

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

S & T Mini Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0221992

FINAL AGENCY DECISION

The record supports that the S & T Mini Market (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 October 24, 2019, Retailer Operations informed the owners 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 record shows that one owner responded by telephone on October 29, 2019. The owners responded to the Charge letter in writing by letter dated October 31, 2019.

Retailer Operations issued a Determination letter dated November 18, 2019. 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 to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program to prevent violations.

By letter dated November 21, 2019, one owner appealed Retailer Operations' determination, and requested administrative review. The appeal was granted by letter dated December 4, 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 credible, 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: "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 March 2019 through August 2019. The patterns of transaction characteristics indicative of trafficking are:

- Multiple transactions were made from individual benefit accounts within a set time period.
- Large transactions 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 presented, including any not referenced.

- The owner called on 10/25/2019, and he stated that the transactions might have been completed by an employee who no longer works at the store. He stated that he understands that as an owner he is still responsible for the operation of the store. He stated that he would submit training material as he believes that his store may qualify for a CMP.
- On my own and on my firm’s behalf I deny any wrongdoing. I am running this business on absentee owner bases and as your records will indicate my firm has been affiliated with your department since 1998. This is the first time my firm got this notice or warning of any sort.
- We have always tried to follow the rules and regulations and provide sound training and proper instructions to the new cashier staff members on their arrival as inscribed by SNAP regulations. They can only start their shift after they have read thoroughly and clearly understood the Snap Training log/guide. A Copy of this document is posted on the front wall near the cashier counter so that there should be no confusion arising regarding the rules and regulations for customers.
- According to our ledger all of the transactions (marked in yellow and pink) are from the shift of just one employee but unfortunately even on numerous attempts we were unable to contact him since left the job on 8/13/2019 without any prior notice. He has been working for our store since January 2018.

- Unfortunately due to a fire that occurred on 26 June 2019, all the receipt records were lost, therefore the details of items bought against corresponding transaction cannot be verified. The transactions (marked in pink) were done after store closing hours are in itself are deemed liable for fraud charges against our firm and is against our established rules of operation.
- This doesn't mean that we are accusing our employee for this misdemeanor as this matter needs to be further investigated to prune [sic] the burden of responsibility. I can assure you that we and the store management have not directly/indirectly to our knowledge benefited from any SNAP violations. We are ready to cooperate and assist in any way deemed necessary in lieu to your current investigation into this matter.
- I request you drop these charges on the base that I was not given any prior warning by your department. Just the details of these transactions solely does not establish any evidence that the store owners or the firm has directly benefited from these suspected transactions/violations and this needs to be investigated either by the details of the household listed in the transaction summary your department provided. The employee listed to whom we are unable to make contact with.
- If you do not find our early request viable, we request a CMP. Our firm meets each of the 4 criteria listed in your regulations some of the documents enclosed are original copies but are water damaged due to the fire that occurred are easily readable.
- Our business had a fire incident on 06/26/2019 which destroyed our back room. All the records and inventory stock also got destroyed.
- All of our employees are trained according to the FNS regulation guideline. Employee training logs also available. All required wall signage in place.
- Total disqualification will have huge negative impact on the business revenue and will add to our financial hardship. This might lead us to completely close down the business.

The owners provided two readable employee-signed SNAP training confirmation documents, a copy of a USDA poster, some unreadable fire damaged documents, a copy of pages from the USDA SNAP retailer training guide, a copy of SNAP pocket guidelines, and copies of pink highlighted transactions from Attachment 1.

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 38 transactions in 17 sets conducted by eight unique households (HHs). The store is typed as a convenience store. The data shows that there are 12 authorized convenience stores, one medium grocery, and one supermarket within a one mile radius of Appellant. Appellant had more data sets flagged on this Attachment than one nearby convenience store comparator that had 0 data sets flagged on this scan for the same timeframe. The data also supports that 62.5% of the HHs listed on this Attachment used SNAP benefits at a supermarket or super store within one day of making a transaction(s) at Appellant. Thus,

recipients did access and use larger authorized retailers to transact benefits. Retailer Operations determined that Appellant's transaction activity was unusual and suspicious.

