

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

Atlanta Food Mart,

Appellant,

v.

Case Number: C0198913

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division (“ROD”) to impose a permanent disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) against Atlanta Food Mart (“Appellant”).

ISSUE

The issue accepted for review is whether the ROD took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a Permanent Disqualification against Appellant on June 7, 2017.

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

In a letter dated May 19, 2017, the ROD charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of SNAP transaction patterns that “establish clear and repetitive patterns of unusual, irregular, and inexplicable activity for your type of firm.” This letter of charges states, in relevant part, “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.” The letter also states that “. . . under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of a permanent disqualification of a firm for trafficking.”

Appellant, through counsel, replied to the ROD's charges in writing. The record reflects that the ROD received and considered this information prior to making a determination. The ROD determined that Appellant's contentions did not outweigh the evidence that the store was trafficking. Based on the preponderance of evidence, the ROD concluded that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

The ROD issued a determination letter dated June 7, 2017. This letter informed Appellant that it was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6 (c) and 278.6(e)(1) for trafficking violations. The letter also states the ROD considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. The ROD determined that Appellant was not eligible for the CMP because Appellant had not submitted sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

On June 19, 2017, Appellant, through counsel, appealed the ROD's determination and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means 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

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented 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 in the event that personnel of the firm engaged in trafficking of SNAP benefits.

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, evidence obtained through a transaction report under an electronic benefit transfer system
(Emphasis added.)

7 CFR § 278.6(a) 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) reads, 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(e)(1)(i) reads, in part:

FNS shall [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2.

Trafficking is defined in 7 CFR § 271.2, in part, as:

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”

Also at 7 CFR § 271.2, eligible food is defined as:

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:

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.

SUMMARY OF CHARGES

The charges under review were based on an analysis of SNAP Electronic Benefit Transfer (EBT) transaction data during the period from September 2016 through February 2017. This analysis identified the following patterns of SNAP transaction activity indicative of trafficking:

- Multiple transactions made from the same accounts in unusually short time frames;
- Transactions that depleted the majority or all of a recipient's monthly SNAP benefits made in unusually short timeframes; and,
- Excessively large transactions.

The attachments furnished with the charge letter specify the questionable and unusual SNAP transactions indicative of trafficking which were conducted at Appellant during the review period.

APPELLANT'S CONTENTIONS

Appellant's contentions regarding this matter are essentially as follows:

- Appellant denies the allegations;
- The owners were unaware of any trafficking transactions. The owners were absent from the store because they needed to care for the mother of one of the owners;
- Appellant has operated for seven years without incident;
- Appellant has instituted safeguards to prevent fraudulent transactions. Appellant described its compliance and training program;
- Appellant is willing to offer a refund of \$7,000 for unauthorized SNAP transactions;
- Appellant has not received a financial benefit from trafficking;
- Appellant requests a CMP;
- Disqualification would pose a hardship to SNAP participants; and,
- Appellant has taken precautions to ensure the problem does not reoccur.

In support of its contentions, Appellant provided the following documentation:

- A SNAP compliance poster;
- A two-page, double-sided document summarizing the amount of the transactions in the charge letter;
- 19 pages of medical documents;
- 42 pages of bank statements;

- 7 employee training acknowledgement forms; and,
- The “SNAP Training Guide for Retailers.”

The preceding may represent only a brief summary of Appellant’s contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any not specifically recapitulated.

ANALYSIS AND FINDINGS

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Based on this empirical data, and in the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the most likely explanation for “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges is trafficking. Transactions having such characteristics sometimes do have valid explanations that support that they were the result of legitimate purchases of eligible food items. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, the ROD determined that Appellant's contentions did not outweigh the evidence. Evidence relied upon by the ROD was considered in this administrative review, including SNAP transaction data, store visit observations, location and characteristics of competitor firms, and household shopping patterns. The issue in this review is whether, through a preponderance of evidence, is it more likely true than not true that questionable transactions were the result of trafficking.

