

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

29 Palms Liquor & Gas,

Appellant,

v.

Case Number: C0196438

Retailer Operations Division,

Respondent.

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 29 Palms Liquor & Gas (29 Palms or 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 January 18, 2017, 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 May 2016 through October 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 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 replied to the charges by letter dated September 26, 2016. Appellant denied trafficking and explained that the transactions were the result of Appellant extending credit to SNAP households and allowing repayment to be made with SNAP benefits. By letter dated January 23, 2017, the Retailer Operations Division requested documentation to support the alleged credit accounts. Appellant responded on January 27, 2017, but it did not provide any documentation to support that it extended credit to SNAP households.

After considering the evidence and the retailer's reply, the Retailer Operations Division issued a determination letter dated February 16, 2017. 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.

In a letter postmarked February 21, 2017, ownership appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear 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 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 and hot food products prepared for immediate consumption."

7 CFR § 271.2 defines trafficking as: "(1) 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, inter alia, 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(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."

SUMMARY OF THE CHARGES

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from May 2016 through October 2016. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were multiple transactions made from individual benefit accounts in unusually short time frames.
- There were excessively large purchase transactions 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

In its February 21, 2017, administrative review request, Appellant provided the following summarized contentions, in relevant part:

- Appellant understands and obeys the laws of the state and the federal government.
- Appellant has no intention of breaking any regulations.
- Appellant has a lot of local customers that regularly return and make multiple purchases.
- Appellant is located at the park entrance of Joshua Tree National Park, with apartment complexes located behind the store that allow its customers to walk to Appellant within one minute.
- Appellant provided examples of multiple credit and debit card sales.
- Ever since Appellant converted its gas station to Mobil and opened a kitchen, the volume of EBT and overall business has increased.

- Appellant's kitchen is currently being remodeled and it is not currently getting sales from it.
- When the kitchen was open, Appellant sold cold drinks, water bottles, deli sandwiches, cold salads, eggs, burritos, and more.
- Appellant also has a fruit stand and provided organic vegetables and fresh eggs from local farmers, all items that other stores do not regularly carry.
- FNS can ask Appellant's customers about their transactions.

In supports of its contentions, Appellant provided the following documents:

- Eight photographs of its kitchen remodel and of its produce; and
- Four pages of some multiple credit and debit transactions conducted in February that were copied and pasted in a Word document.

In its January 15, 2017, reply to the Retailer Operations Division, Appellant provided the following explanations for the transactions:

- Appellant's wife and son work with him.
- Customers were given credit for food, grocery items, dairy products, snacks, soda or water.
- Appellant has a deli and kitchen that serves cold salads for \$7-\$9.
- Appellant has 14 long full doors of SNAP eligible cold beverages and five shelves of food items.
- Many customers either do not have transportation or cannot afford gas and view their store as a one stop shop.

The preceding may represent only a brief 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 29 Palms as a convenience stores on October 21, 2005. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a December 28, 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 firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- 29 Palms is approximately 2600 square feet, with no additional food storage outside of public view.
- There were some shopping baskets and shopping carts for customer use.
- There was one cash register and one point-of-sale device.

- There was an optical scanner for speedy processing of transactions.
- The check-out counter space was limited and cluttered and not suitable for large purchase transactions.
- There were no meat/seafood specials or bundles that might sell for high prices.
- There was no fresh meat or poultry.
- There were two packages of baloney, some canned meat and fish, and meat jerky.
- There was limited fresh produce including four bananas, seven apples, and six oranges.
- Dairy included individual servings of milk, small containers of half and half, quarts of milk, individual string cheese, a package of cheese singles, two boxes of butter, two small containers of cottage cheese, two containers of sour cream, and individual size ice cream servings.
- Other staple foods available for purchase were juice, rice, pasta, canned goods, and snack foods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included tobacco products, alcohol, lottery tickets, gasoline, automotive and cleaning products

All advertisements on exterior of store were for alcohol and tobacco products. The SNAP eligible food stocked by the store 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. 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. Multiple transactions were made from individual benefit accounts in unusually short time frames. 7 U.S.C. 2018 (b)(6) & (b)(7)(c). 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.

Appellant explains that it has a lot of local customers that regularly return and make multiple purchases per day. Appellant further states that it is located at the park entrance of Joshua Tree National Park, with apartment complexes located directly behind the store. 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 SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of Appellant's stock and facilities and

are therefore indicative of trafficking. The photographs from the store visit offer no legitimate 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.

Every transaction cited in this attachment exceeds the average transaction for a convenience store in California during the review period. It is irregular for convenience stores to have purchases such as those cited. 7 U.S.C. 2018 (b)(6) & (b)(7)(c). It is curious as to what this household is purchasing at Appellant, a minimally stocked gas station/convenience store. Appellant's eligible food stock does not appear to be able to support such transactions. Moreover, the Retailer Operations Division conducted an analysis of some of the households that conducted transactions listed on this attachment and determined that many of these households are making what would appear to be normal food purchases at supermarkets or super stores on the same day, day prior, or day after conducting transactions at Appellant. Thus, these households have access to transportation or at least access to other authorized firms.

Appellant explains that debit and credit paying customers also have multiple purchases, thereby implying that the SNAP transactions listed on the charge letter attachment are not unusual. As proof of these credit card transactions, Appellant submitted a four page document with some sets of its multiple debit/credit transactions listed. Each of these transaction sets was reviewed and compared to the transaction sets listed on this attachment. The submitted credit and debit transactions were not as large as the transactions listed on the charge letter and therefore do not meet the parameters of this charge letter attachment. Thus, Appellant's contention that these SNAP transactions are normal it is not convincing.

