

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

A-Z Food Mart,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0221675

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of A-Z Food Mart as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against A-Z Food Mart.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 ... may ... file a written request for review of the administrative action with FNS.”

CASE CHRONOLOGY

In a letter dated October 7, 2019, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of March 2019 through August 2019. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated the Appellant had the right to respond to the charges within 10 days of receipt to provide explanations for the irregular SNAP transaction patterns. The letter also stated 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). The charge letter was delivered by UPS on October 8, 2019.

The Appellant responded to the charges in a letter dated October 17, 2019. Among other contentions, the Appellant stated that a store investigation had revealed that a rogue employee had conducted trafficking transactions with SNAP card holders. The Appellant stated it has taken corrective action and retrained its current employees. Under the circumstances, the Appellant requested that the USDA reconsider the permanent disqualification as it will ultimately cause the store to close. The Appellant did not request a trafficking CMP in lieu of a permanent disqualification.

After considering the evidence in the case and the Appellant's contentions, the Retailer Operations Division issued a determination letter dated October 30, 2019. The determination letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and 7 CFR § 278.6(e)(1). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of 7 CFR § 278.6(i) of the SNAP regulations. The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP because the 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 dated November 8, 2019, the Appellant requested an administrative review of the Retailer Operation Division's determination. The request for administrative review was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

7 U.S.C. § 2021(b)(3)(B) states, in part:

... a disqualification under subsection (a) shall be ... permanent upon ... the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards ...

7 CFR § 271.2 states that the definition of "coupon" includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

7 CFR § 278.6(e)(1)(i) states:

FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 defines trafficking, in part, as:

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 § 271.2 defines eligible food, in part, as:

Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption

7 CFR § 278.6(a) states, in part:

FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system....
[Emphasis added.]

7 CFR § 278.6(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.

7 CFR § 278.6(b)(2) states, in part:

(ii) 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 as specified in § 278.6(i), 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).

(iii) If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such a penalty. [Emphasis added.]

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from March 2019 through August 2019. This involved the following transaction patterns which are trafficking indicators:

- **Charge Letter Attachment 1:** Multiple transactions were made from individual SNAP household accounts within a set time period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
- **Charge Letter Attachment 2:** The store conducted EBT transactions that are large based on the observed store characteristics and recorded food stock. 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- The violations were committed by a rogue store employee. The owner(s) did not knowingly or purposefully commit the violations.
- The store has been authorized since 2008 and requests a lesser suspension as a permanent disqualification would likely cause the store to go out of business as it relies heavily upon the SNAP.
- The store has established an effective compliance policy and program. Although it is not written it is understood that "if you cannot eat it, you cannot sell it" to SNAP card holders.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Authorization History

The Food & Nutrition Service (FNS) authorized A-Z Food Mart for the SNAP on June 15, 2009. During the review period of March 2019 through August 2019, the Retailer Operations Division classified the store as a convenience store. This classification was based on reported sales and observed store inventory.

Owner Responsibility

Although the owners were allegedly not involved in the violations, it cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. Regardless of whom the owners of a store may utilize to handle store business, the owners are accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store owners to disclaim accountability for the acts of persons whom the owners choose to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

A store owner signed the SNAP application for the store on May 13, 2009 and acknowledged that the owners were aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owners would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible items.

Store Visit Report

The case record documents that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an August 28, 2019 store visit conducted by an FNS contractor to observe the nature and scope of the store’s operation, stock and facilities. The store visit report and photographs documented the following store size, description, and characteristics:

- A-Z Food Mart is approximately 2,200 square feet in size.
- The store did not have any shopping carts or shopping baskets for customer use.
- The store had one (1) cash register and one (1) point-of-sale device.
- There were no conveyor belts at the checkout.
- No food was stored in an area out of the public view or offsite.
- The store did not offer specials or sales of expensive items such as fresh meat bundles, fresh seafood specials, and/or fresh fruit and vegetable boxes. The store did not carry any international or specialty food items.
- The checkout area consisted of a counter that displayed candy, beef jerky, and other small items for sale. The available open space for stacking food to be purchased was no more than two (2) feet by two (feet) at best. This limited space for stacking food at the checkout area made it not conducive to conducting large transactions.

