

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

Annapurna Enterprises,)
)
Appellant,)
)
v.)
)
Retailer Operations Division,)
)
Respondent.)
_____)

Case Number: C0190037

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 Annapurna Enterprises (hereinafter Annapurna 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 September 13, 2016, 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 February 2016 through July 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, through counsel, replied to the charges by letter on September 21, 2016, and explained that the transactions were normal based on the unique circumstances of the store. After considering the evidence and the retailer's reply, the Retailer Operations Division issued a determination letter dated October 11, 2016. 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 dated October 14, 2016, Appellant, through counsel, 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 February 2016 through July 2016. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were an unusual number of transactions ending in a same cents value.
- There were multiple transactions made from individual benefit accounts in unusually short time frames.
- There were an excessive number of manual key entered EBT transactions made from the store location.
- 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 appeal request dated October 14, 2016, Appellant provided the following summarized contentions, in relevant part:

- The permanent disqualification is not only cruel and unjust but in violation of the Eight Amendment.
- The permanent disqualification has affected Appellant’s ability to make a living and has made the business worthless.
- If the store is unable to accept SNAP, it is unable to do business.

In its September 21, 2016, reply to the Retailer Operations Division, counsel provided the following explanations for the transactions:

- The items are priced to sell and are usually priced at whole dollar amounts.

- Appellant sells many sandwiches that range in price from as little as \$4.00 to as much \$14.00 for hoagies.
- Many customers will come in and buy two eggs in the morning and come back later that day and buy another two eggs and come back a third time and buy another two eggs.
- Appellant states that the customers should be asked why they make multiple purchases in the same day.
- Sometimes customers will call and ask us to put food aside for them.
- Customers will pick up the ordered food, pay for it with their EBT card, and then come back later in the day to get some more food for another meal or for lunches for the children.
- Appellant swipes the card once or possibly twice and if it does not work, Appellant manually keys in the number to keep the lines moving in the store.
- Appellant cannot control the quality of the cards that are being given to him.
- Sixty-six transactions do not seem to be a great number in light of the total number of transactions that are placed through the store.
- This is probably a very small percentage of all sales that are entered manually.
- Attachment 4 shows 432 sales, 101 of those had to be swiped or about 24%.

In support of its contentions, Appellant submitted six months of invoices to support that is purchased sufficient eligible food stock

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 herein.

ANALYSIS AND FINDINGS

Store Visit

FNS authorized Annapurna as a convenience store on December 9, 2014. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a March 1, 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:

- Annapurna is approximately 400 square feet, with no additional food storage outside of public view.
- There were no shopping baskets or shopping carts for customer use.
- There was one cash register and one point-of-sale device.
- There was no optical scanner for the speedy processing of transactions.
- There were no meat/seafood specials or bundles that might sell for high prices.
- The counter space was limited with an ice cream cooler directly in front of the check-out

area.

- There was no fresh unprocessed meat, poultry, or fish.
- The available meat was deli meat, some packages of bacon, canned meat and canned fish.
- There was limited fresh produce including onions, potatoes, and a few bananas on the counter.
- Other staple food available for purchase were eggs, juice, bread, cereal, pasta, rice, 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, health and beauty supplies, and household items.

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 Attachments

Charge Letter Attachment 1. There were an unusual number of transactions ending in a same cents value. During the review period, Annapurna conducted 6,251 SNAP transactions.

7 USC 2018 (b)(7)(e).

Appellant contends that the items are priced to sell and are usually priced at a whole dollar amounts. Appellant also explains that it sells many sandwiches that range in price from as little as \$4.00 to as much \$14.00. It is possible that some of the smaller transactions are the result of purchasing only even dollar priced items, such as the deli sandwiches and this could explain some of the lower dollar same cent transactions. However, the photographs from the store visit show the majority of Annapurna's items are priced in an amount ending in 9 cents. For example, the photographs show the following prices: coffeemate - \$2.99; vanilla wafer cookies - \$2.99; cream of chicken soup - \$1.69; oil - \$1.69; tomato sauce - \$2.99; individual container of Cheerios - \$1.39; mac and cheese - \$2.99; and gravy mix - \$2.49. Thus, Appellant's explanation that most of its prices are whole dollar amounts is not credible.

The larger transactions cited in the charge letter would most likely consist of the purchase of several relatively inexpensive items and it is unlikely that these purchases would routinely total to an amount ending in 00 cents. 7 USC 2018 (b)(7)(e).

Appellant failed to provide a credible explanation for the same cent transactions listed on Charge Letter Attachment #1. 7 USC 2018 (b)(7)(e).

Charge Letter Attachment 2. Multiple transactions were made from individual benefit accounts in unusually short time frames. 7 USC 2018 (b)(7)(e).

Appellant contends that many customers make multiple visits to Appellant and that it cannot control how often someone uses their card. Appellant explains that customers will buy two eggs three times per day. 7 USC 2018 (b)(7)(e). The SNAP transactions noted in the charge letter are

questionable because they display characteristics of use inconsistent with the nature and extent of the store's stock and facilities. It is irregular for a convenience store to have purchases such as those cited, which are more than double the State average for convenience stores. These transaction totals are too large to consist of a couple of eggs or other possibly forgotten items.

7 USC 2018 (b)(7)(e). Appellant offers no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale. Moreover, the Retailer Operations Division determined 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.

