

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

Essa Deli & Grill Corp.,

Appellant,

v.

Case Number: C021374

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The record supports that Essa Deli & Grill Corp. (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) 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 October 11, 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 did not respond to the Charge Letter. Retailer Operations issued a Determination letter dated October 30, 2018. 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.

The record shows that on October 31, 2018, the owner called Retailer Operations and stated he did not receive the Charge Letter. Retailer Operations confirmed UPS delivery of the Charge Letter signed for by an individual named 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on October 15, 2018, at 09:06 am. Retailer Operations also confirmed that the name, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), was on the UPS delivery confirmation shipment detail for the Determination Letter signed for on October 31, 2018, at 09:25 a.m. Retailer Operations explained the process for requesting an administrative review was outlined in the Determination Letter. The owner stated he would talk to his accountant. Retailer Operations advised the owner that he would need to provide FNS with a signed letter authorizing FNS to speak with his accountant about the case.

The record notes that 5 U.S.C. § 552 (b)(6) & (b)(7)(C), Appellant's accountant, called on October 31, 2018, and stated that his client "didn't know a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) that signed for the charge letter as reported by UPS." The accountant asked if anything could be done about the determination, and Retailer Operations advised the accountant of the administrative review process, outlined in the Determination Letter. Retailer Operations advised the accountant that the retailer would need to provide FNS with a signed letter authorizing FNS to speak with his accountant about this case. The record shows that the owner did not provide a letter of representation in this matter.

By letter dated November 8, 2018, the owner requested a FOIA, and administrative review of Retailer Operations' determination. The appeal was granted by letter dated November 16, 2018. The FOIA office provided fee information to the owner by communications dated November 20, 2018, and December 11, 2018. The FOIA office closed the FOIA request by letter dated January 31, 2019, due to non-receipt of payment of fees.

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: “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 March 2018 through August 2018. The patterns of transaction characteristics indicative of trafficking are:

1. Multiple transactions made from individual benefit accounts within a set time period.
2. Excessively large transactions made from recipient accounts.

APPELLANT’S CONTENTIONS

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

- I am being treated unfairly by USDA staff. I was not given the chance to respond or defend myself. The charge letter was signed by 5 U.S.C. § 552 (b)(6) & (b)(7)(C); there is no person by that name at my store.
- Most of my customers are EBT recipients, the whole area is in a poverty area, my business will be affected significantly, and my family and I will be hurt as this business is our only source of family income.

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 39 transactions in 16 sets conducted by 8 unique households (HHs). Multiple transactions within a set time period are a method stores use to avoid high dollar transactions, and are indicative of trafficking. The record supports that of these 8 HHs listed on the Attachment, 75% transacted benefits at larger variety stores within 1 day, and 88% transacted benefits at larger store types within 2 days. The record confirms that there are at least 50 authorized stores within a 1-mile radius of Appellant, including 1 super store within .37 miles, and 1 supermarket within .66 miles of Appellant. Thus, recipients did use other authorized retail food stores to transact SNAP benefits.

The owner provided no detailed vendor invoices to support acquisition of SNAP eligible foods, customer statements regarding shopping behaviors at Appellant, itemized cash register tapes to support eligible food sales at Appellant, Federal business tax records, State sales tax reports, or business banking records. Thus, the owner has not provided a preponderance of evidence that the transactions on the Attachments are for eligible foods rather than the result of trafficking.

Attachment 2: Listed are 103 transactions conducted by 38 unique HHs for amounts that exceed the average SNAP transaction amount for the same store type in the same State 5 U.S.C. § 552 (b)(7)(E). The average convenience store SNAP transaction amount in New York during the review period was \$8.57. Appellant's average was 20% higher than the same store type in the State of New York. The data shows that Appellant's total SNAP dollar volume was at least 71% higher than 2 comparison stores in the same County, within a 1-mile radius of Appellant. This is unusual; and, it is indicative of trafficking.

The FNS onsite store visit report was conducted on May 25, 2018. The store review consent form in the record was signed by a self-identified "worker," named 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The store report indicates there were no handheld baskets or shopping carts to gather items that might total to large dollar transaction amounts of eligible items. Nonfood, ineligible

items included: tobacco products, alcohol, mobile phones/phone cards, health and beauty aids, paper goods, cleaning products, housewares, ATM and money services. There is a kitchen and/or food preparation area. Food stock is being used in the prepared food area. There is a large menu board that displays hot food items for sale. Hot food items are not eligible for purchase with SNAP benefits.

Contentions

- The owner contends that USDA treated him unfairly, he was not given the chance to respond or defend himself, and that there is no person by the name of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at his store.

On October 31, 2018, the record shows that a phone conversation occurred between the owner and Retailer Operations. According to the record notes, the owner stated he had received the Determination Letter, and it was the first he knew about FNS' case against him. He stated that he had not received the Charge Letter.

UPS delivery shipment detail records for the Determination and the Charge Letters show the documents were received by an individual named 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is also the name on the UPS delivery confirmation documentation as signatory for five FNS letters received by Appellant including: a Warning Letter on an investigate case, delivered on July 5, 2018; the Charge Letter on this case, delivered on October 15, 2018; the Determination Letter in this matter delivered on October 31, 2018; the relevant Administrative Review Request Acknowledgement Letter delivered on November 20, 2018, and a FOIA Administrative Case Closed Letter delivered on February 4, 2019.

While the owner claims there is no person by the name of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at his store, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is the name of a worker at Appellant, who signed the store review consent form at the time of the store visit on May 25, 2018. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is also the name of Appellant's accountant, who called Retailer Operations on behalf of the owner on October 31, 2018. It is more likely than not that the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) who took delivery of the letters issued by Retailer Operations, the Administrative Review Branch, and the FOIA office, as confirmed by UPS documentation, is Appellant's worker, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This review finds that is more likely than not, that Appellant received the Charge Letter, as indicated by the October 15, 2018 UPS delivery notification. This review finds that Retailer Operations properly administered and delivered the records of this case in accordance with 7 CFR § 278.6(b)(2) and 7 CFR § 278.6(o).

- The owner contends that store is located in a poverty area, most customers are EBT recipients, and a SNAP disqualification will have a negative financial impact on Appellant's business.

It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow

ownership to be excused from an assessed administrative penalty 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. Furthermore, 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, the contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

While some households may have conducted legitimate SNAP transactions at Appellant, insufficient evidence was presented by the owner to support this argument. No vendor invoices of eligible items acquired in inventory to support Appellant's SNAP redemptions were advanced. The owner provided no itemized cash register tapes for the review months to support eligible sales. No pricing information for eligible foods was advanced. No federal business tax returns or state tax filings were provided, and no business banking statements were submitted. Thus, the owner has not provided a preponderance of evidence that the transactions on the Attachments are for eligible foods rather than the result of trafficking.

Based on the overall record, and in the absence of compelling evidence to support the transaction patterns cited, a conclusion can be drawn, that the "unusual, irregular, and inexplicable" transactions evidence trafficking as the most likely explanation.

CIVIL MONEY PENALTY

The regulations at 7 CFR § 278.6(i) specify the criteria for a firm's eligibility for a CMP in lieu of permanent disqualification for trafficking. The owner failed to submit documentation timely to show that he met the four criteria in order to qualify for a CMP. Accordingly, Retailer Operations determined that Appellant was not eligible for a trafficking civil money penalty.

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 other analyses that provided evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits.

In the absence of evidence presented by Appellant of the legitimacy of the transactions, the preponderance of 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.

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.

Kim Dameron
Administrative Review Officer

April 3, 2019