

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

**Joe's Food Market II,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0201091**

**FINAL AGENCY DECISION**

The record indicates that Joe's Food Market II (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). It is the decision of the USDA that 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, (Retailer Operations) was appropriate.

**ISSUE**

The issue accepted for review is whether Retailer Operations took 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 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."

**CASE CHRONOLOGY**

By Charge letter dated July 24, 2017, 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 "establish clear and repetitive

patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm.” The sanction for trafficking is permanent disqualification. The record shows that Appellant replied to the Charge letter July 26, 2017, and August 10, 14, and 18, 2017.

Retailer Operations issued a Determination letter dated August 24, 2017. This letter informed Appellant that it was permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the regulations. Retailer Operations considered Appellant’s eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the regulations.

Appellant was not eligible for the CMP because no evidence was submitted timely to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP regulations.

By letter dated September 1, 2017, the owner, via counsel, appealed Retailer Operations’ determination and requested administrative review. The appeal was granted by letter dated September 12, 2017. The owner, via counsel, provided a one page affidavit dated September 22, 2017.

### **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 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 § 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 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: “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*...” (*emphasis added*)

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 on review were based on an analysis of SNAP EBT transaction data during the period of January 2017 through June 2017. This involved two patterns of EBT transaction characteristics which are indicative of trafficking:

1. Multiple transactions made from individual benefit accounts within unusually short time frames.
2. Excessively large purchase transactions were made from recipient accounts.

### **APPELLANT’S CONTENTIONS AND EVIDENCE**

The following may represent a brief summary of the contentions in this matter however, in reaching a decision, attention has been given to all contentions presented, including any not specifically referenced.

- The client owns a very small store and only a small portion of the business is from SNAP.
- We are law-abiding residents.
- We are always cautious and follow the law and regulation to operate this business.

- I sent two customer video statements. They live nearby and have mobility issues.
- Since you close the EBT my business worsens.

Counsel advanced two video recordings of store customers. These appear to be recordings taken at the store; 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

## 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: Multiple SNAP purchase transactions were made from individual benefit accounts in unusually short time frames.** This Attachment lists 48 transactions in 18 sets of two or more transactions, conducted by 11 different households ranging in set total amounts from 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Contentions:

- One customer states she comes to the store to buy food and only food. She shops at this store because it is not busy and with her mental health issues she does not like crowds.
- Another customer states she buys cold food at the store and nothing else. She shops here because she has mobility issues and cannot walk to the supermarket.

According to the record there at least 35 authorized stores within a half mile radius of Appellant including a supermarket and an additional 84 authorized stores in a one mile radius including three supermarkets and two super stores. 5 U.S.C. § 552 (b)(7)(E).

While some households may have conducted legitimate rapid transactions at Appellant, insufficient evidence was presented to support this argument. The owner provided no vendor invoices of eligible items acquired to support its SNAP redemptions. No itemized cash register tapes were provided as evidence of eligible food sales. 5 U.S.C. § 552 (b)(7)(E). The statements do not by a preponderance support Appellant's contentions. Thus, the owner has not provided a preponderance of evidence that the transactions on this Attachment are for legitimate foods.

**Attachment 2: Excessively large purchase transactions were made from recipient accounts.** This Attachment lists 81 individual EBT transactions conducted by 23 different households 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Contentions:

- We do not know what we did wrong. It appears some customer who live nearby had spent too much money in my store.

The owner did not provide a copy of the prices of eligible foods stocked and sold at his store. Appellant does not have shopping carts or hand baskets to facilitate large quantities of eligible items to make up the large dollar transactions listed. These items would need to be handled on a limited counter space in small checkout area. The large dollar transactions remain questionable when considering the proximity of other larger authorized stores located less than a mile from Appellant's location.

A shopping analysis shows that recipients who frequented Appellant also shopped at larger stores, yet spent large dollar amounts at Appellant. The transaction history for the review period shows that one household (HH) that submitted a video completed the majority of her SNAP transactions at Appellant. Nevertheless, the HH did complete transactions at three other larger stores and frequented a total of eight other authorized stores during the review period. Another number on a post-it note advanced by the owner was matched to several transactions listed on the Charge letter. This household did complete several transactions at Appellant, but no video statement was provided in conjunction with this number. Retailer Operations matched the third number on the post-it note to the household that gave a video statement. This individual stated that she frequented Appellant

because she had transportation and mobility issues. The data supports that the HH completed the majority of her transactions at Appellant. Retailer Operations noted that while three numbers were listed on the post-it note in reply to the Charge letter, only two videos were provided. These two customers claim to only buy food at the Appellant. While these statements may be true, insufficient evidence was advanced to legitimize the large dollar transactions at this small store.

The charged owner was given the opportunity to provide evidence of the legitimacy of the transactions listed. He did not provide a food price list, tax information, banking statements or invoices of eligible food stock. He provided a one page affidavit and a thumb-drive with two customer video statements. He states the transactions listed were legitimate. The explanation may be valid however, insufficient supporting evidence was provided.

The owner contends that a SNAP disqualification will have a negative financial impact on Appellant. It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow the owner to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. Furthermore, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other

participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, the owner's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **CIVIL MONEY PENALTY**

Retailer Operations determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations. The owner did not submit documentation to prove that Appellant met the trafficking CMP requirements as stipulated in the regulations at 7 CFR Section 278.6(i). These regulations specify the criteria for a firm's eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. The criteria listed are, as a whole, specifically identified as a minimum standard that firms must meet in order to be eligible for such a penalty. Accordingly, Retailer Operations determined that Appellant did not qualify for a civil money penalty in lieu of a permanent disqualification.

Retailer Operations' determination that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations is sustained.

### **CONCLUSION**

Retailer Operations' analysis of Appellant's SNAP transaction record was the primary basis for its determination to permanently disqualify Appellant. This data 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 a preponderance of compelling evidence for the legitimacy the transactions cites on the Attachments,

by a preponderance of the evidence, it is more likely true than not true that violations did occur as charged by Retailer Operations. Therefore, the decision to impose a permanent disqualification against Appellant is sustained.

### **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 and to Section 279.7 of the regulations (7 CFR § 279.7) with respect to applicable rights 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 the 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

October 11, 2017