

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

Mini Convenience Store and Deli,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0199405

FINAL AGENCY DECISION

The record indicates that Mini Convenience Store and Deli (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 appropriate 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 May 17, 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 letter states that the sanction for trafficking is permanent disqualification. The record shows that Appellant did not reply to the Charge letter.

Retailer Operations issued a Determination letter dated June 15, 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 SNAP regulations. Retailer Operations considered Appellant’s eligibility for a civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP 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 per the regulations cited.

By letter dated June 19, 2017, the owner appealed Retailer Operations’ determination and requested administrative review of this action. He attached a copy of a letter dated May 23, 2017 to Retailer Operations. The appeal was granted by letter dated June 21, 2017. The owner provided additional information by letter dated July 10, 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) 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 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 that “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, inter alia: “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, inter alia: “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 October 2016 through March 2017. This involved three patterns of EBT transaction characteristics which are indicative of trafficking:

1. There were an unusual number of transactions ending in a same cents value.
2. Multiple transactions made from individual benefit accounts within unusually short time frames.
3. Excessively large purchase transactions were made from recipient accounts.

APPELLANT’S CONTENTIONS

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 recapitulated or reference herein. The contentions are:

- I sent this letter on May 23 and on May 25 the post office said you got this letter. I got your letter that you didn’t get that letter and I am resending it.
- I have not violated the SNAP regulations.

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: There were an unusual number of transactions ending in a same cents value. This Attachment lists 197 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Based on the contractor visit, Appellant's inventory contains single-serve, prepared food items including sandwiches and accessory foods typical of convenience stores. When there are a disproportionate number of transactions that end in a same cents value it appears that these transaction amounts are contrived. Therefore, in the absence of any compelling evidence to the contrary, these transactions are indicative of trafficking.

The owner contends:

- We have more grocery food and drinks that comes [sic] exact dollar amount or cent value. Some are: candy \$1 to \$4; cupcake/bun/pastries \$1; cookies/crackers 75 cents; chips \$1-\$2; soda/water \$1; juice \$1; Red Bull/Monster \$2.50; Gatorade/powerade \$1, \$1.50 and two for \$3; cola \$1.25; can soda .75 cents; 2 liter soda \$2; big juice/punch \$2.99 and \$3.99; gallon water \$2; case water \$7; 6 pack soda \$6; 12 pack can soda \$6; cereal \$2.99 and \$3.99; cookie \$3.49; crackers \$2.99; pizza \$6.99; bread and egg \$2; bacon, coffee, and butter \$4.99; cold cuts \$4.99 to \$6.99, Pop tarts .75 cents to \$3.99; pasta and sauce \$1.50, \$1.99, and \$2; rice \$2.99 and \$12.99; mayonnaise \$1.99, \$4.99 and \$14.99; corned beef \$5.99 and other items listed.
- Sandwiches are priced at \$3.99, \$4.99, \$5.99 and \$6.99.
- Some customer buys just meat like ham \$4, turkey \$5 and cheese \$5. Some buy soda, candy chips, and some buy sandwich with soda, chips and other things. Some buy meat, cheese, milk and bread and some buy all those groceries.

This is a convenience store with a deli that has exterior signage that promotes hot and cold sandwiches. The photos show a prominent scale to sell items by the pound. The store stocks various staple foods including frozen pizza, frozen beef patties, canned vegetables and fruits, canned meat and tuna, eggs, bread, oil, coffee, butter, cereals, other staples and snacks. Appellant also stocks a profusion of accessory food items. Ineligible items include: tobacco products, paper and cleaning items, pet food, and health and beauty products.

Review of the onsite photos confirms some of the prices stated by the owner. There also appears to be sufficient stock to total to the transaction amounts listed in the Attachment at the various ending cent values listed. This Attachment is not determined to be persuasive of trafficking.

Attachment 2: Multiple SNAP purchase transactions were made from individual benefit accounts in unusually short time frames. This Attachment lists 50 transactions in 20 sets of two or more transactions, conducted by 13 different households **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

The owner contends:

- Some customer buys big grocery. We have a small counter sometime I can't

put everything on the counter; I bag some items and charge that one first and I do other things again. This is why transactions comes two three time [sic].

- Some customers buys grocery first and order sandwich then wait for sandwich and see other things and they keep buying. We have to do it again, later they pay for sandwich and other things, and we have to do again and again.
- Sometimes customer put food, drink or other things on the counter and I start to ring still they looking other things. Same time other customer comes. I have to charge first customer and I take other customer then do again that first customer.

According to the record there at least 63 authorized stores within a one mile radius of Appellant including small groceries and a superstore. 5 U.S.C. § 552 (b)(7)(E).

One household transacted benefits at three different super stores up to 5.83 miles from Appellant within three days of conducting a transaction at Appellant. Another household transacted benefits at two super stores and a large grocery at a distance of 2.97 miles within three days of conducting a transaction at Appellant. A household transacted benefits at three different super stores and two supermarkets at a distance of 2.64 miles from Appellant within one day of conducting a transaction at Appellant.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

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. He did advance a 2016 Form 1099-K showing by month payment card and third party network transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The three review months in 2016 have redemption totals that generally comport with the amounts listed on this form. However, this form does not serve to legitimize the transactions listed. No itemized cash register tapes were provided as evidence of eligible food sales. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Thus, the owner has not provided a preponderance of evidence that the transactions on this Attachment are for legitimate foods

Attachment 3: Excessively large purchase transactions were made from recipient accounts. This Attachment lists 269 individual EBT transactions conducted by 78 different households 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The transactions listed on this Attachment are for amounts that exceed the average transaction amount for the same store type in the same state by more than three or four times. When compared to six nearby convenience stores Appellant had more transactions flagged on this Attachment for the same period at the other stores. This is irregular.

The owner contends:

- We don't order that much grocery from company. We go to the supermarket wherever they have sale we buy from there. That is why we have good price and some customers does shopping here.

- Most customer don't have ride. We say if you buy more than \$40 of grocery we can give you ride. Some customers already know they just come to buy grocery things here and we give them ride. When they get ride they buy everything.
- When I give them ride they buy like this and some buy for their family and friend.

The owner provided a copy of an undated two page list of itemized foods reportedly purchased at the grocery. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

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. This limitation reportedly caused the owner to split transactions since there was not sufficient space to place the items. The large dollar transactions remain questionable when considering the proximity of other larger authorized stores located in proximity of Appellant's location. A shopping analysis shows that recipients who frequented Appellant also shopped at larger stores, yet inexplicably spent large dollar amounts at Appellant. While the owner may have offered rides to recipients who transacted more than \$40, there is no signage in the store to attest to this practice. No recipient affidavits were advanced to support the contention that free rides were offered when \$40 or more was spent at Appellant.

The charged owner was given the opportunity to provide evidence of the legitimacy of the transactions listed. He did provide a price list, a sampling of eligible items totaled to various amounts, and a 2016 1099-K form. He also provided some explanations as to why the transactions listed were legitimate. The explanation may be valid however, they lack sufficient supporting evidence. As noted, the owner did not submit invoices of eligible food stock. While the stock may have been acquired at a variety of stores as contended (5 U.S.C. § 552 (b)(6) & (b)(7)(C).) no invoices from these locations was provided. The owner also failed to provide evidence via customer affidavits, signage, advertisements or other documents to support that he gave rides to customers who purchased \$40 or more or that they shopped in the manner described by the owner.

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.

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 for two of the three Attachments in the Charge letter, 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.

Retailer Operations also determined 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. Under review, the denial of a trafficking CMP 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

August 9, 2017