

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

Oz Petroleum,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0200209

FINAL AGENCY DECISION

It is the decision of the USDA, Food and Nutrition Service (FNS) that the record indicates that Oz Petroleum (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 retail food store 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 July 5, 2017, Retailer Operations informed the owners that FNS had compiled evidence that Appellant had violated the SNAP regulations based on 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 July 11, 18, 25, and 31, 2017, and August 1, 3, and 21, 2017. Retailer Operations issued a Credit Charge letter on July 11, 2017.

Retailer Operations issued its Determination letter September 6, 2017. This letter informed the owners that Appellant was permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP 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 timely to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

By letter dated September 15, 2017, the owners, via counsel, appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated September 25, 2017. Counsel provided additional information dated October 20, 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 food 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) reads: “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 § 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 charge on review is based on an analysis of SNAP EBT data during the period of December 2016 through May 2017. This involved two patterns of transactions 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 herein.

- The respondent operates a gas station convenience store. There is a park across the street which is a significant source of business for the store.
- The pattern of purchases objected to, was not in and of itself, evidence of any wrongdoing.
- Respondent disputes any and all parts of the claims, including the fact that allowing a customer to use their card more than once a day or for an amount **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** is inappropriate or in violation of any rules governing the program.

ANALYSIS AND FINDINGS

Store Profile

FNS conducted a store visit on March 22, 2017. Appellant is a gas station convenience store. The check-out area is enclosed by a Plexiglas barrier with two windows each with a fixed opening with a small pass-through space. There also appears to be a revolving platform in a small window between the two fixed openings whereby items could be placed and turned to the cashier for processing. Merchandise is seen on the limited counter space around the windows, and is stacked underneath the check-out counter. There was no optical scanner noted, no shopping carts or hand baskets, and there was no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers. No meat/seafood specials or bundles, or fruit/vegetable boxes were seen. There is a hot coffee and cappuccino dispenser at a counter area with some pastries displayed for self-service.

Staple food stock included: prepackaged foods, canned goods, soup, cereal, crackers and juices. Appellant lacked high priced foods such as fresh meat, poultry or seafood or ethnic food products. The FNS contractor noted store conditions as having dusty cans and packages. The store photos indicated there were empty shelves/racks and sparsely stocked SNAP food items. Non-food stock included: tobacco products, lottery, automotive products, health and beauty aids, cleaning supplies, CDs, T-shirts, and paper products. A photo confirms that some construction was underway on the date of the visit.

Contentions:

- My client put an addition of 700 sq. ft. on the convenience store in 2014 for storage of grocery items and added 900 sq. ft. of retail and food service space in 2017. Copies of the construction drawings of both additions are provided.

The drawings advanced support Appellant's contentions. As noted, the FNS photos did show one room in an apparent early state of remodel/expansion. It is not stated when the 2017 remodel was completed. Presumably it could have been completed by April and/or May of the review months; however, what was stocked or displayed in the added space is not documented with sufficient invoice evidence of eligible SNAP foods.

Attachments

The evidence that Appellant violated the SNAP regulations is furnished in the Charge letter Attachments. Government analyses of stores caught in trafficking violations during actual on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns, including include those cited in the Charge letter. 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 transactions are validated and loaded into a database for subsequent analysis. A USDA system scans all retailer SNAP transactions at the beginning of each month for the prior month. The system uses pre-defined criteria or patterns

for potential fraud detection. Formatted reports provide information on those authorized 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. In addition, the system utilizes mapping software which translates the location address information into geo-codes, and enables the user to map the locations of selected authorized stores and track transaction locations of recipients. Retailer Operations staff use the analysis of SNAP transaction data to evaluate the type and extent of potential program violations. Users are able to supplement and/or confirm their analyses by accessing the applicable state's EBT processors' administrative systems. The case of trafficking is made by compliance staff on the basis that the transaction patterns cannot be explained based on the store size, layout, inventory, location, recipient shopping histories, and other factors.

Attachment 1: This Attachment lists 57 transactions in 20 sets of two or more transactions, conducted by nine different households (HHs). Appellant's flagged transactions were compared to six nearby convenience stores from 0.11 to 0.67 miles distant from Appellant. Appellant had 20 sets flagged, while four other stores had zero, one store had nine, and the other convenience store had two flags. This is suspicious.

