

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

3-H Market,

Appellant,

v.

Case Number: C0207930

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that 3-H Market (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(a) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against 3-H Market by letter dated July 2, 2018.

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 May 14, 2018, 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 2017 through March 2018. 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 facsimile correspondence sent on May 25, 2018, Appellant replied to the charge letter and generally stated that the store has been in the family for over 15 years and has made a lifetime impression on the neighbors. The customers are our livelihood so we go the extra mile to make them smile. We are in a tranquil neighborhood with the nearest streetlight a mile away. Our parking lot is only capable of holding four cars so 90 percent of our business traffic is walk-in customers. We have the local park located in our backyard just a block away. The bulk of our grocery sales are from customers that shop here the first week of the month when SNAP benefits are dispersed. The two reasons for these transactions were first, customers often grabbed beverages to drink while they shopped with families. In order to clarify that the beverage was not brought in from outside, we charged the beverage first while they shopped or while totals were being calculated. We then followed this transaction with the large amount that based on the purchase made.

The second reason for multiple charges is due to our produce department. Since managing produce inventory is difficult, we implemented a procedure in which all produce sales are charged and sold separately, again no exceptions. We compare our inventory of produce with our sales to insure two things, one – to identify possible theft if amounts are not reasonable and two – to assure we are ordering the correct amounts of produce to prevent losses from rotting. Since customers are walk-in's we allowed them to take our carts home and return them. They would fill their carts as much as they can during the first visit and sometimes purchased additional items when they returned their carts during the second visit. The manual swipes were very rare and occurred often times with the same household. This is due to the security swipe not working or a damaged card but the card is always physically present with the customer. We never conduct transactions over the phone or for people on the behalf of others.

Appellant stated that for the final claim in the letter, the separate transactions were because we only have one SNAP terminal while we have two and sometimes three registers/checkout stands. It does happen occasionally but not always when two families come in at the same time to make large size purchases. In this event, the cashier who tallies up his/her totals first will charge their customers first while the second cashier will wait until the terminal is available.

After considering the Appellant's reply and evidence of the case, Retailer Operations Division issued a determination letter dated July 2, 2018. This letter informed ownership that they were permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also states 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 10, 2018, 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 2008, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) 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.

7 CFR § 278.6(a) states, in part 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 1977, 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.” 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.”

7 CFR § 278.6(b)(2)(ii) states, in part, that: “Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence... that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).”

7 CFR § 278.6(i) states, in part: “FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking...if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.”

SUMMARY OF THE CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from October 2017 through March 2018. This involved the following transaction patterns which are trafficking indicators:

1. Multiple transactions were made too rapidly to be credible.
2. Multiple transactions were made from the accounts of individual SNAP households within a set time-period.
3. Excessively large purchase transactions were made from recipient accounts.

The first issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the identified irregular and questionable transactions were the result of trafficking in SNAP benefits.

APPELLANT'S CONTENTIONS

In its response to the charge letter and in its request for administrative review, Appellant made the following summarized contentions, in relevant part:

1. Customers often grabbed beverages to drink while they shopped with families. In order to clarify that the beverage was not brought in from outside, we charged the beverage first while they shopped or while totals were being calculated. We then followed this transaction with the large amount that based on the purchase made.
2. The second reason for multiple charges is due to our produce department. Since managing produce inventory is difficult, we implemented a procedure in which all produce sales are charged and sold separately, again no exceptions. We compare our inventory of produce with our sales to insure two things, one – to identify possible theft if amounts are not reasonable and two – to assure we are ordering the correct amounts of produce to prevent losses from rotting.
3. Since customers are walk-in's we allowed them to take our carts home and return them. They would fill their carts as much as they can during the first visit and sometimes purchased additional items when they returned their carts during the second visit.
4. The manual swipes were very rare and occurred often times with the same household. This is due to the security swipe not working or a damaged card but the card is always physically present with the customer. We never conduct transactions over the phone or for people on the behalf of others.
5. The separate transactions were because we only have one SNAP terminal while we have two and sometimes three registers/checkout stands. It does happen occasionally but not always when two families come in at the same time to make large size purchases. In this event, the cashier who tallies up his/her totals first will charge their customers first while the second cashier will wait until the terminal is available.

