

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

Honufa Deli Grocery Corp,

Appellant,

v.

**Office of Retailer Operations
and Compliance,**

Respondent.

Case Number: C0205719

FINAL AGENCY DECISION

The record supports that the Honufa Deli Grocery 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 Office of Retailer Operations and Compliance (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 February 6, 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. Counsel responded to the Charge letter by letter dated February 14, 2018, and

made a FOIA request dated February 14, 2018. The FOIA office completed the request on April 3, 2018. Counsel made a FOIA appeal June 20, 2018. The FOIA appeal was completed September 16, 2019. Counsel provided a reply to the Charge letter dated September 22, 2019.

Retailer Operations issued a Determination letter dated November 5, 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 November 8, 2019, counsel appealed Retailer Operations' determination, and requested administrative review. The appeal was granted by letter dated January 16, 2020.

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 credible, 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) 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 August 2017 through December 2017. The patterns of transaction characteristics indicative of trafficking are:

- Multiple purchase transactions were made too rapidly to be credible.
- Multiple transactions were made from individual benefit accounts in unusually short time frames.
- Excessively large purchase transactions were made from recipient accounts.

APPELLANT’S CONTENTIONS

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

- The USDA has wrongfully concluded that this firm has engaged in accepting SNAP benefits in exchange for cash. My client denies that he or anyone involved with or employed by this business has engaged in such activities.
- As there are no specific violations committed by individual personnel of the firm and there has been no prior action taken by FNS to warn the firm about the possibility that violations are occurring, then the only remaining basis for disqualification is other evidence that shows the firm’s intent to violate the regulations.
- The EBT transactions in exchange for eligible items constitute approximately 65% of this vendor’s sales, and provide the income necessary to keep this business profitable so it can continue its operation. This vendor would not jeopardize this source of business and his livelihood, by engaging in the illegal activity charged.
- The owner, since being authorized to accept benefits, has continuously trained and tested his employees concerning the SNAP regulations and requirements. During this time the vendor has maintained an exemplary record. Such an unblemished record is evidence of his continued compliance with the law and his training and supervision of his employees.

FNS should apply a CMP in that disqualification would cause hardship to participating households.

- This vendor provides necessary items to the community comprised of numerous large multi-family apartment houses and other apartment buildings, all with large families which are all within a two-block radius of the vendor. There are also family homeless shelters and other commercial enterprises in the immediate area. The closest supermarket is approximately a ¼ mile away and closes early in the evening.
- The baby food items are expensive with Enfamil selling at \$20.00, \$24.99, and \$34.99 which is a common item sold in volume in this store.
- This store is located near a subway stop and has a bus stop located directly across the street.
- You have failed to specifically describe the type of firm operated by this vendor, and you have failed to investigate and set forth which of the precise transactions constitute trafficking activities. It would be expected and required that the USDA would investigate and evaluate the specific activities in this business, which has an unblemished record as a participant in the SNAP. It appears that the disqualification is based upon a predetermined standard of SNAP activity for the type of firm owned by this vendor. If this were the case, then a statistical sampling has been used to erroneously determine that the normal transactions in this store significantly exceed the normal practice for his type of firm.
- Your review and statistical analysis based on the EBT transactions are not and cannot be a basis for your determination that the firm's intent was to violate the regulations.
- Your use of the EBT records in sole support of what you claim to be a serious unlawful activity is inadequate. It is not based on fact, and the conclusions reached are unfounded and without merit. Accordingly, the decision to permanently disqualify this owner is based on inadequate proof, which will deprive the owner of his business and cause him to sustain irreparable injury and damage is inconclusive and arbitrary.
- The transactions should require a more careful review before making such a major decision based totally upon computer generated reports which only create an unfounded inference and presumption of wrongdoing. To permanently disqualify this vendor from the SNAP under these circumstances is a violation of the vendor's due process under the law. The vendor should not be disqualified for any period at this time and the determination should be rescinded.

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 92 transactions in 46 sets that were made too rapidly to be credible. For example, transactions numbers 35 and 36 were each for a large dollar amount, conducted by two different households (HHs), 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This is unusual.

Contentions:

