

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

24 Seven #3,

Appellant,

V.

Retailer Operations Division,

Respondent.

Case Number: C0197303

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that 24 Seven #3, (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). 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 was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant by letter dated July 6, 2017.

AUTHORITY

7 U.S.C. § 2023 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 April 11, 2017, 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 October 2016 through February

2017. 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 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

In correspondence dated April 19, 2017, the Appellant responded to the charge letter and generally stated that it vehemently denied the allegations of trafficking. Appellant provided the following documentation in support of its position: Photographs of the store, monthly purchases, sales tax monthly filing, proof of receipts, affidavits of support, training walkthrough signed by each employee, 20 days of video recordings, and a letter of authorization.

After giving consideration to the Appellant's reply and evidence of the case, Retailer Operations Division issued a Determination letter dated July 6, 2017. The 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. The letter also stated that Retailer Operations Division considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, Retailer Operations Division determined that Appellant was not eligible for the CMP because it failed to submit sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated July 14, 2017, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal 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 an 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 & Nutrition Act of 2008¹, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) (c) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store in the event that personnel of the firm have engaged in trafficking SNAP benefits.

¹ Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246

7 CFR § 278.6(a) states, *inter alia*, that “FNS may disqualify any authorized retail food store...from further participation in the program 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(c) reads, in part, “*Review of Evidence.* 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)...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...”

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 mean: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption.”

SUMMARY OF THE CHARGES

The charges on review were based on an analysis of SNAP electronic benefit transfer (EBT) transactions dated during the five month period of October 2016 through February 2017. This involved two patterns of EBT transaction characteristics indicative of trafficking:

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

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

The Appellant, through counsel, made the following summarized contentions in its response to the permanent disqualification letter issued by Retailer Operations Division, and its request for administrative review, in relevant part:

- 24 Seven #3 was not afforded the opportunity to pay a Civil Money Penalty (CMP) due to an alleged lack of an established and implemented effective compliance policy

and prevention program regarding violations of the SNAP. However, 24 Seven #3 did in fact have such policies and programs in place.

- The mandatory employee training contained watching a video or an online document packet describing the SNAP regulations and guidelines as provided by FNS. Employees were given a pocket guideline that described the eligibility for certain food items, and included tips with “how to” and what not to do.
- The area where 24 Seven #3 is located is economically disadvantaged but very populated. There is only one other food store location within a one-mile radius. 24 Seven #3 request that it be considered for a civil money penalty or, in the alternative, a disqualification for six months.

Appellant, through counsel, provided an affidavit from the owner, seven individual SNAP training documents listed as Exhibit 1, 10 color photographs of the register with sample purchase transactions listed as Exhibit 2, and an area map of the store generated from the SNAP retailer locator.

The preceding may represent a brief summary of Appellant’s contentions in this matter however, in reaching a decision, full attention has been given to all contentions presented, including any not specifically recapitulated or referenced herein.

ANALYSIS AND FINDINGS

The FNS authorized the business as a convenience store on March 2, 2016. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a January 11, 2017, store visit to the business 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 that formed patterns indicative of trafficking. The firm review summary documented the following store size, description, and characteristics:

- Two cash registers and one POS device, counter area has two small openings approximately 1.5ft x 2ft in size, partially obstructed by other smaller items available for sale and enclosed in Plexiglas. Counter area not equipped to hold large amounts of food items.
- Shopping baskets available but shopping carts available for customer use.
- No adding machines but optical scanners are available at checkout
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- No hot foods sold for take-out or for onsite consumption.
- A deli or prepared food section available with other refrigerated foods.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.
- Estimated 3600 square footage and no food stored in storage area out of public view
- Operates through a night window with food stock behind the barrier.
- Store is not a delivery route, farmers’ market or specialty food store primarily selling

- one food type such as meat, poultry, seafood, bread, fruit or vegetables.
- Store stocks a significant amount of non-food items such as but not limited to household products, personal hygiene products, tobacco products, alcohol, lottery tickets, cleaning products, paper goods, pet products, automotive products, and gasoline.
- Store stocks minimal amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products.
- Store visit photographs show outdated staple food products.
- Store does not carry any fresh meat or meat plans, no deli products, no fresh produce, no ethnic or specialty foods.

