

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

Food Way,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0200561

FINAL AGENCY DECISION

It is the decision of the USDA, Food and Nutrition Service (FNS) that the record indicates that Food Way (Appellant), committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retail food store in the SNAP, as initially 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 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 July 7, 2017, Retailer Operations informed the owner that FNS had compiled evidence that Appellant had violated the SNAP regulations. Analysis of the records revealed 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 on July 26, 2017. Retailer Operations issued a credit Charge letter on August 4, 2017, and received a reply from Appellant August 22, 2017. Retailer Operations considered the replies and issued a Determination letter dated September 18, 2017. This letter informed the owner that Appellant was permanently disqualified from 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 regulations.

By letter dated September 29, 2017, the owner appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated October 4, 2017. The owner contacted this office by telephone October 18, 2017. He stated he offered credit and did not traffick. He stated he had no further evidence to provide as many of those individuals to whom he advanced credit are gone.

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 food 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 in part: “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 in part: “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 EBT transaction data during the period of November 2016 through April 2017. This involved three patterns of EBT transaction characteristics which are indicative of trafficking:

1. Multiple transactions made from individual benefit accounts within unusually short time frames.
2. In a series of SNAP EBT transactions, the majority or all of individual recipient benefits were exhausted in unusually short periods of time.
3. Excessively large purchase transactions were made from recipient accounts.

APPELLANT’S CONTENTIONS AND EVIDENCE

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

- I don’t really give out credit, don’t advertise it, there are no credit forms.
- Little by little people start asking for credit and little by little you give in to some.
- As I fill these little receipts I just carry it over to another receipt.
- I didn’t think I was doing anything wrong. My business will hurt without the EBT customers.
- The EBT people would pay once a month. I would sometimes swipe the card twice because people wouldn’t know how much they had on the card.
- I never give cash back.

The owner advanced written credit tabs for a few individuals.

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: This Attachment lists 24 transactions in 12 data sets conducted by four different households (HHs). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is irregular that except for two transactions, all the other transactions end in 00 cent amounts. The record supports that there are eight authorized stores within one mile of Appellant including one small grocery store and four convenience stores, so recipients have shopping options to use their benefits. The FNS-contractor photographs show that Appellant stocked a minimal variety of staple food including canned goods, pasta, breads, cereal, milk, eggs, and snack items. Appellant's primary business appears to be the preparation of hot and cold foods for takeout or to eat on the premises.

Attachment 2: This Attachment lists 11 data sets and seven individual transactions conducted by five different households whereby a single household's benefit account is depleted or almost depleted in a single calendar day. A household's depletion of its benefit allotment in one or two transactions in a calendar day, leaving little or no benefits for the rest of the month, is inconsistent with the normal shopping behavior of SNAP benefit households and is indicative of trafficking.

Under review, the shopping histories for the households listed in this Attachment were assessed. The histories of the five HHs indicates that the HHs only exchanged SNAP benefits at Appellant with the exception of one household that made one transaction during the six month period at another authorized store. While Appellant stocked a minimal amount of staple foods, it appears to operate more as a takeout prepared food establishment than a retail food store. The photos show a kitchen, food prep area, tables and chairs, prepared food display cases, and posted food menus. Appellant also stocked ineligible items including paper goods, cleaning products, and offered hot foods which are not eligible for purchase with SNAP benefits.

Appellant presented some credit tabs as evidence to support that credit was advanced to SNAP households for food. Some of the tally amounts on the tabs are high and could be the result of credit. However, the tallies do not have full names, addresses or dates, and the tabs do not list what eligible items were reportedly exchanged for benefits or credit. As such, the credit information is too limited to compare to the state administrative terminal to make an assessment of the validity of the credit claimed. No itemized cash register tapes were presented to confirm that only eligible items were sold, no federal or state tax information was advanced, and no banking statements were provided.

Attachment 3: This Attachment lists 61 SNAP transactions made by 23 households r5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant's layout and inventory do not support a high percentage of transactions markedly exceeding the average transaction amount of its store type. The firm has one cash register and one POS device with

minimal counter space which limits the feasibility of large transactions. It also features hot and cold prepared foods. Hot food is not eligible for purchase with SNAP benefits.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The record supports that within a two mile radius of Appellant there are two super stores, one supermarket, two medium grocery stores, two small grocery stores, and 12 other authorized convenience stores. No evidence of Appellant's acquisition and stock of eligible foods was provided by means of vendor invoices or receipts, no price list of eligible stock was advanced, and no customer statements were provided. While the owner contends that the transactions are legitimate, no itemized cash register receipts were advanced as evidence of eligible foods purchased.

Credit

Credit tabs for some individuals were advanced to explain the transactions. The tabs show some first names, amounts, and some notes such as "she took off" and "left town." The credit slips do not show the dates, the full name of the recipients, or identify what items were allegedly purchased for EBT benefits. To refute charges of trafficking, the retailer must provide adequate proof that credit accounts existed at the time the suspicious transactions occurred so that such proof can be compared with the transactions outlined in the Charge letter. Without substantial documentation to support that credit was extended to SNAP recipients the transactions are to be examined for trafficking. The owner did not provide sufficient evidence of a credible credit ledger to explain the suspicious transactions listed on the Attachments.

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. The owner admits that he allowed credit account, 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 obtained.

While credit may account for some of the transactions listed in this matter, the credit evidence advanced was not sufficiently detailed to make that argument persuasively. An Appellant that seeks to set aside an agency determination bears the burden of proof by a preponderance of the evidence. A one year disqualification for credit cannot be entertained when by a preponderance of the evidence it is determined that trafficking has more likely than not occurred. Under the regulations, FNS may permanently disqualify a retail food store on the basis of EBT data. 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 by FNS. This burden has not been met.

CIVIL MONEY PENALTY

To be considered eligible for a trafficking CMP, a firm must establish, by substantial evidence, its fulfillment of each of the criteria listed under 7 CFR § 278.6(i). The criteria as a whole are specifically identified as a minimum standard that firms must meet in order to be eligible for such a penalty. No evidence was produced that Appellant met the requirements to qualify for a CMP in lieu of permanent disqualification.

CONCLUSION

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.

Upon review of all of the evidence in this matter it is determined that the evidence supports by a preponderance the conclusion that the transaction activity at Appellant was more likely due to SNAP benefit trafficking than to violative credit. Thus, based on the discussion herein, the decision to impose a permanent disqualification against Appellant is sustained.

Appellant did not provide any documentation for consideration for a CMP in lieu of permanent disqualification. Thus, Retailer Operations properly denied a CMP according to the terms of Section 278.6(i) of the SNAP regulations.

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

November 15, 2017