

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

Pier Liquor,

Appellant,

v.

Case Number: C0203557

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The record indicates that Pier Liquor (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the permanent disqualification 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 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 March 28, 2018, Retailer Operations informed the owner that FNS had compiled evidence that Appellant had violated the SNAP regulations based on analysis of electronic benefit transfer (EBT) transactions that established clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for the type of firm. The sanction for trafficking is permanent disqualification.

The record supports that Appellant replied to the Charge letter by telephone on April 2 and in writing on April 7, 2018. Retailer Operations issued its Determination letter April 18, 2018. This letter 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 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. The firm was found 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 per the regulations cited.

By letter dated April 27, 2018, counsel requested administrative review. The appeal was granted by letter dated May 3, 2018. Counsel provided additional information by cover letter dated May 25, 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 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 in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 CFR § 271.2 states: "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 § 278.6(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(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 at 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 charges on review were based on an analysis of SNAP EBT data during the period of September 2017 through February 2018. This involved two patterns of transactions indicative of trafficking:

1. Multiple transactions made from individual benefit accounts within a set time period.
2. Excessively large purchase transactions made from recipient accounts.

APPELLANT’S CONTENTIONS

Attention has been given to all contentions presented, including any not specifically listed here.

- We have listed all the merchandise that we sell to customers with EBT cards.
- Our store is in a very isolated area, we are approx 2 blocks from the beach where customers camp or live.
- There are no other stores within a 3 or 4 mile radius and a lot of customers are homeless and have no means of transportation.
- One sale on October 25, 2017, the household was just released from jail and was shopping for a whole lot of food and everything to eat. He stays with his mother.
- My client can provide records of compliance training and compliance documentations, attended by management and employees.
- The store was the only WIC/SNAP eligible location within the area, showing why large purchases were made by families and homeless persons.
- My client can provide information regarding receipts listed by the notice, including a list of items purchase.
- My client can provide invoices from vendors showing the rate of purchases and decrease in stock.

Counsel provided: a letter from an employee outlining the circumstances of the purchases of one recipient; a letter from an individual who was in jail; statements from customers who state they

shop at Appellant; available receipts containing summary of purchases listed in the initial letter, numbered to correspond to the master sheet of all purchases; a copy of the certification the store received after is biennial county training and certification in SNAP and related services.

ANALYSIS AND FINDINGS

The evidence that Appellant violated the SNAP regulations is furnished with the Charge letter as 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. These patterns include those cited in the letter of charges. 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 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. Retailer Operations staff use the analysis of SNAP transaction data to evaluate the type and extent of potential program violations.

Attachment 1: Listed are 105 transactions in 33 sets of two or more transactions. **5 U.S.C. § 552 (b)(6) & (b)(7)(C).** Based on the store visit of August 23, 2017, Appellant stocked generally inexpensive food items along with alcohol, clothing, sun glasses and other ineligible items.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Most items ended in 99 cents or x9 cent values. One item each ends in 25 cents, 96 cents and 50 cents, and three items end in 00. The record supports that the onsite store report confirmed that there were three items priced at \$5 or more: Folger's coffee at \$6.99 for 11.3 ounce, Red Bull 4-pack priced at \$7.99 for 8.4 ounce cans, and jerky at \$14.99 for 10 ounces. None of these specific items were found on the owner's price list. The owner's submission shows coffee is priced at \$5.99 for cans, and beef jerky at \$8.99 for four ounces.

The record supports that within a one mile radius of Appellant there are four authorized convenience stores. Homeless recipients living in the area would likely be restricted in food items they are able to store due to lack of refrigeration and storage space. Of the 21 different households (HHs) identified in this Attachment, 43% made a SNAP transaction at either a large grocery, supermarket, or super store the same day they made a SNAP transaction(s) at Appellant, and 66.6% made a SNAP transaction at a large grocery, supermarket, or super store either a day before or after making a SNAP transaction(s) at Appellant. This indicates the HHs flagged were able to and did access other authorized food stores.

