

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

Keg & Bottle Party Shoppe,

Appellant,

v.

Case Number: C0207679

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The record supports that the Keg & Bottle Party Shoppe (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) 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 April 25, 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. Previous counsel responded to the Charge letter in writing May 9, 2018 and May 14, 2018.

Retailer Operations issued a Determination letter dated May 22, 2018. 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 June 4, 2018, new counsel appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated June 15, 2018. By email to counsel dated July 16, 2018, this office requested a signed letter of representation from the owner. To date, no such letter was received; as such counsel is not copied on this decision.

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 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 at 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 September 2017 through February 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 purchase transactions made from recipient accounts.

APPELLANT’S CONTENTIONS

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

- USDA’s determination is incorrect and/or drawn upon defective assumptions.
- Please note that 80% plus of the local residents are subsiding at the poverty level.
- At least 80% of sales are to poor individuals who subsist primarily on government assistance and the small salaries they eke from any work.
- This market provides healthful, staple food items that are part of the daily diet of its customers.
- Removing the business from SNAP will have a devastating effect on the neighborhood.
- We do not believe the effect on the neighborhood of removing this market from SNAP participation was given the weight it deserves.
- The Regulatory Flexibility Act requires Agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant impacts on a substantial number of small entities. Pursuant to that review and based on the limited population of retail food stores impacted, this rule is certified not to have a significant impact on a substantial number of small entities.

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 50 transactions in 19 sets conducted by 12 unique households (HHs). Multiple transactions within a set time period are a method stores use to avoid high dollar transactions and are indicative of trafficking.

Contentions:

- The items obtained with the EBT cards were for authorized food items only.
- The customers who signed the affidavits specifically welcome a call from USDA to confirm the transactions.
- Most of the customers do not have consistent transportation so walk to and from the store. Some customers come with several family members to assist with carrying bags. Some will buy what they can carry home and will come back later to purchase more items.
- For some customers the store is their primary grocery store. The customers are in and out of the store several times a day. They come with other family members and purchase groceries together or at different sales windows with the same card.
- Many of the customers make spending choices that we may feel are unusual. What they are purchasing are SNAP eligible items. It is not the store's place to question how and when they choose to spend their food stamps. Nor can the store refuse them service.
- It is fairly common for a SNAP customer to come to the store with 1 or 2 other people and purchase groceries **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Once the groceries are purchased, the customers divide the groceries among themselves, either inside or outside the store.

An onsite visit was conducted in March 2018 which revealed that Appellant's staple food stock was limited and included canned and pre-packaged foods. The firm did not sell fresh meat or produce, it did not have shopping carts or baskets, and it has minimal counter space with a plastic barrier in front of the checkout with a spinner window and small ledge in front. The firm's ineligible items included: tobacco, lottery, alcohol, health and beauty items, paper products, cleaning items, and miscellaneous items.

No itemized cash register tapes or vendor invoices to support the acquisition of SNAP eligible foods were advanced. The owner provided identical customer statements with the recipient's name, address, telephone number, and signature. The language in each statement states: the customer is a SNAP recipient and a regular customer of the store; the customer makes large purchases of eligible SNAP food items at the store because of the convenience of shopping nearby; none of the transactions involved an exchange of SNAP benefits for money; a SNAP

representative is welcome to call the customer to confirm the information provided; and the customer waives any confidentiality as it relates to the information given in the statement.

Retailer Operations found 12 of the 15 households in the state SNAP system data, and determined that only six of the 12 households identified as SNAP recipients had transactions listed on the Charge letter Attachments. Some totals listed for these six households, corresponded to those on the Attachments, however no evidence to support the signed statements that the items were SNAP eligible food items was provided. With regard to customer statements provided by Appellant which purport to establish that questionable transactions were legitimate and no trafficking occurred, the truth of such statements cannot be verified. None of the statement were sworn under the penalty of perjury or notarized. Recipients engaging in trafficking transactions would be unlikely to admit to this violative behavior as the state could take action to remove their SNAP benefits for trafficking such. On the contrary, proffered customer statements would be expected to attest to the legitimacy of questionable transactions regardless of whether they were, in fact, legitimate.

Former counsel provided a 2017 and 2018 Summary of Sales/Use/Withholding Tax for Appellant. Among other columns, each worksheet prepared by a named CPA lists: Gross Sales, Amount of Allowable Deductions (Food for human con.), Tax Included in Gross Sales, Taxable Balance, Sales/Use/Tax Amount Due - Return, Total Discounts, Tax Amount Due, and Gross MI Payroll, MI Income Tax withheld, and Total Taxes Due for each month in 2017 and January, February, and March 2018. The amounts listed for food indicate that in September 2017, food (allowable deductions line g) is 5 U.S.C. § 552 (b)(6) & (b)(7)(C). SNAP redemptions that month totaled 5 U.S.C. § 552 (b)(6) & (b)(7)(C); this is irregular. All other months of the review period show higher food deductions than SNAP redemptions. For example in January 2018, food is listed at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), while SNAP redemptions were 5 U.S.C. § 552 (b)(6) & (b)(7)(C), or 40% of the food reported as taxed. Without vendor documentation to support the actual eligible foods in inventory, the spreadsheets are not adequate to support that all the food reported as sold at Appellant was eligible for purchase with SNAP benefits.

The record shows that within one mile of Appellant there are at least 54 authorized stores including: one super store, two supermarkets, five large grocery stores, 12 medium grocery stores, 16 small grocery stores, and 18 convenience stores. The data shows 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of the flagged HHs on this Attachment conducted a transaction(s) at a large grocery, supermarket or super store, on the same day they conducted a SNAP transaction at Appellant. Thus, recipients had access to and did use other SNAP authorized stores. The record contains Retailer Operations' analysis of some recipient shopping histories that are unusual and suspicious.

The onsite report indicates there were no handheld baskets or shopping carts to assist recipients with the collection and movement of large volumes of items in the store that might total to high dollar amounts. 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 161 transactions 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). The data shows that Appellant's SNAP dollar volume for the review months was 5 U.S.C. § 552 (b)(6) & (b)(7)(C) higher than the average SNAP dollar volume for state convenience stores. Appellant's average SNAP transaction amount was 5 U.S.C. § 552 (b)(6) & (b)(7)(C) higher than the state convenience store SNAP average amount. This is unusual.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

While some households may have conducted legitimate SNAP transactions at Appellant, insufficient evidence was presented by the owner to support this argument. No vendor invoices of eligible items acquired in inventory to support Appellant's SNAP redemptions were advanced. The owner provided no itemized cash register tapes for the review months. No pricing information was advanced. No federal business tax returns or actual state tax filings were advanced, and no business banking statements were provided. 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 sufficient documentation timely to show that he met the four criteria in order to qualify for a CMP. Accordingly, Retailer Operations determined that Appellant was not eligible for a trafficking civil money penalty.

As to the claim that the impact on the neighborhood was not given weight, it must be noted that the regulations are clear that in a case of charged trafficking, the criteria in the regulations cited are to be applied. Hardship to recipients is considered only in cases of less than permanent disqualification. As to the rule making contention, the regulations regarding SNAP have long been promulgated.

CONCLUSION

Retailer Operations' analysis of Appellant's SNAP 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.

Based on empirical data and in the absence of a preponderance of evidence of the legitimacy of the transactions presented by Appellant, 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 a 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

July 27, 2018