The SNAP eligible food stocked by the store consisted almost exclusively of inexpensive canned and packaged goods typical of a convenience store. The store also sold inexpensive accessory food items such as snack foods, ice cream, potato chips, candy, carbonated sodas, coffee, tea, condiments, and spices. The most expensive food item for sale as identified by store personnel was 3.25 ounces of beef jerky at \$7.69. The ineligible items for sale included gasoline, lottery

tickets, tobacco products, automotive products, health and beauty aids, paper goods, and cleaning products.

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 transaction patterns significantly different from similar-sized competitors offering similar food items.

Multiple Transactions by the Same Household within a Set Time Period

The Appellant stated that a rogue employee conducted the violations under Charge Letter Attachment 1. **5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(7)(E)**

The evidence in the case file documents that it is unlikely that SNAP customers would shop at the store and purchase such a large volume of items multiple times during a set time frame. In addition, the store's small checkout area and limited counter space makes it unsuitable for conducting large transactions. The store had no shopping carts or baskets for transporting food within the store. A preponderance of the evidence supports that the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

Excessively Large Transactions

The Appellant stated that a rogue employee conducted the violations under Charge Letter Attachment 2. **5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(7)(E)**

Sometimes a store may have higher than normal SNAP transactions due to the lack of access to other SNAP authorized stores in the area. However, agency mapping systems shows that, during the review period, there were five (5) SNAP authorized stores located within a one-mile radius of A-Z Food Mart. These included four (4) other convenience stores and a combination grocery store.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts and baskets support the Retailer Operations Division determination. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on a preponderance of the evidence, including the Appellant's admission that trafficking occurred in the store, the irregular transaction patterns cited in Charge Letter Attachment 2 are the result of trafficking in SNAP benefits.

Violations Warrant a Permanent Disqualification

The Appellant requests that the store be suspended for only a set period of time as the store will suffer an economic hardship if it is permanently disqualified. With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in the SNAP. However, there is no provision in the SNAP statute

or regulations for a waiver or reduction of a permanent disqualification for trafficking on the basis of possible economic hardship to either the owners personally or the firm resulting from the imposition of such penalty. Trafficking in SNAP benefits is an extremely serious violation and both 7 U.S.C. § 2021(b)(3)(B) and 7 CFR § 278.6(e)(1)(i) state that **a first time violation** warrants a permanent disqualification.

TRAFFICKING CIVIL MONEY PENALTY

The Appellant states that the store has established an effective compliance policy and program although it is not written. An effective compliance policy and program is the basis for determining a store is eligible for a trafficking CMP in lieu of a permanent disqualification. 7 CFR § 278.6(b)(2)(ii) mandates that a request for a trafficking CMP along with supporting documentation shall be submitted within ten (10) days of receipt of the charge letter. The SNAP regulation at 7 CFR § 278.6(b)(2)(iii) also states, in part, that “if a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking **and submit documentation and evidence** of its eligibility **within the 10 days ... the firm shall not be eligible** for such a penalty.” [Emphasis added.]

The Appellant did not submit a timely request for a trafficking CMP. 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’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 the Appellant’s EBT transaction record in comparison with actual store circumstances was the primary basis for its determination to permanently disqualify the retailer. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Stores caught in trafficking violations consistently display particular, characteristic patterns of transactions, including those cited in the letter of charges.

In the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did in fact occur as determined by the Retailer Operations Division. Based on the discussion above, the decision to impose a permanent disqualification against A-Z Food Mart, Appellant, is **sustained**.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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, FNS is 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.

RONALD C. GWINN
Administrative Review Officer

March 12, 2020