Appellant did not provide any compelling justification as to why households are conducting multiple transactions at 29 Palms or evidence that all the irregular transactions cited in the charge letter were for eligible food items only. 7 U.S.C. 2018 (b)(7)(e).

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. 7 U.S.C. 2018 (b)(7)(e). These large transaction amounts are not consistent with the store's inventory. Based on the store visit report, the firm does not offer food in bulk or any specialty foods that might sell for a high price. Instead, the store carries mostly inexpensive canned and packaged goods and single-serving food items. There was no fresh meat and there was limited fresh produce. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

7 U.S.C. 2018 (b)(7)(e). There was no evidence that Appellant stocked sufficient inventory to support these transactions during the review period or that Appellant offered special pricing to draw customers.

Appellant contends that it had a fruit stand and provided organic vegetables and fresh eggs from local farmers, all items that other stores do not regularly carry. On the day of the store visit, there were no eggs and the only fresh produce available for purchase was four single bananas, seven apples, and six oranges. Appellant provided photographs of large boxes of potatoes, lettuce, and oranges. However, these items were not present during the store visit and were likely purchased

for the sole purpose of responding to the charges. Although there were oranges available on the day of the store visit, they were limited in quantity. Similarly, Appellant alleges that the kitchen is being renovated and that it received many sales from the kitchen prior to the renovation. However, there was no evidence submitted to support this contention. 7 U.S.C. 2018 (b)(7)(e).

Sometimes a firm may have higher than average SNAP transactions amounts due to the lack of access to other SNAP authorized stores. However, the Retailer Operations Division determined that within a three-mile radius of 29 Palms, there are at 11 authorized stores, including five other convenience stores, four combinations stores, and two supermarkets. It is not plausible that the firm's customers would regularly purchase large amounts of merchandise at Appellant when larger, better stocked stores are readily available and in the vicinity of the Appellant firm.

Appellant explained that many of its customers walk to Appellant and do not have access to other stores. The Retailer Operations Division determined that 39 households shopped at a large grocery, super market or super store within one day of conducting 7 U.S.C. 2018 (b)(7)(e) transaction at Appellant. Clearly, the customers shopping at 29 Palms have access to other, better stocked stores.

Lastly, the Retailer Operations Division examined three households identified in the charge letter to analyze their shopping patterns at 29 Palms compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at supermarkets and superstores. 7 U.S.C. 2018 (b)(7)(e). Many of these transactions were larger than the transactions conducted at the supermarkets or super stores. It is highly unlikely that a convenience store with limited staple foods would have legitimate SNAP transactions comparable to supermarkets or super stores which have a superior breadth and depth of stock at likely better prices.

In summary, Appellant's layout, business structure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. 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 evidence to legitimize 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.

Credit

Appellant contends that it extended credit to SNAP recipients and payments were made with SNAP benefits. Accepting SNAP benefits for payment on credit is a violation of Section 278.2(f). Credit transactions must be accounted for with substantive evidence such as the dates credit was extended, to whom, for what amount, and for what items. In this case, exculpatory evidence would be in the form of an accounts receivable ledger, which lists the full name of each recipient, their SNAP number, address or other contact/identifying information, as well as the dates and amounts of each credit transaction, and what eligible items were purchased and what transactions were to repay outstanding balances. Absent this type of detailed documentation, it is not possible

to compare alleged credit payments against the transactions outlined in the charge letter attachments to determine if these were legitimate.

While the firm could potentially be holding some credit accounts, there is insufficient evidence to show that the charge letter transaction patterns are the result of credit repayments. Under review, the evidence more substantially supports a conclusion that the transaction activity, as documented in the charge letter attachments, was due primarily to trafficking in SNAP benefits.

Intent

Appellant contends it did not intend to violate any rules. With regard to the element of “intent,” a conclusion regarding one’s intention to violate the regulations cannot be drawn from EBT data alone, nor would it be possible to do so in a case based primarily on inconsistent redemption data or transaction data under an EBT system. However, it should be noted that the definition of trafficking contained in the SNAP regulations at 7 CFR § 271.2 does not require an element of intent on the part of the violator.

Rule Abiding Business

Appellant states that it understands and obeys the laws of the state and the federal government. Assertions that the firm has not violated program rules, by themselves and without supporting evidence, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

Furthermore, Appellant alleges to have allowed customers to repay credit accounts with SNAP benefits, which is a clear violation of SNAP regulations. The owner signed the FNS-252 SNAP application for store authorization on September 26, 2005, certifying thereby that the owner read, understood, and agreed with the conditions noted therein which includes the following statement: “I accept responsibility on behalf of the firm for violations ... including:

- Trading cash for SNAP benefits (trafficking);
- Accepting SNAP benefits as payment for ineligible items;
- Accepting SNAP benefits as payment on credit accounts or loans;
- Knowingly accepting SNAP benefit payments from people not authorized to use them; and
- Participation can be denied or withdrawn if my firm violates any laws or regulations issued by Federal, State or local agencies ... ”

Also, at the time of authorization each retailer is given a training guide that clearly explains that credit is not allowed. The training guide is available online and in many languages. This guide states that SNAP customers must pay for their purchases at the time of sale and that a retailer may not accept SNAP benefits as payments on credit accounts. Ownership was provided multiple and redundant resources through which a thorough knowledge of program rules and requirements could be readily obtained. Nonetheless, Appellant alleges to have allowed credit, a clear violation of the SNAP regulations. Thus, its assertion that it would never break the law is not credible.

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 did not request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i), even though it was informed of the right to do so in the charge letter.

Even if a timely request had been submitted, Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because 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).

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. Under review, the denial of a trafficking CMP was deemed correct and proper.

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 owners 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, 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, 2017