

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

Hernandez Market,

Appellant,

v.

Case Number: C0213657

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The record supports that the Hernandez Market (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 the Food and Nutrition Service (FNS).

CASE CHRONOLOGY

By Charge letter dated December 4, 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 responded to the Charge letter in writing on December 26, 2018.

Retailer Operations issued a Determination letter dated February 19, 2019. 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 February 28, 2019, the owner appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated March 8, 2019. The owner provided additional information dated March 28, 2019.

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 that 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 May 2018 through September 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 refute that my place of business is violating SNAP regulations.
- The market is the only convenience store in the area, a 13 block radius, between Lawrence and Andover. The neighborhood has well over 200 three family dwellings.
- The store is known and highly respected for its professionalism, its courteous and friendly management, and the service provided by staff.
- The location is convenient since the closest store is 13 blocks away with no close supermarket.
- Many clients come to the store multiple times daily.
- The store is 2300 square feet; we have fresh produce, a meat and deli display and provide basic food staples.
- I take orders for large and bulk items which I buy at Restaurant Depot.
- I buy meat in bulk and have had clients order whole goats, pigs, pork shoulders and 40 lb. boxes of chicken as well as vegetables and seafood.
- The summer months are our busiest time and we sell more meat and cut meat to order.
- I would be happy to provide you with information of individuals who can attest to this information.
- I am unaware of any regulation that says the customer cannot buy their meat or any other product in bulk.

The owner provided receipts of purchases of stock and photos of stock and the local area.

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 40 transactions in 18 sets by 10 unique households. Multiple transactions within a set time period are a method stores use to avoid high dollar transactions, and are indicative of trafficking. The data shows that 60% of the households flagged conducted a SNAP transaction(s) at another larger authorized store on the same day that they made a transaction at Appellant, and 70% conducted a SNAP transaction(s) at larger authorized stores within two days of conducting a transaction at Appellant. Thus, there are other authorized stores in the vicinity where SNAP benefits are transacted.

Retailer Operations' review found that there are 12 convenience stores within a one mile radius of Appellant, with four of the nearby stores generating equal or greater sales volume than Appellant. Further, within the mile radius, there are 39 SNAP-authorized retailers, including: 13 other same-type small grocery stores, eight combination grocery stores, five medium grocery stores, and one super store just .64 of a mile distant from Appellant. The availability of these store dampens the owner's contention regarding no close-by SNAP market alternatives for recipients.

The onsite store visit report conducted on September 7, 2018, did not provide information supportive of the owner's claim regarding the sale of bulk items, whole goats, pork shoulders or 40 pounds of chicken. Based upon store photos, Retailer Operations determined that Appellant appeared to be minimally to moderately stocked. The onsite visit report documents unfavorable conditions including: empty/broken/unused coolers/freezers, dust on cans/packages, poor lighting, empty shelves, fading/missing labels, expired/outdated/spoiled food, and ice crystals on frozen food.

No itemized cash register tapes were advanced to support eligible food sales. No itemized vendor invoices to support the acquisition of SNAP-eligible foods were advanced. The owner provided no recipient statements regarding shopping behavior at the store. No evidence was provided to support the claim that the owner procured specific items on order for recipients. No business banking records were provided. No federal business tax submissions or state tax submissions were advanced.

The owner has not by a preponderance of the evidence demonstrated that these transactions are the result of the exchange of benefits for SNAP-eligible foods rather than the result of trafficking.

Attachment 2: Listed are 73 transactions by 25 households for amounts that exceed the average transaction amount for the same store type in the same state by at least three times. The data shows that Appellant’s average SNAP transaction amount was 46% higher than the state small grocery store SNAP average transaction amount, and 69% higher than the SNAP average transaction amount at the same type store in Essex County for the review months.

The photographs provided by the owner for review show a stock of boxes of portioned breast fillets, boneless legs, drum sticks and other unidentifiable packaged items. While the owner submitted photos of large amounts of meat and poultry, at the time the onsite store visit, it appeared that there was nowhere to store large quantities of frozen goods. The store visit report documents that: “The owner mentioned several times that they were remodeling, and that their walk-in freezer in the back wasn’t working.” The retailer did not provide any bulk meat pricing information in his initial response, or with his subsequent submission.

Regarding the copies of receipts provided by the owner, Retailer Operations found that the receipts lacked probative value given that they did not indicate what items, eligible foods or non-SNAP eligible items, were purchased. The receipts provide the subtotals for non-itemized products, purchased for the months of May, June and July 2018. Four pages or receipts had no dates and/or were illegible. The remainder of the receipts were for the month of April, which was outside of the review period of May through September of 2018.

Retailer Operations determined that the totaled receipts amounted **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** for the review months for alleged food product purchases. This amount could not be verified as that what was actually purchased, since the receipts were not itemized. The record shows that Appellant stocked non-food products including: tobacco, lottery, health and beauty aids, cell phones, phone cards, paper goods and cleaning products. Appellant also sold hot food items, not eligible for purchase with SNAP benefits. During the review period, the retailer redeemed 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits. Therefore, Appellant’s SNAP redemptions were greater than the advanced evidence of food inventory purchases.

While some households may have conducted legitimate SNAP transactions at Appellant, insufficient evidence was presented to support this argument. The vendor invoices of items acquired in inventory were not itemized, and failed to support the volume of Appellant’s SNAP dollar redemptions for the review months. The owner provided no itemized cash register tapes for the review months. No pricing information for eligible items stocked was advanced. No federal business tax returns or actual state tax filings were advanced, and no business banking records were provided. No recipient statements were advanced to support shopping patterns at Appellant, or the contention that bulk orders were made and fulfilled. 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.

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 owner failed to submit documentation to show that he met the four criteria 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 provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. Based on the data, and in the absence of a preponderance of evidence presented by Appellant of the legitimacy of the transactions, 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 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 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

May 8, 2019