

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

Lucky Farm,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0203004

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Lucky Farm (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the program, 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) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Lucky Farm by letter dated November 2, 2017.

AUTHORITY

7 U.S.C. § 2023 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 October 18, 2017, Retailer Operations Division charged the 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 March 2017 through August 2017. The letter specifies that the penalty for trafficking is permanent disqualification as provided by 7

CFR § 278.6(e)(1). The letter also states that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

In an October 19, 2017, telephone conversation with Retailer Operations Division ownership indicated that he received the charge letter and inquired about next steps. Ownership was informed that he could send in any documentation that would show the transactions in the charge letter were legitimate food transactions. Ownership was also encouraged to submit a letter explaining the transactions. Ownership indicated that he would work on sending in receipts and a letter.

In correspondence date October 27, 2017, Appellant replied to the charge letter and generally stated that the allegations are false and baseless. The firm has not conducted any trafficking violations or indulged in any malpractice, in EBT transactions, more particularly Attachment 1 to the notice. Apparently some customers were charged for the purchase of monthly groceries that appear to be large and other households did not create any pattern of abuse by the purchaser or provider. Appellant also stated that all items sold are covered by the SNAP program including but not limited to groceries, meat, cereal, fruit & vegetables, oil and all milk and dairy products. None of the items, like ready to eat food or luxury items were sold to the customers except chips, cookies and ice cream. Appellant further stated I am attaching a pricing list of items sold in my retail store. I hope and trust that after reviewing the above explanation and the price list, you will be fully convinced and satisfied that my firm has not committed any willful violations of the SNAP regulations including trafficking.

After giving consideration to the Appellant's reply and evidence of the case, Retailer Operations Division issued a determination letter dated November 2, 2017. This letter informed ownership that they were permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also states that Retailer Operations considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, Retailer Operations Division determined that Appellant was not eligible for the CMP because it failed to submit sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated November 10, 2017, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an 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 & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 CFR § 278.6(a) states, in part that, “FNS may disqualify any authorized retail food store...from further participation in the program if the firm fails to comply with the Food and Nutrition Act of 1977, 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(e)(1) reads, in part, “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 in part that, “Eligible foods mean: 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 § 278.6(b)(2)(ii) states, in part, that: “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, in part: “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 Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from March 2017 through August 2017. This involved the following transaction pattern which is a trafficking indicator:

1. Excessively large purchase transactions were made from recipient accounts.

The first issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the identified irregular and questionable transactions were the result of trafficking in SNAP benefits.

APPELLANT'S CONTENTIONS

In its request for administrative review, Appellant, through counsel, made the following summarized contentions, in relevant part:

- The charge letter is vague, overbroad and lacks specificity and therefore is per se defective. The notice is liable to be reversed on this ground alone.
- The impugned order is arbitrary and capricious. Our client was not afforded an opportunity to effectively plead its case in the absence of a specific allegation.
- The impugned order is against the due process of law. Due to vagueness of the allegations, our client was deprived of an opportunity to interpose a suitable answer/response to overbroad allegations in the notice. The Attachment 1 does not specify how it established clear and repetitive patterns of unusual, irregular and inexplicable activity.
- Our client has obtained testimonials and certifications from some of the available customers who are referenced in Attachment 1. These certificates are self-explanatory and negate any wrongdoing on the part of our client.
- FNS arbitrarily and capriciously failed to consider the civil penalty and chose to apply permanent disqualification. Our client was an innocent owner not involved in any of the alleged transactions and was unduly and harshly penalized for alleged acts.

Appellant provided a copy of the determination letter dated November 2, 2017, as Exhibit A, a copy of the charge letter dated October 18, 2017, as Exhibit B and eight (8) customer affidavits signed and dated on November 10, 2017, attesting to the amount of groceries purchased during a specific time period, some months the customer purchased groceries in bulk due to travel or other issues preventing a visit to the shop and the need for the store in the neighborhood.

