

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

Hugo Hitching Post,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0198872

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is not sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, (Retailer Operations) was appropriate. Therefore, the permanent disqualification decision is reversed.

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 April 26, 2017, Retailer Operations informed Appellant

that FNS had compiled evidence that the firm had violated 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 letter of charges states, that “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.” The record shows that Appellant replied to the Charge letter April 28, 2017, May 1, 2017, and May 11, 2017.

Retailer Operations issued a Determination letter dated May 11, 2017. This letter informed

Appellant that it 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 civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations.

Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP per the regulations cited.

By letter dated May 12, 2017, the owners, via counsel, appealed Retailer Operations’ determination and requested administrative review of this action. The appeal was granted by letter dated May 17, 2017. By email dated June 9, 2017, counsel requested an extension of time to provide information. This extension was granted. Counsel provided an additional letter dated June 12, 2017, and materials by CD and hard copies. Additional affidavits were provided by counsel by email on June 29, 2017, and all materials were provided by hard copy. All new information was forwarded to Retailer Operations for review and analysis.

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 or wholesale food concern in the event that personnel of the firm have engaged in trafficking

SNAP benefits.

7 U.S.C. § 2021(b)(3)(B) states, inter alia: "... a disqualification under subsection (a) shall be ... permanent upon ... the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards ..."

7 CFR § 271.2 states, inter alia: "Trafficking means: The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone..."

7 CFR § 271.2 states in part that, "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 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, 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)(1) states, inter alia: "Any firm considered for disqualification ... under paragraph (a) of this section... shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification... The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter..."

7 CFR § 278.6(b)(2)(ii) states, inter alia: "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(b)(2)(iii) states: "If a firm fails to request consideration for a civil

money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such a penalty.

7 CFR § 278.6(c) states, inter alia: “The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.”

7 CFR § 278.6(i) states, inter alia: “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.”

7 CFR § 278.6(e)(1) reads, in part, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.”

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 transaction data during the period of October 2016 through March 2017. This involved the following transaction patterns indicative of trafficking:

1. Multiple transactions made from individual benefit accounts within unusually short time frames.
2. An unusual number of manual key entered EBT transactions were made from your location.
3. Excessively large purchase transactions were made from recipient accounts.

APPELLANT’S CONTENTIONS

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

- My clients contest each of the allegations against them in the Charge letter.

- My clients dispute the SNAP permanent disqualification.
- My clients' inability to accept SNAP transactions is a true hardship so I would be grateful if this process could be addressed as hastily as possible.
- The owners' declarations that they have owned and operated the store for approximately 25 years and have at no time engaged in any form of trafficking.
- There was no prior action to warn the firm about the possibility of violations. The owners and the store have never been subject to any type of disciplinary action, disqualified from participation or had a civil penalty.
- There is no evidence that the owners intended to violate any SNAP regulations. They have not improperly benefitted from participating in the program.
- There has been no change in lifestyle of the owners during the period in which FNS claims suspicious activity.
- The explanations and nature of my clients, their longstanding status as business owners with untainted records, and average rates of transactions that FNS deems suspicious, all support a finding that the charge of trafficking is unfounded and the determination should be deemed unsubstantiated.

Appellant provided the following evidence:

1. Fifteen patron letters.
2. A one page testimonial letter dated June 1, 2017, from Options Southern Oregon.
3. A one page news article from the *Daily Courier* regarding December and January storms in the region.
4. Thirty-six pages, most with multiple register tapes for October 1, 2016 through March 29, 2017. These tapes show daily sales volumes in four departments: groceries, cigarettes, gas and beer.
5. 122 pages of vendor food invoices, most pages with multiple copies of receipts.
6. Copies of Federal and Oregon State tax returns for 2015 and 2016, numbering 25 pages.
7. Copies of Bank **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** savings and business checking account statements, including copies of cancelled checks, numbering 64 pages.
8. Four pages of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** statements for each owner dated 10/01/2016 – 12/31/2016 and 01/01/2017 – 03/31/2017.
9. Six pages of lists of eligible food items sold with corresponding prices.
10. Two page documentation regarding POS device with remittal check number to Retail Profit Systems.
11. A one page photo of an old truck used to transport inventory.
12. Copies of eight sworn and notarized affidavits with recipients' EBT card numbers.
13. Two page affidavits sworn under penalty of perjury by each owner.
14. Ten pages of photographs of store stock.
15. Three page list of groceries and prices.