Appellant provided four signed customer statements in support of its contentions. 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 May 24, 2001. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a March 23, 2018, 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 is then used to ascertain if there are justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Two cash registers and one POS device with one small counter containing possibly two areas that are partially obstructed by other smaller items available for sale. One specialty register dedicated to the sales of Western Union.
- Estimated to be approximately 1800 square feet.
- No shopping baskets or carts available for customers.
- No adding machines or optical scanners were available at checkout.
- Store does not operate through a night window or plastic barrier with food stock behind the barrier.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- Pricing structure is not unusual, such as ending most products with 00 cents. The store does not round transaction totals.
- No food stored in an area outside of public view
- Store has storage freezers or coolers but not food stored off site.
- Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
- Store does not take telephone or online orders and does not offer delivery
- Highest priced eligible food items were Enfamil (\$21.99), Soda (\$9.99), Coffee (\$7.99) and Water (\$6.99 for a 40 pack).
- Store stocks a significant amount of non-food items such as but not limited to paper products, household products, tobacco products, alcohol products, automotive products, health and beauty aids, clothing items, lottery tickets, and cleaning products.
- Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products. Limited fresh produce
- A kitchen/prepared food area with hot foods sold for onsite consumption. There is a table with chairs as well as a microwave-heating source.
- No deli or prepared food section. Unclear of the amount of meat products used in the hot food preparation.
- No meat or seafood specials/ bundles or fruit/vegetable boxes sold.
- Some canned goods contained a layer of dust.
- Some of the freezer meats appeared open and freezer burnt or in bags and could not be identified.

- Photograph shows parking spaces in front of the store as well as on the side of the store.

The second 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 Appellant's store 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 purchase transactions were made too rapidly to be credible.

There were 14 sets of 28 SNAP transactions that met the parameters of this attachment. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Two different households completed twelve of the 14 sets. These types of rapid transactions at a firm where there is limited counter space and no equipment to expedite the transactions are indicative of trafficking in EBT benefits. Retailer Operations considered this a strong indicator because the second purchase of items would have to be transported to the limited counter area without shopping carts, keyed at the register, a card swiped, a pin entered, an approval indicated and a receipt printed. Although Appellant has two registers, the counter area is not conducive to rapid multiple transactions.

Appellant contends that customers often grabbed beverages to drink while they shopped with families. In order to clarify that the beverage was not brought in from outside, we charged the beverage first while they shopped or while totals were being calculated. We then followed this transaction with the large amount that is based on the purchase made. With regard to this contention and as an example, transaction #1 was for a nominal amount, which could have been a beverage however; there were no other purchases from that household during that month. The second rapid transaction was from a different household. This pattern continued in 11 of the 14 transaction sets. There were two transaction sets completed by the same household, however, without the assistance of shopping carts or hand baskets, it is implausible that the second rapid transaction was conducted in the time cited in the charge letter.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant has limited stock and very limited counter space and without processing equipment, such as an optical scanner or conveyor belt, to aid in the quick processing of the number of eligible food items no doubt needed for the transaction amount, it is improbable that the transactions cited in Attachment 1 are all legitimate SNAP transactions.

Appellant contends that the separate transactions were because we only have one SNAP terminal while we have two and sometimes three registers/checkout stands. It does happen occasionally but not always when two families come in at the same time to make large size purchases. In this event, the cashier who tallies up his/her totals first will charge their customers first while the second cashier will wait until the terminal is available. With regard to this contention, though it may be true that while two transactions are being conducted one clerk may have to wait until the first transaction is completed and this may account for some of the transactions in this Attachment, it is not likely that this scenario would occur on more than a couple of occasions. The transaction amounts and Appellant's counter area does not appear equipped to handle large

multiple rapid transactions. With no shopping carts or hand baskets in which to transport food items to the limited counter space, and the number of steps required in which to process a SNAP transaction it is improbable that these transactions time frames would be completed **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

Attachment 2 of the Charge letter - Multiple transactions were made from individual benefit accounts in unusually short time frames.

