

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

RNE Deli Inc,

Appellant,

v.

Case Number: C0200291

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The record supports that RNE Deli Inc. (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 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 the Food and Nutrition Service (FNS).

CASE CHRONOLOGY

By Charge letter dated July 26, 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 established clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for the firm type. The sanction for trafficking is permanent disqualification. Counsel responded to the Charge letter by letter dated August 7, 2017.

Retailer Operations issued a Determination letter dated March 15, 2018. This letter informed Appellant that it 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 March 22, 2018, counsel appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated March 28, 2018. Counsel requested an extension to provide information by email dated April 16, 2018. By email dated April 17, 2018, this office provided an extension until April 30, 2018. Counsel provided information dated April 26, 2018. Upon receipt, the information was provided to Retailer Operations for review. The review was completed June 1, 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). 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) 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 § 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 EBT transaction data during the period of October 2016 through May 2017. The patterns of transaction characteristics indicative of trafficking are:

1. An unusual number of transactions ending in a same cents value.
2. Multiple transactions made from individual benefit accounts in unusually short time frame.
3. The majority or all of individual recipient benefits exhausted in unusually short periods of time.
4. Excessively large purchase transactions made from recipient accounts.

APPELLANT’S CONTENTIONS

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

- The owner did not commit trafficking. The transactions listed in the exhibits are legitimate transactions.
- He does not wish to pay a CMP for something he did not do.
- Based on the definition, there is no evidence of trafficking. The Charge letter does not identify the section in the U.S. Code and the regulations at Title 7 of the U.S. Code are silent that the attachments constitute trafficking.
- The Charge letter is overly broad and does not link the types of transactions to violations.
- My client meets all the criteria for a CMP.
- The EBT business is such an integral part of the store’s business model that the owner would not risk anything that would look like trafficking or otherwise manipulating the EBT model.

- Previously we requested a CMP. RNE Deli Inc. now contests the finding that trafficking occurred at the store. After a careful examination of the store's records it is our position that trafficking did not occur.
- After review of the pertinent records the store engaged in extending credit to its SNAP customers and should face a maximum penalty of a one-year suspension pursuant to the regulations.
- The practice of extending credit to SNAP customers is widespread among small shops all over poor communities. RNE Deli was simply attempting to provide goods to lower-income individuals and their families who were in desperate need at the time they were extended credit.
- People from all over the surrounding community come to shop for grocery needs at RNE Deli. A permanent disqualification, rather than a one year suspension, will almost assuredly put this store out of business and leave a void for grocery items in the neighborhood.
- Although not previously disclosed to FNS, RNE Deli now asserts that it was the extension of credit accounts which caused the trafficking detection algorithm to alert FNS.
- The employees allowed recipients to purchase items on credit and maintained a record of those transactions. At the beginning of each month, the credit beneficiaries would redeem benefits to pay down their debt. Exhibit A is evidence of these credit based transactions.
- Although rudimentary, these logs provide evidence and an explanation as to why there were a high number of above average transactions in a relatively short period of time.
- No trafficking has occurred and the maximum penalty of credit is only 1 year suspension.

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: 5 U.S.C. § 552 (b)(6) & (b)(7)(C). When there are a disproportionate number of transactions that end in same cents values it appears that these transaction amounts are contrived. In the absence of any compelling evidence to the contrary, these transactions are indicative of trafficking.

Based on the onsite visit at Appellant, Retailer Operations determined that the only discernable prices were for some of the hot foods on a large menu board. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Hot foods are ineligible to be purchased using SNAP benefits.

No change is provided with SNAP transactions, therefore there is no incentive to price items in a certain way. The owner provided no price list of the eligible foods at Appellant. No itemized cash register tapes were advanced. No invoices of eligible foods were advanced to support

SNAP redemptions. The owner has not by a preponderance of evidence demonstrated that this Attachment lists legitimate SNAP transactions for eligible foods.

Attachment 2: Listed are 103 transactions in 36 sets of transactions conducted by 16 households (HHs).

Contentions:

- These transactions could be the result of customers ringing up their shopping list in multiple transactions for their convenience and for the convenience of the employee.
- Some of these transactions could be the result of a customer who will purchase items and then return later to purchase additional items they either forgot the first time or later decided they wanted to buy.
- Some customers will fill all of their grocery needs at RNE Deli Inc.
- The store does not have shopping carts because the layout does not permit it however, they do have baskets for customers to use.
- The counter space is cramped so customers ring up their shopping list in multiple transactions for their convenience or for the convenience of the employee who cannot see the large, heavy items on the floor. Other times customers will purchase some items and then go back for additional things they either forgot or later decided they wanted to buy. The commercial businesses around the store include mechanics and body shops and they shop at the store virtually every day for various grocery items.

Retailer Operations found that at the time of the store visit the only bulk items in stock were approximately 10-12 boxes of Top Ramen, Bowl Noodle and Cup of Noodle soups in various flavors. At the time of the store visit almost all of the eligible food stock consisted of inexpensive, single serving, packaged foods, canned foods, snack and accessory foods as well as some deli meats and cheeses, and deli salads. The only fresh fruits and vegetables were onions, potatoes, and lemons. Appellant lacked high dollar inventory such as fresh meat and/or food bundles.