The issue for consideration is whether Retailer Operations Division has presented a convincing case that Appellant likely trafficked in 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 the Appellant firm during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

Attachment 1 of the Charge Letter - Multiple transactions were made from individual accounts in unusually short timeframes

This attachment lists 23 sets of 78 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits. Multiple transactions conducted by the same household account **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** is a method which violating stores use to avoid the detection of single high dollar transactions that cannot be supported by the retailer's inventory and structure. Considering that Appellant is a typical gas station/convenience store, there is no logical reason for a household to shop at Appellant's store three, four, or five times **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** spending large amounts of SNAP benefits.

Appellant, through counsel, did not offer, with its review request, any explanation or related evidence in an attempt to clarify or justify the specific transactional behavior noted in the Attachment 1 of the charge letter therefore, based on the analysis above and in the absence of any compelling evidence to the contrary, the irregular and unusual transaction pattern cited in the charge letter is unlikely and a strong indicator of trafficking in SNAP benefits.

In conclusion, it is therefore more likely true than not true that the irregular transactions cited in the charge letter Attachment 1 are due to trafficking in SNAP benefits.

Attachment 2 of the Charge Letter - Excessively large purchase transactions were made from recipient accounts

This attachment lists 279 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Based on the results of the contracted store visit, the large transaction amounts are not consistent with the store's inventory of low priced foods. The firm does not offer food in bulk or any ethnic or specialty foods that sell for a high price. Therefore, the substantial number of high dollar

purchases calls into question the legitimacy of these transactions. The average convenience store transaction in Harris County, Texas during the review period was \$7.60. The largest purchase amount at the subject store during the review period 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is 15 times higher than the average convenience store transaction in Harris County Texas.

Appellant, through counsel, did not offer, with its review request, any explanation or related evidence in an attempt to clarify or justify the specific transactional behavior noted in the Attachment 2 of the Charge letter therefore, based on the analysis above and in the absence of any compelling evidence to the contrary, the irregular and unusual transaction pattern cited in the charge letter is unlikely and a strong indicator of trafficking in SNAP benefits.

Based on this empirical data, and in the absence of sufficient evidence as to the legitimacy of such transactions, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the charge letter evidence trafficking as the most likely explanation. In this case, ownership did not provide sufficient evidence to legitimize Appellant’s transaction data as outlined in the Attachments. Retailer Operations Division determined that Appellant’s contentions did not outweigh the evidence that the store was trafficking and concluded, through a preponderance of evidence, that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

The transaction data and overall firm record convincingly demonstrate repetitive patterns of unusual, irregular, and inexplicable SNAP activity for this type of firm indicative of trafficking. Once Retailer Operations Division established the convincing case against Appellant, ownership 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 matter asserted is more likely to be true than not true. If this is not demonstrated, the case is to be sustained.

As noted, 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 inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Retailer Operations Division has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns in two attachments of EBT transaction data, the inadequacy of the firm’s eligible food stock as observed and recording during the onsite visit to support such large transactions, the lack of evidence of invoices of foods in inventory to cover SNAP redemption totals for the review months, the lack of explanation for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant, and the irregular SNAP transaction data of Appellant as compared to other convenience stores in the State.

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 charge letter. Therefore, based on this empirical data, and in the absence of evidence for the legitimacy 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. While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence in the record.

The purpose of the administrative review process is to ensure that firms aggrieved by Retailer Operations Division' adverse actions have the opportunity to have their position fairly considered by an impartial review authority prior to that adverse action becoming final. Appellant has been duly given, and has taken the opportunity to present to USDA through the administrative review process whatever evidence and information it deems pertinent in support of its position that Retailer Operations Division' adverse action should be reversed. Therefore, any evidence and information that Appellant presented to Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to Appellant's right to a fair and thorough review.