- It is not the responsibility of this vendor to deny an EBT cardholder services or police violations or misuse of the benefits and enforce or address violations thereof.
- These are all legitimate transactions, and none were ever in exchange for cash or consideration other than eligible food. This store has two cash registers with are able to accommodate multiple purchases at a rapid speed.
- This is the business model for the vendor, who has a right to make such a business judgment without being accused and suspected of wrongful behavior. This owner is able to use the counter space in his store to permit multiple transactions at a rapid pace and nothing is suspicious or unusual.
- The FNS never indicated or regulated that pricing items with same cents values is not permitted. This vendor's business practice may not fit the pattern of the nationwide computer model, but to pre-judge the ability to accommodate his customers as an unacceptable business practice is discriminatory and should not render him a criminal in the eyes of this agency. It is unconscionable that this agency can cause an owner to be permanently disqualified merely based on his business judgment, without any other proof of wrongdoing, merely for being outside the agency's acceptable computer analysis.
- It is not credible to assert that this vendor would risk a permanent disqualification for too rapid transactions where it is unknown by the agency as to what portion of that amount was even exchanged for cash, if any amount was exchanged for cash.
- It is incumbent upon the FNS to evaluate the merits of this claim through investigation and in consultation with the benefits holders to ascertain whether their usage was in accordance with the FNS regulations.
- Regular customers will often call the store to place their large grocery orders, and then personally pick-up these orders at which time they pay for the telephone orders and purchase additional items, which they cannot do at a supermarket. The business practices that cause the using of individual benefit accounts in short time frames or large purchase transactions are not for any unlawful purpose. It is designed to accommodate the needs of regular and repetitive customers of this business.

Retailer Operations determined that Appellant is a convenience store of approximately 550 square feet. The check-out counter is approximately 2 ft. X 4 ft., and the photos show that the counter was crowded with merchandise making the logistics of large transactions difficult. The record shows one cash register was present, not two as contended. There were no shopping carts or baskets for customer use to assemble eligible items that would result in high dollar transaction amounts. There were no conveyor belts or optical scanners in use at the store. The store onsite visit report shows that Appellant did not accept telephone orders. As such, the contention that orders were placed and later picked up is contradicted by evidence in the record.

Store inventory consisted of: canned goods, bread, cereal, dairy products, deli products, minimal fresh produce, baby food, baby formula, soda, snacks and candy. Appellant did not stock fresh meat, meat plans, frozen foods, specialty or ethnic foods. The store did not accept WIC benefits. Appellant stocked ineligible items such as: alcohol, paper products, diapers, laundry and cleaning supplies, and health and beauty items.

The record shows that there are 196 authorized and redeeming stores within a one mile radius of Appellant which included: 16 supermarkets, four super stores, ten large groceries, and 14 medium groceries. There are two small groceries and one convenience store located within a close proximity of Appellant. Retailer Operations noted there were four authorized and redeeming supermarkets and two super stores within a half mile radius of Appellant. This supports that there are other nearby authorized retailers at which SNAP recipients could purchase eligible foods. Retailer Operations concluded that since Appellant did not stock unique products, there is no apparent reason for SNAP data at this firm to vary from that of nearby same type stores.

5 U.S.C. § 552 (b)(6) & (b)(7)(C), while the state average SNAP amount for a convenience store was \$8.46, and convenience stores in the county had an average SNAP transaction amount of \$9.50. Thus, Appellant's average SNAP transaction was 5 U.S.C. § 552 (b)(6) & (b)(7)(C) higher than the same store type in the same county. Appellant's average SNAP transaction amount was 38% higher than the supermarket average SNAP transaction amount for the state. Appellant's SNAP dollar volume was 5 U.S.C. § 552 (b)(6) & (b)(7)(C) higher than a nearby comparator convenience store. This is unusual.

No itemized cash register tapes were submitted to support that the transactions listed were for eligible foods. No recipient attestations were provided to support the shopping patterns alleged by counsel. No business banking records or tax filings were submitted. No vendor documentation was provided to support the stock of eligible foods at Appellant. No telephone records of phone orders were advanced. Thus, Appellant has not provided a preponderance of evidence to support that the transactions listed were for eligible foods.

Attachment 2: Listed are 829 transactions in 376 data sets made from individual benefit accounts in unusually short time frames. Multiple transactions, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), are methods which stores use to avoid single high dollar transactions that cannot be supported, and are indicative of trafficking. For example, SNAP transactions numbers 530 to 533 were all conducted on one date, 5 U.S.C. § 552 (b)(6) & (b)(7)(C); this is irregular.

Contentions:

- The usage of the benefit cards are not within the control of my client. Some of these recipients allow others to use their card or they themselves use the card for other families. Many of these resulted from individuals who live in close proximity and are going out to pick up items they need for convenience or who are picking up their children or low income seniors who live nearby and frequent the store regularly.
- Most of these customers do not own motor vehicles and need to make multiple trips to transport their purchases, which are packaged in plastic shopping bags. Many of the recipients who are the regular customers of this vendor live in the immediate area and don't have the capacity to carry heavy shopping bags through the street and up into their apartment buildings. Most are on foot so they make several trips to make their daily, weekly and monthly purchases.
- This vendor allows individuals to purchase items in this store throughout the day and night, allowing its customers to purchase breakfast, lunch and dinner.