Regarding Appellant’s denial of violations, this review examines the relevant information regarding the determination. Once the ROD establishes trafficking occurred, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that that it did not engage in trafficking. If this is not demonstrated, the case will be sustained. Assertions that the firm has not violated program rules, without supporting evidence and rationale, do not constitute valid grounds for overturning the determination.

Store Characteristics

The case file supports that in reaching a disqualification determination, the ROD considered information obtained during a September 4, 2016 store visit conducted by a USDA contractor to observe Appellant’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 documented the following store size, description, and characteristics:

- The contractor estimated the store to be about 2,500 square feet with no food stored outside of public view. It is in an urban, commercial area;
- The available inventory of SNAP-eligible food items showed stock typical of a convenience store, including being composed predominantly of inexpensive items;
- There were two one cash registers and one electronic SNAP terminal device;
- There were no shopping carts or hand baskets;

- There were also no scanners or conveyor belts;
- There was no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers; and,
- There were no meat or seafood specials or bundles.

In addition, the store's checkout counter space area was cluttered, small and surrounded by Plexiglas affording very little surface area on which to place items for large purchases and precluding the processing of more than one customer at a time.

There was no indication that SNAP households were inclined to visit the store regularly to purchase large quantities of grocery items. The available food was primarily of a low-dollar value and there was no hint that the firm sold items in bulk. Given the available inventory, there was no sign that Appellant would be likely to have SNAP redemption patterns that differed significantly from those of similarly-sized competitors.

Repeat Transactions by the Same Household

Attachment 1 to the charge letter documents the same household making back-to-back transactions in unusually short time frames. Violating stores may conduct multiple transactions from the same household account **7 U.S.C. 2018 (b)(7)(e)** to avoid the detection of single, high-dollar trafficking transactions. There are 69 repeat transactions **7 U.S.C. 2018 (b)(6) & (b)(7)(c)** included in this document.

The record reflects that customers conducting rapid, repetitive and large transactions at Appellant frequently spent SNAP benefits at better-stocked and more competitively-priced grocery stores, sometimes on or about the same day they shopped at Appellant.

While there are legitimate reasons why a SNAP recipient might return to a convenience store in a short period of time, the examples in Attachment 1 indicate a series of purchases that total to large amounts. SNAP benefits are intended to supplement the food budget for households whose net income is near or below the Federal Poverty Level. It is difficult to believe customers who must rely on SNAP benefits to make ends meet prefer to pay higher prices and spend considerable amounts of their benefits at a convenience store. Spending sizable portions of one's SNAP benefit allotment in a convenience store when there are larger stores at which one also shops, which carry more variety of foods at a lower cost, is unreasonable customer behavior. Moreover, households listed in this attachment conducted this strange shopping pattern of making substantial purchases at Appellant multiple times during the review period. Given the common practice of violating retailers breaking up large, suspicious transactions into multiple, smaller transactions to avoid detection, a firm's explanation and evidence for why these transactions are occurring **7 U.S.C. 2018 (b)(7)(e)** in a convenience store should be both rational and compelling. Appellant's explanation in this regard is neither.

SNAP Benefit Depletions

Attachment 3 to the charge letter documents the same household exhausting all or nearly all its benefits in rapid order. There are 51 transactions **7 U.S.C. 2018 (b)(6) & (b)(7)(c)** included in

this document. In some cases, SNAP customers depleted SNAP account balances to within pennies of a zero balance and/or depleted balances during the first week of the month. It is highly implausible that customers would desire, or be able, to regularly conduct large transactions which deplete balances to within pennies of a zero balance. The likelihood that these transactions were the result of the legitimate sale of eligible foods only is extremely small.

A government report on SNAP shopping patterns¹ indicates that after the first day of benefit issuance, on average, 80 percent of a household's allotment remains unspent. Even after seven days, 40 percent of benefits still remain unspent. It typically takes 14 days to deplete 80 percent of one's benefits, and 21 days to deplete 90 percent. This report also revealed that households most often redeemed their benefits at supermarkets and supercenters, with only four percent of all households never shopping in a supermarket.

