

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

Park Avenue Discount Beverage,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0216985

FINAL AGENCY DECISION

The record supports that the Park Avenue Discount Beverage (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). It is the decision of the USDA that there is sufficient evidence to support that the permanent disqualification of Appellant from participation as an authorized retail food store 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 Food and Nutrition Service (FNS).

CASE CHRONOLOGY

By Charge letter dated May 22, 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 owner responded to the Charge letter via a letter dated June 1, 2019. Retailer Operations issued a Determination letter dated July 18, 2019. This letter informed ownership that Appellant was permanently disqualified as a 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 civil money penalty (CMP) according to Section 278.6(i) of the regulations, and found it was not eligible because insufficient evidence was submitted timely to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program to prevent violations.

By letter dated July 30, 2019, the owner requested administrative review of Retailer Operations' determination. The appeal was granted by letter dated August 15, 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, 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 an analysis of SNAP transaction data during the period of September 2018 through February 2019. The patterns of transaction characteristics indicative of trafficking are:

1. Multiple transactions made from individual benefit accounts within a set time period.
2. The bulk of SNAP households’ remaining benefits were depleted within short time frames.
3. EBT transactions that are large based on the observed store characteristics and recorded food stock.

APPELLANT’S CONTENTIONS

In reaching a decision, consideration has been given to all contentions as stated, including any not referenced.

- As I have acknowledged in my previous letter that those transactions took place at my store and it was conducted inappropriately by the store associates who has been terminated and he did those transactions to benefit the associate not the firm.
- I have been a vendor to accept SNAP for almost 10 years and never ever my firm has been in violation, unfortunately one bad associate put my firm in a bad reputation and now I am in the verge of losing the service that will impact my business and will impact negatively for my family as this is the only earning I have to support them.
- I take full responsibility that those transactions took place at my store and were conducted inappropriately by store associates during the evening, where almost all of the time I’m not there.
- I’m mostly at the store in the morning for banking and delivery purpose. As a small owner many things we are unable to do as large company can which to have surveillance camera, electronic time keeping and schedule keeping system, including having separate swipe machine to identify the EBT transactions. If we had a separate

EBT machine to swipe all transaction I may have identified those transaction before even receiving a notification from your office.

- I communicated with my associates to identify whom it was done but I wasn't able to as all current employees have declined. They understand that it is illegal for them to make such transactions as I advised them at the time of hiring.
- I had an employee that is no longer with us during that time that may have done these inappropriate transactions. Therefore, I couldn't ask him to confirm the reason he did it knowing it is illegal.
- I request the department to give me a second chance to continue the SNAP program and waive the penalty for this unusual transaction and illegal activities.
- I make a sworn commitment to ensure the department these will never happen again and I will personally ensure to validate each transaction going forward.

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 98 transactions in 42 sets conducted by 31 unique households (HHs). Multiple transactions within a set time period are a method stores use to avoid high dollar transactions, and are indicative of trafficking. Appellant had a 5 U.S.C. § 552 (b)(7)(E) higher SNAP dollar volume than state convenience stores, and a SNAP average transaction amount that was 5 U.S.C. § 552 (b)(7)(E) higher. Thus, Appellant's activity was unusual and suspicious.

The record confirms that there are at least 21 authorized retailers within a one mile radius of Appellant including: 12 convenience stores, one large grocery store, two small grocery stores, two supermarkets, and one super store. Thus, recipients had access to and did use other shopping options to transact SNAP benefits.

The owner provided no evidence to support that trafficking was not occurring at Appellant. The owner took responsibility and stated the transactions were conducted inappropriately by store associates.

Attachment 2: Listed are 51 transactions in 26 sets, involving 25 unique households whereby the majority or all of the individual households' benefits were exhausted under the Attachment's criteria. Depletion or near depletions of a household's entire SNAP balance, in one or a few transactions, is inconsistent with the shopping behavior of SNAP benefit households. Therefore, transactions in which SNAP benefits are exhausted are indicative of trafficking.

The owner provided no evidence to support that trafficking was not occurring at Appellant.

Attachment 3: Listed are 290 transactions conducted by 108 unique HHs for amounts that exceed the average transaction amount for the same store type in the same state by three times or more.

The owner provided no evidence to support that trafficking was not occurring at Appellant. The owner took responsibility and stated the transactions were conducted inappropriately by store associates. While some households may have conducted legitimate SNAP transactions at Appellant, no evidence was presented to support this argument. Based on the empirical data, and in the absence of compelling evidence for such transaction patterns, a conclusion can be drawn, that the “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation.

In the absence of a preponderance of evidence of the legitimacy of the transactions presented by Appellant, the evidence supports that violations did occur as charged by Retailer Operations. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf.

It is recognized that some degree of financial hardship is a likely consequence whenever a store is disqualified from participation in the SNAP. However, there is no provision in the SNAP statute or regulations for waiver or reduction of an administrative penalty assessment on the basis of possible reduced earnings to the owner resulting from the imposition of a regulatory sanction. To allow store ownership to be excused from an assessed administrative sanction based on a purported reduction in earnings, would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

CIVIL MONEY PENALTY

The regulations at 7 CFR Section 278.6(i) specify the criteria for a firm’s eligibility for a CMP in lieu of permanent disqualification for trafficking. The owner failed to submit documentation timely to show that Appellant met the four criteria in order to qualify for a CMP. Accordingly, Retailer Operations determined that Appellant was not eligible for a trafficking civil money penalty.

CONCLUSION

Retailer Operations’ analysis of Appellant’s SNAP transaction data was the primary basis for its determination to permanently disqualify Appellant. The record also included onsite store photographs, an onsite store inventory report, and SNAP household shopping analyses that provided substantial evidence that the questionable transactions during the review period had

characteristics that are consistent with trafficking violations in SNAP benefits. On review, the owner's contentions did not outweigh the evidence in the record. Furthermore, per the applicable regulations, Retailer Operations' denial of a trafficking CMP was proper. Therefore, the decision to impose a permanent disqualification against Appellant is sustained.

The effective date of this decision is 30 days after receipt of the decision by the firm.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008 and to 7 CFR § 279.7 of the regulations with respect to applicable rights to judicial review of this decision. If 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 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

September 23, 2019