

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

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| 24 Hour Mini Mart, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | Case Number: C0190629 |
| |) | |
| Retailer Operations Division, |) | |
| |) | |
| Respondent. |) | |
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FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the decision by the Retailer Operations Division to impose a permanent disqualification against 24 Hour Mini Mart (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

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)(i) in its administration of the SNAP, when it imposed a permanent disqualification against Appellant on August 2, 2016.

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 July 8, 2016, 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 during the months of December 2015 through May

2016. 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 the 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).

Appellant, through counsel, responded to the charge letter on July 20, 2016, requesting a CMP. The Retailer Operations Division notified Appellant in a letter dated August 2, 2016, that the firm 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. This determination letter also stated that Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated ". . . you are not eligible for the CMP because you failed to submit sufficient evidence to demonstrate that your firm had established and implemented an effective compliance policy and program to prevent violations of the Supplemental Nutrition Assistance Program."

By letter dated August 15, 2016, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted. No subsequent correspondence has been received from Appellant.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence that the administrative actions 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 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 U.S.C. § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(e)(1)(i) establishes 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 of SNAP benefits.

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 part, in 7 CFR § 271.2, as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone"

In addition, 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(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(e)(1) reads, in part, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2.”

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 a six month period of December 2015 through May 2016. This involved three patterns of EBT transaction characteristics indicative of trafficking:

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

STORE BACKGROUND

The FNS initially authorized the Appellant business on August 1, 2012, as a convenience store. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a May 5, 2016, 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 EBT transactions at Appellant’s store that formed patterns indicative of trafficking. The store review summary documented the following store size, description, and characteristics:

- The business was a typically stocked convenience store carrying a minimal amount of staple foods.
- The contractor estimated the store to be about 2000 square feet with no food stored in a storage area out of public view.
- There were no shopping carts and only 10 handheld baskets for customer use seen during the visit making it difficult for customers to carry large amounts of food to the checkout.

- There were two checkout counters each inset into a plastic security wall with a revolving window approximately 1 foot by 1 foot and with a narrow slot under the plastic. There was a narrow shelf in front of the two checkout areas with displays on both sides leaving an area approximately 1.5 feet by 0.5 feet to set purchases upon. The checkout counter had two cash registers, two POS terminals, and an optical scanner, but no adding machines or calculators.
- No food packages, bundles, case sales, bulk items, or other sales were evident. The only cased items available were canned/bottled drinks and beer.
- The inventory of staple foods at the time of the visit included: dried/bottled/canned fruit and vegetables, fruit and vegetable juices, bagged nuts, canned meat/poultry/fish, jerky, canned milk, dry pasta/noodles, sugar, Masa flour, cooking oil, corn meal, baked goods, snacks, pancake mixes, baking mixes, bread, rolls, tortillas, mac&cheese, hot/cold cereals, noodle soups, and frozen foods (pizza, heat&eat sandwiches, burritos, etc.)
- Dairy items included: flavored milk drinks, milk, margarine, packaged cheese, sour cream, cream cheese, and ice cream.
- Refrigerated items included: eggs, bacon, hot dogs, Chorizo sausages (3), and packaged lunch meats (ham and bologna),
- Fresh fruit and vegetables included: one lemon, five limes, and four tomatoes. There were no other fresh fruits or vegetables and also no frozen fruits or vegetables.
- There was minimal staple food stock with the majority of stock in accessory foods (primarily soda and other drinks), snacks, candy, and ineligible items.
- There were no fresh unprocessed meats or seafood, no frozen unprocessed meats and seafood, minimal processed meats and no processed seafood, no deli meats or cheeses, no frozen entrees, minimal fresh produce and no frozen produce, no baby foods, no infant formula, minimal fresh milk, no rice, and few, if any, expensive items.
- Ineligible items included: tobacco, alcohol, video poker, Keno, household products, paper products, pet products, auto products, health and beauty items, ATM, clothing, hats, charcoal, lighter fluid, bill pay, and Western Union while accessory foods included: condiments, spices, candy, coffee, tea, cocoa, and carbonated/uncarbonated drinks.
- The store did not stock any ethnic or unique foods.
- The majority of items were priced with almost all visible prices ending in .x9 cents except for a very small number of drinks priced at \$1.00 and the fresh fruit/vegetables priced at two for \$1.00. This is the most common pricing structure for stores of this type.
- The store was not a WIC vendor.
- The store is open 24/7 as confirmed by cashier Cassandra Rotteria during the store visit.
- Signage in the store was primarily in English.

