

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

McNichols Petro Mart, Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0247867

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the permanent disqualification of McNichols Petro Mart, Inc. (Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

AUTHORITY

7 USC § 2021 and the implementing regulations at 7 CFR § 279.1 provide that “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS.”

CASE CHRONOLOGY

In a letter dated September 29, 2021, the Retailer Operations Division charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of January 2021 through June 2021. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

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Appellant, through counsel, replied to the charges by letter on October 11, 2021. Appellant requested household information and a reduced CMP. After considering the retailer's reply and the evidence, the Retailer Operations Division issued a determination letter dated November 3, 2021. The determination letter informed Appellant that it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that Appellant was not eligible for a trafficking CMP because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

By letter dated December 20, 2021, Appellant appealed the Retailer Operations Division's determination and requested an administrative review. The administrative review was granted.

STANDARD OF REVIEW

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

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) 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 USC § 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 § 271.2 defines trafficking, 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; . . .

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(e)(1) reads, in part:

FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

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.

7 CFR § 278.6(b)(2) states, in part:

(ii) 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 as specified in § 278.6(i), 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).** [Emphasis added.]

(iii) **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. [Emphasis added.]

SUMMARY OF THE CHARGES

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from January 2021 through June 2021. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were a large number of transactions in repeated dollar values.
- There were multiple transactions made from individual benefit accounts within a set time period.
- There were EBT transactions that are large based on the observed store characteristics and recorded food stock.

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.

APPELLANT'S CONTENTIONS

In its December 20, 2021, administrative review request, Appellant, through counsel, provided the following summarized contentions:

- The owner is a registered nurse and denies trafficking.
- During COVID, the owner dedicate time to nursing and relied on the store manager who also denies the allegations.
- The information regarding EBT card holders is critical for the store owner to be able to explain who conducted the transactions.
- The owner makes a good living and would not put herself at risk civilly or criminally for financial gains by engaging in trafficking.
- The owner does rely on her employees and management to operate the gas station and is aware that sometimes employees go astray.
- Appellant requests a reduced CMP because Appellant already had a zero-tolerance policy in place regarding SNAP violations and each employee had been training.

The preceding may represent only a summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced.

ANALYSIS AND FINDINGS

Store Visit

FNS authorized McNichols Petro Mart, Inc. as a convenience store on September 13, 2017. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an April 22, 2021, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- McNichols Petro Mart, Inc. is approximately 2000 square feet.
- There was one checkout space, two cash registers, and two point-of-sale devices.
- There was no optical scanner for the speedy processing of items at checkout.
- There were no shopping baskets or shopping carts for customer use.
- The checkout area was surrounded by a Plexiglas display wall with two small opening for processing transitions.
- There was no fresh unprocessed meat, poultry, or fish.
- There was no fresh produce.
- Dairy included milk, cheese, butter, and yogurt.

- Other staple foods available for purchase were eggs, juice, rice, cereal, pasta, one loaf of bread, and a limited selection of canned goods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included gas, lottery, tobacco, cleaning products, and paper products.

The SNAP eligible food stocked by the store, a gas station, was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. In fact, there were only two items priced greater than \$5.00 on the day of the store visit. The highest priced items on the day of the store visit were cans of two different brands of coffee - \$5.99. According to the photos and the store visit report, there were limited amounts of these larger dollar items available. Given the available inventory as noted above, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors.

Charge Letter Attachments

Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

Charge Letter Attachment 1. There were an unusual number of transactions in the same dollar amount. During the review period, there were 47 transactions resulted in repeated dollar values of \$59 that meet the parameters of this attachment. When such patterns are unsupported by special pricing structures, they are a strong indicator of trafficking in SNAP benefits.

It is not uncommon for dollar values to repeat over the course of a six-month period. However, when certain dollar values are unusually repetitive without a reasonable explanation, they can be a likely indicator of trafficking. Based on the store visit, the store does not have any specials or food packages that can result in same repeated dollar amount purchases. As such, in the absence of any compelling rationale to the contrary, the Retailer Operations Division determined that these transaction amounts are contrived and are indicative of trafficking.

Appellant failed to provide a credible explanation for the \$59.00 transactions listed on Charge Letter Attachment #1.

Charge Letter Attachment 2: Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment documents 44 transaction sets completed by six households that total \$7,212.48 in SNAP benefits that meet the parameters of this scan. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

The SNAP transactions noted in the charge letter are questionable because because they display characteristics of use inconsistent with the nature and extent of Appellant's stock and facilities and

are therefore indicative of trafficking. Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Appellant multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale. Appellant is not set up to provide for all of one's food needs and lacks an abundant depth and breadth of staple foods. The second and third transactions in each set are too large to consist of forgotten items.

The Retailer Operations Division reviewed the transactions of three nearby similarly stocked convenience stores. Whereas Appellant conducted 44 transaction sets that met the parameters of this scan, none of the other three stores conducted any similar transaction sets. The question then is why households shop differently at Appellant.

Appellant has not offered any evidence to show that the transactions listed in Charge Letter Attachment #2 were legitimate purchases of eligible food.

