

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

Cook Express Food Mart Corporation,

Appellant,

v.

**Office of Retailer Operations
and Compliance,**

Respondent.

Case Number: C0224405

FINAL AGENCY DECISION

The record supports that the Cook Express Food Mart Corporation (Appellant), committed violations of the Supplemental Nutrition Assistance Program (SNAP). It is the decision of the USDA that there is sufficient evidence to support that the permanent disqualification of Appellant from participation as an authorized retail food store in the Program, as imposed by the Office of Retailer Operations and Compliance (Retailer Operations), was appropriate.

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 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 the Food and Nutrition Service (FNS).

CASE CHRONOLOGY

By Charge letter dated December 20, 2019, 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 established clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for the firm type. The sanction for trafficking is permanent disqualification.

The owner provided an email response dated December 28, 2019. The record documents a telephone conversation on December 30, 2019, wherein the owner is stated to have admitted that the transactions appeared suspicious, but he did not know what happened. The Retailer Operations staffer is said to have told him that he was still responsible even if the employees committed violations.

Retailer Operations issued a Determination letter dated January 13, 2020. This letter informed Appellant that it was permanently disqualified as a retail food store in accordance with Sections 278.6(c), and 278.6(e)(1) of the regulations. Retailer Operations considered Appellant's eligibility for a civil money penalty (CMP) according to Section 278.6(i) of the regulations, and found it was not eligible because insufficient evidence was submitted timely to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program to prevent violations.

By letter dated January 22, 2020, counsel appealed Retailer Operations' determination, and requested administrative review. The appeal was granted by letter dated February 5, 2020. Counsel submitted additional information by email dated February 26, 2020.

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 credible, 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 or wholesale food concern 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: “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 charges were based on an analysis of SNAP transaction data during the period of June 2019 through November 2019. The patterns of transaction characteristics indicative of trafficking are:

- Multiple transactions were made from individual benefit accounts within a set time period.
- Large transactions based on the observed store characteristics and recorded food stock.

APPELLANT’S CONTENTIONS

In reaching a decision, consideration has been given to all contentions as presented, including any not referenced.

- I didn’t realize what happened, I know nothing about who did that or how that could happen. I wasn’t in U.S., I went to Yemen and Djibouti in first of August, 2019 until November 2nd, 2019. I didn’t notice any change in the income average, the monthly average didn’t increase . So I didn’t figure out that there are violations.
- The available time you give me which is ten days is so short and most of that time includes holidays. So I try to find legal counsel to assist me in presenting my reply, but I didn’t find because of the holidays.
- Please help me know what happened because I was absent most of that period in which the violations occurred.
- I don’t know if the workers in my corporation or the customers caused that violations.

- Our client was traveling out of the Country for a portion of the time of the alleged violations and has no knowledge of same. Enclosed herewith please find documents related to our client's travel and extended stay due to illness.
- During the time of the alleged violations, the following individuals were working at the store: 5 U.S.C. § 552 (b)(6) & (b)(7)(C), June and July, left for overseas in August and did not return until November; 5 U.S.C. § 552 (b)(6) & (b)(7)(C), (son), June thru November; and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (son), June thru November.

Counsel provided emails from the U.S. Embassy in Djibouti, visa information, and a hospital report.

ANALYSIS AND FINDINGS

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

Attachment 1: Listed are 91 transactions in 34 sets, conducted by 21 unique households (HHs). Much of the stock seen in the FNS photos taken during the onsite visit of October 10, 2019, appears to be accessory foods such as snacks and beverages. There were no fresh meats or specialty/ethnic items noted in the FNS-contractor's onsite inventory. The record shows that Appellant stocked non-eligible items including: lottery tickets, tobacco products, gasoline, health and beauty products, household cleaning and paper products, automotive items, party goods, clothing, and incidental goods.

The checkout area had two cash registers, and one point of sale device. The counter was congested with impulse-buy items. Appellant did not offer any shopping baskets or carts for customers to accumulate foods; it would be difficult for customers to transport many items totaling to higher dollar amounts to the register. No explanation was provided for the transaction amounts conducted within set times of each other.