It is highly doubtful that a SNAP household making a legitimate purchase would choose to spend a large portion of its monthly allotment at a convenience store with likely higher prices and substantially less inventory than what would be found at a supermarket or superstore. Although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefits in only a few transactions or a single day. Depleting a large portion of one's SNAP balance early in the benefit month, leaving little to purchase food for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP households.

Large Transactions

The food stock and facilities of Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at such stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. It is rare for a convenience store such as Appellant's to have purchases like those included in Attachment 3 to the charge letter. This attachment cites 123 EBT transactions during the six-month period of investigation **7 U.S.C. 2018 (b)(6) & (b)(7)(c)**.

7 U.S.C. 2018 (b)(6) & (b)(7)(c). Households typically shop to obtain a certain collection of food items, irrespective of the total cost (other than to remain within allotment balances), and do not strive to achieve a particular total. The purchase amount of eligible food items typically approximates a random total. In contrast, firms facilitating trafficking tend to concentrate transactions at particular dollar amounts. In the absence of any compelling rationale to the contrary, the pattern of clustering transactions around certain dollar levels is implausible and indicative of transaction structuring and SNAP-benefit trafficking.

Its large transactions during the review period were much more frequent than those of similar stores **7 U.S.C. 2018 (b)(6) & (b)(7)(c)**.

¹ U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program, by Laura Castner and Juliette Henke. Project officer: Anita Singh, Alexandria, VA: February 2011.

Based on the store layout, infrastructure, and available inventory, it is not credible that the Appellant would so frequently conduct transactions closely resembling those typically found at a supermarket or superstore. It is not plausible that the firm's customers would regularly carry very large amounts of merchandise around the store without the benefit of shopping carts or shopping baskets, especially since larger, better stocked stores are readily available and in the vicinity of the Appellant firm. Appellant is not set up to process high-dollar transactions, as indicated by its lack of equipment to facilitate large transactions and limited counter space. There are no legitimate bases for SNAP customers' unusual attraction to the firm such as a superior selection of staple foods, price advantages, package specials, bulk or promotional items, an extensive variety of otherwise unavailable ethnic food items, or special services rendered. Appellant failed to provide convincing evidence to establish the legitimacy of these excessively large transactions, such as itemized cash register receipts. Based on all of these factors, the large volume of transactions for high-dollar amounts is unlikely to indicate a pattern of legitimate food purchases.

Appellant's Responsibilities

Appellant insists that the owners were unaware of any trafficking transactions, and that they were absent from the store because they needed to care for a family member. While the owner's mother's medical condition may be deserving of sympathy, when ownership signed the FNS application to become an authorized SNAP retailer, this included a certification and confirmation that the owner(s) would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time." The violations listed on this certification document include trafficking. Regardless of whom the ownership of a store may choose to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions.

No Applicable Mitigating Factors

This review is limited to consideration of the circumstances at the time the ROD's determination was made. It is not within the scope of this review to consider actions Appellant may have taken subsequent to this decision to begin to comply with program requirements. There is no provision in SNAP regulations for reducing an administrative penalty on the basis of corrective actions implemented subsequent to findings of program violations. Therefore, Appellant's contention that the owner has taken precautions to ensure violations do not reoccur in the future does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant asserts that this is the first time there has been an issue related to SNAP. In this regard, a record of program participation with no documented previous violations does not constitute valid grounds for mitigating the impact of the present serious determination of trafficking.

Appellant offered a refund of \$7,000 for unauthorized SNAP transactions. Neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be most serious, even when the exchange of SNAP

benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store.” In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS must disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved.

No Undue Hardship to SNAP Participants

Appellant asserts that disqualification would be a hardship to SNAP households who rely on the store. Some degree of inconvenience to SNAP benefit users is inherent in the disqualification from SNAP of any participating food store as the normal shopping pattern of such SNAP participants may be altered due to the disqualification. Section 278.6(f)(1) of SNAP regulations provides for CMP assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP households because of the unavailability of a comparable participating retail food store in the area to meet their needs. However, this regulation also sets forth the following specific exception: “A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.” Because the matter at hand involves a permanent disqualification, this CMP provision is not applicable.

