

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

All Star Grocery,

Appellant,

v.

Case Number: C0176607

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The record supports that All Star Grocery (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). It is the decision of the USDA that there is sufficient evidence to support the permanent disqualification of Appellant from participation as an authorized retail food store in the program, as imposed by the Retailer Operations Division (Retailer Operations).

ISSUE

The issue accepted for review is whether Retailer Operations 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 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

By Charge letter dated November 12, 2014, Retailer Operations informed the owner that it had compiled evidence that Appellant had violated the SNAP regulations based on electronic benefit transfer (EBT) transactions that establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for her type of firm. The sanction for trafficking is permanent

disqualification. The record shows that Appellant replied to the Charge letter November 20, 2014, which included a FOIA request.

The Agency FOIA response letter was sent to counsel February 24, 2015. Counsel appealed the FOIA response by letter dated March 18, 2015. On September 28, 2017, the FOIA office notified counsel that the appeal had been denied in part, and some new information was attached to the September 28 letter. Retailer Operations issued a ten day notification letter addressed to counsel October 25, 2017. Counsel submitted a written response dated November 3, 2017, received by Retailer Operations November 6, 2017. This response was reviewed and assessed by Retailer Operations.

Retailer Operations issued a Determination letter dated January 30, 2018. This letter did not properly reference the November 20, 2014, or the November 3, 2017 replies. The record supports that the replies were duly considered by Retailer Operations. The Determination 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. Retailer Operations considered Appellant's eligibility for a civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

By letter dated February 2, 2018, counsel appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated February 8, 2018. Counsel provided additional information by letter dated March 2, 2018.

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 evidence which 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 § 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 § 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 § 271.2 states: “Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco 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...”

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 evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The patterns of EBT transaction characteristics indicative of trafficking were:

1. An unusual number of transactions ending in a same cents value.
2. Multiple transactions made from individual benefit accounts in unusually short time frames.
3. Excessively large purchase transactions from recipient accounts.

APPELLANT’S CONTENTIONS

The following may represent a summary of the contentions however, in reaching a decision, attention has been given to all contentions presented, including any not specifically referenced.

- My client denies the allegations that trafficking took place at her establishment.
- The determination letter indicated that the reply to the initial charge letter was not received and the decision was made without consideration of the detailed response of November 3, 2017.

- The failure to take into account the response is a blatant violation of my client's civil rights and calls for a remand of the entire file to a new review office for a de novo review.
- Most clients are without an automobile and are in a sense forced to purchase from the store.
- The store is perfectly situated at the nexus of a commercial and a residential neighborhood.
- The closest authorized firm is a gas station. If an individual does not take advantage of the store he or she will have to hike a considerable distance to reach an establishment that offers the same variety and quality found at the store.
- The store has been under current ownership for almost five years and has become an institution in the neighborhood. Client loyalty is such that the folks in the neighborhood are more inclined to stop by her store, spend more at the store and return sooner to the store.
- Food insecurity and fear forces the neighborhood residents to buy excessively large amounts of food in one visit or to buy so frequently as to be considered out of the ordinary. This fear my client cannot control.
- The factual predicate for a finding of trafficking does not exist and a permanent disqualification is both unwarranted and in violation of the regulations and case law.
- A review of the evidence and rationale demonstrates by a preponderance of the evidence that the disqualification should be reversed.

Undated store photos and a one page, undated handwritten price list were provided.

ANALYSIS AND FINDINGS

Retailer Operations presented a case that Appellant trafficked SNAP benefits. Appellant was authorized November 1, 2013, and the charges were based on an analysis of SNAP EBT data during the period of May 2014 through July 2014. Each Attachment represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant during the review period. As patterns of unusual transactions appear across multiple Attachments the case of trafficking becomes more convincing.

Attachment 1: Listed are 104 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. When there are a disproportionate number of transactions that end in same cents values it appears that these transaction amounts are contrived, and in the absence of any compelling evidence to the contrary, they are indicative of trafficking.

Contentions:

- **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. There is no presence of an extremely large pattern of transactions. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. By focusing on one percent of the potential number of sets out of a universe of 100, the end results are skewed. Had the

department provided information on the rate of recurrence on the other number set it would have been simple to know if the figures are the result of exploitation or random occurrence. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

- It is extremely difficult to randomly produce data that avoids repetitive patterns. Contrived numbers are obvious. There have been SNAP fraud cases where up to 23 percent of the transactions end in a single same cent denomination.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). An Appellant that seeks to set aside an agency sanction must focus its efforts on providing evidence by a preponderance that the transaction activity at issue is not due to SNAP benefit trafficking.

In 2017, Appellant provided a one page undated handwritten price list for 20 items with two items that had no associated prices. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

No itemized cash register tapes were advanced to support that SNAP eligible foods were sold at Appellant. No customer statements were advanced, and no vendor invoices were provided to support the acquisition of eligible foods by the owner. The owner has not by a preponderance of the evidence addressed this Attachment to reflect eligible SNAP transactions.