The record indicates there are other authorized firms located within a one mile radius of Appellant including: one large grocery store, 11 convenience stores, and 4 combination stores. This supports that there are other authorized retailers at which SNAP recipients could purchase eligible foods. Retailer Operations conducted a SNAP recipient shopping analysis of several HHs, and determined that the HHs apparently had access to transportation as they were transacting benefits at other authorized stores that were at a distance from Appellant, as well as those stores that were nearby. The record supports that 66.6% of the households listed on this Attachment made transactions at a super store or supermarket within two days of making a SNAP transaction(s) at Appellant.

Retailer Operations analyzed the shopping histories of some households listed in the Charge letter, and determined that the shopping patterns at Appellant were suspicious. The owner provided no evidence to support that Appellant stocked sufficient eligible foods to meet its

SNAP redemptions. No itemized cash register tapes were provided to support that the transactions listed were legitimate. No recipient affidavits were advanced to support the shopping behavior at the store. No banking records or business tax filings were advanced.

Attachment 2: Listed are 194 transactions conducted by 59 different households for amounts that exceed the average transaction amount for the same store type in the same state by three times or more. The record supports that 64% of the households listed on this Attachment conducted transactions at a super store or supermarket, within two days of making a transaction(s) at Appellant.

Retailer Operations determined that a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transaction at Appellant was a large amount given that there were no shopping carts or hand baskets to convey eligible foods to the checkout counter, and only a limited clear area on the counter to set down items for processing. Furthermore, limited quantities of staple foods were photographed and recorded at the store. The data shows that Appellant had higher transaction volume in 5 U.S.C. § 552 (b)(6) & (b)(7)(C) ten dollar ranges than convenience stores in the same County. Appellant also had 5 U.S.C. § 552 (b)(7)(E) higher SNAP dollar volume than the same store type in the same County for the same timeframe. This is unusual.

Retailer Operations conducted a review of several HHs' shopping patterns at Appellant. These patterns show that HHs made transactions at larger store types on dates proximate to or on the same date at Appellant, while conducting lower dollar SNAP transactions at larger authorized stores. While some households may have conducted legitimate SNAP transactions at Appellant, insufficient evidence was presented to support this argument. No itemized cash register receipts were provided. No business banking records were supplied. No federal business tax returns or state tax returns were advanced. No vendor receipts to support stock of eligible foods to cover Appellant's SNAP redemptions were advanced. No recipient affidavits were presented.

The regulations at 7 CFR § 278.6(a) state 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, and that such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through, inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system. The owner has the burden of providing credible, 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. The owner has not provided a preponderance of evidence to support that the transactions flagged were for eligible foods. That the owner was not in the country does not mitigate the sanction. The owner is responsible for the SNAP transactions processed at his store.

SNAP authorization is an administrative privilege, granted upon proof of eligibility and continued proof of compliance with the governing laws and regulations. The agency labors to diligently operate the program in accord with the statute enacted by Congress and the regulations promulgated to implement the provisions thereof. It is Appellant's burden to demonstrate that it has not engaged in SNAP-benefit trafficking by presenting a preponderance of evidence of same. This burden has not been met.

The owner of Appellant is liable for all violative transactions handled by either paid or unpaid store personnel. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. The contention that the owner was not in the country, and did not know of or conduct any violations of program regulations himself cannot be accepted as a valid basis for diminishing the penalty.

CIVIL MONEY PENALTY

The regulations at 7 CFR Section 278.6(i) specify the criteria for a firm's eligibility for a CMP in lieu of permanent disqualification for trafficking. The four criteria listed at the cited regulation are identified as a minimum standard that firms must meet in order to be eligible for CMP consideration. The owner did not request or submit any substantive documentation to support a trafficking civil money penalty in lieu of permanent disqualification as required by the regulations. Given the lack of a substantial evidence submission which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP, the owner did not meet the criteria for a CMP, and Retailer Operations properly denied it.

CONCLUSION

Retailer Operations' analysis of Appellant's SNAP transaction data was the primary basis for its determination to permanently disqualify Appellant. The record also included onsite store photographs, an onsite store inventory report, and HH shopping analyses that provided evidence that the questionable transaction patterns during the review period had characteristics that are consistent with trafficking violations in SNAP benefits.

Based on empirical data, and in the absence of evidence of the legitimacy of the transaction patterns presented by Appellant, the preponderance of the evidence supports that violations did occur as charged by Retailer Operations. Retailer Operations denial of a trafficking CMP was also proper per the applicable regulations. Therefore, the decision to impose a permanent disqualification against Appellant is sustained. This decision is effective 30 days from receipt by Appellant.

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. If 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 11, 2020