CIVIL MONEY PENALTY

The Appellant, through counsel, contends that it was not afforded the opportunity to pay a CMP due to an alleged lack of an established and implemented effective compliance policy and prevention program and Appellant, did in fact, have such policies and programs in place. Appellant provided an affidavit of the owner which generally states that on April 19, 2017, the owner sent, what was believed to be, satisfactory evidence and information to refute the charges and that information would be enough to be eligible for a civil money penalty instead of a permanent disqualification. The affidavit further stated that a permanent disqualification would cause hardship to SNAP households because there are no other authorized retailers in the area selling as large a variety of staple food items at comparable prices. Appellant, through counsel, provided seven individual SNAP training documents listed as Exhibit 1, 10 color photographs of the register with sample purchase transactions listed as Exhibit 2, and an area map of the store generated in the SNAP retailer locator in support of its position.

The issue to be decided here, then, is whether, through a preponderance of the evidence,²⁴ Seven #3 had an effective policy and program to prevent trafficking violations that was fully in accord with the provisions of 7 CFR §278.6(i), and thus that it is eligible for a CMP.

7 CFR §278.6(i) specifies that in order for a firm to qualify for a CMP in lieu of permanent disqualification, it must submit substantial evidence that it has fulfilled each of the following

criteria:

Criterion 1: The firm shall have developed an effective compliance policy as specified in §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 §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 only 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...”

As it relates to the above Criteria 1 and 2, 7 CFR §278.6(i)(1), entitled “Compliance policy standards,” provides the following, in relevant part:

“...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 SNAP regulations and current SNAP policy on the proper acceptance and handling of food coupons. 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. In addition, in evaluating the effectiveness of the firm’s policy and program to ensure SNAP compliance and to prevent SNAP violations, FNS may consider the following:

- i. Documentation reflecting the development and/or operation of a policy to terminate the employment of any firm employee found violating SNAP regulations;
- ii. Documentation of the development and/or continued operation of firm policy and procedures resulting in appropriate corrective action following complaints of SNAP violations or irregularities committed by firm personnel;
- iii. Documentation of the development and/or continued operation of procedures for internal review of firm employees’ compliance with SNAP regulations;
- iv. The nature and scope of the violations charged against the firm;
- v. Any record of previous firm violations under the same ownership; and
- vi. Any other information the firm may present to FNS for consideration.”

As it relates to the above Criterion 3, 7 CFR §278.6(i)(2), entitled “Compliance training program standards,” provides the following, in relevant part:

“...the firm shall have developed and implemented an effective training program for all managers and employees on the acceptance and handling of (SNAP benefits)...A firm which seeks a civil money penalty in lieu of a permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted; a record of dates of employment of firm personnel; and contemporaneous

documentation of the participation of the violating employee(s) in initial and any follow-up training held prior to the violation(s). FNS shall consider a training program effective if it meets or is otherwise equivalent to the following standards:

- (i) Training for all managers and employees whose work brings them into contact with (SNAP benefits) or who are assigned to a location where (SNAP benefits) are accepted, handled or processed shall be conducted within one month of the institution of the compliance policy under Criterion 1 above. Employees hired subsequent to the institution of the compliance policy shall be trained within one month of employment. All employees shall be trained periodically thereafter;
- (ii) Training shall be designed to establish a level of competence that assures compliance with Program requirements as included in this part 278;
- (iii) Written materials, which may include FNS publications and program regulations that are available to all authorized firms, are used in the training program

Training materials shall clearly state that the following acts are prohibited and are in violation of the Food and Nutrition Act and regulations: the exchange of... (SNAP benefits)...for cash..."

Appellant failed to provide Retailer Operations Division with the required documentation to be considered for a trafficking CMP in lieu of disqualification. The owner's affidavit and employee training walkthrough documentation, does not rise to the level, required by regulation, to be considered for a CMP in lieu of permanent disqualification. Therefore, Retailer Operations Division correctly determined that Appellant was not eligible for a trafficking CMP as set forth in the SNAP regulations.

CONCLUSION

Ownership has not provided sufficient evidence to rebut the convincing case that Appellant most likely trafficked in SNAP benefits. As such, 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 shall disqualify the firm permanently.

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify 24 Seven #3 from participation in the SNAP. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Therefore, based on a review of all the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged by Retailer Operations Division. Based on the discussion herein, the determination to impose a permanent disqualification against 24 Seven #3 is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 1977, as amended,(7

U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right 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 you reside or are 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 (FOIA), 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.

Monique Brooks
ADMINISTRATIVE REVIEW OFFICER

October 2, 2017