

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

Old Country Store #1,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0201573

FINAL AGENCY DECISION

The record indicates that Old Country Store #1 (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). It is the decision of the USDA, Food and Nutrition Service (FNS), there is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the SNAP, 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 its 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

By Charge letter dated September 14, 2017, Retailer Operations informed the owner that FNS had compiled evidence that Appellant had violated the SNAP regulations based on its analysis of electronic benefit transfer (EBT) transactions that “establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm.” The sanction for

trafficking is permanent disqualification. The record supports that Appellant replied to the Charge letter September 25, 2017 and October 10, 2017.

Retailer Operations issued a Credit Charge letter on September 25, 2017. A Determination letter dated November 9, 2017, 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 SNAP regulations. However, the firm was 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.

By letter dated November 20, 2017, the owner appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated December 5, 2017. The owner provided additional information by letter postmarked December 29, 2017.

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). Parts 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 § 271.2 states in part: "Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot foods and hot food products prepared for immediate consumption."

7 CFR § 278.2(f) states: "Food stamp benefits shall not be accepted by an authorized retail food store in payment for items sold to a household on credit. A firm that commits such violations shall be disqualified from participation in the Food Stamp Program for a period of one year."

7 CFR § 278.6(a) states that: "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(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.”

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 electronic benefit transfer (EBT) transaction data during the period of January 2017 through June 2017. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions made from individual benefit accounts within unusually short time frames.
2. 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 recapitulated here.

- I am a convenience store at an excellent location and open 24/7.
- I have been in business for 29 years and have had a good program relationship thus far.
- I talked to all my employees and each denied any wrong doing, using their SNAP to pay for food that had been charged to their in-house account at the end of the month for which I provide.
- I have put a stop to my employees using Food Stamps to pay for food that had been charged on their charge accounts monthly.
- If anything took place as far as trafficking, it was not with my knowledge.
- I have placed new guidelines in effect and I am monitoring them closely. Anyone using Food Stamps for anything other than purposes intended will be terminated.
- I am guilty of trusting my employees but not guilty of trafficking.
- I have terminated one employee and am investigating another employee because this action began just after she was hired. Her application is enclosed to verify her date hired.
- She and another employee possibly involved will also be terminated if proof of any wrong doing.

The owner provided a 2016 Federal tax Schedule C return showing his store does more than five million dollars of gross business, and a statement regarding his character saying he has given back and volunteered his time to the fire department. He also furnished a W-4 employee

withholding allowance certificate, and a Virginia department of taxation personal exemption worksheet.

ANALYSIS AND FINDINGS

Retailer Operations presented a case that Appellant trafficked SNAP benefits. As patterns of unusual transactions appear across multiple Attachments the case of trafficking becomes more convincing.

Attachment 1: This Attachment lists 46 transactions in 18 sets of two or more transactions conducted by ten different households (HHs) in unusually short time frames.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant also operates as a gas station. Its food stock consisted of mostly canned items and snacks. The onsite store visit inventory indicated that Appellant did not stock any specialty items, or fresh meats. Nonfood items in stock included: tobacco products, alcohol, lottery tickets, gasoline, health and beauty aids, and cleaning products. Appellant had no shopping baskets or hand held baskets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

The owner provided a copy of his 2016 Schedule C. Gross sales would most likely include tobacco products, alcohol, lottery, hot food, gasoline and other ineligible items as well as eligible foods. The record states that Retailer Operations' staff contacted the owner October 10, 2017, to request documentation of non-taxed items sold and itemized store invoices. The record supports that the owner stated he would send whatever he would find however, no other documents were provided. Appellant's 2015 reauthorization application states 65% of the store's retail sales came from hot foods and nonfood items not eligible for purchase with SNAP benefits. It is more likely that most of the sales reported on the tax return came from nonfood items, including gas. As such, the tax document does not explain the transactions listed on the Attachments.

Attachment 2: This Attachment lists 128 individual SNAP transactions made by 45 households 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E). Appellant also had more flags on each of the Attachments than the comparator convenience stores.

Credit Accounts

The retailer charged with trafficking claimed that the transactions listed on the Attachments were attributable to the establishment of credit accounts. Since credit was offered as an explanation in a charged trafficking case, the retailer was sent a credit Charge letter, and asked to provide adequate proof that credit accounts existed at the time the suspicious EBT transactions occurred. Evidence of the purported credit is requested since the transactions in the Charge letter must be assessed by Retailer Operations to determine if credit more likely than trafficking explains the suspicious data. Credit accounts have long been claimed by retailers as a defense for trafficking in an effort to garner a lesser sanction than permanent disqualification. Therefore, to refute charges of trafficking, the owner must provide adequate proof that credit accounts existed at the time the suspicious transactions occurred so that Retailer Operations can compare such proof

with transactions listed in the letter of charges. Such evidence may include an accounts receivable ledger, which lists the name of each recipient, their addresses, SNAP ID information, as well as the dates, amounts of each transaction, and what was acquired that the retailer claims to be a credit account transaction. If the owner does not provide adequate proof of credit, the retailer shall be permanently disqualified for trafficking. A one year disqualification for credit cannot be entertained when by a preponderance of the evidence it is determined that trafficking has more likely than not occurred.

