

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

Ivory Ms Store,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0201039

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the permanent disqualification of Ivory Ms Store (Ivory Ms Store or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division 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 USC § 2021 and the 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

In a letter dated July 19, 2017, the Retailer Operations Division charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of February 2017 through June 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant replied to the charges by letter dated July 24, 2017. Appellant denied trafficking and explained that the transactions were normal based on the unique circumstances of the store. After considering the evidence and the retailer's reply, the Retailer Operations Division issued a determination letter dated August 15, 2017. The determination letter informed Appellant that it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that Appellant was not eligible for a trafficking CMP because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a postmarked August 25, 2017, Appellant appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions 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 matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) 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, in part, that, “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 § 271.2 defines trafficking as: “(1) 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 § 278.6(a) states, inter alia, 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*, . . .” (emphasis added)

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

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.”

SUMMARY OF THE CHARGES

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from February 2017 through June 2017. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were an unusual number of transactions ending in a same cents value.
- There were excessively large purchase transactions made from recipient accounts.

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.

APPELLANT'S CONTENTIONS

In its administrative review request postmarked August 25, 2017, and subsequent correspondence dated September 22, 2017, Appellant provided the following summarized contentions, in relevant part:

- The business is a drive-thru.
- Sometimes many items are sold and the total cost is rounded.
- The large sales are from the sale of boxes or cases of items.
- Appellant sells a box of chips for \$20.00, a case of Arizona ice tea for \$20.00, and a Capri sun box for \$15.00
- Appellant discounts the price of the boxes to increase its sales.
- Many families do not have car to go to a big supermarket.
- Appellant averages 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per day in total sales.
- If Appellant was trafficking then the average would be more than that.
- Appellant uses flat pricing for the sake of speed.
- Nothing illegal happens at Appellant.
- Appellant requests reconsideration of the permanent disqualification.
- In the future Appellant will be very careful with its SNAP sales and follow the SNAP rules and regulations.

In support of its contentions, Appellant submitted a three page handwritten price list, a copy of its July 24, 2017, reply to the charges, and a copy of the August 15, 2017, determination letter.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced.

ANALYSIS AND FINDINGS

Store Visit

FNS authorized Ivory Ms Store as a convenience store on March 11, 2011. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a June 3, 2017, store

visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Ivory Ms Store is approximately 350 square feet, with no additional food storage outside of public view.
- There were no shopping baskets or shopping carts for customer use.
- There was one cash register and one point-of-sale device.
- There were no meat/seafood specials or bundles that might sell for high prices.
- There was no unprocessed fresh meat, poultry, or fish.
- There was no fresh produce.
- There was a limited selection of staple food items.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included tobacco products, alcohol, health and beauty products, and household products.
- The store was unorganized and cluttered.

The SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. Given the available inventory as noted above, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors.

Charge Letter Attachments

Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

Charge Letter Attachment 1. There were an unusual number of transactions ending in a same cents value. During the review period, there were a total of 383 transactions that meet the parameters of this attachment.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). When such patterns are unsupported by special pricing structures, they are a strong indicator of trafficking in SNAP benefits.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant further states that to prevent cars from backing up at the drive- thru, Appellant uses this simpler pricing. However, on the day of the store visit, the contractor noted the following prices for Appellant's most expensive items: a gallon of milk - \$5.89; a box of cereal - \$5.29; and a canned ham

- \$5.79. There appears to be a variety of pricing and the evidence does not support Appellant's contentions regarding its pricing. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The store's inventory is exclusively inexpensive food items and accessory foods. It is possible that some of the smaller transactions are the result of purchasing one or some same cent item and this could explain some of the lower dollar same cent transactions. The larger transactions cited in the charge letter would most likely consist of the purchase of several relatively inexpensive items and it is unlikely that these purchases would routinely total to an amount

5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Consequently, when many transactions end in a same cents amount and same dollar amount, it appears that these transaction amounts are contrived and therefore, in the absence of compelling evidence to the contrary, are suggestive of trafficking.

