

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

El Mismo Primo 8,

Appellant,

v.

Case Number: C0207850

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The record supports that El Mismo Primo 8 (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 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 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 Food and Nutrition Service (FNS).

CASE CHRONOLOGY

By Charge letter dated May 10, 2018, 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 replied to the Charge letter by letter dated May 16, 2018. Retailer Operations issued a Determination letter dated May 29, 2018. This letter informed the owner that Appellant was permanently disqualified as a retail food store 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. It found Appellant was not eligible because insufficient evidence was submitted timely by the owner to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program to prevent violations.

By letter misdated June 8, 2019, counsel appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated June 28, 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 or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 CFR § 278.6(e)(1) reads: "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 September 2017 through February 2018. The patterns of transaction characteristics indicative of trafficking are:

1. An unusual number of transactions ending in same cents values.
2. Multiple transactions from the accounts of individual SNAP households within a set time period.
3. Excessively large transactions made from recipient accounts.

APPELLANT’S CONTENTIONS

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

- The store is managed by one person and has no other employees.
- The owner has owned the store for three years and her responsibility with the business does not involve customer contact, making sales, or attending to the cash register.
- She makes deposits and orders merchandise and of course she is responsible for the operations of this store.
- She trained the employee who made the erroneous SNAP transactions using the written materials supplied by the USDA. She supervised him for 3 to 4 days and was convinced he understood the rules.
- She has trained him since your letter of May 10.
- This is the first instance of a violation by my client and we request a CMP in lieu of permanent disqualification.
- Many low income people in the neighborhood do not have access to an automobile and this store fulfills an important need for the community.

ANALYSIS AND FINDINGS

Retailer Operations presented a case that Appellant trafficked SNAP benefits. The Attachments furnished with the Charge letter represent the questionable patterns of SNAP transactions indicative of trafficking 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 85 transactions ending in 50 cent values. No change is provided with SNAP transactions, therefore there is no incentive to price items in a certain way. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). When there are a disproportionate number of transactions that end in a same cents value, it appears that the amounts are contrived.

Contention:

- Although coincidental, she believes this to be normal.

Retailer Operations noted that the onsite visit report does not cite an unusual pricing structure at Appellant. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The FNS-contractor report also noted that Appellant did not round off transaction totals.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The owner provided no price list of the eligible foods at Appellant. No itemized cash register tapes were advanced. No recipient statements were provided to support the 50 cent end value listed. The owner has not by a preponderance of the evidence addressed this Attachment to support that the transactions listed are for eligible foods rather than the result of trafficking.

Attachment 2: Listed are 50 transactions in 20 sets of two or more transactions from the accounts of individual SNAP households within a set time period.

Contentions:

- This not at all unusual in high poverty areas such as surrounding area of the store.
- Many of these are attributable to neighbors who often come into the store more than once a day.

The owner provided no evidence to support that the transactions listed were for legitimate SNAP foods.

Attachment 3: Listed are 154 transactions conducted for totals that exceed the average transaction amount for the same store type in the same state by more than three times. The SNAP total redemption dollar volume at Appellant exceeded the SNAP redemption volume of other state convenience stores by 21%, and the average SNAP transaction amount was 26% higher. When compared to convenience stores in the same county, Appellant redeemed a 21.5% higher SNAP dollar volume, and its SNAP average transaction amount was 18% higher than the same type store average in Fairfield County. This is irregular.

Contention:

- The owner disagrees that the transactions listed constitute excessively large purchases; many are likely to purchase large bags of rice or oil common in this neighborhood.

The store visit report supports that Appellant does not have any shopping baskets or carts for recipient use. The FNS photographs show a small check-out area behind a plastic barrier. The onsite report and photographs also indicate that Appellant does not have any storage for additional inventory. Retailer Operations determined that the extent of the available eligible food items does not support excessively large transactions. The store photographs reveal the only bulk item appeared to be large bags of rice with less than five stocking units seen at the time of the store visit. Cooking oil was not identified as a bulk or high dollar item in the store visit report. There were no other bulk items, specials, or deals advertised for sale at Appellant. The owner provided no vendor invoices to support Appellant's inventory of eligible foods. No itemized cash register tapes were provided. No federal or state business tax filings were provided. No business bank records were advanced. No recipient statements attesting to shopping behavior at Appellant were offered for review. While there may be some legitimate transactions for eligible foods listed in this Attachment, insufficient evidence was advanced to support that the transactions were legitimate rather than the result of trafficking.

SNAP authorization is an administrative privilege, granted upon proof of eligibility and continued proof of compliance with the governing laws and regulations. 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.

There are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty on the basis of after-the-fact corrective actions implemented subsequent to findings of program violations. Therefore, Appellant's contention that corrective action such as training the employee on SNAP does not provide any valid basis for dismissing the charges. This review is limited to what facts were at the basis of Retailer Operations' sanction at the time such determination was made. It is not the authority of this review to consider what subsequent remedial actions may be undertaken so that a store might begin to comply with Program requirements.

CIVIL MONEY PENALTY

Contentions:

- The store has an effective compliance policy committed to insure that the grocery store is operating in a manner consistent with the regulations and FSPI policy on the proper acceptance and handling of food coupons. That policy involves at least 3 days of training of any employee who operates the cash register or interacts with customers and an additional 3 days of supervision of that employee by the owner.
- Prior to the occurrence of the violations cited the sole employee was trained for his job by the owner whose training was received from various documents and manuals provided to her by the USDA.

- The store has developed and implemented an effective training program for all managers and employees on the acceptance and handling of food coupons in accordance with section 278. Training sessions were held on numerous dates in 2015 and immediately after receipt of the May 10, 2018 letter. Written materials including FNS publications and program regulations were used in the training program as required in 7 CFR 278.6(i)(2)...(i).
- The owner was not aware of, did not approve of, did not benefit from, nor was she in any way involved in the conduct or approve of the trafficking violations, and this was the first time the same had occurred by anyone involved in her store. These trafficking violations did not involve firearms, ammunition, explosives or controlled substances as defined in 21 USC 802.
- The owner requests that she not be disqualified from SNAP but be allowed to make a CMP of \$13,920.
- In addition to the initial training given the sole employee to avoid violations of the SNAP, the owner regularly discusses the requirements of the program with her employee on a weekly basis. She regularly discusses the requirements with her brother-in-law who owns other similar grocery stores.
- It is difficult to conceive of any greater lengths my client could have gone to in order to insure compliance with the SNAP.

Counsel did not provide any documentation or evidence to support the contentions. Substantial documentation must be presented to prove by a preponderance that Appellant met the trafficking CMP requirements as stipulated in the regulations at 7 CFR § 278.6(i). Retailer Operations determined that Appellant was not eligible for a trafficking 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 that are consistent with trafficking violations in SNAP benefits. Based on empirical data and in the absence of a preponderance of evidence of the legitimacy of the transactions listed on the Attachments, it is more likely true than not true that violations did occur as charged by Retailer Operations. Retailer Operations' denial of a trafficking CMP was proper per the applicable regulations. The decision to impose a permanent disqualification against Appellant is hereby sustained.

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 a judicial review of this decision. 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

August 22, 2018