There were 40 sets of 96 SNAP transactions that met the parameters of this attachment. 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.

Appellant contends that multiple charges are due to our produce department. Since managing produce inventory is difficult, we implemented a procedure in which all produce sales are charged and sold separately, again no exceptions. We compare our inventory of produce with our sales to insure two things, one – to identify possible theft if amounts are not reasonable and two – to assure we are ordering the correct amounts of produce to prevent losses from rotting. Appellant's explanation of how produce items are handled is not sufficient to explain the transactions as cited in the charge letter. It is noted that food items can be separated into groups and processed with a subtotal and then a final amount however, Appellant's checkout area does not provide adequate space in which to process food items separately especially since there are no shopping carts or hand baskets in which to hold other items aside. In addition, the store visit photographs do not show that Appellant's produce selection was elaborate to the point where it would need detailed maintenance and accountability such as produce sections located in supermarkets or superstores. If Appellant did charge and sell all produce separate from other food items it would be more likely that there would be more transactions in each transaction set at smaller amounts as Appellant's stock of produce is very limited.

Attachment 3 of the Charge letter - Excessively large purchase transactions were made from recipient accounts.

There are 292 SNAP transactions that meet the parameters of this attachment. 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.

Retailer Operations conducted an in-depth analysis of the shopping habits of three of the households identified in the charge letter. This analysis concluded that these households also shopped at other area grocery stores including full-line supermarkets and superstores that offer a much larger quantity and variety of eligible food items for likely better prices either on the same day or within days of visiting Appellant's firm. This again indicates that lack of access to other stores is not at issue. However, despite this access to large supermarkets and superstores, these households consistently conducted much higher transactions at the Appellant firm than at better-stocked supermarkets/superstores in and around the Madera County area of California.

The record also reflects that, during the review period, 76 households shopped at larger retail food stores on the same day as visiting Appellant's store, 115 households shopped at larger retail food stores within a day of visit Appellant's store and 129 households shopped at larger retail food stores with two days of visiting Appellant's store. This indicates that Appellant's store does not supply household with all of their grocery needs and that households do not shop mainly at Appellant's store. This pattern is another strong trafficking indication.

Appellant contends that since customers are walk-in's we allowed them to take our carts home and return them. They would fill their carts as much as they can during the first visit and sometimes purchased additional items when they returned their carts during the second visit. With regard to this contention, it is important to note that the contracted store visit documentation and photographs show that Appellant did not have shopping carts or hand baskets for customer use, therefore this contention does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

Appellant contends that the manual swipes were very rare and occurred often times with the same household. This is due to the security swipe not working or a damaged card but the card is always physically present with the customer. We never conduct transactions over the phone or for people on the behalf of others. With regard to this contention, Retailer Operations Division did not analyze or cite manual transactions in the charge letter therefore; this contention does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

Based on the above analysis, the Retailer Operations presented a convincing case that the 3-H Market trafficked in SNAP benefits, which the Appellant failed to adequately rebut. The attachments furnished with the charge letter identify the irregular patterns of SNAP transactions, which indicate that trafficking was taking place at the firm during the review period. As there is more than one pattern of trafficking, a determination that the Appellant firm engaged in trafficking becomes more convincing. Appellant did not provide any register receipts or evidence in which to corroborate its contentions.

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 a 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 based on 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 has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns identified in the charge letter, the lack of food inventory necessary to support the firm's SNAP redemptions as observed and recorded during the onsite visit, the lack of purchase invoices of foods to cover SNAP redemption totals for the review months, the lack of adequate explanations 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 letter of charges. 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 patters 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 owner 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.

CIVIL MONEY PENALTY

The Appellant did not timely 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 dated December 12, 2016. Even if a timely request had been submitted, the 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 SNAP compliance policy and program *prior* to the violations. Therefore, the Retailer Operations Division' decision, not to impose a trafficking CMP in lieu of disqualification, is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify 3-H Market. 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 above, the determination to impose a permanent disqualification against 3-H Market is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, 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

November 27, 2018