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

ANALYSIS AND FINDINGS

The FNS authorized the business as a convenience store on November 13, 2014. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during an August 21, 2017, store visit to the business 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:

- One cash register and one POS device with a small counter area partially obstructed by other smaller items available for sale. One specialty register.
- Estimated to be approximately 2400 square feet.
- Approximately six (6) hand baskets but no shopping carts available for customers.
- No adding machines or optical scanners were available at checkout.
- Store does not operate through a night window or plastic barrier with food stock behind the barrier.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- No unusual pricing structure such as ending most products with 00 cents and does not round transaction totals.
- Food stored in an area outside of public view approximately 350 square feet.
- Store has storage freezers or coolers but not food stored off site.
- Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
- Store does not take telephone or online orders and does not offer delivery
- Highest priced eligible food items were Boar's Head Roast Beef (\$10.99), Coffee (\$17.99), Rice (\$9.99) and Oil (\$12.99).
- Store stocks a substantial amount of non-food items such as but not limited to paper products, tobacco products, health and beauty aids, cleaning products, alcohol products, foil pans and lottery tickets.
- Store stocks sufficient amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and very minimal amounts of fish products. The meat consists mainly of canned and deli meats which were also used in prepared menu items. No fresh meat was noticed in the store visit photographs.
- A kitchen/prepared food area with hot foods sold for on-site and off-site consumption. Microwave available.
- A deli or prepared food section. Prices posted for meats/cheeses. Prepared salads and prepared/made to order sandwiches.
- Stock is not used in preparation of food however there doesn't appear to be a separate area of stored deli meat for various prepared sandwiches.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.

The second issue for consideration is whether Retailer Operations Division has presented a convincing case that Appellant likely trafficked in SNAP benefits. The attachment furnished with the charge letter represents the questionable and unusual pattern of SNAP transactions indicative of trafficking which were conducted at Appellant's store during the review period.

Attachment 1 of the Charge letter - Excessively large purchase transactions were made from recipient accounts.

There were 64 SNAP transactions that met the parameters of this attachment. Based on the results of the contracted store visit, the large transaction amounts are not consistent with the store's inventory of low priced foods. The firm does not offer food in bulk or any ethnic or

specialty foods that sell for a high price. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions. During the review period, Appellant's transactions, in the Attachment, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) . 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Appellant, through counsel, obtained testimonials and certifications from some of the available customers who are referenced in Attachment 1. Appellant, through counsel, contends that these certificates are self-explanatory and negate any wrongdoing on the part of our client. The customer affidavits attested to the amount of SNAP benefits used to purchase groceries during a specific time period and that at times groceries were purchased in bulk due to travel or other issues preventing a visit to the store. The affidavits also indicated that there was a need for the store to remain in the neighborhood. With regard to the client affidavits provided by Appellant, which purport to establish that questionable transactions were legitimate and that no trafficking occurred, the truth of such declarations can neither be confirmed nor denied. Although such affidavits may be sworn to and notarized, that does not mean that they are necessarily truthful or necessarily demonstrate compliance by all individuals with whom the firm conducts transactions. One would not expect clients to admit that questionable transactions were not legitimate, were it really so. On the contrary, one would expect that any client affidavit provided would attest to questionable transactions being legitimate.

Retailer Operations Division verified the identity of the eight customer affidavits provided and determined that all of the households shopped at Appellant during the review period however, a review of the system shows that the amount of SNAP benefits spent as listed on the affidavits does not match or come close to the actual amounts of SNAP benefits expended at Appellant's store during the dates noted on the affidavits or during the review period.

In addition to the eight customer affidavits provided by Appellant, Retailer Operations also conducted an analysis of the shopping habits of three of the households identified in the charge letter. This analysis concluded that these households also shopped at other area grocery stores including full-line supermarkets and superstores that offer a much larger quantity and variety of eligible food items for likely better prices either on the same day or within days of visiting Appellant's firm. This again indicates that lack of access or travel to other stores is not at issue. However, despite this access to large supermarkets and superstores, these households consistently conducted much higher transactions at the Appellant firm than at better stocked supermarkets/superstores in and around the Queens County area of New York. This is another strong trafficking indicator.