Much of the stock seen in the FNS photos taken during the onsite store visit of August 5, 2019, appears to be accessory foods such as snacks and beverages. There were four observed fresh bananas and no other fresh produce. There were no fresh meats or poultry, or specialty or ethnic foods seen. Retailer Operations found that there were no promotional, special, bulk, or package deal offers advertised at Appellant. There were some frozen foods but many of the freezer and refrigerator units appears empty or nearly empty. The checkout area was restricted and closed-in by a sliding security window. There was one cash register, and one point-of-sale device. There was no conveyor belt to expedite high dollar or rapid consecutive purchases such as transaction numbers one and two. The store visit report notes that there were no shopping carts or handheld baskets for recipients to transport food items that would total to the high dollar transaction amounts listed on the Attachments. Ineligible items seen for sale included: lottery tickets, tobacco products, alcohol, mobile phones/phone cards, automotive products, health and beauty aids, paper goods, and cleaning products.

No recipient statements were provided to support that recipients shopped at Appellant multiple times a day or in short periods for eligible foods. No vendor invoices were provided to support that Appellant stocked adequate eligible foods to cover its SNAP redemptions for the review period. While this could be the result of a fire, no evidence of the fire was provided to support this contention. No federal or state business tax returns, or banking statements were provided.

Attachment 2: Listed are 95 transactions conducted by 22 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 data shows that 82 percent of the households flagged on this Attachment conducted a transaction(s) at a supermarket, or super store within one day of making a transaction(s) at Appellant. Appellant had more flags on this Attachment as compared to one nearby same type convenience store which had 47 transaction flags. Appellant had a 14.5% higher SNAP average transaction amount than convenience stores in Sacramento County for the same timeframe.

The onsite store visit report confirms that Appellant did not sell fresh meats, seafood, produce other than bananas, have an onsite bakery, specialty and ethnic items, or staple food items that would reasonably classify it as anything but a convenience store. The store report indicates there were no handheld baskets and no shopping carts. Retailer Operations found it more likely than not that the large dollar transactions were indicative of trafficking.

The data supports that there are authorized stores nearby that had comparable or better staple food stock, and that households listed on the Attachments did utilize these other retailers. Retailer Operations conducted a review of several HHs' shopping patterns at Appellant. The data shows that HHs made transactions at supermarkets and super stores on dates proximate to or on the same date as conducting lower dollar SNAP transactions at these larger stores. This is suspicious, particularly as Appellant carried limited staple foods.

The regulations requires FNS to consider any prior warnings and evidence of a firm's intent to violate when determining a sanction. It does not require FNS to give such warning when

charging a firm with a violation. The regulations at 7 CFR § 278.6(a) state 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, and that such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through, inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system. As noted herein, Appellant has the burden of providing credible, 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. 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. No vendor invoices of eligible items acquired in inventory that might cover Appellant's SNAP redemption volume were provided. The owners provided no itemized cash register tapes for the review months. No listing of eligible foods with pricing was advanced. No federal business tax returns or state tax filings were provided, and no business banking statements were submitted. No recipient affidavits were offered as evidence to support shopping behaviors at the firm. Thus, the owners have not provided a preponderance of evidence that the transactions on the Attachments are for eligible foods rather than the result of trafficking.

The owner who initially called Retailer Operations did not deny that the violations may have occurred. He admitted he is an absentee owner, and that an employee may have violated the SNAP regulations. The owners of Appellant are liable for all violative transactions handled by either paid or unpaid store personnel. Regardless of who the store owners 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 owners choose to use to conduct 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.

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 SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to a firm resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would undermine 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 for similar violations. Therefore, that the firm may incur economic hardship based on the assessment of an administrative sanction does not provide any valid basis for dismissing the penalty imposed.

CIVIL MONEY PENALTY

The regulations at 7 CFR Section 278.6(i) specify the criteria for a firm's eligibility for a trafficking CMP in lieu of permanent disqualification. The four criteria listed at the cited regulation are as a whole, specifically identified as a minimum standard that firms must meet in order to be eligible for CMP consideration. The owner did provide several documents as evidence that staff had been trained on the SNAP video and USDA training guide. Retailer Operations determined however, that the submission did not meet all four regulatory criteria of substantial evidence to support a trafficking CMP in lieu of permanent disqualification.

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 households' shopping analyses that provided substantial evidence that the questionable transaction patterns during the review period had characteristics that are consistent with trafficking violations in SNAP benefits.

Based on empirical data, and in the absence of evidence presented by Appellant as to the legitimacy of the transaction patterns, the preponderance of the evidence supports that violations did occur as charged by Retailer Operations. Retailer Operations denial of a trafficking CMP was also proper per the applicable regulations. The owners did not meet the four regulatory criteria of a substantial submission of evidence to warrant a trafficking CMP. 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 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 owners reside or are 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 15, 2020