Contentions:

- The nearest grocery store is approximately one mile away.
- Many residents of the neighborhood, most of whom do not have cars, use the gas station to buy all their food and paper products. See attached exhibit of customers prepared to speak with you regarding the store and nature of the transactions.
- Either the customer buys a few things while other family members shop; or this is a result of customers purchasing several items for themselves and then making purchases for others.
- If the USDA does not want the store to allow purchases in succession we will refuse to allow them.
- My client had been advised not to refuse a sale to anyone even if they are clearly purchasing food for another person.
- My client believes the business has been shopped by the USDA and has never been found to be in violation.
- Two POS systems are in use at any given time.

The record shows that within a one mile radius of Appellant there are: 21 convenience stores, five combination grocery/other stores, two small grocery stores, one large grocery store, two supermarkets, and one meat/poultry specialty store. The data shows that six of the nine HHs flagged on this Attachment, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), made SNAP transactions at a large grocery, supermarket or super store on the same day that they conducted transactions at Appellant. Within two days of a transaction at Appellant, eight of the nine HHs (5 U.S.C. § 552 (b)(6) & (b)(7)(C)), made a SNAP transaction at a large grocery, supermarket or super store. One HH made transactions at seven other larger stores at a distance of 7.85 miles. Another HH made transactions at five super stores and supermarkets at a distance of more than 16 miles, and another household conducted transactions at two large groceries at a distance of

3.35 miles. This supports that there is no lack of authorized store options for SNAP recipients to purchase eligible foods. Given the shopping options for SNAP recipients in this area, it seems irregular that multiple SNAP expenditures for eligible foods were made in short periods at this convenience store that features accessory foods and ineligible items.

Appellant provided a one page list of customer names and contact information. One would not expect a SNAP recipient to admit to trafficking against their own self-interest potentially exposing them to administrative and criminal charges. On the contrary, experience has shown that SNAP customer declarations and affidavits routinely attest to irregular transactions being legitimate even when there is strong evidence of trafficking. Furthermore, there is no requirement in the statute or the regulations that the agency conduct client interviews under these circumstances. If Appellant believed recipient interviews would have provided probative evidence in its favor, Appellant could have provided recipient affidavits or videos for the record. Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. The case record documents that Retailer Operations compiled strong evidence of trafficking before making its determination. Although Appellant believes that more evidence should be collected, this does not disprove the trafficking case by a preponderance of the evidence, or render the permanent disqualification decision “unconscionable.”

In fact, Retailer Operations did review the shopping histories of the households provided by Appellant, and matched eight of the nine individuals with SNAP transaction data. Seven of the eight households made transactions at supermarkets and/or super stores in proximity of making flagged transactions at Appellant. Retailer Operations determined that transportation did not appear problematic as the SNAP recipients had access to and transacted benefits at supermarkets and/or super stores, many at distances of more than five miles from Appellant, throughout the review period.

The record supports that on April 7, 2016, the USDA issued an official warning letter to the owners as a result on an onsite investigation. Based on this investigation, the USDA determined that the firm had accepted SNAP benefits in exchange for a common ineligible non-food item in one of three store visits. The USDA warned Appellant that the acceptance of SNAP benefits was in violation of Section 278.2(a) of the regulations. Thus, Appellant has been warned of a previous SNAP violation.

Retailer Operations researched the POS terminals used at Appellant during the review months and determined that four different terminal numbers were used at various points in time. The SNAP transactions noted in the Charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of Appellant’s stock and facilities, and the use of limited SNAP benefits by recipients. A 2011 USDA study shows that **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** benefits are redeemed at supermarkets and supercenters.

Based on the onsite store visit, Appellant’s inventory contains a profusion of inexpensive single-serve prepared food items, accessory foods, and ineligible items. The most expensive item on the one page price list provided by the owners is milk at \$3.99 a gallon.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Therefore, it is unlikely that it was shopping with family members.

Appellant provided no federal or sales tax records, or bank or credit card records in support of its contentions. The owners did not provide itemized cash register tapes to support the sale of SNAP eligible foods, or sufficient vendor documentation to support the SNAP redemptions at Appellant. Thus, the transactions have not been demonstrated by a preponderance of the evidence to be for SNAP foods.

