

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

Page Discount Market #1,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0202932

FINAL AGENCY DECISION

It is the decision of the USDA that there is not sufficient evidence to support a finding that Page Discount Market #1 (Appellant) should be permanently disqualified from participation in the Supplemental Nutrition Assistance Program (SNAP) for trafficking.

ISSUE

The issue accepted for review is whether the Retailer Operations Division (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 October 5, 2017, 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 “establish clear and

repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm.” The sanction for trafficking is permanent disqualification. Appellant replied to the Charge letter October 10 and 13, 2017.

Retailer Operations issued a Determination letter dated October 18, 2017. This letter informed Appellant that it 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 civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP per the regulations cited.

By letter dated October 20, 2017, the owner appealed Retailer Operations’ determination and requested administrative review of this action. The appeal was granted by letter dated October 24, 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). 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 in part: “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 were based on analysis of SNAP EBT transaction data during the period of March 2017 through August 2017. This involved two patterns of EBT transaction characteristics that are indicative of trafficking:

1. There were an unusual number of transactions ending in a same cents value.
2. Excessively large purchase transactions were made from recipient accounts.

APPELLANT’S CONTENTIONS AND EVIDENCE

The following may represent a summary of the contentions however, in reaching a decision attention has been given to all contentions presented, including any not specifically referenced here.

- The charges of trafficking are false and have been improperly reviewed.
- I run a convenient store that has a full line of groceries and a kitchen in which 95% of the customers use EBT.
- I am aware of the regulations and have been complying.
- The majority of our customers purchase food from our menu. All food is purchased first and cooked free of charge. They can purchase it raw and if need be take it raw or we cook it for free.

The owner provided a double sided tri-fold flyer of the menu, and a one page statement from Prompt Tax Services regarding the markup percentage. Vendor invoices of stock and EBT tapes were also advanced.

ANALYSIS AND FINDINGS

Attachment 1: 5 U.S.C. § 552 (b)(6) & (b)(7)(C) When a disproportionate number of transactions end in same cents values it appears that these transaction amounts are contrived and are indicative of trafficking.

Contentions:

- Most menu prices end in 99 cents.
- The majority of the EBT revenue is from the menu that explains the prices 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

The menu prices, the grocery prices as reflected on the onsite visit report, and the register tapes all support that the end cent values listed can be derived from the acquisition of food items at Appellant. Therefore, this Attachment is not more persuasive of trafficking than not.

Attachment 2: Listed are 840 individual EBT transactions conducted by 577 different households. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Contentions:

- The kitchen is the heart of our establishment where 95% of our customers spend SNAP benefits.
- Customers look at the menu and tell the clerk what they want from the kitchen and they can pay with cash or EBT. The clerk gives the order ticket and the cook prepares their food as a courtesy.
- All food is raw so there is a wait time of 15 to 25 minute per order.
- We have no dining area so after their order is complete customers must leave the premises.

This Attachment is not more persuasive of trafficking than not. The evidence supports that the business is more likely primarily a takeout restaurant than a typical convenience store. According to the owner's admission, SNAP benefits are used 95% of the time for menu items. As such, Appellant appears to be an ineligible firm per the regulations.

CONCLUSION

Retailer Operations' analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided evidence that the questionable transactions during the review period had

characteristics that are consistent with trafficking violations in SNAP benefits. However, upon review of all of the evidence, the determination to impose a permanent disqualification against Appellant is not supported by a preponderance of the evidence, and is herein reversed. The most probable explanation for the questionable transactions is that Appellant is operating primarily as a takeout restaurant. Restaurants are not eligible for SNAP authorization.

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

December 6, 2017