

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

Primo Grocery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0200873

FINAL AGENCY DECISION

The record indicates that Primo Grocery (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 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 August 18, 2017, 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 “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 orally to the Charge letter September 7, 2017.

Retailer Operations issued its Determination letter November 27, 2017. 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 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 December 1, 2017, the owner appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated December 6, 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 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 § 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 January 2017 through June 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.

- I deny conducting EBT trafficking violations.
- Any violations committed were done by a cashier working at the store when the owner was not present.
- To my knowledge, the Attachment 1 and 2 transactions resulted from legitimate EBT purchases from EBT customers.
- I have accepted FNS for many years. I have always been in compliance with all regulations.
- Considering me for a trafficking CMP is unbearable and financially destructive.
- I provide products to the University Heights Community. I will never jeopardize my compliance with regulation.
- I do not understand how I am found non-compliant when all I do is sell products that qualify under your regulations.

- It will cause a burden to the neighbors who will have to walk various blocks to obtain this service.
- This will cause my business to close as this is a source for 80% of my sales.

ANALYSIS AND FINDINGS

Attachments

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 onsite 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 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.

Attachment 1: Listed are 118 transactions in 52 sets of two or more transactions, conducted by 26 different households (HHs). Appellant's flagged transactions were compared to four nearby small groceries from 0.21 to 0.38 miles distant from Appellant. Appellant had 52 sets flagged, while other stores had 15, 5, 13 and 4 sets flagged. This is suspicious.

Data shows that within a one mile radius of Appellant there are 195 authorized small, medium and large groceries, supermarkets, and super stores. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This supports that there is no lack of larger 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 Appellant.

The record supports that in April 2017, USDA issued an official warning letter to the owner 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 nonfood item in two of four store visits. 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 previous SNAP violations.

Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. Appellant provided no federal or sales tax records or business bank records in support of its contentions. The owner did not provide itemized cash register tapes to support the sale of SNAP foods, or vendor documentation to support the acquisition of eligible stock to back SNAP redemptions at Appellant. No pricing list of eligible foods sold was provided. No recipient affidavits were advanced to support this shopping pattern 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 199 SNAP transactions made by 46 households 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is implausible that transactions add up to the same final total purchase amounts on so many occasions. This indicates that the transactions are more likely than not the result of trafficking.

The record confirms that SNAP households were not dependent on Appellant to meet their food needs as there are other authorized stores nearby. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This is an indicator that access to larger retailers was not an impediment to the HHs flagged.

Contentions:

- I do not overcharge.
- I do not engage in any type of transaction that can classify my business as illegal.

As noted, the owner did not provide a copy of his prices of eligible foods or his sale markup, and no evidence was advanced to support the owner's contention that these transactions were for eligible foods. The retailer's explanations are not sufficient by a preponderance of the evidence to support that Appellant's transactions are more likely than not legitimate.

To allow the owner to be excused from an assessed administrative penalty based on purported economic hardship 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 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.

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). 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 it met the requirements to qualify for a trafficking CMP in lieu of permanent disqualification.

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 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 FNS in the Attachments. This burden has not been met.

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 computer printouts of transaction data and other reports, in addition to onsite store visit observations and an analysis of household shopping behaviors, 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. The evidence by a preponderance supports that it is more likely true than not true that program violations did occur at Appellant. 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 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 19, 2018