Attachment 2: Listed are 47 sets of 101 transactions conducted by 33 different households (HHs) within a short time frame.

Contentions:

- 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The owner cannot prevent a recipient from using SNAP benefits in any manner they choose.
- Multiple family members use the card over a short time frame.
- The recipients do not have cars, so they rely on the store's delivery service several times a day, or pick the items up at the store.
- A small number of recipients seem to be purchasing items for other individuals. A government study indicates that normally 90% of the SNAP benefits are depleted within 3 weeks, so the last 10 days are very lean for many SNAP customers.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The exterior signage photo with the 2017 reply shows "free delivery" however, the photo is not adequate to prove that Appellant offered delivery. No affidavits were provided to support that delivery was offered or used by recipients. No employee attestations or statements from contracted delivery individuals were provided to support that the store offered free delivery in 2014. Counsel's November 2014 reply supports that the owner stated she had few employees and during the review months she was largely absent from the store. According to the record,

she was on maternity leave and was rarely present at the store. It seems unlikely that the small store with limited staff would deliver multiple times to the same households on the same day. Inadequate evidence was presented to support that delivery services were offered by Appellant which contributed to the transactions listed during the 2014 review months.

The data shows that 16 of the 33 HHs flagged conducted a SNAP transaction at a larger store on the same day they conducted a transaction at Appellant. One HH that conducted five transactions on this Attachment made a transaction at a super store at a distance of .6 miles. Another household that made three transactions listed, transacted benefits at three supermarkets and a super store at a distance of 9.6 miles. Within two days of making a transaction at Appellant, 23 households or 69.6% made transactions at larger stores. For example, one HH with two transactions on this Attachment made transactions at two different supermarkets at a distance of 2.38 miles. Therefore, the data shows that recipients frequented and accessed other authorized stores. The record shows that at the time of the charges, there were at least 40 authorized stores within a one mile radius of Appellant, including a super store, three supermarkets, and seven small groceries. The evidence supports there were other shopping alternatives to recipients and that they accessed these authorized stores.

Attachment 3: Listed are 353 transactions conducted by 165 different households for amounts that exceed the average transaction amount for the same store type in the same state by more than three times.

Contentions:

- The store has food specials at the beginning of the month.
- There are shopping carts that can be used to transport large orders to the counter.
- A delivery system allows recipients without cars to purchase greater than normal volume.
- The quantity of food is abundant, vegetables and other items. There are substantial quantities of meat, a variety of frozen stocks, a large frozen food section with shrimp, pasta, fish pizza, and other items, and fruits and vegetables.
- A typical client will purchase several grinders at the same time as other products that result in large transactions. The variety encourages sales that are larger than usual for a convenience store.
- Some items, such as rice and oil, are priced lower than the prices at local supermarkets. A handwritten list of prices was submitted.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- A small store's pricing requires a substantial markup of 75%; a typical markup is 65%. The owner indicates that the Hartford market markup is 75% on a number of non-sale non-staple items. This markup will result in a series of higher than expected sales.

The FNS onsite store report of June 17, 2014, indicates Appellant did not have shopping carts or baskets. The onsite visit of September 27, 2013, also confirms that the store had no shopping carts or baskets. While the photos submitted in 2017 show carts, no purchase evidence for said carts was provided by the owner. The evidence in the record, by a preponderance supports that the store had no shopping carts or baskets to move large quantities of foods during May or June of the review months, and no evidence was advanced that the carts were in place in July 2014.

It should be noted that a 2006 study by the Office of Analysis, Nutrition and Evaluation found that 83% of SNAP benefits are redeemed in supermarkets; 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Supermarkets and super stores typically have more eligible food stock and have higher SNAP average transaction amounts than a small grocery like Appellant. 5 U.S.C. § 552 (b)(7)(E).

5 U.S.C. § 552 (b)(7)(E).

In 2017, Appellant submitted a price list of some items. It is not known if the prices on that sheet reflect the actual prices of the listed items during the relevant review months in 2014. The reported price for oil was \$5.99 and \$8.99 for rice. Appellant provided no evidence to support that the prices of these two items listed in the November 2017 response to the Charge letter were lower than larger stores or that these prices were the same in 2014.

SNAP authorization is an administrative privilege, granted upon proof of eligibility and continued proof of compliance with the governing laws and regulations. While due process is honored, the Agency is not burdened with proving to Appellant's satisfaction that Retailer Operations has correctly imposed the sanction at issue. Rather it is Appellant's burden to demonstrate that it has not engaged in SNAP benefit trafficking by presenting a preponderance of evidence of same. Since permanent disqualification is warranted on the first occasion of trafficking, it is Appellant's burden to raise material issues of fact as to the transactions set forth as suspicious in the Attachments provided with the Charge letter. This burden has not been met.

