

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

353 Ninos Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0216563

FINAL AGENCY DECISION

The record indicates that 353 Ninos Corp. (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). It is the decision of the USDA, Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retail food store in the SNAP, as imposed by the Retailer Operations Division (Retailer Operations), was appropriate.

ISSUE

The issue accepted for review is whether Retailer Operations took 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 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer 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

By Charge letter dated April 30, 2019, Retailer Operations informed the owner that FNS had compiled evidence that Appellant had violated the SNAP regulations based on analysis of electronic benefit transfer (EBT) transactions that establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for the firm type. The sanction for trafficking is permanent disqualification.

Appellant replied to the Charge letter by email dated May 9, 2019. Retailer Operations issued a Determination letter dated May 31, 2019. This letter informed the owner that Appellant was permanently disqualified from the SNAP in accordance with Sections 278.6(c), and 278.6(e)(1), of the regulations.

Retailer Operations considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the regulations. The firm was deemed not eligible because insufficient evidence was submitted to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP regulations.

By letter dated June 8, 2019, the owner appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated June 21, 2019.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant 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, credible evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and Section 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e)(1) 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 § 271.2 states: "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 § 278.6(a) states: "FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system."

7 CFR § 278.6(e)(1) states: "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 § 278.6(b)(2)(ii) states: “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: “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 issue in this review is whether, through a preponderance of the 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 the period of September 2018 through February 2019. This involved two patterns of transactions indicative of trafficking:

1. Multiple transactions made from individual benefit accounts within a set time period.
2. Excessively large purchase transactions were made from recipient accounts.

APPELLANT’S CONTENTIONS

In reaching a decision, attention has been given to all contentions as presented by the owner, including any not specifically recapitulated here.

- The customers have control over how many transactions they want to do and how often they would like to visit our store. Some of our customers will ask that their purchase be done in two transactions with two receipts, as a retail provider I have no reasons to deny their request as it is reasonable. If there is a daily transaction limit for each SNAP household, the SNAP participants and SNAP vendor should be notified, but there is no such regulation.
- Multiple transactions within a set time period can result from more than one family member’s use of the EBT card within the same household. Customers may/can allow spouse, children or other household member to make purchase transactions with the same EBT card. My only obligations are to allow the purchase of SNAP approved items as long as the total amount of purchase is approved and the holder of the card has a valid PIN. I have no control over who uses the EBT card or how many times they can use the EBT card.
- Our store is a grocery/convenient store; we sell both food and goods. Our store conduct EBT transactions that are technically NOT large based on the store characteristics. Our store carries an abundant variety and stock of Infant formulas (refer to attached images), infant food, organic produce and goods.

- Regular infant formula starts at \$24.99 per can, specialized formula are sold for \$49.99 per can. Regular baby food, cereal, snacks and yogurt can range from \$4.99 to \$9.99 per piece. Organic baby food, cereal, snacks and yogurt sell at higher prices than regular items. Organic produce and product also are sold at higher prices than regular products. Oftentimes, because of stock availability and customer's requests, we allow bulk purchase to be made (refer to attached images).
- The analysis presented was merely listed transactions. An assumption was made that our business has trafficked. A determination based on an assumption is unjust and undeserved. Multiple transactions within a time period do not mean the business has violated the rules.
- We offer many more variation of infants/toddler/children products along with organic items (see pictures of inventory).
- Because of the abundant amount of inventory we carry we often allow bulk sales. Our infant related items are high price ranging from \$25 to \$50 per items. Comparing the transaction amounts to the items sold, the amounts should not be considered large.

Copies of photo were provided, as were vendor receipts.

ANALYSIS AND FINDINGS

Retailer Operations presented a case that Appellant trafficked SNAP benefits. As patterns of unusual transactions appear across multiple Attachments the case of trafficking becomes more convincing.

Attachment 1: Listed are 33 transactions in 15 sets of two or more transactions conducted by 13 different households (HHs). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is suspicious that the same one household conducted three large short-time data sets at Appellant in November, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Based on the information gathered during the onsite visit, the firm does not stock any fresh meat, frozen foods or any fresh produce. The store did stock baby food, baby formula and food products geared to infants. The staple food stock included canned goods, cereal and eggs. Ineligible items included: health/beauty aids, paper goods, cleaning products and other non-food baby products. According to the record, there are at least 250 authorized stores within a one mile radius of Appellant; including 118 convenience stores, 77 small grocery stores, 21 medium grocery stores, eight large grocery stores, ten supermarkets and six super stores. The data shows that 69% of the HHs listed made a transaction(s) at a large grocery, supermarket or super store within one day of making transactions at Appellant, and within three days, more than 85% of the HHs listed, made SNAP transactions at larger store types. Thus, the data supports that the recipients had access to, and did transact benefits at other authorized retailers.

The owner provided insufficient evidence in support of his contentions. No recipient affidavits were provided to attest to shopping patterns at the store. No itemized cash register tapes were advanced. No business banking records or tax records were provided. While some vendor invoices supporting the acquisition of eligible food inventory were provided, these were not sufficient to supports Appellant's SNAP redemptions.

Attachment 2: Listed are 189 transactions conducted by 84 different households. The amounts listed are at least 5 U.S.C. § 552 (b)(7)(E) higher than the average purchase amount for this store type in the state. Appellant had an average SNAP transaction dollar amount that was 5 U.S.C. § 552 (b)(7)(E) higher than the same type store in the state for the same time period, and 5 U.S.C. § 552 (b)(7)(E) higher than the same store type in Kings County.