Appellant had a significant quantity and variety of ineligible items to include: alcohol, tobacco, paper products, health and beauty aids, cleaning products and hot foods. The firm is equipped with a kitchen area that has a large grill where customers can purchase hot and cold prepared food items. There is a large menu board posted on the wall listing a variety of custom prepared items along with the prices. Appellant also had a food bar with different hot items where customers could self-serve hot foods to go.

The record shows that within one mile of Appellant there are eight other authorized retailers of varying store types including six convenience stores, one small grocery store and one super store. The data shows that within two days of conducting a transaction at Appellant, 81% of the flagged HHs on this Attachment conducted a SNAP transaction at a large grocery, supermarket or super store. Thus, recipients had access to and did use other shopping options.

The onsite report indicates there were no handheld baskets or shopping carts to assist recipients with the collection and movement of large volumes of items in the store that might total to high

dollar amounts. The claim that the store has shopping baskets for customers was not supported by any evidence, such as store photos or a receipt of purchase of said baskets. As such this claim cannot be validated. The enclosed checkout area had about 18 inches of space to place items and is fronted by a reach-in display case, making the logistics of large dollar transactions challenging. The owner did not provide attestations from recipients regarding the shopping pattern contented in this Attachment. As such, the owner has not by a preponderance of the evidence demonstrated that these transactions are the result of the exchange of benefits for SNAP eligible foods rather than trafficking.

Attachment 3: Listed are 25 transactions conducted by five households whereby the majority or all of their benefits were exhausted within 5 U.S.C. § 552 (b)(6) & (b)(7)(C) hours. When compared to five nearby convenience stores Appellant was the only store that had transactions on the parameters of this Attachment.

Contentions:

- The store sells grocery items, fresh foods and has a cold cuts counter which sells a host of meat products and sandwiches.
- There is one cash register and one door for customers to come in and out.
- Three employees work at the store and there are at least two employees on duty at any given time.
- The owner works around the clock and is fully responsible for all aspects of the store.

On page 4, paragraph 1 of counsel's original response to the Charge letter he stated: "The store does not engage in any sort of EBT manipulation. Mr. Haddad and his employees do not extend credit to customers, as many other stores do. The EBT business is such an integral part of their business model that he cannot afford to do anything that would look like trafficking or otherwise manipulating the EBT model and affect the stores eligibility. RNE Deli Inc. is a honest business. The owner takes integrity very seriously."

On review, counsel raised the contention that the transactions were the result of Appellant extending violative SNAP credit. To support the claim of credit, photos of credit lists were advanced. Thus, counsel has provided two different and conflicting responses regarding this matter. In the original response to the Charge letter the wording is very clear that the owner and his employees have not and would not manipulate the EBT program data nor do they extend credit. However, after the retailer was unable to provide sufficient evidence to explain the suspicious transactions in the Charge letter and was sanctioned with a permanent disqualification, the contention was changed to state that the transaction activity is a result of credit accounts which carries a one year disqualification. The two positions offered to explain the transactions are in opposition, and as such do not bolster the credibility of the owner.

The photo evidence of credit consists of seven copied pages. One photo shows five first names with columns and some totals. Listed are no SNAP ID numbers, no full names, no addresses, no dates and no way to track these five names to transactions in the Charge letter. One photo shows the name Eric 2017 with seven columns and amounts. Again, there is no way to know if this individual is a SNAP recipient or if he conducted any of the suspicious transactions listed on the

Attachments. Four photos are apparently of the same shot of a list posted on the wall with many amounts struck through. The names appear to be first names only and no dates are obvious. There is another photo with five one word names, no dates, no addresses and no SNAP ID information.

Retailer Operations determined that below the names are rows of amounts with some totals. Some columns indicate “p/d” or presumably paid. There are also unpaid columns. The copies of the pages hanging on the wall also have columns with a heading of an individual’s name followed by amounts. The copies on the wall are difficult to read because the majority of them have been crossed out or scribbled through, leading to the possibility that these are paid accounts. Retailer Operations concluded that these photos lacked sufficient detail to validate that credit accounts more likely than trafficking resulted in the suspicious transactions at Appellant.

At the time of authorization each retailer is provided a USDA SNAP training guide that states that credit and trafficking are not allowed. The training guide is available online and in many languages. This guide states that SNAP customers must pay for their purchases at the time of sale and that a retailer may not accept SNAP benefits as payments on credit accounts. The training packet includes:

- A video and book that explain the SNAP rules.
- Information that the store owner is responsible for carefully reviewing the program rules and making sure all employees fully understand these rules.
- Information that failure to follow the rules can result in disqualification, fines, civil and/or criminal action.