Appellant had no promotional, special, bulk, or package deal offers advertised. In addition, there was only one cash register, only one electronic SNAP terminal device, and no shopping carts for use by customers to transport to the checkout area large amounts of food items that would be necessary to reach totals found in some of the large questionable transactions cited. Appellant did not provide any other documentation in support of its position or to legitimize the SNAP transactions cited in the charge letter.

Based on the above analysis, the Retailer Operations presented a convincing case that Lucky Farm trafficked in SNAP benefits which the Appellant failed to adequately rebut. The

attachment furnished with the charge letter identifies the irregular pattern of SNAP transactions which is an indication that trafficking was taking place at the firm during the review period.

Appellant, through counsel, contends that the charge letter is vague, overbroad and lacks specificity and therefore is per se defective. The notice is liable to be reversed on this ground alone. With regard to this contention, the extensive analysis of Appellant's EBT transaction record, upon which charges of violations are based, provides substantial evidence that questioned transactions during the focus period have characteristics that are not consistent with legitimate sales of eligible food to EBT customers at a store of this type and size. **5 U.S.C. § 552 (b)(7)(E)**. A review of the record has yielded no indication of error or discrepancy in the reported findings by Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it appears the Retailer Operations has provided substantial evidence of trafficking violations, in the Attachment pattern of EBT transaction characteristics indicated in the letter of charges, and that it is more likely true than not that program violations did, in fact, occur as charged.

CFR § 278.6(a), which establishes the authority upon which FNS may disqualify any authorized retail food store, reads, in part: "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." Therefore, that the Retailer Operations used computer printouts of transaction data and other reports, in addition to store visit observations and an analysis of household shopping behavior, in rendering a finding that violations indicative of trafficking are occurring, is as valid a means of establishing facts as direct evidence obtained through an on-site investigation and the eye witnessing of trafficking

The Appellant, through counsel, contends that the impugned order is against the due process of law. Due to vagueness of the allegations, our client was deprived of an opportunity to interpose a suitable answer/response to overbroad allegations in the notice. The Attachment does not specify how it established clear and repetitive patterns of unusual, irregular and inexplicable activity. With regard to these contentions, it is important to note that the charge letter dated October 18, 2017, states:

"The SNAP regulations also provide that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000.00 in lieu of permanent disqualification of a firm for trafficking. The SNAP regulations, Section 278.6(i), list the criteria that you must meet in order to be considered for a CMP. If you request a CMP, you must meet each of the four criteria listed and provide the documentation as specified within 10 calendar days of your receipt of this letter.

No extension of time can be granted for making a request for a CMP or for providing the required documentation. Your request and all documentation must be postmarked by midnight of the 10th calendar day after you receive this letter, in order to be considered timely. If the 10th calendar day falls on a Saturday, Sunday or legal (Federal) holiday, a request with documentation, will be timely if it is postmarked the next day which is not a Saturday, Sunday or legal (Federal) holiday. If your request and the required

documentation are not submitted on time, you will lose your right for any further consideration for a CMP. If it is determined that you qualify for a CMP, the amount of that penalty will be \$19,560.00. Payment in full is due within 30 calendar days after you receive our determination letter. The amount of the CMP was calculated in accordance with SNAP regulations at Section 278.6(j).

If you do not request consideration for a CMP or are determined to be ineligible for a CMP, the permanent disqualification of your firm shall be effective on the date of receipt of the letter informing you of our final decision (SNAP regulations, Section 278.6(c)).”

It is noted that the charge letter also include a link to the applicable regulation that outlines the four criteria required to be eligible for a CMP. Furthermore, the letter of charges provided Appellant the opportunity to reply to the charges and provide explanations for the questionable transactions. Appellant did reply to the charges in writing, denying the charge of trafficking and offering various explanations for the questionable transactions however, Appellant did not provide documentation or request a civil money penalty in lieu of disqualification.