Attachment 2: This Attachment lists individual SNAP transactions made by 50 households 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E). Appellant was compared to six nearby convenience stores, and Appellant had more flags on this Attachment at 259 than any of the other stores which had flags numbering 20, 68, 20, 6, 78 and 44. The transactions listed on this Attachment are suspicious in that Appellant did not stock a profusion of high dollar staple food items. Appellant advanced one page of pricing information of eligible stock that lists only low cost snacks and beverages.

The record confirms that SNAP households were not dependent on Appellant to meet their food needs as there are numerous other authorized stores nearby. Data shows that 38, or 76% of the 50 households flagged at Appellant on this Attachment, made a transaction at a super store or a supermarket within one day of conducting a transaction(s) at Appellant. Within three days of a transaction(s) at Appellant, 5 U.S.C. § 552 (b)(7)(E) 42 households, made a SNAP transaction at a supermarket or a super store. This is a strong indicator that transportation to larger retailers to exchange benefits was not an impediment to the HHs flagged.

Contentions:

- It is not unusual for EBT customers to purchase 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of merchandise in a single transaction.
- My client promotes the sale of beverages by the case, a good value for customers and good profit for the store. See copy of sign posted for purchase of case beverages.
- Invoices of purchases of case beverages were provided for May 2017. Invoices are available for each month in question but were too voluminous to attach.
- In the summer months customers will make case purchases of beverage products and take them to the park.

The record shows that Appellant provided 12 invoices and three delivery receipts which were reviewed and analyzed by Retailer Operations. A Faygo Beverage invoice dated May 10, 2017, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Three delivery receipts were not counted. Two Sam's Club receipts were provided; one dated June 15, 2017 was outside of the review period and was not counted. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Even with a 71% markup applied by Retailer Operations, the May 2017 invoices were not adequate to substantiate Appellant's SNAP redemptions for that month, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Thus, Retailer Operations concluded that insufficient documentation of eligible foods was advanced to demonstrate that Appellant stocked eligible

foods such that it could meet its recorded SNAP redemptions. While Appellant stated it has more invoices, these were not submitted to Retailer Operations or advanced for administrative review. As noted, the Appellant has the burden of providing relevant evidence to support its contention that it was not trafficking.

One photo of a poster listing the beverage cost per case was provided. This list was not seen in any of the FNS contractor store visit photos. Also, while beverages may be popular in the summer months, the review months in this matter were not in the summer. As noted, no itemized cash register receipts were provided as evidence of eligible food sales to SNAP recipients.

Credit

Contention:

- There have been no sales of merchandise on credit. There was some confusion regarding the sale of merchandise on credit. Any discussion about credit purchases was a result of confusion at the time of the discussion between myself **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

The record states that on July 11, 2017, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** received telephone call from owner, Ismail Zindani, who mentioned during the conversation with that the transactions were due to his store offering credit accounts. The record states Mr. Zindani stated that the firm keeps a log and that he would provide invoices, EBT receipts, the mark-up, and credit accounts log. On July 18, 2017, Mr. Zindani telephoned **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and confirmed that he had received the USDA Credit Charge letter. According to the record, he stated that when he said credit he didn't mean it as having credit accounts like letter states. He stated he would explain in writing what he meant when he submitted all of the documents. Mr. Zindani stated as far as the credit accounts there would be nothing to submit, because he did not provide credit in the manner in the letter he received.

Per 7 CFR § 278.2(f) extending store credit is against SNAP regulations and subject to a term disqualification. Credit accounts have long been claimed by retailers as a defense for trafficking in an effort to garner a lesser sanction than permanent disqualification. If a retailer charged with trafficking claims that the transactions listed on the Attachments are attributable to the establishment of credit accounts, the retailer's reply to the Charge letter 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 on the Charge letter. Such evidence may include an accounts receivable ledger, which lists the name of each recipient as well as the dates, items acquired, and amounts of each transaction the retailer claims to be a credit account transaction. Recipient affidavits attesting to credit accounts may also be proffered as evidence of credit. If the retailer does not provide adequate proof of purported credit accounts, the appropriate penalty is permanent disqualification.

