

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

Mega Food Store, Inc.,

Appellant,

v.

Case Number: C0210634

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that there is not sufficient evidence to support a finding that Mega Food Store, Inc., (Appellant) should be permanently disqualified from participation in the Supplemental Nutrition Assistance Program (SNAP) for trafficking. The permanent disqualification decision is herein 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 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 July 27, 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.

The owner replied to the Charge letter on August 2, 10, and 14, 2018. Retailer Operations issued a Determination letter dated October 10, 2018, and informed the owner that Appellant was permanently disqualified from the SNAP 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 the terms of Section 278.6(i) of the regulations. The firm was deemed not eligible for the CMP because insufficient evidence was submitted to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP per the regulations cited.

The owner requested administrative review by letter dated October 16, 2018. The appeal was granted October 26, 2018. The owner provided additional information November 9, and 14, 2018. Retailer Operations provided this office with its assessment of the new information December 7, 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 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) 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 it is more likely true than not true, by a preponderance of evidence, that the questionable transactions were the result of trafficking. The charges were based on an analysis of SNAP transaction data during the period of January 2018 through June 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 transactions made from recipient accounts.

APPELLANT’S CONTENTIONS

Attention has been given to all contentions presented in rendering this decision.

- I counter these charges and unusual activity that may be deemed as trafficking.
- I understand the importance of adhering to all the rules and regulations. We do not engage in any practice that may be deemed detrimental to the program. We do not provide credit to customers, we do not sell any unauthorized items and we do not perform any form of trafficking whatsoever.
- The business is located across the street from the Webster/Morrisania housing projects that includes 20 buildings and is populated with many low income families who compose most of the store’s clientele.
- In Attachment 1 the majority of the transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. We are one of the only stores in a residential area that can still process SNAP.
- We carry a large inventory of food options. It is not unusual for customers who live in the proximity of the store to come and make multiple purchases in a single day. It is difficult to understand why these purchases would be classified as trafficking. Our deli serves cold cuts to order and cold sandwiches eligible for purchase. Our business relies on fulfilling the needs of the customer and to come to us anytime they need groceries.
- Attachment 2 are not excessively large purchases. The store is well-stocked (prices included) these are common prices in the New York Area and not out of line.
- My business would not survive disqualification like the majority of the businesses in the area.

The owner provided: copies of 391 invoice pages, some with multiple invoices per page to validate the store sells a high volume of goods; 40 pages of banking information; three signed training sheets to support the request for a CMP; 23 photos of store interior stock; an additional eight photos including some of the nearby housing complex; a one page copy of repair invoice on a deli unit; and nine additional pages of invoices, some pages with multiple receipts.

ANALYSIS AND FINDINGS

The primary issue for consideration is whether or not Retailer Operations established by a preponderance of the evidence that Appellant engaged in trafficking which warrants a permanent disqualification. After a thorough review of all documentation, it is the determination of this review that Appellant's information supports by a preponderance of evidence that legitimate purchases of eligible foods were likely made at Appellant.

There is no way for this review to definitively conclude that trafficking did not occur at the Appellant. However, a determination of permanent disqualification must be supported to such a degree so as to conclude that trafficking is the most plausible explanation. In light of the evidence and information in the record, this review finds that there are other legitimate explanations, besides trafficking, that could account for the unusual transaction patterns at Appellant.

CONCLUSION

It is the determination of this review that the Appellant has met the burden of proving, by a preponderance of the evidence, that the transactions listed in the Charge letter were, more likely than not, allowable purchases of eligible foods. Therefore, the determination to impose a permanent disqualification against Appellant is reversed.

RELEASE OF INFORMATION

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

March 5, 2019