After considering the evidence of the case and Appellant’s reply, the Retailer Operations Division determined that a permanent disqualification was warranted. But while administrative action is held in abeyance for most adverse actions against firms pending appeal, there can be no stay of action pending an appeal of a permanent disqualification. 7 U.S.C. at 2023(a)(18) of the Food Stamp Act of 2008, as amended, states, in part: “SUSPENSION OF STORES PENDING REVIEW. Notwithstanding any other provision of this subsection, any permanent disqualification ... shall be effective from the date of receipt of the notice of disqualification.” Appellant’s right to due process has not been violated and therefore, the Appellant’s contentions do not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

Appellant, through counsel, contends that the impugned order is arbitrary and capricious. Our client was not afforded an opportunity to effectively plead its case in the absence of a specific allegation. With regard to this contention, 7 CFR §278.6(a), noted herein, establishes the authority upon which FNS may disqualify an authorized retail food store on the basis of evidence obtained through a transaction report under an electronic benefit transfer (EBT) system. **5 U.S.C. § 552 (b)(7)(E)**. This and other data presented Retailer Operations with a statistically valid convincing indication of unusual transaction activity; the activity therein identified is not marginally irregular, but markedly so.

Properly analyzed and interpreted, Retailer Operations does not contend that the EBT transactions detailed in its charge letter are overtly suspicious when they occur on an occasional or intermittent basis, but when such transactions form repetitive patterns on a comparative basis over periods of time such activity is identified for further analysis. Once such firms have been identified as potential compliance cases, from more than 200,000 authorized firms nationwide, **5 U.S.C. § 552 (b)(7)(E)**. Agency policy and procedures direct that only after a careful, comprehensive and complete analysis, from which appropriate conclusions are logically derived, will the firm be issued a charge letter. The firm is then given the opportunity to reply to those charges and provide any information it deems appropriate to justify the transaction activity

detailed in the charge letter. In the present case, these policies and procedures are shown by the record to have been duly performed in all relevant and appropriate detail.

Moreover, as noted, the regulations at 7 CFR §278.6(a) state that FNS may disqualify any authorized retail food store on the basis of evidence obtained through a transaction report under an EBT system. Consequently, transaction data as a basis for the charges at issue is as valid as evidence obtained through an undercover investigation. Accordingly, the case against the firm is not reflected by the record to lack evidentiary value, but rather to be comprehensive, analytic, logically derived and specific in its charges of SNAP benefit trafficking, an egregious violation of the Act and regulations. **5 U.S.C. § 552 (b)(7)(E)**.

Summary

The transaction data and overall firm record convincingly demonstrate repetitive patterns of unusual, irregular, and inexplicable SNAP activity for this type of firm indicative of trafficking. Once Retailer Operations Division established a convincing case against Appellant, ownership 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 matter asserted is more likely to be true than not true. If this is not demonstrated, the case is to be sustained.

Retailer Operations has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious pattern identified in the charge letter, the lack of food inventory necessary to support the firm's SNAP redemptions as observed and recorded during the onsite visit, the lack of purchase invoices of foods to cover SNAP redemption totals for the review months, the lack of adequate explanations for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant, and the irregular SNAP transaction data of Appellant as compared to other convenience stores in the State.

While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence in the record. The owner has not provided sufficient evidence to rebut the convincing case that Appellant most likely trafficked in SNAP benefits. As such, the SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have trafficked, which is that FNS shall disqualify the firm permanently.

CIVIL MONEY PENALTY

The Appellant, through counsel, contends that FNS arbitrarily and capriciously failed to consider the civil penalty and chose to apply permanent disqualification. Our client was an innocent owner not involved in any of the alleged transactions and was unduly and harshly penalized for alleged acts. The record reflects that the Appellant did not timely 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 dated October 18, 2017. Even if a timely request had been submitted, the 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 SNAP compliance policy and program *prior* to the 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

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Lucky Farm. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Therefore, based on a review of all the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged by Retailer Operations Division. Based on the discussion above, the determination to impose a permanent disqualification against Lucky Farm is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right 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 you 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 (FOIA), 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.

Monique Brooks
Administrative Review Officer

February 12, 2018