The median travel distance to an authorized store of the HHs identified in this Attachment was 2.23 miles. Retailer Operations determined that from Appellant's location there is a large grocery at 1.18 miles, a supermarket at 1.45 miles, and a super store within 1.63 miles. The larger stores stock comparable food items at comparable or lower prices than Appellant. Given

the shopping options for recipients in this area, it seems irregular that multiple SNAP expenditures for eligible foods were made in short periods at Appellant.

The owner provided an employee statement and a corresponding statement from a named recipient. The recipient stated he is homeless, cares for his mother, and that his multiple SNAP transactions were to purchase enough food for the month. He amassed a large dollar amount of SNAP as a result of being incarcerated for a time.

Retailer Operations found that the named individual made multiple transactions on a single day and made transactions at Appellant in October 2017 and January 2018. The recipient states he has difficulty traveling but the shopping history shows he did transact benefits at larger better stocked stores, and in February 2018 he used his total SNAP benefits at a supermarket. The owner provided receipts for 18 transactions. These receipts have some description of items purchased. For this named HH the owner included only summary total EBT receipts only for the month of October 2017 with no information about what was purchased.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Retailer Operations determined there was no compelling reason for the household to transact a large dollar amount at Appellant when it went to the larger store with more available food selection and comparable or lower prices. The behavior is suspicious and indicative of trafficking.

The letters from customers focus on the convenient location of Appellant. Some recipients identify as transients living on a nearby beach. The statements do not include HH numbers or EBT card numbers. Retailer Operations conducted an analysis of the HHs it could identify and the record details why it found the shopping behavior was indicative of trafficking.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The receipts advanced also show that the owner was charging ineligible items to SNAP, a clear regulatory violation. **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

Appellant provided no federal or sales tax records, and no business bank records were advanced to support that trafficking did not occur as charged. Thus, the transactions have not been demonstrated by a preponderance of the evidence to be for eligible SNAP foods.

Attachment 2: Listed are 344 transactions that are at least three times higher than the average SNAP transaction amount for this store type in this state. The record supports that 58.5% of the households flagged on this Attachment completed a SNAP transaction at a large grocery, supermarket or super store the same day they conducted a transaction at Appellant, and 84% of households flagged completed a transaction at a those larger store types within two days of a flagged transaction(s) at Appellant.

5 U.S.C. § 552 (b)(7)(E).

The record supports that households conducting large dollar transactions at Appellant had suspicious shopping histories. The owner provided no evidence of the acquisition of eligible foods from vendors to support the SNAP redemptions at Appellant for the review months. The

EBT receipts are not useful to support Appellant's case. The EBT totals are available to the agency via the processor downloads. The itemized receipts presented show that Appellant did transact ineligible lottery purchases and they are not itemized in detail other than for example to list: soda, food, sundry, lottery, beer, Pier Liq, tobacco, deli, ice cream, wine, and liquor.

A store owner who seeks to set aside an agency sanction action must focus its probative efforts on providing evidence by a preponderance that the transaction activity at issue is in fact 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 set forth as suspicious by Retailer Operations in its Charge letter. In this matter, this burden has not been met. Based on the transaction data in the Attachments, an onsite store visit and inventory report, recipient transaction analyses, and consideration of the owner's responses to the charges, Retailer Operations permanent disqualification of Appellant is sustained.

CIVIL MONEY PENALTY

To be considered eligible 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). Appellant produced no evidence that met the requirements to qualify for a trafficking CMP in lieu of permanent disqualification within the regulatory time frame.

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. Retailer Operations used transaction data and other data reports, an onsite store visit report and inventory, and an analysis of household shopping behavior in rendering a finding that violations indicative of trafficking occurred at Appellant. The evidence by a preponderance supports that it is more likely true than not true that program violations did occur at Appellant. Thus, 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 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 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 2, 2018