Enclosures provided by FNS to retailers when authorized include:

- A SNAP Permit
- SNAP Training Guide for Retailers and a training video
- Report Abuse of the SNAP Poster - **MUST BE POSTED IN YOUR STORE**
- We Accept SNAP Benefits - Window Sticker and Poster
- Using SNAP Benefits Poster
- Dos and Don’ts for Cashiers/Penalties for Violations of the SNAP: Double-sided sign
- EBT Fact Sheet
- From the “SNAP EBT Dos and Don’ts card (FNS-136, included in the authorization package) “Do not accept SNAP benefits (EBT) as payment on credit accounts.”
- From the SNAP Training Guide for Retailers: “SNAP customers must pay for their purchases at the time of sale. You may not accept SNAP benefits as payments of credit accounts. You may not hold customers’ SNAP EBT cards or card account information at your store for future use.”

Thus, the owner was provided multiple and redundant resources through which a thorough knowledge of program rules and requirements could readily be obtained.

When the owner signed the certification to become a SNAP retailer he confirmed his understanding of and agreement to abide by program rules and regulatory provisions. He agreed to accept responsibility on behalf of the firm for violations of the SNAP including those committed by any of the firm’s employees. These include violations such as accepting SNAP

benefits as payment on credit accounts or loans and trafficking. The certification is clear that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal or disqualification from the SNAP. Despite agreeing to abide by SNAP rules and regulations, and initially stating without reservation that credit was not extended at Appellant, the owner now claims he allowed credit accounts, a violation of SNAP regulations and rules.

Upon review, the evidence provided for the credit accounts cannot be accepted as sufficient by a preponderance that credit rather than trafficking accounts for the suspicious transactions at Appellant. There is insufficient information to identify the names as SNAP recipients. There are no dates next to any of the amounts listed under each name therefore there is no way to cross reference that these possible credit purchases took place during the review period and correspond to transactions cited in the Attachments. None of the photos include any evidence as to what was supposedly purchased by the individuals on credit. There is no way to determine from the lists if the items allegedly purchased were SNAP eligible foods.

Credit accounts have long been claimed by retailers as a defense for trafficking in an effort to garner a lesser sanction than permanent disqualification. Therefore, to refute charges of trafficking, the owner must provide adequate proof that credit accounts existed at the time the suspicious transactions occurred so that Retailer Operations can compare such proof with the transactions listed in the letter of charges. If an owner is not able to account for all of the suspicious EBT transactions for which the owner has been charged, the determining office must evaluate the remaining transactions and determine whether trafficking has occurred. If the retailer does not provide adequate proof of purported credit accounts, the appropriate penalty is permanent disqualification.

Attachment 4: Listed are 189 transactions conducted by 50 different households for amounts that exceed the average transaction amount for the same store type in the same state by more than three times. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. This is unusual.

Contentions:

- The store is a grocery and convenience store located on a very busy and crowded street in a diverse neighborhood. There are a lot of residential and commercial properties surrounding the store and the location is busy with people coming in and out all day.
- The store is open 7 days a week from 7 am until 10 pm Monday through Saturday and 8 am until 9 pm on Sunday.
- The customers are largely of Latino and African American descent and they shop at RNE Deli Inc. for all of their grocery needs. These cultures typically have large families and they cook in quantities and come to shop at the store to purchase items in bulk.
- These logs provide an explanation as to why there were a high number of above average transactions in a relatively short period of time.

SNAP authorization is an administrative privilege, granted upon proof of eligibility and continued proof of compliance with the governing laws and regulations. It is Appellant's burden to demonstrate that it has not engaged in SNAP benefit trafficking by presenting a preponderance of evidence of same. An Appellant that seeks to set aside an agency sanction

must focus its probative efforts on providing 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 set forth as suspicious in the Attachments provided with the Charge letter. This burden has not been met.

While some households may have conducted legitimate SNAP transactions at Appellant, insufficient evidence was presented to support this argument. The owner provided no vendor invoices of eligible items acquired in inventory to support Appellant's SNAP redemptions. The owner provided no itemized cash register tapes for the review months. No pricing information was advanced. No SNAP customer statements were provided to support that the transactions listed were for eligible foods. No federal business tax returns or state tax filings were advanced, and no banking statements were provided. Thus, the owner has not provided a preponderance of evidence that the transactions on the Attachments are for eligible foods rather than the result of trafficking.

Ownership contends that a SNAP disqualification will have a negative financial impact on Appellant's business. It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. 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 the imposition of such penalty. To allow the owner 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, the contention that the firm may incur economic hardship based on the assessment of a permanent disqualification does not provide any valid basis for dismissing the sanction.

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 store owner failed to submit any documentation to show that he met the four criteria in order to qualify for a CMP. While counsel listed all four criteria in his original response and made the statement: "my client does meet all of the statutory requirements" no evidence was provided to support the claim. Accordingly, Retailer Operations determined that Appellant was not eligible for a trafficking civil money penalty.

CONCLUSION

Retailer Operations' analysis of Appellant's SNAP 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. Based on empirical data and in the absence of a preponderance of evidence of the legitimacy of the transactions listed on the Attachments, by a preponderance of the evidence, it is more likely true than not true that violations did occur as charged by Retailer Operations. Retailer Operations denial of a trafficking CMP was also proper per the applicable regulations. Therefore, the decision to impose a permanent disqualification against Appellant is sustained.

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 a judicial review of this decision. 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 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

June 12, 2018