Charge Letter Attachment 3: Excessively large purchase transactions were made from recipient accounts. This attachment lists 219 SNAP transactions as large as \$108.08, and that total \$11,768.12. These large transaction amounts are questionable because they are not consistent with the store's inventory. Appellant does not have any shopping baskets or carts to transport such large orders and it has limited space at the check-out counter to place items for purchase. There was no fresh meat and no fresh produce. The frequency of high-dollar purchases in a six-month period call into question the legitimacy of these transactions.

Appellant's average SNAP transaction amount was 23% greater than the average SNAP transaction amount for convenience stores in Wayne County and Appellant's total SNAP redemption dollar value for the review period was 94% greater than the average for convenience stores in the County. The Retailer Operations Division considered this an indicator of trafficking considering Appellant's available inventory.

The Retailer Operations Division compared Appellant three nearby convenience stores. Appellant's average SNAP transaction amount was at least 46% greater than the other three stores. The Retailer Operations Division also determined that Appellant conducted more SNAP transactions in the dollar range between \$34.99 - \$79.99 than the three comparison stores. There was an unusual spike in the \$40.00 to \$59.99 transaction range. In addition, the Retailer Operations Division determined that the transaction pattern of Appellant exceeded the other stores, as seen on the table herein. The data from this nearby store shows that the transaction patterns at the Appellant firm were unusual.

| Store | Attachment 1 Pattern | Attachment 2 Pattern | Attachment 3 Pattern |
|-----------|-------------------------|-------------------------|-------------------------|
| Appellant | 27 | 44 | 219 |
| Store #1 | 0 | 0 | 13 |
| Store #2 | 1 | 0 | 26 |
| Store #2 | 0 | 0 | 7 |

Sometimes a firm may have higher than average SNAP transaction amounts due to the lack of access to other SNAP authorized stores. However, the Retailer Operations Division determined that within a one-mile radius of Appellant there are at least 20 other authorized stores including 20 other convenience stores, two combination groceries, 28 other convenience stores, one supermarket, and one super store. The Retailer Operations Division reviewed the SNAP transactions of four households identified in the charge letter to analyze their shopping patterns at McNichols Petro Mart, Inc. compared to their shopping patterns at other SNAP authorized stores. Despite access to better stocked stores, each of the three households conducted excessively large transactions at McNichols Petro Mart, Inc. within a short time of shopping at a supermarket or super store. It is questionable as to why households would conduct large transactions at Appellant, when these households had just visited or planned to visit larger stores with a better selection of fresh meat and produce and likely better prices.

Ownership Involvement

Appellant states that ownership had no involvement in the violations, but it does rely on management and employees to operate the business because the owner is also employed as nurse. Although ownership was allegedly not involved in the violation, it cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. Regardless of whom the ownership of a store may utilize to handle store business, the ownership is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. Ownership signed the FNS application to become a SNAP authorized retailer on August 8, 2017, which included a certification and confirmation that the owner 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 include accepting SNAP benefits for cash and as payment for ineligible items, a violation of the SNAP rules and regulations. The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations.

Evidence

The transactions reports are derived from the ALERT system, a computerized fraud detection tool to identify SNAP transactions that form patterns having characteristics indicative of trafficking. However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still conduct an extensive analysis of the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether the questionable transactions were, more likely than not, the result of trafficking.

The legality of this method is supported by 7 CFR §278.6(a) which states, inter alia, “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.]

The documentation and evidence provided by the Retailer Operations Division was thoroughly examined. From all indications, the Retailer Operations Division obtained the EBT data (provided by ALERT), found it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough investigation before concluding that trafficking was likely occurring.

Appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed and that the transactions detailed in the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. Appellant offered insufficient evidence to prove that the transactions listed in the charge letter were legitimate purchases of eligible food. In the absence of compelling information or documentation weighed in comparison to the evidence provided by the Retailer Operations Division, the evidence weighs in favor of the Retailer Operations Division’s determination that SNAP-benefit trafficking substantially produced the transaction activity at issue in the present case.

CIVIL MONEY PENALTY

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR § 278.6(i). Appellant was informed that it would need to provide both the request and supporting evidence within ten calendar days of receiving the charge letter and that no extension of time could be granted for making the request or for providing the required evidence. Appellant requested consideration for a trafficking CMP in lieu of a permanent disqualification; however, Appellant did not submit any documentation to support its statements. Thus, there is insufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy to prevent SNAP violations. Therefore, the Retailer Operations Division’s decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

Counsel contends that the store owner does train its employees but sometimes employees go astray. It is true that an employee can chose to violate the SNAP regulations even when trained properly. However, when an employee intentionally commits such violations, the regulations at 7 CFR 278.6(i) allow firms, that have taken the necessary and sufficient steps to prevent violations and ensure employee compliance with SNAP regulations, the opportunity to seek a CMP in lieu of a permanent disqualification. As indicated, in this Appellant did not submit any evidence to show that it implemented an effective policy and training program to prevent violations.

CONCLUSION

The Retailer Operations Division’s analysis of Appellant’s EBT 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. Therefore, based on a review of

all of the evidence in this case, it is more likely true than not true that program violations did occur as charged by the Retailer Operations Division. The determination to impose a permanent disqualification against Appellant is sustained.

The Retailer Operations Division 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. The denial of a trafficking CMP is also correct.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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.

Mary Kate Karagiorgos
ADMINISTRATIVE REVIEW OFFICER

May 5, 2022