APPELLANT'S CONTENTIONS

In the response to the letter of charges and in the request for administrative review, Appellant has stated as its position in the matter the following:

- The firm did have an effective, established, and implemented compliance policy and program in place to prevent SNAP violations and the FNS disqualification letter offered no support or argument as to how exactly the firm did not meet its burden for a CMP despite a significant amount of evidence to the contrary;
- The business developed an effective compliance policy before the violations occurred as evidenced by the clerk responsible for the violations having signed an acknowledgement of this policy on January 28, 2014. Despite having had no previous violations, the business terminated the responsible employee upon learning of the violations and updated the firm's employee handbook to include more extensive education and training for employees and managers. All managers and employees whose work involves SNAP transactions are trained within one month of hiring or sooner. Spot-training is conducted periodically thereafter on an as needed basis. Training is designed to establish a level of competence that assures compliance with SNAP regulations with any violations resulting in termination. The new Updated Compliance Policy contains the Training Guide for Retailers as provided by FNS for SNAP training. The Updated Policy contains improved employee training and improved management oversight of employees as well as an EBT rules and regulations examination;
- The firm has never had any previous complaints or violations in any USDA program. The trafficking violations were the result of a single, non-managerial employee working the night shift whose actions were not known by the firm and were limited to a mere six months of scattered transactions when the firm has been operating for over four years. When confronted, this employee freely admitted to knowingly violating the EBT policies in effect at the firm. The employee conducted a final fraudulent transaction in the amount of \$40.99 committed at 5:58 AM on July 15, 2016, while management was conducting due diligence into the issue. Ownership did not benefit from and was in no way involved in the conduct or approval of the offending employee's trafficking violations. In fact, the firm has suffered a net loss because of the associated transaction charges with the fraudulent SNAP transactions even though the business received no benefit or profit from the fraudulent transactions;
- There had been no prior action by FNS to warn the firm about the possibility that violations were occurring. Upon learning of the alleged violations, the firm immediately terminated the offending employee and revised the firm's compliance policy to avoid any further infractions. There was no intent to violate the regulations as the handbook clearly indicates in at least two places that EBT should never be exchanged for cash, products, drugs, any other items, or credit under penalty of termination. The offending employee signed that he read the rules of the Handbook, understood the meaning and intent of the agreement, and entered it knowingly and voluntarily on January 28, 2014. The inclusion of language within the Handbook that prohibited the mishandling of EBT transactions under penalty of termination indicates the firm's commitment to ensure the firm was operated in a manner consistent with the regulations. The Handbook contains four full pages on the proper policies for receiving EBT transactions, what may be purchased with EBT benefits, items that may not be purchased, and the prohibition on exchanging EBT for cash, products, drugs, or other items. This even included the

- heating of a frozen burrito before paying for it using EBT;
- Furthermore, of the two stores in the same neighborhood that accept EBT, none offers the substantial variety of staple food items as offered by 24 Hour Mini Mart. All of these items are offered at extremely competitive prices so the surrounding neighborhood may thrive. A permanent disqualification would certainly cause severe hardship to SNAP households in the area as the firm is the only store offering the variety of staple foods items at comparable prices in the neighborhood. Many of the SNAP customers do not have vehicles and arrive on foot. Thus, many would be wholly unable to obtain proper nutrition if the firm's ability to accept SNAP was permanently disqualified; and,
- Based on the above, Appellant requests a CMP in lieu of permanent disqualification.

