

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

Nino's Market,

Appellant,

v.

Case Number: C0218184

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 Nino's Market (Appellant), should be permanently disqualified from participation in the Supplemental Nutrition Assistance Program (SNAP) for trafficking. The permanent disqualification determination is hereby 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 its 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 June 19, 2019, 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 record supports that Appellant replied to the Charge letter on July 1, 2019, and July 31, 2019. Retailer Operations issued its Determination letter dated August 19, 2019, that 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. Retailer Operations deemed the firm was not eligible for the CMP. This was 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 August 25, 2019. The appeal was granted by letter dated October 2, 2019.

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, credible 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 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, and 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 transaction patterns were the result of trafficking. The charges were based on an analysis of SNAP transaction data during the period of October 2018 through March 2019.

The patterns of transaction characteristics indicative of trafficking were:

1. Multiple transactions were made from the accounts of individual SNAP households within a set time period.
2. The store conducted EBT transactions that are large based on the observed store characteristics and recorded food stock.

APPELLANT’S CONTENTIONS

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

- I have owned this business since October 2004, and have never had any violations or issues. I run a very respectable and legitimate business.
- I mailed you a letter explaining the situation. I provided you with as many grocery invoices as I could for the time period in question. I provided invoices, receipts, affidavits from customers, signs in my store, and written and verbal explanations for the transactions in question.
- I follow the rules and regulations set forth by SNAP. I run an extremely strict business, we check ID and do not sell tobacco or alcohol to minors, and have not had a single violation against my store or against me in any other business.
- I know these are just words to you, but please take my history into consideration. I have never done anything illegal in my entire life. I have not had any violations or issues in my personal life or my business ever.
- My registers run off a barcode scanner system and will not even allow an item that is not EBT eligible to be paid via EBT.
- I understand that there is an extreme amount of fraud with the EBT program, and as an honest tax paying citizen it is frustrating, but this is definitely not the case with my business. I do understand what a huge problem fraud is in general. It absolutely disgusts

me when I hear about the fraud going on and I would definitely never partake in it myself.

- I immediately stopped accepting benefits at my business upon receiving the termination letter, and since then my business has been severely impacted. I am begging you to please reconsider the termination. I would never do anything to jeopardize my business or livelihood.
- The transactions marked as suspicious were customers taking advantage of discounts we offer for buying cases of Red Bull and Baby Formula, among other things.
- Had the transactions in question been more recent, rather than almost a year old, I could have provided video evidence showing the customers making the purchases, as well as been able to provide the journal receipt from my register.
- I mailed several testimonials from various customers, as well as sample receipts for the specific transactions in question. I have reviewed these purchases and dates and believe this is one of my customers who purchases Similac baby formula by the case, as well as Red Bull by the case, and we offer her a large savings for doing so. I am assuming it is around the same time of each month because that is when she has funds available.
- I firmly believe this is just a big mistake and truly wish you would have contacted me with any concerns prior to just serving me with such ridiculous accusations.
- These transactions are spread across several months, and it seems to be the same few customers making the same purchases around the same time every month. It is not my responsibility to help my customers budget themselves and save their funds.
- I offer discounts for buying in bulk and some customers do take advantage of that. It is by no means the majority of my customers, or all that typical, but it does happen.
- I can see why there would be concern on your end, but honestly if someone were committing fraud I would think it would be much more frequently than a few transactions over several months.
- I have since removed the signs offering case discounts and will not sell Red Bull, Similac, Enfamil, or any other items in my store by the case or in bulk anymore, and I honestly never knew it was not allowed.

APPELLANT'S EVIDENCE

- 374 pages of vendor inventory invoices, some pages with multiple invoices.
- Fifteen handwritten recipient statements, each associated with an Bridge Card number.
- Three one page signs promoting Enfamil, posted on stacks of bulk Enfamil cartons. A one page sign promoting bulk Red Bull.
- Nine itemized cash register receipts dated 7/23/19 and 7/30/19.

ANALYSIS AND FINDINGS

The primary issue for consideration in this case 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 the record, it is the determination of this

reviewer, that the owner has provided documentation by a preponderance of the evidence, to support that legitimate SNAP purchases of eligible foods were made at Appellant.

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

Please contact Andrew Haluptzok at (312) 877-2362 regarding reinstatement or operations questions.

CONCLUSION

It is the determination of this review that the Appellant has met the burden of supporting, by a preponderance of the evidence, that the transaction patterns listed in the Charge letter were more likely than not, allowable SNAP purchases of eligible foods. Therefore, the determination to impose a permanent disqualification against Appellant for trafficking is herein 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

November 26, 2019