

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

Ivy Food Mart,

Appellant,

v.

Case Number: C0209374

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the United States Department of Agriculture (USDA), Food and Nutrition Service (FNS) that the record indicates that Ivy Food Mart (Appellant) likely committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support that the permanent disqualification from participation as an authorized retailer in the program, as 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 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 FNS.

CASE CHRONOLOGY

By Charge letter dated June 29, 2018, Retailer Operations informed the owner that USDA had compiled evidence that Appellant had violated the SNAP. The analysis of Appellant's electronic benefit transaction (EBT) records established clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity. Based on this information, Appellant was charged with

trafficking as defined in Section 271.2 of the regulations. The sanction for trafficking is permanent disqualification. The owner replied to the Charge letter by facsimile on July 5, 2018.

Retailer Operations issued a Determination letter dated July 12, 2018. This letter informed the owner that Appellant was permanently disqualified as a SNAP 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 trafficking civil money penalty (CMP) according to Section 278.6(i) of the regulations, and deemed it was not eligible for a CMP because insufficient evidence was submitted to demonstrate that the owner had established and implemented an effective SNAP compliance policy and program to prevent violations.

By letter postmarked July 21, 2018, the owner requested review of the determination. The request for administrative review was granted by letter dated August 2, 2018.

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 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 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 on review were based on an analysis of SNAP EBT data during the period of November 2017 through April 2018. This involved four patterns of EBT transaction characteristics that are indicative of trafficking:

1. Multiple transactions made too rapidly to be credible.
2. Multiple transactions made from individual benefit accounts within a set time period.
3. The majority or all of individual recipient benefits were exhausted in unusually short periods of time.
4. Excessively large transactions were made from recipient accounts.

APPELLANT’S CONTENTIONS

In reaching a decision attention has been given to all contentions presented, including any not specifically referenced here.

- Our business is fully depend [sic] on this program. I am new and first time small business owner.
- I tried to provide all my receipts and evidence. I am unexperienced not having knowledge about therefore I made several mistakes, which I regret.
- There is no evidence that I provided cash or sold any item which is not allowed to card holder.
- All receipts are provided and other receipt [sic] in record.
- My business located few block from church facility for treatment for drugs and alcoholic with about 400 residents, also shelter for homeless people nearby.
- Just above my business 17 apartments, sometime multi transection [sic] and use of muli time card happened.
- In church facility some fellow not allowed to go out for 60 days, their colleague shop for them.
- I am planning to install video camera for more evidence.

The owner provided copies of register receipts with his initial response.

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 98 transactions in 49 sets of two transactions each, made too rapidly to be credible. All sets were completed in less than two minutes. For example, transactions #91 and #92 made by two different households (HHs) for a total of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The record shows that there were no shopping carts or handheld baskets at Appellant to assist recipients with their groceries, and there was no optical scanner. Retailer Operations found that when considering the numerous steps involved to process a legitimate purchase, including the cashier's handling to determine the price of individual items and the manual keying of amounts, separating SNAP and non-SNAP eligible items, bagging the items for carry out, and processing the transaction in the POS, these transactions were made too rapidly to be credible and are indicative of trafficking.

No household attestations were advanced to attest to HHs' purchases of eligible foods in rapid times. No vendor receipts for the acquisition of SNAP eligible foods were provided. While some of these transaction sets may be for eligible SNAP foods, insufficient evidence was advanced to meet the burden of Appellant to support the owner's contentions.

Attachment 2: Listed are 208 transactions in 82 data sets of two or more transactions conducted by 51 different households. Multiple transactions made from individual benefit accounts in set time frames are indicative of trafficking. The record supports that there are more than 20 authorized stores within a one mile radius of Appellant including: one supermarket, two super stores, five combination groceries, seven convenience stores, four small groceries and three medium groceries. The data supports that SNAP recipients that transacted benefits at Appellant also conducted transactions at large groceries, supermarkets and super stores. Of the HHs flagged on this Attachment, 78% transacted benefits at one or more of the larger store types listed here within one day of making a transaction at Appellant.

Appellant provided 97 cash tapes for review. All of the receipts show the same tender type "Cash" at the bottom with the totals. All items sold are listed as "DEPT003" on all 97 receipts. There is no way to determine what items, if any, were actually sold and if these were eligible food items. Retailer Operations identified irregularities on the cash tapes and did not find them credible to explain the transactions on the Attachments.

No recipient statements were advanced to support that colleagues where shopping for others with their cards or using cards that were the property of others to acquire eligible SNAP foods. No

business bank records were provided. No federal or state business tax filings were advanced. No vendor invoices to support the acquisition of eligible foods were provided. Insufficient evidence was advanced to meet Appellant's burden to support the contentions.

Attachment 3: Listed are 57 transactions conducted by 20 households whereby the majority or all of the HHs' benefits were exhausted 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The record shows that SNAP beneficiaries had a variety of authorized stores in the near area at which to redeem benefits. Fifty-five percent of the household's flagged conducted transactions at other larger stores within one day of making a transaction(s) at Appellant.

The owner provided no recipient affidavits to support that the households flagged expended their benefits at Appellant for eligible foods. The cash register tapes provided to support that the transactions were legitimate fail to do so since they are not itemized as to what was purportedly purchased. While some of the transactions may have been for eligible foods made by recipients residing nearby and treatment facility residents, insufficient evidence was advanced to meet Appellant's burden to support the contentions.

Attachment 4: Listed are 474 individual EBT transactions that are for amounts that exceed the average transaction amount for the same store type in the same state by at least three or more times. 5 U.S.C. § 552 (b)(7)(E). This is irregular.

The regulations allow for disqualification of a retail food store based on a finding of a violation on the basis of evidence that may include facts established through inconsistent redemption data and/or evidence obtained through a transaction report under an electronic benefit transfer system. 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.

In appeal of this matter, 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. Regarding the owner's denial of the trafficking allegations, this review encompasses and documents the examination of the relevant information in this case to determine whether Appellant demonstrates by a preponderance of the evidence that the permanent disqualification should be reversed. Assertions that the firm has not violated program regulations, without a preponderance of supporting evidence, do not constitute valid grounds for dismissal of the current charges of violations.

CIVIL MONEY PENALTY

7 CFR § 278.6(i) specifies the criteria for a store's eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. The criteria listed therein are specifically identified as a minimum standard that firms must meet in order to be eligible for such a penalty. The owner did not request a CMP or provide any substantial information in support of a CMP. Accordingly,

Retailer Operations determined that Appellant did not qualify for a civil money penalty in lieu of a permanent disqualification.

CONCLUSION

Retailer Operations' analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. Appellant's data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits.

The contentions offered for the transaction patterns were not persuasive by a preponderance of the evidence. No recipient affidavits were advanced to support the shopping patterns cited by the owner. No federal or state sale tax submissions were advanced. The cash register tapes were not itemized, a sole code seen on each receipt to describe each item reportedly sold. As such, there was no way to know what if anything was sold. No vendor invoices of acquired eligible stock were provided. Therefore, based on the analysis of the transaction data in the Attachments, a conclusion can be drawn, through a preponderance of evidence that the unusual, irregular, and inexplicable transaction patterns cited in the letter of charges evidence trafficking at Appellant as the most likely explanation.

Retailer Operations also properly determined that Appellant was not eligible for a trafficking CMP according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations. Therefore, based on the discussion herein, the decision to impose a permanent disqualification against Appellant is sustained.

RIGHTS AND REMEDIES

Your 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 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

September 13, 2018