The shopping histories in the record confirm that households that made SNAP transactions at Appellant also conducted transactions at large groceries, supermarkets and super stores. As such, recipients did use benefits at other authorized retailers. Retailer Operations' review of the store visit photographs revealed that there did not appear to be eligible foods at Appellant that could not be obtained at larger stores in the area. Appellant's average SNAP transaction amount was also 79% higher than a supermarket just .29 miles from Appellant, that Retailer Operations identified as also being a WIC vendor. This is irregular.

The owner submitted seven photos of WIC Authorized items such as infant food, Similac and Pediasure, and stated that these items were the reason for the high dollar transactions. Retailer Operations contacted the New York State WIC Office and confirmed Appellant's WIC redemption during the review period as: September 2018, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Retailer Operations found the claim that WIC items making up the large transactions on this Attachment was unlikely to be true. The majority of SNAP households that contain infants and children under the age of five are also eligible for WIC participation. Therefore, it is uncommon for such households to purchase items from the WIC food package, such as infant food, Similac and Pediasure with their SNAP benefits. It would be unusual for a SNAP household which also receives WIC benefits to transact its limited SNAP resources on expensive infant formula when it would already be able to purchase such items with WIC benefits.

The store owner also submitted 13 copies of vendor receipts which detailed some of the purchases made during the review period. Retailer Operations analyzed the receipts and determined no receipts were submitted for September 2018 or February 2019. Three receipts were dated in October 2018, four were dated in November 2018, five receipts were dated in December 2018, and one was dated in January 2019.

Retailer Operations assessed the receipts with the WIC redemption data. While the SNAP redemptions, with an applied 20% markup, did not exceed the vendor receipt totals in three of the six review months, when the WIC data is included, Retailer Operations determined that the owner did not provide sufficient evidence that he purchased enough eligible foods to cover the SNAP redemptions for the review period. Retailer Operations documented that some HHs that conducted transactions at Appellant shopped at other WIC authorized stores typed as supermarkets and super stores. Retailer Operations determined that it would be unusual for a SNAP household, which also receives WIC benefits, to transact its limited SNAP benefits on infant formula at a convenience store, when the HH is able to purchase such items with their WIC benefits at other larger store types at which they are already shopping.

Retailer Operations' analysis of Appellant's stock shows that it stocked a large amount of non-food, non SNAP-eligible items. Based on the store photos, Appellant appears to stock a much larger inventory of ineligible non-food items than staple food inventory. This is supported by the owner's own May 2017 SNAP application information, wherein he reported that 60% of total sales were derived from nonfood items, including lottery products, 25% of sales were for accessory foods that do not count towards SNAP eligibility criteria for authorization, and only 15% of his total retail sales were of staple foods. Retailer Operations' review of the store photos indicated that the items stocked on the shelves were displayed for sale as single items. Retailer Operations determined that the owner did not submit sufficient documentation/evidence to support that Appellant stocked and sold items in bulk. The owner did not submit any documentation such as sales flyers/advertisements, to support that Appellant promoted items for bulk sale. The onsite store survey, completed with the assistance of the store manager, does not reveal comments related to bulk sales conducted at the store. The store photos do not reveal any posted signs indicating that the store engages in bulk sales.

The retailer provided no comprehensive price list of eligible foods at the store, citing only the prices of some specific items. The owner did not submit sufficient vendor invoices to support the volume of eligible food stock to cover Appellant's SNAP redemptions for all the review months. Given the sales of WIC items confirmed by the state data, the invoices were not compelling as to the volume of purchases of eligible foods by Appellant.

The burden to disprove trafficking rests with Appellant. While some transactions flagged on the Attachments may be legitimate exchanges of eligible foods for benefits, insufficient evidence was advanced to support this contention. Permanent disqualification is warranted on the first occasion of trafficking. An Appellant that seeks to set aside an Agency sanction must focus its probative efforts on providing evidence by a preponderance that the transaction activity cited is not due to SNAP benefit trafficking. Appellant has not met its burden.

CIVIL MONEY PENALTY

To be considered eligible for a CMP, a firm must establish by substantial evidence, its fulfillment of each of the criteria under 7 CFR § 278.6(i). Retailer Operations determined that Appellant did not meet the requirements to qualify for a CMP in lieu of permanent disqualification. The owner did not request a trafficking CMP.

CONCLUSION

Retailer Operations' analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Upon review of all of the evidence in this matter, it is determined that it more substantially supports a conclusion that the SNAP transaction activity at Appellant was due to SNAP benefit trafficking than to legitimate SNAP transactions for

eligible foods. Thus, based on the discussion herein, the decision to impose a permanent disqualification against Appellant is sustained.

Appellant did not provide substantial documentation, as required by the cited regulation, for consideration for a CMP in lieu of permanent disqualification. Thus, Retailer Operations properly denied a CMP according to the terms of Section 278.6(i) of the SNAP regulations.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008, and to 7 CFR § 279.7 of the regulations, with respect to applicable rights to judicial review of this decision. 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 the Appellant's owner resides or is engaged in business, or in any court of record having competent jurisdiction as to Guam. 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.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

August 20, 2019