period calls into question the legitimacy of these transactions.

Attachment 2 lists 13 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 to 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and considering that the store has limited inventory, a very small checkout area, and no shopping carts or baskets to help a customer transport large amounts of food, this review finds it difficult to believe that every large transaction listed in Attachment 2 was a legitimate purchase of eligible food.

Attachment 2 also lists a very large number of repetitive, even-dollar transactions. For instance, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As noted earlier, the contractor's store visit report shows that most items in the store appear to have prices with a cents-value ending in 9, such as \$3.49. The

report also indicates that the store does not round transaction totals up or down at checkout. As such, it is highly unlikely that the firm would so frequently conduct legitimate non-taxed SNAP transactions in which the purchase total ended in these even-dollar values. These transaction patterns strongly suggest that violations such as trafficking were occurring.

Unfortunately, the Appellant has not offered any specific contentions or evidence to explain the transaction patterns listed in Attachment 2. Such evidence might have included itemized cash register receipts, inventory records, or other documents that prove that the transactions were legitimate purchases of eligible food.

The Appellant did claim that there is a large number of homeless persons in the area who buy their monthly groceries from Wilmington Community Market and then store their food in the firm's coolers. The Appellant further claims that it has many customers who will testify to the legitimacy of the transactions. Unfortunately, no evidence of any of these claims has been provided. As such, this review has little option but to consider such contentions anecdotal only and of little evidentiary value.

This review does not doubt that Wilmington Community Market sells eligible food items and conducts some legitimate SNAP business. But when unusually large transactions form patterns that are substantially different from comparable stores in the area, further evidence from the Appellant is warranted to verify that there is not something more, such as trafficking or other program violations, taking place. In this case, the Appellant has offered no evidence to help explain what occurred between the customers and cashiers at the point of sale. Accordingly, it is the finding of this review that trafficking was a likely cause of the unusual transaction patterns found in Attachment 2.

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. With regard to Attachments 1 and 2, the Appellant has not met this standard.

No Prior Violations

The Appellant contends that the owners have owned the store for a long time and have never had any issues with SNAP. This contention implies that due to the firm's prior compliance with SNAP rules, the disqualification should be reconsidered.

With regard to this contention, this review finds that the Retailer Operations Division properly evaluated the firm's history with SNAP compliance and found no prior violations. However, statute at 7 U.S.C. § 2021(b)(3)(B) and SNAP regulations at 7 CFR § 278.6(e) require that when trafficking occurs, permanent disqualification is the necessary penalty, even on the first occasion, regardless of a firm's prior compliance with program rules. As such, this review finds that the sanction imposed by the Retailer Operations Division fully conforms to SNAP regulations and is consistent with sanctions imposed upon other retail stores that have committed similar violations.

Owner Not Involved in Violations

The Appellant contends that the store owner is working at another job and has left the store in the hands of one of its employees. This contention implies that the owner was not involved in any program violations.

With regard to this contention, the record shows that on March 22, 2019, the Appellant owner signed an application to participate as a retailer in SNAP. By signing this application, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. The record clearly establishes that the Appellant owner agreed to abide by program rules, including taking responsibility for violations committed by any of the firm's employees, whether paid or unpaid, new, full-time or part-time. An owner or manager is not free of responsibility simply because he or she was not in the vicinity at the time the violations occurred or because he or she was uninvolved in the violations. Regardless of which clerks are operating the cash register at a given time and regardless of whom firm ownership authorizes to handle store business, the ownership of the firm is ultimately responsible for the proper training of staff and the monitoring and handling of SNAP benefit transactions. As such, the owner's implied lack of involvement in this matter is not a valid reason to dismiss the charges or modify the penalty in any way.

Hardship to Appellant

The Appellant hopes that FNS will reconsider its decision, because with the current coronavirus pandemic, the store will shortly be out of business.

With regard to this contention, 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 statute or regulations for a waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm itself as a result of such a penalty. As such, financial hardship to the firm cannot be a consideration in this matter.

Civil Money Penalty

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 program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a CMP 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 supporting documentation within 10 days of receipt of the charge letter. The case record shows that the Appellant did not request a trafficking CMP 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 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 Wilmington Community 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 in this case, the decision to impose a permanent disqualification against the Appellant, Wilmington Community 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. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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

June 1, 2020