

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

Saba Express,

Appellant,

v.

**Office of Retailer Operations
and Compliance,**

Respondent.

Case Number: C0228582

FINAL AGENCY DECISION

The record supports that Saba Express (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 Office of Retailer Operations and Compliance (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 20, 2020, 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 in writing May 22, 2020 that included

an extension request and proof of third-party representation. By letter dated May 26, 2020, Retailer Operations granted the extension requested by counsel. The extension letter was delivered by email to counsel on the 26th, as well by traceable mail delivered to counsel on May 27, 2020. This extension reply clearly states: “We hereby extend the deadline to respond to that letter to June 22, 2020. (Note: The time to request a civil money penalty in lieu of permanent disqualification and to provide the documentation to support such a request has not been extended.)” The record shows that no reply was received from counsel by the June 22, 2020 due date.

Retailer Operations issued a Determination letter dated June 23, 2020. 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 June 24, 2020, counsel appealed Retailer Operations’ determination, and requested administrative review. The appeal was granted by letter dated June 29, 2020. Counsel sent this office an email June 29, 2020, noting that he received the administrative review acknowledgment letter. Counsel provided no additional information by the July 20, 2020 deadline. By email dated July 29, 2020, counsel requested an update.

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 July 2019 through December 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 by telephone and in writing, including any not referenced.

- If eligible, please provide my office with a CMP to present to my Client for acceptance.
- Saba Express, LLC denies the Retail Vendor allegations of violations of the SNAP. The vendor hereby requests a stay of the order to allow the permit holder to operate its business until such time as this review is heard.
- The retailer was confused by the charges against him, as the transactions outlined in the charge letter were legitimate.
- The basis for this appeal is there is no substantive, reliable, probative evidence presented regarding any of the alleged violations to my Clients Knowledge, and avers that all sales

have been conducted with the appropriate care and usage as outlined by the SNAP program. All items sold have been made through SNAP and were for authorized foods purchased through the retailer.

- Retailer states that if a stay of the order is not granted, the business will suffer irreparable harm and be forced to close its doors and will lose its customer base. Retailer hereby requests a stay of the Termination without further evidence of wrongdoing or improper use by Applicant.
- At all times prior to and after the denial letter, Applicant has always maintained that it has no knowledge of the transactions of which it was charged, and no knowledge of any wrongdoing of Applicant or its employees.
- As applicant had requested an extension of the time required to respond to said charges, on May 26th, applicant requested and received an extension to respond of what was understood to be 30 days. Applicant's Counsel thereafter marked the date as the 26th of June for which to respond after receiving confirmation of the delivery date of May 27, 2020.
- Applicant requests that its Letter of Denial of the underlying Charges be submitted timely, but for the mistake in scheduling and to allow Applicant to continue processing through its location until a final determination can be made.
- Applicant is unduly burdened by the termination of its ability to accept any SNAP benefits until such time, and would further be injured if unable to provide the retail sales at its location through EBT/SNAP customers, one that is the primary customer base in the area.
- I understand that the review would not be completed until after the submission of materials would be made, but this review is based on a mix up of calendar dates to respond to the initial communication requiring a denial of the alleged violations. I have sent him a formal denial and communicated it by phone during our initial contact in the beginning of June.
- This termination was only due to a failure to respond, but that was due to a miscommunication between my Office and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at the time I called for the time extension.
- I have sent a certified letter denying the allegations, and the appeal is of the timing of that letter. Other than the obvious mix up, the letter was post marked the day me and the agent spoke. On that day, he gave me 30 days to respond. I made a calendar date to respond the week after I returned. That was the week that we received the termination notice. The respond by date of the letter did not match the date we discussed over that phone call, which was for July 26 and not July 20th.

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 61 transactions in 23 sets conducted by 11 unique households (HHs). The onsite FNS-contractor store visit report supports that Appellant is a convenience store. Staple and accessory food items were displayed with no advertised meat/grocery bundles or

package deals. No price list was advanced by the owner, nor can a wide range of prices be discerned from the onsite store photos, which feature many accessory foods. The staple food stock included among other items, a selection of canned and packaged goods, hot dogs, bacon, eggs, juices, bread and some dairy varieties.

The checkout area is via a small cleared counter top fronted by shelves of candy and surrounded by other products. There is not much space to set numerous items for processing that might total to high dollar amounts for eligible foods. The onsite store visit report supports that there were no handbaskets or shopping carts available for customers to assemble large numbers of items for high amount purchases. No optical scanning tool was noted. The onsite visit report indicates the store did not accept telephone orders, and did not offer delivery service. The store stocks many nonfood SNAP-ineligible items such as: lottery tickets, tobacco products, health and beauty aids, cleaning supplies, paper goods, automobile products, and miscellaneous items such as hats, gloves, and shirts.

