

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

North Ave Retail LLC,

Appellant,

v.

Case Number: C0207589

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 North Ave Retail LLC (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 April 20, 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, via counsel, replied to the Charge letter on May 2, 2018.

Retailer Operations issued a Determination letter dated May 4, 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 dated May 17, 2018, counsel requested review of the determination. The request for appeal was granted by letter dated May 22, 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 transaction data during the period of September 2017 through February 2018. This involved four patterns of EBT transaction characteristics that are indicative of trafficking:

1. Multiple purchase transactions were made too rapidly to be credible.
2. Multiple transactions were 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 purchase 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.

- We denied the charges and provided adequate evidence.
- You have no evidence whatsoever as to any witnesses or customers who claimed or admitted to the fraudulent practice you cited in your Charge letter.
- Our rebuttal stands uncontradicted and should be accepted as true.
- The trafficking charges are false.

Counsel advanced: a one page statement signed by the manager, two photos with item pricing, a one page list of EBT totals and bank deposits for September 2017 through February 2018, copies of bank statements from TCF National Bank for September 2017 through February 2018, copies of pages from a transaction log by dates, times, amounts and results.

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 64 transactions in 32 sets of two transactions each, made in rapid times at the same POS terminal. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). While Appellant provided photos of pricing for Enfamil Instant at \$104.93, Enfamil GMO at \$49.99, and Similac at \$39.99, no invoices of vendor purchases of these items were advanced. The signage on the Similac photo states “limit 2 per customer” and the Enfamil Instant photo states “limit 1 case per customer.”

Contentions:

- The manager statement says that to ring 3 items takes a maximum of 20 seconds. A larger transactions such as 3-4 milk cases 5 U.S.C. § 552 (b)(6) & (b)(7)(C), 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- In transaction #43 the purchaser bought a single item 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and a second purchaser paid 5 U.S.C. § 552 (b)(6) & (b)(7)(C) which could amount to two cases of Similac, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C)k.
- Transactions #55 and #56 the same purchaser purchased 2 items 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and for whatever reason paid twice.
- The manager can ring up 3 items 5 U.S.C. § 552 (b)(6) & (b)(7)(C), this is nothing unusual and nothing suspicious.

The record shows that there were no shopping carts or handheld baskets to assist customers 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 of individual items to determine the price which can include 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 itemized cash register tapes were presented to support what items were sold for the listed transaction totals. No household attestations were advanced to attest to HHs’ purchases. No vendor receipts for the acquisition of SNAP eligible foods were provided. While some of these transaction sets may be for legitimate SNAP foods, insufficient evidence was advanced to meet the burden of Appellant to support its contentions.

Attachment 2: Listed are 128 transactions in 58 data sets of two or more transactions conducted by 40 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 at least two supermarkets, one at .22 miles from Appellant, and three super stores, the closest one just .14 miles away.

Contentions:

- Certain customers prefer to do all their shopping at the same time and get it over with.
- We have no control over these customers, it is their decision if they want to sue up all their benefits in a single day. We have no say in the matter.

The record supports that SNAP clients that transacted benefits at Appellant also conducted transactions at large groceries, supermarkets and super stores. Of the HHs flagged on this Attachment, 75% transacted benefits at one or more of the larger store types listed within one day of making a transaction at Appellant. Retailer Operations was unable to verify Appellant's claims since no itemized cash receipts were provided. The log provided only had totals. FNS has access to all EBT total transactions.

SNAP transaction data is provided to FNS via each state's EBT processor on a daily basis in a single layout and format that is standardized nationwide. The EBT transactions are validated and loaded into a database for subsequent analysis. The USDA system scans all retailer transactions at the beginning of each month for the prior month. The system uses pre-defined criteria or patterns for potential fraud detection. Pre-formatted reports provide information on those stores and transactions meeting the pre-established criteria. The system provides a series of spreadsheets and graphs that compare a specific store's data to the average for its firm type or to user-selected comparison stores. The system identifies a retailer for further investigation, and the actual case of trafficking is made by retailer compliance staff on the basis that the transaction patterns cannot be explained based on the store size, layout, inventory, and other factors.

Insufficient evidence was advanced to meet Appellant's burden to support the contentions.

Attachment 3: Listed are 89 transactions conducted by 40 households whereby the majority or all of the HHs' benefits were exhausted **5 U.S.C. § 552 (b)(7)(E)**. The record shows that SNAP beneficiaries had a variety of authorized stores in the near area at which to redeem benefits. The owner provided no recipient affidavits to support why the recipients flagged chose to expend their benefits at Appellant. No cash register tapes were provided to support that the transactions flagged were for eligible SNAP foods. Insufficient evidence was advanced to meet Appellant's burden to support the contentions.

Attachment 4: Listed are 571 individual EBT transactions that are 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)**.

Contentions:

- We often sell by bulk given our prices for formula, soups, milk and other large items. There should be nothing suspicious that our customers choose to do the bulk of their shopping at our store for a week or even a month at a time.

- We have compiled a chart of EBT monthly totals and compared it with our TCF bank account statements and attached it, our EBT records and our bank statements. Every month our deposits and checks and monies spent for business purposes exceeds any monies we receive from EBT benefits.
- If we were trafficking as claimed then our wholesale purchase for supplies and food would be lower than what we received from EBT.

Retailer Operations found that the list of Appellant's EBT monthly totals and its bank monthly deposit amounts was not exculpatory since the items purchased were not detailed or supported by vendor receipts. Also, while Appellant had some bulk items, there were specific restrictions on two of the three signs photographed, that limited the quantity of items that could be purchased per customer. SNAP recipients are also eligible for WIC benefits. The high dollar formula items at Appellant are typically acquired by recipients at WIC-authorized stores using WIC benefits that are restricted to use for certain qualifying items. This allows the very same recipients to use SNAP benefits for other foods. It strains credulity that Appellant was selling large volumes of WIC items in exchange for SNAP benefits.

The advancement of insufficient documentation to support SNAP redemptions supports that Appellant was trafficking. **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. Therefore, that Retailer Operations used computer transaction data in addition to store visit observations and an analysis of household shopping behavior in rendering a finding that violations indicative of trafficking were occurring at Appellant, is as valid a means of establishing facts as direct evidence obtained through an on-site investigation and the eye witnessing of trafficking.

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 primary and 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, as a whole, specifically

identified as a minimum standard that firms must meet in order to be eligible for such a penalty. Accordingly, Retailer Operations correctly 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. No federal or state sale tax submissions were advanced. No itemized cash register tapes were advanced. No vendor invoices of acquired eligible stock were provided. 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 Section 279.7 of the Regulations (7 CFR § 279.7) 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

July 13, 2018