

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

Eridania Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0202254

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 that the permanent disqualification of Eridania Corp. (Appellant) from participation as an authorized retail food store in the Supplemental Nutrition Assistance Program (SNAP), was properly 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 September 19, 2017, Retailer Operations informed the owner that Appellant was in violation of the terms and conditions of the SNAP regulations

based on EBT benefit transactions that “establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm.” The sanction for trafficking is permanent disqualification.

The owner replied to the Charge letter on September 21, 2017. Retailer Operations issued a Determination letter dated October 16, 2017, that informed the owner that Appellant was permanently disqualified from participation in 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 trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, the firm was not eligible for the CMP because insufficient evidence was submitted to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP per the regulations cited.

By letter dated October 27, 2017, the owner, via counsel, appealed Retailer Operations’ determination and requested administrative review. The appeal was granted by letter dated October 31, 2017. By email dated November 14, 2017, this office provided new information to Retailer Operations for its review. On December 8, 2017, Retailer Operations provided its review to this office.

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). Parts 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 § 271.2 states: “Eligible foods means: 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 § 278.2(f) states: “Food stamp benefits shall not be accepted by an authorized retail food store in payment for items sold to a household on credit. A firm that commits such violations shall be disqualified from participation in the Food Stamp Program for a period of one year.”

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(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.”

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 on review were based on an analysis of SNAP electronic benefit transfer (EBT) transaction data during the period of February 2017 through July 2017. This involved three patterns of EBT transaction characteristics which are indicative of trafficking:

1. Multiple transactions were made too rapidly to be credible.
2. Multiple transactions made from individual benefit accounts within unusually short time frames.
3. Excessively large purchase transactions were made from recipient accounts.

APPELLANT’S CONTENTIONS

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

- Allow either a CMP or limit the disqualification to a period of one year.
- This is the firm’s first offense and they were merely guilty of accepting benefits for items sold on credit.
- The firm refutes the assertion that it was involved in trafficking.
- The firm was engaged in the practice of selling on credit. Credit explains the charges.
- As proof that the store sells on credit, pictures of credit slips that hang

behind the counter are provided.

- The slips reflect a series of small purchases bought on credit which may be redeemed either in lump sum or via a series of several simultaneous transactions.
- In addition to being accused of the incorrect violation, the firm has been issued an unfair and excessive penalty.
- The firm has been authorized for almost 20 years without a single warning or violation.
- The penalty for a first violation without warning is either a CMP or a disqualification for 6 months to five years.

ANALYSIS AND FINDINGS

Attachments

Retailer Operations presented a case that Appellant trafficked SNAP benefits. Attachments 1 through 3 furnished with the Charge letter represent the questionable and unusual patterns of SNAP transactions indicative of trafficking conducted at Appellant during the review period.

1: Listed are 13 sets of two transactions each, with the second transaction being completed the previous transaction at the same terminal.

Contentions:

- Store personnel includes highly experienced individuals in this area of labor being that scanning limited inventory is not such a complex task, quick processing of items is common.
- A transaction can be made in a short period of time especially when the item is costly like crabmeat, rice, oil meat, jam and other items; three or four items can be processed in a short period of time.
- There is much competition in the area; personnel makes sure whomever is running the register is more than able to cope with heavy work conditions, to keep from wasting the time of our customers, and possibly losing them.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

2: Listed are 133 transactions in 62 sets of two or more transactions ranging from 5 U.S.C. § 552 (b)(6) & (b)(7)(C), conducted by 39 different households (HHs). Multiple transactions within a short period are used to avoid high dollar transactions that cannot be supported and are indicative of trafficking.

Contentions:

- During spring and summer break, the Hispanic community has many teenagers roaming around the area; a lot of them run errands for their elders i.e. grocery shopping. Many times, after they've sent their children

for such tasks, they will return later on to purchase something that was missed, or possibly forgotten. It is difficult for store personnel to track them and be aware that the card already made a transaction that day.

- The store is also very close to a shelter on Walton Ave in the Bronx. When the shelter is a full capacity, some of these transactions come from those poor people that only have food stamps to survive and eat.

Retailer Operations determined that according to the New York City Department of Education the spring and summer recesses for the academic year 2016 through 2017 were April 10 through April 18, spring break, and June 28 was the start of summer recess. The data sets conducted during these time frames represent a low percentage of those listed. There are 62 transactions sets listed and as such, the contention does not explain the majority of the transaction sets.

Data shows that within a one mile radius of Appellant there are there are 96 authorized retailers classified as medium grocery stores, large grocery stores, supermarkets, and super stores. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Thus, the data supports that the flagged households did access other larger stores to transact their SNAP benefits.

3: Listed are 270 transactions conducted by 117 households 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant's average SNAP transaction amount was compared to three medium groceries in under a half mile radius of Appellant. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant also had more flags on this Attachment than the comparator stores.

Contentions:

- Most of the transactions were either made at the beginning of the month or at the end of the month; this low income community normally comes to the store for supplies.
- These purchases are not expensive either, due to my current inflation on inventory; normal items can easily exponentially grow in cost. Basic items are becoming costlier, permitting that these transactions look bigger than they actually are.
- Truly, the highest transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is really not too much, considering provision for a family of four or more. The community contains 90% of extensive families (four or more), which reflects on the amount of these transactions.

Retailer Operations assessed the shopping patterns of three households and determined that these households shopped at larger and better stocked stores while at the same time conducting suspicious shopping transactions at Appellant, a medium grocery store.