Appellant failed to provide a credible explanation for the same cent transactions listed on Charge Letter Attachment #1.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 79 transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transaction amounts are not consistent with the store's inventory with no fresh meat or fresh produce. Based on the store visit report, the firm does not offer food in bulk or any specialty foods that might sell for a high price. Instead, the store carries mostly inexpensive canned and packaged goods and single-serving food items. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

With its reply to the charges, Appellant submitted photographs of its food stock to the Retailer Operations Division. There were cases of soda and cases of chips in the photographs. These items were not visible during the store visit. It is also unlikely that a drive-thru business would be passing bulk boxes of chips and heavy cases of soda through a window. Appellant also submitted a handwritten price list that had some larger priced items listed. Again, these items were not visible on the day of the store visit. The photographs from a previous store visit conducted on May 25, 2016, were also reviewed. There were no bulk items for sale at that time either. The contractor noted that the largest priced item on the day of the store visit was \$5.89 and it was a gallon of Kirkland milk. This is also different than what the retailer indicated its milk was priced at. Thus, the evidence submitted does not appear to be credible or convincing.

Appellant contends that its average total sales 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per day and if it was trafficking then the average would be more than that.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The photographs from the store visit offer no legitimate explanation for this, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale.

Sometimes a firm may have higher than average SNAP transactions amounts due to the lack of access to other SNAP authorized stores. However, the Retailer Operations Division determined that within a one-mile radius of Appellant, there are seven other convenience stores, three combination stores, two small groceries, one medium grocery, one large grocery, one supermarket, and one super store. It is not plausible that the firm's customers would regularly purchase large amounts of merchandise at Appellant when larger, better stocked stores are readily available and in the vicinity of the Appellant firm.

Lastly, the Retailer Operations Division examined three households identified in the charge letter to analyze their shopping patterns at Ivory Ms Store compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at supermarkets and superstores. However, despite this access to better stocked stores, all of the three households conducted excessively large transactions at Ivory Ms Store within 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of shopping at a supermarket or super store. There is no legitimate reason why households would conduct large transactions at Appellant when these household had just visited or planned to visit larger stores with a better selection of staple foods including fresh meat and produce and likely better prices.

The Retailer Operations Division determined that upon receipt of the charge letter on July 20, 2017, the number of Appellant's large dollar SNAP transactions decreased. If the high dollar transactions in the charge letter were legitimate food purchases, then there should not be a drastic decrease in Appellant's SNAP transaction totals following receipt of the charge letter. As such, unexplained and drastic declines in SNAP redemptions as a result of receiving compliance related correspondence are often indicative of trafficking.

In summary, Appellant's layout, business structure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Therefore, based on this empirical data, and in the absence of evidence to legitimize such transaction patterns, a conclusion can be drawn, through a preponderance of evidence that the "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation.

Corrective Action

Appellant promises to abide by all SNAP regulations and rules. Regarding this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations

Division. This review is limited to what circumstances existed at the time that was the basis of Retailer Operations Division's action. It is not the authority of this review to consider what subsequent remedial actions may be planned so that a store may begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of alleged or planned after-the-fact corrective actions implemented subsequent to investigative findings of program violations. Therefore, Appellant's contention that it will abide by all regulations and law does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Reconsideration

Appellant requests reconsideration of the permanent disqualification. Neither the Food and Nutrition Act of 2008, as amended, nor the regulations allow discretion in this matter nor provide for a lesser penalty or a term disqualification for violations related to trafficking of SNAP benefits. Trafficking is always considered to be the "most serious" of SNAP violations. Trafficking in SNAP benefits is an extremely serious violation and both 7 USC § 2021(b)(3)(B) and 7 CFR § 278.6(e)(1)(i) state that even a first time violation warrants a permanent disqualification.

In conclusion, Appellant's contentions do not constitute valid grounds for dismissal of the trafficking charges or for mitigating the impact of those charges through a lesser penalty.

CIVIL MONEY PENALTY

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR § 278.6(i). Appellant was informed that it would need to provide both the request and supporting evidence within ten calendar days of receiving the charge letter and that no extension of time could be granted for making the request or for providing the required evidence. Appellant did not request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i), even though it was informed of the right to do so in the charge letter.

Even if a timely request had been submitted, Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy to prevent SNAP violations. Therefore, the Retailer Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

The Retailer Operations Division's 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. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did occur as charged by the Retailer Operations Division. The determination to impose a permanent disqualification against Appellant is sustained.

The Retailer Operations Division also determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations. Under review, the denial of a trafficking CMP was deemed correct and proper.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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 owners reside or are 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.

Mary Kate Karagiorgos
Administrative Review Officer

December 21, 2017