While some households may have conducted legitimate transactions at Appellant, insufficient evidence was presented to support this argument. The owner provided no vendor invoices of eligible items acquired to support Appellant's SNAP redemptions. The owner provided no itemized cash register tapes for the review months. There is no way to assess if the 2017 pricing information reflected the 2014 prices relevant to the charges. No recipient statements were provided to support that the transactions listed were for eligible foods or that deliveries were made by Appellant to SNAP households. No business tax returns or state tax filings were advanced, and no banking statements were provided. Thus, the owner has not advanced a preponderance of evidence that the transactions on this Attachment are for eligible foods rather than the result of trafficking.

The administrative review process does not include an assessment of the constitutionality of the laws, or regulations under which the Agency imposed adverse actions, but rather whether the Agency actions undertaken were proper pursuant to those laws and regulations sustainable by a preponderance of evidence. Additionally, challenges to the laws and regulations governing the

SNAP are more appropriately the province of judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

As to the court cases cited by counsel, the administrative review officer is not responsible for determining whether the legal cases cited apply to Appellant's situation. The Administrative Review Officer will make a final determination using the process provided for in Section 14(a)(5) of the Food and Nutrition Act and the SNAP regulations at 7 CFR Part 279. If the owner feels aggrieved by the final agency decision, the owner may appeal the decision to federal district court as is provided for in Section 14(a)(13) of the Act and by 7 CFR Part 279. If the final agency decision is appealed to the federal district court, the judge is responsible for determining whether case law cited by counsel is on point and applicable to Appellant's case.

CIVIL MONEY PENALTY

By letter dated November 20, 2014, counsel presented a request for CMP consideration. He stated the client owned the business for a year and three months and had no record of a previous SNAP violation; the compliance policy was in effect since August 16, 2013, when the client purchased the store; and the fact that she successfully operated the business prior to the incident is proof of the efficacy of the policy and program in effect. Counsel also stated that the owner employed few individuals; she ensured that each individual had a firm grasp on the SNAP; and that all were trained within one month of being hired. It was stated that she continued to monitor employees until they had a grasp of the precepts. She was not aware of, did not approve, did not benefit from or was in no way involved in conduct of trafficking violations. She was in fact on maternity leave and rarely present at the business.

The owner did not submit documentation to support that Appellant met the four criteria which, as a whole, specifically identify the minimum standard that a firm must meet in order to be eligible for a CMP in lieu of a permanent disqualification for trafficking. Accordingly, Retailer Operations determined that Appellant did not qualify for a civil money penalty.

In his November 3, 2017 response, counsel stated that the store qualified for a CMP because Congress intended that an innocent store owner be subject to penalty under the amendment to Section 2021 (b) of the Act which held that CMPs should be the normal penalty instead of disqualification for owners who have not participated in trafficking, nor personally benefited from the trafficking.

For FNS to impose a trafficking CMP in lieu of permanent disqualification, the owner must submit timely substantial evidence that demonstrates she had established and implemented an effective compliance policy and program to prevent SNAP violations. There was no evidence submitted in support of any of the four criteria listed in the regulations. For example, no training dates or contemporaneous curricula documentation was advanced to support the claim that Appellant met the personnel training requirements of the regulations. No evidence was submitted initially, or at any later time, to verify or substantiate that the owner met the four criteria set forth in the regulations respective to CMP consideration.

The statute, regulations and agency policy do not limit the scope of the required compliance policy and program to violations other than those caused by error, inadvertence, oversight or lack of management supervision but rather direct that the policy and program are structured to prevent all violations, regardless of cause. The standard of substantial evidence is difficult to meet, particularly if such policy and program are not implemented and documented prior to the violations. Nevertheless, such is the standard required by the regulations, and to which Appellant is held during the course of this review.

Additionally, the size of an organization, or number of personnel, is not a consideration in determining the eligibility of a firm for a CMP in lieu of permanent disqualification for trafficking. Moreover, while significant effort may be required to develop and maintain a compliance policy and program, if such fails to meet the requirements, that level of effort, even if substantial, does not mitigate the insufficiency. Accordingly, Retailer Operations correctly determined that Appellant did not qualify for a civil money penalty.

CONCLUSION

Retailer Operations' analysis of Appellant's SNAP 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 consistent with trafficking violations in SNAP benefits. Based on empirical data and in the absence of a preponderance of compelling evidence of the legitimacy of the transactions on the Attachments, it is more likely true than not true that trafficking violations did occur as charged. Retailer Operations denial of a trafficking CMP was proper per the applicable regulations. Therefore, the decision to impose a permanent disqualification against Appellant is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 and to Section 279.7 of the regulations (7 CFR § 279.7) with respect to applicable rights to a judicial review of this determination. 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 Appellant's owner resides or is 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.

M. Viens
Administrative Review Officer

March 21, 2018