Summary

The ROD determined that Appellant likely trafficked in SNAP benefits. The charges of violations were based on the ROD’s assessment that there was substantial evidence that the questionable transactions occurring during the review period displayed patterns inconsistent with legitimate sales of eligible food to SNAP participants. The evidence the ROD considered in support of its determination included the irregular SNAP transaction data of Appellant as compared to similar stores, observations made during an store visit by a USDA contractor including the inadequacy of the firm’s staple food stock to support such large transactions, the availability of other SNAP- authorized stores located close to Appellant, and shopping behaviors of Appellant’s customers. The transaction data and overall firm record demonstrate the patterns of unusual, irregular, and inexplicable SNAP activity for this firm is likely the result of trafficking.

Upon review, Appellant failed to prove by a preponderance of the evidence that the administrative action should be reversed. Appellant provided inadequate explanations for the suspicious transactions and insufficient evidence to legitimize its transaction data. It has not convincingly rebutted the ROD’s determination that Appellant most likely trafficked in SNAP benefits. 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 must disqualify the firm permanently.

CIVIL MONEY PENALTY

Appellant requested a civil money penalty (CMP). Appellant contends it had established and implemented an effective compliance policy and program to prevent violations of SNAP. There

is a provision at 7 CFR § 278.6(i) of the SNAP regulations permitting the imposition of a CMP in lieu of permanent disqualification for trafficking.

For an Appellant's request for a civil money penalty to be considered, the regulations at 7 CFR § 278.6(b)(2) require that Appellant submit supporting documentation within ten days of receipt of the charge letter. Appellant was advised of this provision in the charge letter of May 19, 2017. A review of the administrative record indicates Appellant did not submit all of its documentation to support its eligibility for this alternative sanction by this deadline.

7 CFR § 278.6(i) sets forth the eligibility requirements for a CMP:

The firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:

Criterion 1: The firm shall have developed an effective compliance policy as specified in Section 278.6(i)(1); and,

Criterion 2: The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and,

Criterion 3: The firm had developed and instituted an effective personnel training program as specified in Section 278.6(i)(2); and,

Criterion 4: Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations; or it is the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm ...

In support of Appellant's contention that it is eligible for a CMP it described its compliance and training program and stated it has not received a financial benefit from trafficking. It also included a SNAP compliance poster, seven employee training acknowledgement forms, and the "SNAP Training Guide for Retailers."

In this regard, the various documentation provided by Appellant is not "substantial evidence" that fulfills each of the four criteria of 7 CFR § 278.6(i), demonstrating "that the firm had established and implemented an effective compliance policy and program to prevent violations." None of these documents have employee signatures or dates of when this training allegedly occurred. There is no contemporaneous documentation that could verify that a compliance program was in place prior to the trafficking. The documentation provided could have simply been created subsequent to the firm being charged.

The standards of eligibility for a trafficking CMP are high in that they require that it be substantially shown that there is an established and implemented compliance policy and program, and that this had been in place prior to the occurrence of violations. This was perhaps to thwart efforts of firm's attempting to falsely present compliance policies and programs that actually were not implemented prior to violations. As Appellant did not provide the required supporting documentation, the ROD did not assess a CMP. According to the requirements stated

in 7 CFR § 278.6(b)(1), § 278.6(b)(2)(ii and iii), and § 278.6(i), Appellant is not eligible for a CMP in lieu of a permanent disqualification from participation as an authorized retailer in SNAP. The determination by the Retailer Operations Division to deny Appellant a civil money penalty is sustained.

CONCLUSION

The record has yielded no indication of error in the finding by the Retailer Operations Division that Appellant trafficked in SNAP benefits. A review of the evidence in this case supports that it is more likely true than not true that program violations did occur as charged. Based on the discussion above, the determination by the Retailer Operations Division to impose a permanent disqualification against Atlanta Food Mart from participation as an authorized retailer in SNAP is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

RICH PROULX
ADMINISTRATIVE REVIEW OFFICER

July 31, 2017