Appellant submitted a new affidavit signed by the store owner and dated August 15, 2016, an affidavit signed by the store owner and dated July 20, 2016, a copy of the store's undated Employee Handbook Policies & Procedures, a signed statement by Hani Toma dated January 28, 2014, stating that he had read the rules of the employee handbook, an Employee Warning Notice dated July 17, 2016, for the termination of Hani Toma, a copy of the undated Updated Compliance Policy FNS–EBT Transactions that included a copy of the FNS SNAP Training Guide for Retailers, and a copy of an email from counsel to ROD attesting to there having been seven employees at the business during the review period in support of these contentions.

The preceding may represent a summary of Appellant's contentions 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 herein.

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. Therefore, 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 "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation. Nevertheless, transactions having such characteristics are sometimes valid and sufficient evidence that support that they were the result of legitimate purchases of eligible food items is provided. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited and to provide evidence that they are legitimate.

The Retailer Operations Division presented a case that Appellant trafficked SNAP benefits based on transaction patterns, the results of a contracted store visit, and an analysis of shopping patterns of the households who conducted the irregular SNAP transactions at the Appellant firm. Each Attachment furnished with the letter of charges identifies the questionable and unusual patterns of SNAP transactions that indicate trafficking was taking place at Appellant's business during the review period. As patterns of unusual transactions appear across multiple

Attachments, the case of trafficking becomes more convincing. Appellant does not dispute or rebut the trafficking case established by the Retailer Operations Division, but states that the firm did have an effective, established, and implemented compliance policy and program in place to prevent SNAP violations and the FNS disqualification letter offered no support or argument as to how exactly the firm did not meet its burden for a CMP despite a significant amount of evidence to the contrary. Appellant also contends the violations were the result of a single, non-managerial employee working the night shift whose actions were not known by the firm and were limited to a mere six months of scattered transactions when the firm has been operating for over four years. There had been no prior action by FNS to warn the firm about the possibility that violations were occurring. Upon learning of the alleged violations, the firm immediately terminated the offending employee and revised the firm's compliance policy to avoid any further infractions.

In regards to Appellant's contentions, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not within the authority of this review to consider what subsequent remedial actions may have been taken so that a store may begin to comply with program requirements. 7 USC 2018 (b)(7)(e). Therefore, while ownership having terminated the responsible employee and revised the firm's compliance policy are positive steps, these actions do not provide a valid basis for dismissing the charges, or for mitigating the penalty imposed.

Additionally, a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges. Regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, the ownership is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time. There are no requirements in existing FNS regulations that require stores suspected of trafficking SNAP benefits be provided with a written or verbal notification that violations of SNAP regulations may be occurring and the potential penalties. Additionally, the FNS retailer electronic application form contains a certification page whereby applicants must confirm their understanding of and agreement with SNAP retailer requirements in order to complete the application process including that violations may result in disqualification. Store ownership did certify its understanding and agreement with these requirements when it applied for authorization as a SNAP retailer in May 2012. The "SNAP Training Guide for Retailers" is also provided to all retailers upon their authorization and clearly states that store owners or operators are legally responsible for their own actions as well as the actions of everyone working in their store and that violations may include being disqualified from SNAP. This guide and the video accompanying it are also both available online through the FNS retailer web site and provide detailed information for SNAP retailers regarding compliance with SNAP rules and

regulations and training store employees.

It is a matter of record that store ownership has admitted that trafficking occurred claiming that all of the violative acts were conducted by one employee working the night shift. **7 USC 2018 (b)(7)(e)**.

The evidence under review shows SNAP activity indicative of trafficking. Neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto 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 the most serious violation, 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 shall 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 and second chances are not an authorized option.