- This vendor is permitted to make decisions as fits his business model and is not violative of any rule or regulation under SNAP. That there are multiple transactions on the same card is in no way indicative of trafficking, and such transactions are not unusual in these business practices and should not subject this vendor to the irreparable harm of losing his livelihood.
- The FNS prior to authorizing this owner, at no time, ever indicated or regulated or put this owner on notice that is not permitted to allow bona fide benefit card holders to use their EBT card more than once per day.
- It is ridiculous that after years of participation in the SNAP that this vendor would risk permanent disqualification for the sum listed.
- It is unknown by the agency as to what portion of that amount might have been exchanged for cash, if any swipe amount was in fact exchanged for cash.

Appellant provided no evidence to support the alleged shopping behavior of recipients. Likewise, no vendor receipts were advanced to support that Appellant carried sufficient inventory of eligible foods to cover its SNAP redemptions.

Attachment 3: Listed are 1,930 transactions for excessively large purchase amounts that exceed the average transaction amount for the same store type in the same state by three times or more. The record supports that 65% of the households listed on this Attachment made transactions at a large grocery, super store, or supermarket within two days of making a SNAP transaction(s) at Appellant. Appellant had many more transactions that met the parameters of this scan, as compared to a nearby same type store.

Contentions:

- Many of these purchases are made immediately after the benefits are added to the cards. The recipients use much of the balance of their food stamp account in this store. None were, or are, indicative of trafficking, and all resulted from established customers placing advance large orders and paying for same when they were picked-up or delivered.
- If the agency averages out the amount of the purchases, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, which is not unusual under these circumstances. During the summer when the weather was warm, numerous customers only wanted to go out when they had to and bought in bulk to avoid the hot weather. A customer's shopping habits should not be interpreted in a negative manner with an inference that trafficking has occurred.
- While there are larger stores in the area those supermarkets are not preferred by the residents, as they are crowded with long lines, selling the same items for similar prices. There is nothing unusual or inexplicable about customers in New York City using a grocery store to buy their groceries. The grocery stores are closer, more convenient, open longer and are competitively priced, if not cheaper, than supermarkets in the area. These transactions are nothing more than the cost of goods in New York City, where all food items are costly.
- It is ludicrous for this agency to refuse to allow a vendor to sell \$50.00 bags of rice, cooking oil and large containers of Enfamil without risking allegations of trafficking.
- No specifics are set forth concerning the other transactions that occurred in the store. The vendor is not afforded the opportunity to answer and challenge the charges lodged against

it. The letter of charges is an unsubstantiated general accusation; it has no merit; and to base a decision upon such an accusation is to deprive this vendor of due process.

Retailer Operations determined that a 5 U.S.C. § 552 (b)(7)(E) transaction at Appellant was a large SNAP transaction given that there were no shopping carts or hand baskets to convey eligible foods to the checkout counter, and only a limited clear area on the counter to set down items at the checkout. Furthermore, limited quantities of staple foods were photographed and recorded at the store. The data shows that Appellant had higher SNAP transaction volume in the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) ten dollar ranges than a nearby convenience store. While Appellant did stock Enfamil, it is not a WIC vendor. Therefore, Retailer Operations found it unlikely that Appellant would sell large quantities of this item, as it would more likely be acquired by HHs at WIC-authorized stores. There were no invoices or itemized cash register tapes supplied to support the claim of a high volume of sales of Enfamil, large bags of rice, or boxes of oil.

Retailer Operations conducted a review of several HHs' shopping patterns at Appellant. These patterns show that HHs made transactions at larger store types on dates proximate to or on the same date as at Appellant, while conducting lower dollar SNAP transactions at the larger stores. While some households may have conducted legitimate SNAP transactions at Appellant, insufficient evidence was presented to support this argument. No itemized cash register receipts were provided. No business banking records were provided. No federal business tax returns or state tax returns were advanced. No vendor receipts to support stock of eligible foods to cover Appellant's SNAP redemptions were advanced. Stating that a vendor would not jeopardize his business without advancing supporting evidence does not meet the burden of Appellant to rebut the charges. Also, simply because the owner has not been previously charged, does not mean that he has not been trafficking or violating SNAP.

The regulations at 7 CFR § 278.6(a) state that FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, and that such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through, inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system. The owner has the burden of providing credible, 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. The owner has not provided a preponderance of evidence to support that the transactions listed in the Attachment patterns were for eligible foods.

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 four criteria listed at the cited regulation are identified as a minimum standard that firms must meet in order to be eligible for CMP consideration. The owner did not submit substantive documentation to support a trafficking civil money penalty in lieu of permanent disqualification as required by the regulations.

Given the lack of a substantial evidence submission which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations, the owner did not meet the criteria for a CMP. Retailer Operations properly denied it.

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 HH shopping analyses that provided evidence that the questionable transaction patterns during the review period had characteristics that are consistent with trafficking violations in SNAP benefits.

Based on empirical data, and in the absence of evidence of the legitimacy of the transaction patterns presented by Appellant, the preponderance of the 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. This decision is effective 30 days from receipt by Appellant.

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.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

February 27, 2020