The owner provided receipts and credit ledger. The record supports that he stated to Retailer Operations that he threw most of the receipts away when they were paid. Retailer Operations examined the receipts to assess if credit would more likely than not explain the Attachment data. Although some of the receipts state what items were acquired, the ledger did not show dates within the review period. The four first names on the ledger do not explain by a preponderance of the evidence that the transactions listed on the Attachments are for eligible SNAP foods acquired on violative credit. One of the first names listed on the credit list is the same first name as the employee that the owner states he terminated.

When the owner signed the certification to become a SNAP retailer, he confirmed his understanding of and agreement to abide by program rules and regulatory provisions. He agreed to accept responsibility on behalf of the firm for violations of the SNAP, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. These include violations such as: accepting SNAP benefits as payment on credit accounts or loans, and trafficking. The certification is clear that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal or disqualification from the SNAP. Despite agreeing to abide by SNAP rules and regulations, the owner now admits he allowed credit accounts, a clear violation of SNAP regulations and rules.

At the time of authorization, each retailer is provided a USDA SNAP training guide that states that credit and trafficking are not allowed. The training guide is available online and is translated in many languages. This guide states that SNAP customers must pay for their purchases at the time of sale and that a retailer may not accept SNAP benefits as payments on credit accounts. The training packet includes:

- A video and book that explain the SNAP rules.
- Information that the store owner is responsible for carefully reviewing the program rules and making sure all employees fully understand these rules.
- Information that failure to follow the rules can result in disqualification, fines, civil and/or criminal action.

Enclosures provided by FNS to retailers when authorized include:

- A SNAP Permit
- SNAP Training Guide for Retailers and a training video
- Report Abuse of the SNAP Poster - **MUST BE POSTED IN YOUR STORE**
- We Accept SNAP Benefits - Window Sticker and Poster
- Using SNAP Benefits Poster
- Dos and Don'ts for Cashiers/Penalties for Violations of the SNAP: Double-sided sign
- EBT Fact Sheet

- From the “SNAP EBT Dos and Don’ts card (FNS-136 included in the authorization package) “Do not accept SNAP benefits (EBT) as payment on credit accounts.”
- From the SNAP Training Guide for Retailers (page 9): “SNAP customers must pay for their purchases at the time of sale. You may not accept SNAP benefits as payments of credit accounts. You may not hold customers’ SNAP EBT cards or card account information at your store for future use.”

Thus, the owner was provided multiple and redundant resources through which a thorough knowledge of program rules and requirements could be readily obtained. Nonetheless, he allowed credit, a violation of the SNAP regulations.

A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or mitigate the impact of the violations upon which they are based. There is no provision in the Act, or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees. The owner contends to have been in business for 29 years and to have had a good program relationship thus far. However, the regulations stipulate “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2.”

CIVIL MONEY PENALTY

To be considered eligible for a CMP, a firm must establish, by substantial evidence its fulfillment of each of the criteria under 7 CFR § 278.6(i). The criteria are, as a whole, specifically identified as a minimum standard that firms must meet in order to be eligible for such a penalty. Given these considerations, it is clear that the statute and the regulation allow no flexibility below the level of this stated standard. Appellant produced insufficient evidence that it met all the requirements to qualify for a CMP in lieu of permanent disqualification.

There are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective actions implemented subsequent to findings of program violations. Further the actions are not sufficiently documented or supported by evidence for consideration for a trafficking CMP in lieu of permanent disqualification. Therefore, Appellant’s contention that corrective actions such as SNAP training, and increased owner monitoring of the store, do not provide any valid basis for dismissing the charges or for mitigate the penalty imposed.

CONCLUSION

Retailer Operations’ analysis of Appellant’s EBT 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. The review of all the evidence does not support that credit payments more likely than trafficking, accounted for the

transactions listed on the Attachments. Upon review of all of the evidence it is determined that it supports by a preponderance that it is more likely true than not true that program violations did occur at Appellant as charged by Retailer Operations. Thus, based on the discussion herein, the decision to impose a permanent disqualification against Appellant is sustained.

Appellant did not provide documentation or evidence of fulfillment of the four criteria for consideration for a CMP in lieu of permanent disqualification. Thus, Retailer Operations properly denied a CMP.

RIGHTS AND REMEDIES

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. 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

January 10, 2018