CIVIL MONEY PENALTY

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP. Additionally, there are 29 SNAP authorized stores, including four super stores, located within a one mile radius of Appellant's business. The many nearby stores appear readily accessible to SNAP recipients and offer a variety of staple foods comparable to, or better than, those offered by Appellant. Appellant does not carry any unique items or foods that cannot be found at other stores. 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 benefit holders may be altered.

To be considered eligible for a trafficking CMP a firm must 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).
- 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.

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

SNAP regulations are explicit in what constitutes substantial evidence. Specifically, 7 CFR § 278.6(i)(2) states in relevant part, “As specified in Criterion 3 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider *written and dated statements of firm policy* which reflect a commitment to ensure that the firm is operated in a manner consistent with this part 278 of current FNS regulations and current FSP policy on the proper acceptance and handling of food coupons.” This section goes on to state, “As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation.” This section further states, “A firm which seeks a civil money penalty in lieu of permanent disqualification *shall document* its training activity by submitting to FNS its *dated training curricula and records of dates training sessions were conducted...*” (Emphasis added).

A review of the documentation submitted by store ownership in support of the trafficking CMP in lieu of permanent disqualification was conducted. This review showed that the firm’s Employee Handbook Policies & Procedures does not mention the store’s name, is undated, has no page numbers, and consists of a wide range of topics unrelated to SNAP with pages that vary widely in their font and formatting indicating that the Handbook was most likely compiled over a period of time. There is no way to determine what pages were in the Handbook at the time that the certification by employee [7 U.S.C. 2018 (b)(6) & (b)(7)(c)] dated January 28, 2014, was executed. It is also unlikely, as previously discussed, that all of the violative transactions were in fact conducted by a single employee and more likely that at least one other employee was involved. No training records for the store’s seven other employees were submitted and there is no record of any subsequent training for [7 U.S.C. 2018 (b)(6) & (b)(7)(c)] or the other store employees. The record shows that store ownership applied for authorization as a SNAP retailer by submitting an application electronically through the FNS retailer web site in May 2012. This same web site cautions applicants about their responsibilities for training and overseeing store employees specifically stating:

“You must read the SNAP Retailer Training Guide and watch the instructional video. Store owners accept responsibility for the actions of their employees. You are responsible for the actions of your employees. All of your employees must read the SNAP Retailer Training Guide and watch the instructional video which is also included in your approval package to ensure compliance with SNAP rules and regulations.”

The “SNAP Training Guide for Retailers” is provided to all retail store owners upon their

authorization and the Training Guide and the video accompanying it are also both available online through the FNS retailer web site and provide detailed information for SNAP retailers regarding compliance with SNAP rules and regulations. Despite the clear-cut emphasis on using these two resources, the store's Handbook makes no mention of either the Training Guide or the instructional video. Store ownership does state that it has included the Training Guide in the revisions to the Handbook made after receipt of the charge letter.

Based on this discussion, the Retailer Operations Division correctly determined that the documentation submitted by store ownership did not meet the criteria required by § 278.6(i) to be eligible for a trafficking CMP in lieu of permanent disqualification.

Regarding the financial impact on the business and on store ownership, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. 7 USC 2018 (b)(7)(e). To allow ownership 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, as amended, 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, ownership's contention that she and 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.

CONCLUSION

The Retailer Operations Division has presented a case that Appellant likely trafficked in SNAP benefits. Retailer Operations' 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. This is evidenced by: the suspicious patterns in three Attachments of EBT transaction data, the inadequacy of the store's staple food stock as observed during the store visit to support large transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type stores in the county and state.

Store ownership is not contesting the charges, does not deny that trafficking occurred at the Appellant business, and has not provided any evidence to rebut the case that the business most likely trafficked 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 in fact occur as charged by the Retailer Operations Division. Based on the discussion herein, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations.

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, it may be necessary to release this document and related correspondence and records upon request. If such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released could constitute an unwarranted invasion of privacy.

October 5, 2016

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

DATE