Appellant did not provide any compelling justification as to why households are conducting multiple transactions at Annapurna or evidence that all the irregular transactions cited in the charge letter were for eligible food items only. Multiple transactions over a short period of time, especially of high dollar value, are indicative of attempts to diminish attention to signs of trafficking.

Charge Letter Attachment 3: An excessive number of manual key entered EBT transactions were made from store location. These transactions significantly exceeded the normal practice for stores in the state. During the review period 6,251 EBT transactions were processed at Appellant. 7 USC 2018 (b)(7)(e).

The Retailer Operations Division determined that several households conducted manual transactions at Appellant while also conducting another SNAP transaction at another location in a short period of time. Due to the distance between Appellant and these other stores, it was implausible that the EBT card was in hand for both transactions. 7 USC 2018 (b)(7)(e).

Charge Letter Attachment 4: Excessively large purchase transactions were made from recipient accounts. 7 USC 2018 (b)(7)(e). These large transaction amounts are not consistent with the store's inventory with no fresh unprocessed meat and limited fresh produce. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

There were no shopping baskets or carts visible on the day of the store visit. Appellant is not set up to process high-dollar transactions, as indicated by its lack of equipment to facilitate large transactions and limited counter space. There are no legitimate bases for SNAP customers' unusual attraction to the firm such as a superior selection of staple foods, price advantages, package specials, bulk or promotional items, an extensive variety of otherwise unavailable ethnic food items, or special services rendered.

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 one-mile radius of Annapurna, there are 153 authorized stores, including 18 combination/other stores, 45 other convenience stores, five medium groceries, 80 small groceries, two supermarkets, and three super stores. 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.

[7 USC 2018 (b)(7)(e)].

[7 USC 2018 (b)(7)(e)]

The Retailer Operations Division determined that there were 365 households whose transactions were flagged during the period. Of these 365 households, 184 households used an area large grocery, supermarket, or superstore within one day of the flagged transaction at Appellant. This is a strong indicator that Appellant is not a primary food source. The Retailer Operations Division conducted a shopping analysis of six of the households with transactions identified in the charge letter. These shopping analyses indicate that that 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. There is no compelling reason why any household would conduct high dollar SNAP transactions at Appellant while shopping at stores that carries a much larger quantity and variety of eligible food items. The Retailer Operations Division determined that this pattern is indicative of trafficking given that Appellant's inventory and layout do not support such transactions.

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.

Receipt Analysis

Appellant, through counsel, submitted six months of invoices of eligible food items purchased to show that the store carried sufficient product to support the level of SNAP activity. Many of the receipts provided listed [7 U.S.C. 2018 (b)(6) & (b)(7)(c)] as the vendor's customer, with the Appellant's address listed. Some of the receipts provided were grocery store receipts with no invoice or receipt number. These receipts provide no identifying information making it impossible to guarantee that the receipts are for Appellant's inventory. However, in Appellant's favor, these receipts were included in the analysis. Some of the receipts provided by the retailer were not able to be used as proof of an inventory purchase for the following reasons: contained no identifying vendor or store information; contained only ineligible non-food items; or was outside of the review period.

The receipts and invoices show that the store purchased sufficient food inventory to account for the firm's SNAP redemption volume, although it is questionable whether the stock is sufficient to cover credit and cash transactions since SNAP could not reasonably be the only payment source. Regardless, sufficient inventory alone does not explain the suspicious patterns of SNAP transactions such as rapid and consecutive transactions by individual during the same store visit or in a single day. The large dollar transactions remain questionable even when there is sufficient food inventory to support such transactions when consideration is made of there being

only a limited variety of stock in the store, no fresh meat and produce, a greater variety of foods at lower prices at other stores, including super stores and supermarkets at which many customers also shop, no shopping carts, and very little counter space to place food for purchase at the checkout counter.

Appellant Hardship

With regards to the Appellant's contention that the business is suffering, it is recognized that economic hardship is a likely consequence whenever a store is permanently disqualified from participation in SNAP. **7 USC 2018 (b)(7)(e)**. To excuse ownership from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that the firm will incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposition.

Violation of the 8th Amendment

Appellant contends that permanent disqualification is a violation of the 8th Amendment. **7 USC 2018 (b)(7)(e)**. The administrative review process cannot properly include an assessment of the constitutionality of the statute, regulations and policies under which the agency imposed adverse actions, but rather assesses whether the agency actions undertaken were proper pursuant to those laws, regulations and policies and sustainable by a preponderance of evidence. Challenges to the laws and regulations governing the SNAP are more appropriately the province of judicial review. Accordingly, no findings or conclusions are rendered in this regard.

Civil Money Penalty

In the charge letter dated September 13, 2016, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR § 278.6(i). Appellant was also 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. The criteria for a trafficking CMP in lieu of disqualification is defined under 7 CFR § 278.6(i) which reads, inter alia:

*In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by **substantial evidence** [emphasis added] its fulfillment of each of the following criteria:*

Criterion 1. The firm shall have developed an effective compliance policy as specified in §278.6(i)(1); and

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in §278.6(i)(2); and

Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations

Appellant did not submit any documentation to the Retailer Operations Division to show that it met the four criteria required by 7 CFR § 278.6(i). Thus, the Retailer Operations Division correctly determined that there was insufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program prior to the SNAP violations in this case.

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.

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 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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

MARY KATE KARAGIORGOS
ADMINISTRATIVE REVIEW OFFICER

February 1, 2017
DATE