

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

Sam's Cut Rate Food & Liquor,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0217090

FINAL AGENCY DECISION

The record supports that Sam's Cut Rate Food & Liquor (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 June 4, 2019, 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 made a FOIA request dated June 11, 2019. The agency replied to the FOIA by letter dated July 17, 2019. The owner, via counsel, responded to the Charge letter with information dated November 17, 2019.

Retailer Operations issued a Determination letter dated November 26, 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 timely to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program to prevent violations.

By letter dated December 8, 2019, counsel appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated December 26, 2019. Counsel sent this office an email dated January 14, 2020, requesting an extension to provide information. This office replied by email that same date, and granted an extension. Counsel provided a brief by email on January 28, 2020. Retailer Operations provided this office its assessment of the brief on February 7, 2020.

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 Section 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 August 2018 through January 2019. The patterns of transaction characteristics indicative of trafficking are:

1. Multiple transactions were made from individual benefit accounts within a set time period.
2. The store conducted EBT transactions that are large based on the observed store characteristics and recorded food stock.

APPELLANT’S CONTENTIONS

In reaching a decision, consideration has been given to all contentions, including any not specifically referenced.

- Any attempt to allege trafficking based upon its program which analyzes raw transaction data can only be based upon illegal, arbitrary and capricious standards which violate both procedural and substantive due process guarantees set forth in the Constitution of the United States.
- The Department hasn’t proffered any authority which has found that the system and its inherent conclusions of law and fact are even credible enough to be admitted into evidence, let alone be sufficient to establish the Department’s burden of proof that trafficking has occurred.

- The Department’s use of this type of untested electronic data is a grievous evidentiary error which must not be allowed in cases of debarment which effectively puts participants out of business.
- The assertion that disclosure of the subjective basis of the conclusion that trafficking has transpired would compromise the investigative process is pure sophistry. USDA must lay bare its process to demonstrate its validity. Doing so would lead to nothing but a real deterrent to fraud when unscrupulous retailers realize they can’t escape a valid, tested system which is based upon legitimate assumptions, not hidden subjective conclusions.
- The Department’s response to my FOIA request did include copies and associated photos of not one but two undercover investigations of my client’s store. The investigator attempted to purchase ineligible items and eligible items in each visit. My client refused to process ineligible items on both attempts! The investigator’s report of the case reached the following conclusion: “In the absence of indications that the subject store violates program regulations the investigation was terminated and the case is closed.”
- This investigation occurred just a year prior to the test period. It is unconscionable for the Department to attempt to debar a retailer without corroboration when a recent prior investigative action found that my client had not engaged in trafficking!
- The Department’s process denies my client due process by delaying its charging letter more than three months after its test period expired. A significant method of refuting electronic analysis charging of trafficking is the review of video system data to prove actual sales which match those alleged. Most if not all small to medium sized retailer video systems only store data for 14 to 21 days. Therefore, the Department has virtually illuminated [sic] the best avenue of defense by its delay in charging.
- This case lacks the quantum and quality of evidence which is common in debarment allegations. Both allegations are unsupported by normal investigative techniques including undercover “buy” of cash back, surveillance, or witness interviews. The conclusions of the system draw from raw data are subjective and not demonstrated to be valid upon which reasonable findings of fact.
- The Department failed to corroborate purported trafficking in light of its own recent investigation which affirmatively disproved it. Basing a lifetime debarment upon unreliable and uncorroborated raw data would be a gross injustice.

Counsel advanced: copies of a USDA investigation report with two negative passes at Appellant, six pages of sample check-out tapes, copies of the USDA case analysis document.

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 37 transactions in 17 sets conducted by 11 unique households (HHs). Multiple transactions within a set time period are a method stores use to avoid high dollar transactions, and are indicative of trafficking.