Credit

In his request for review, counsel raised the contention that credit explained the Attachments. As evidence of credit, ten photographs of credit slips posted at the store were advanced. This was the first time the owner claimed credit accounts as a defense for trafficking.

Contentions:

- Despite the rustic nature of record keeping system, the USDA should note that these slips reflect a series of small purchases that are bought on credit that are bought on credit which may all be subsequently redeemed either in either in lump sum or via a series of several simultaneous transactions.

Credit is often claimed by retailers in an effort to garner a lesser sanction than permanent disqualification. A firm that commits a credit violation is sanctioned with a one year disqualification period. If the retailer does not provide adequate proof of credit, the retailer shall be permanently disqualified for trafficking. A one year disqualification for credit cannot be entertained when by a preponderance of evidence it is determined that trafficking has more likely than not occurred.

To refute charges of trafficking in this matter, the owner had to provide adequate proof that credit accounts existed at the time the suspicious transactions occurred so that Retailer Operations could compare such proof with transactions listed on the Attachments. Such evidence may include an accounts receivable ledger which lists the name of each SNAP recipient, the dates and amounts of each transaction, and what eligible items were acquired on claimed credit account transactions. The evidence of the purported credit consisted of photos of slips.

Retailer Operations determined that the provided documentation did not identify the full name of the recipients, dates, and, amounts of each transaction Appellant claims to be credit transactions. The documentation shows only a partial name and a list of amounts. There is no way to know if the names are associated with SNAP recipients. There are no dates for these listed amounts and no way to identify whether or not these amounts correspond to any of transaction amounts listed in either Attachment 2 or 3. Thus, the credit information does not by a preponderance of the evidence support that credit more accounts for the charged Attachments than trafficking.

When the owner signed the certification to become a SNAP retailer, he confirmed his understanding of and agreement to abide by program rules and regulatory provisions. He agreed to accept responsibility on behalf of the firm for violations of the SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. These include violations such as accepting SNAP benefits as payment on credit accounts or loans and trafficking. The certification is clear that violations of Program rules can result in administrative

actions such as fines, sanctions, withdrawal or disqualification from the SNAP. Despite agreeing to abide by SNAP rules and regulations, the owner now claims he allowed credit accounts, a violation of SNAP regulations and rules.

At the time of authorization each retailer is provided a USDA SNAP training guide that states that credit and trafficking are not allowed. The training guide is available online and in many languages. This guide states that SNAP customers must pay for their purchases at the time of sale and that a retailer may not accept SNAP benefits as payments on credit accounts. The training packet includes:

- A video and book that explain the SNAP rules.
- Information that the store owner is responsible for carefully reviewing the program rules and making sure all employees fully understand these rules.
- Information that failure to follow the rules can result in disqualification, fines, civil and/or criminal action.

Enclosures provided by FNS to retailers when authorized include:

- A SNAP Permit
- SNAP Training Guide for Retailers and a training video
- Report Abuse of the SNAP Poster - **MUST BE POSTED IN YOUR STORE**
- We Accept SNAP Benefits - Window Sticker and Poster
- Using SNAP Benefits Poster
- Dos and Don'ts for Cashiers/Penalties for Violations of the SNAP: Double-sided sign
- EBT Fact Sheet
- From the "SNAP EBT Dos and Don'ts card (FNS-136, included in the authorization package) "Do not accept SNAP benefits (EBT) as payment on credit accounts."
- From the SNAP Training Guide for Retailers (page 9): "SNAP customers must pay for their purchases at the time of sale. You may not accept SNAP benefits as payments of credit accounts. You may not hold customers' SNAP EBT cards or card account information at your store for future use."

Thus, the owner was provided multiple and redundant resources through which a thorough knowledge of program rules and requirements could be readily obtained. Credit accounts as an explanation for the transactions listed on the Charge letter is not persuasive absent sufficient evidence of contemporaneous credit accounts established by the owner for SNAP recipients.

Regarding the owner's denial of the trafficking allegations, this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is to determine whether the owner demonstrates by a preponderance of the evidence that the permanent disqualification should be reversed. Assertions that the firm has not violated program rules, by themselves and without sufficient supporting evidence do not constitute valid grounds for dismissal of the current charges of violations or mitigate their impact. While the owner

contends that the transactions on the Attachment are legitimate, no itemized cash register receipts were advanced as evidence of eligible foods sold at Appellant during the review period. Further, no vendor invoices or receipts were provided as evidence of Appellant's acquisition and stock of eligible foods to support its SNAP redemptions. No bank records or federal or state tax records were provided. No customer affidavits were submitted.

A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees. Further, the regulations stipulate "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2."

CIVIL MONEY PENALTY

No evidence was produced that Appellant met all the requirements to qualify for a trafficking CMP in lieu of permanent disqualification. To be considered eligible for a CMP, a firm must establish, by substantial evidence, its fulfillment of each of the criteria under 7 CFR § 278.6(i) of the regulations. The criteria are, as a whole, specifically identified as a minimum standard that firms must meet in order to be eligible for such a penalty. Given these considerations, it is clear that the statute and the regulation allow no flexibility below the level of this stated standard.

CONCLUSION

Upon review of all of the evidence in this matter it is determined that the evidence in two Attachments more substantially supports a conclusion that the SNAP transaction activity at Appellant was due primarily to SNAP benefit trafficking. Retailer Operations' 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. The evidence supports that it is more likely true than not true that program violations did occur at Appellant as charged by Retailer Operations. Appellant did not provide any documentation for consideration for a CMP in lieu of permanent disqualification. Thus, Retailer Operations properly denied a CMP. Thus, based on the discussion herein, 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. 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 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, 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

December 22, 2017