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: 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This Attachment lists 55 transactions in 26 sets of two or more transactions, conducted by 16 different households 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Contentions:

- On average FNS is finding approximately 5.2 groups of transactions per week that appear suspicious. Given the extensive number of transactions that occur during any given week or month, 1 group of transactions per week seems a startling low number to be considered suspicious.
- Multiple members of the same household will often purchase 5 U.S.C. § 552 (b)(6) & (b)(7)(C) groceries at a time, but wish that items be accounted for separately.
- Oftentimes, family members act as separate entities financially, where one agrees to pay a certain amount for groceries, which is taken into account at the time of purchase.
- The owners aren't typically privy to who is using the card or what relationship they bear to one another. The owner did recall a conversation between a couple that broke a large grocery purchase into two. As best he can recall these are transactions 3 and 4.
- It is not uncommon for the owners to see couples arguing and then agree to have groceries divided into two piles and accounted for separately in multiple transactions.
- Many family members using the same card make multiple trips to the store to purchase groceries in a single day because they do not have a car and they must carry groceries home.
- This is quite common and there are many group transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for instance transactions: 5/6, 7/8, 9/10, 16/17, 18/19, 20/21, 24/25 and 54/55.
- These transactions occurred during the winter months. There was higher than average snowfall. Schools were closed, electrical blackouts occurred and some people were unable to drive for weeks due to heavy snows and lack of preparedness by local government. As such, there were increased and larger transactions made at local and rural general stores.

Appellant's evidence is deemed credible and supports by a preponderance the argument that the transactions in the Attachment could be due to legitimate reasons other than trafficking.

Attachment 2: An unusual number of manual key entered EBT transactions were made from your location. During the review period Appellant conducted 235 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The record shows that cards that scanned at other stores were manually key entered at Appellant. This indicates that Appellant was processing transactions without the EBT cards being present, a pattern that is indicative of trafficking.

Contentions:

- This doesn't seem to be a suspiciously high number of manual entries. On average there was 1.72 manual transactions made in the store per week.
- It seems more likely that one or two people per week would have trouble with getting the SNAP machine to read their card than it would that no customers had trouble with their card being read.
- My clients have experienced considerable difficulty with the machine's ability to read cards. The owners were forced to have their machine replaced in the short amount of time since they acquired their first machine.
- Perhaps this is a problem with the machine. The cards are used regularly and get dirty overtime. They experience this with credit cards as well.

The review finds that Appellant was processing manual transactions without the card being present. This is a practice that should immediately be discontinued. Nevertheless, the record supports that during the six review months, transactions at Appellant were recorded on three different terminal IDs, and evidence of a payment to repair equipment was provided. As such, the Attachment is not more persuasive of trafficking than not.

Attachment 3: Excessively large purchase transactions were made from recipient accounts. This Attachment lists 103 transactions conducted by 37 different households 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The transactions listed are for amounts that exceed the average transaction amount for the same store type in the same state 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Contentions:

- There appear to be 103 transactions over the review period which is one such excessively large transaction every 1.71 days. These numbers don't seem unreasonable in and of themselves.
- The store is 4 miles from the freeway and 15 miles from Grants Pass, which hosts the vast majority of major chain grocery stores in the area.
- The store carries a greater than average diversity and volume of groceries than a metropolitan convenience store might carry.

- Many local residents use the store as their primary shopping location for the sake of convenience, to support their local store, or by lack of choice due to lack of car or access to car whereby they could shop at a larger store.

Appellant's evidence is deemed credible and supports by a preponderance the argument that the transactions in the Attachment could be due to legitimate reasons other than trafficking.

CONCLUSION

The analysis of Appellant's EBT transaction record was the primary basis for the determination to permanently disqualify Appellant. The data had characteristics that are consistent with the trafficking of SNAP benefits. A determination of permanent disqualification for trafficking must be supported by the preponderance of the evidence so as to conclude that trafficking is the most likely explanation.

With regard to this review, it is not possible to conclude that trafficking positively did not occur at Appellant. However, after review of all of the documentation provided in this case, the determination to impose a permanent disqualification against Appellant is not supported by a preponderance of evidence, and is herein reversed.

INFORMATION RELEASE

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

August 9, 2017