Mr. Zindani provided a sworn affidavit dated August 4, 2017 that: "...the station has never nor will it sell merchandise on credit with future payment to be made with EBT. Any

discussion about credit purchases was a result of confusion at the time of the discussion between myself and 5 U.S.C. § 552 (b)(6) & (b)(7)(C).” Retailer Operations’ record does not elaborate as to any language barrier or possible confusion regarding the owner’s initial admission to offering credit and having documentation of credit that would explain the transactions in the Charge letter. Absent more detail in the record as to the veracity of the initial credit admission, and given the owner’s subsequent denials of credit by phone and via affidavit, under review, credit accounts as a possible explanation for the listed transactions, was not assessed.

Previous Owner

Counsel contends:

- It was brought to my attention that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) indicated that this address should not have been granted a license based upon the disqualification of the previous owner. If this address has had a disqualification, it would have occurred prior to the bank foreclosure and the station being out of business. The actions of any owner or operator prior to 2010 should not be held against my client who purchased the property in 2012.

The record under review is silent as to the above referenced discussion. Locations are not disqualified by FNS. Authorized stores and their owners who fail to conform to the applicable statutes and regulations, may be removed from the SNAP in accordance with the provisions detailed in said regulations. As such, that any previous owner of any gas station store at Appellant’s location may have been disqualified, has no bearing whatsoever on the trafficking sanction against Appellant that is the subject of this review.

Loss Sales

It must be impressed upon Appellant that SNAP authorization is an administratively-granted privilege subject to the terms and conditions for participation detailed in the Act and the regulations. Any rights or privileges resultant to a firm’s SNAP authorization are subject to revocation along with that authorization via the sanctions for violations detailed in the Act and implementing regulations. That Appellant has profited or otherwise benefitted from a SNAP authorization does not create a property interest which supersedes the statute or implementing regulations. Thus, that Appellant has had lower daily sales since it was disqualified to accept SNAP benefits, is a likely economic consequence of such disqualification. However, there is no provision in the regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to a firm resulting from imposition of such penalty.

To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, and the enforcement efforts of the USDA. Furthermore, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been

disqualified from the program in the past for similar violations. Therefore, ownerships' contention that the firm has incurred economic hardship based on the assessment of an administrative sanction does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

The record shows that following receipt of the July Charge letter, SNAP redemptions in July 2017 dropped 15.8% from redemptions in May 2017. Retailer Operations noted this was an indicator of a change in operations after the charges were received. Presumably if Appellant was not trafficking, it would be expected that SNAP redemptions would hold steady with previous months, particularly in July when beverage sales were stated to be robust.

CIVIL MONEY PENALTY

Contentions:

- If you determine any of the transactions in question have violated any regulation, my client would pay any reasonable fine to resolve this matter and not be subject to disqualification.
- The residents in the neighborhood need to be able to use their EBT for purchases at this convenience store.

To be considered for a CMP in lieu of permanent disqualification for trafficking, a firm must establish, by substantial evidence its fulfillment of the criteria as listed at 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 applicable regulation allow no flexibility below the level of this standard. Appellant produced no evidence that met the requirements to qualify for a trafficking CMP in lieu of permanent disqualification within the regulatory time frame.

The possible hardship of SNAP recipients is assessed only in sanctions other than trafficking wherein the regulations at 7 CFR § 278.6(f)(1) allow for a hardship CMP.

CONCLUSION

An Appellant who seeks to set aside an agency sanction action must provide evidence by a preponderance that the transaction activity at issue is not due to SNAP benefit trafficking. Since permanent disqualification is warranted on the first occasion of trafficking, it is Appellant's burden to raise material issues of fact as to the transactions in the patterns set forth as suspicious. Appellant has not met this burden.

The evidence supports that it is more likely true than not true that program violations did occur at Appellant. 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 in two Attachments had characteristics that are consistent with trafficking violations in SNAP

benefits. Retailer Operations used computer printouts of transaction data and other reports, in addition to an onsite store visit report, and an analysis of household shopping behavior, in rendering a finding that violations indicative of trafficking occurred. These are as valid a means of establishing facts as direct evidence obtained through an onsite investigation and the eye witnessing of trafficking. Thus, based on the discussion herein, the decision to impose a permanent disqualification against Appellant is sustained.

Appellant did not provide any documentation as required by the regulations for consideration for a trafficking CMP in lieu of permanent disqualification. Thus, Retailer Operations properly denied a CMP according to the terms of Section 278.6(i) of the SNAP regulations.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008, and Section 279.7 of the regulations (7 CFR § 279.7) discuss the 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 owners 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, 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 9, 2017