The data shows that within a one mile radius of Appellant, larger SNAP-authorized stores included: two medium grocery stores, one supermarket, and one super store. Thus, beneficiaries have available other stores located within a reasonable distance of Appellant, which likely had comparable or better staple food stock and prices than Appellant. The data supports that 82% of the HHs listed on this Attachment used SNAP benefits at an authorized supermarket or super store within one day of making a transaction(s) at Appellant.

Appellant had more data sets flagged on this Attachment than four nearby convenience store comparators, two of which had zero data sets flagged on this data pattern for the same timeframe, one store had five flags, and another had one flag. Retailer Operations expected that other nearby convenience stores would have a similar number of flagged data sets as they would likely be frequented by the recipients who made transactions at Appellant. That was not the case.

No vendor invoices were provided to support that Appellant stocked adequate eligible foods to cover or approach its SNAP redemptions for the review period. No federal or state business tax returns, or business banking statements were provided. No itemized cash tapes were advanced to show what items were purchased during the review period. Retailer Operations determined that the owner failed to provide evidence to explain the unusual and suspicious patterns of SNAP redemptions listed on this Attachment. A stated denial of the charges against the firm is not proof that trafficking did not occur.

Attachment 2: Listed are 105 transactions conducted by 29 unique HHs for amounts that exceed the average transaction amount for the same store type, in the same state, by three times or more. These are large transactions based on the observed store characteristics and recorded eligible food stock at Appellant. Appellant had more flags on this Attachment as compared to four convenience stores within a one mile radius. Appellant also had the highest average SNAP dollar transaction amount of these comparator same type stores.

Appellant had 38% higher SNAP dollar volume amount than authorized convenience stores in Cuyahoga County for the same timeframe. Appellant's average SNAP transaction amount was 28% higher than the average transaction amount of convenience stores in the same County.

Given the limited staple food stock and physical characteristics of Appellant, Retailer Operations found it more likely than not that the large dollar transactions were indicative of trafficking.

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 at Appellant, while conducting lower dollar SNAP transactions at these larger stores. The data shows that 69% of the HHs flagged on this Attachment conducted a transaction(s) at a super store or supermarket within one day of making a transaction(s) at Appellant. This is unusual.

Retailer Operations' extension letter clearly stated the specific date information was due in response to the Charge letter, yet counsel did not reply timely. Retailer Operations concluded that Appellant did not adequately demonstrate that the transactions in the Charge letter were legitimate via the submission of credible evidence. On review counsel was afforded another opportunity to provide information in support of Appellant's denial of the violations, however, no evidence was advanced. While counsel requested a stay of the permanent disqualification imposed by the determination letter, such stays must be granted by an appropriate court.

The owner advanced no itemized store cash register sales tapes for the review months. No listing of eligible foods with pricing was submitted. No vendor invoices of eligible foods to support the SNAP redemption totals were provided. No federal or state business tax returns or filings were provided. No business banking statements were submitted. No store photographs, no recipient statements, or other evidence was provided to support Appellant's denial of the charges of trafficking.

Based on the patterns of the transactions listed in the Charge letter, the unverified volume of eligible food inventory of Appellant, the number of authorized stores in the area, the shopping patterns of households, the high SNAP dollar volume redeemed at the store, and other analysis, Retailer Operations determined that it was more likely than not that the transaction patterns on the Attachments were the result of trafficking, and not the legitimate sale of eligible foods.

On review it is found that while some households may have conducted legitimate SNAP transactions at Appellant, insufficient evidence was presented to support this argument. 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.

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. 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. Counsel's contention that the permanent disqualification, he terms a "termination" was only due to a failure to respond, and that was due to a miscommunication, is not correct. The sanction was imposed as a result of the EBT transactions that establish clear and

repetitive patterns of unusual, irregular, and inexplicable activity for the type of firm. A listing of the transactions in two data patterns was provided to the owner with the Charge letter. A stated denial of the charges against Appellant does not constitute a preponderance of evidence that the charged trafficking did not occur. Appellant has not met the burden of supporting by a preponderance of the evidence, that the administrative sanction should be reversed.

CIVIL MONEY PENALTY

The regulations at 7 CFR Section 278.6(i) detail the four criteria for a firm's eligibility for a trafficking CMP in lieu of permanent disqualification. The listed criteria 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 not provide evidence for consideration for a trafficking CMP during the required timeframe. According to 7 CFR §278.6(b)(1), this information and evidence shall be submitted within 10 days. This information was clearly stated in the Charge letter, and reiterated in the extension letter emailed and sent to counsel. Thus, Appellant is not eligible for consideration for a trafficking CMP.

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 evidence that the Attachment transaction patterns had characteristics that are consistent with trafficking violations in SNAP benefits.

Based on this data, and the lack of evidence presented by the owner as to the legitimacy of the transaction patterns, the preponderance of the evidence in the record supports that SNAP violations did occur as charged by Retailer Operations. Retailer Operations denial of a trafficking CMP was also proper per the applicable regulations. The owner did not submit substantial information to support consideration for a trafficking CMP within the regulatory timeframe. The decision to impose a permanent disqualification against Appellant is herein 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 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 delivery 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

August 14, 2020