Contentions:

- Only the first 6 sets occurred on the same day. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The remaining transactions were on separate days. This miniscule number of such transactions becomes statistically insignificant given the thousands of reported sales occurring within the sample period. They certainly are not indicative of the characteristic “trafficking” incidents wherein multiple transactions occur 5 U.S.C. § 552 (b)(6) & (b)(7)(C) while the customer is still standing in line.
- It is far from uncommon for customers to return within the same day or the next day to purchase more items necessary for unexpected needs, forgotten items, and most importantly items that couldn’t be carried in a single trip due to the lack of personal transportation or space on public transportation due to the area where the store is located.
- It is not at all unusual for low income recipient families to allocate proportional shares of benefits among themselves. Hence each may have their own items which are purchased as a group, but imputed to the SNAP recorder separately in an effort to track proportional shares of the benefits.
- Retailers can’t even keep track of family sales due to the lack of identification on the participant cards. Given the low number of such transactions and the lack of short duration purchases, no rational conclusion can be drawn which implicates the client in any inappropriate activity. The Department has not established trafficking by a preponderance of evidence.
- The conclusions of the system draw from raw data are subjective and not demonstrated to be valid conclusions upon which reasonable findings of fact and ultimate conclusions may be based. Most importantly, the Department failed to corroborate purported trafficking in light of its own recent investigation which affirmatively disproved it.

Based on an onsite store visit, Retailer Operations determined that Appellant stocked nonfood SNAP-ineligible items that included: alcohol, tobacco, health and beauty aids, paper goods, cleaning products, houseware, gift items, party goods, and miscellaneous items. Eligible items stocked included: canned items and packaged goods. Much of the inventory appears to be drinks and other accessory foods including snacks, candy, and condiments. According to the store inventory report, Appellant had no hand baskets or shopping carts. Therefore, assembling and carrying large numbers of items as indicated by the cash tapes advanced, appears to be logistically challenging. The owner advanced no vendor invoices to support its stock of eligible foods. No recipient statements were provided to attest to shopping patterns at Appellant.

Upon review of the register receipts submitted by counsel, Retailer Operations did not find these compelling as to the acquisition of eligible items. The 29 receipts are not itemized as to what was purportedly acquired listing only “Food Stamp,” some have cash as tender, some have Food Stamp as tender, and none of the receipts have the store name or address as indication that these were generated at Appellant. The only other designation on the tapes is “Liquor,” listed on separate tapes. It is unusual that the tapes do not show ineligible items as well as the Food Stamp designation for items purportedly acquired.

Retailer Operations reasoned that if factors such as: returning for forgotten items, meeting unexpected needs, the lack of transportation, and use of public transportation, given the location of the store were impacting the SNAP transactions at Appellant, these same factors would likely affect nearby same type stores similarly. Yet, other authorized stores did not seem to be similarly impacted by these factors. This is irregular.

Retailer Operations compared Appellant's transactions during the review period with three other convenience store located within a one mile radius of the store. The comparison stores were chosen based on the short distance from Appellant, and food stock similarities based on store visit photos. Appellant's total SNAP dollar volume was 21% to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) higher than the dollar volume at the comparator stores. Appellant's average SNAP transaction amount was 74% to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) higher than the same type comparator stores for the same timeframe.

Retailer Operations determined that Appellant had more sets of transactions flagged on this Attachment's parameters than a the comparator stores located less than a mile away from Appellant. Appellant had 17 flagged data sets, while two comparator stores had zero data sets flagged, and one had one set for the same timeframe. Thus, Appellant's activity was unusual and suspicious.

No customer statements were advanced to support that large families shop at the store, have no transportation, go to the store multiple times a day, or that the transactions listed are for eligible foods. No cash register tapes were provided that list eligible foods sold at Appellant. No federal or state business tax records were advanced. No business banking records were provided. It is Appellant's burden to provide credible, relevant evidence to rebut the trafficking charges. That burden has not been met.

Attachment 2: Listed are 237 transactions conducted by 79 unique HHs, that are large based on the observed store characteristics and recorded food stock. The Attachment lists 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 75 percent of the households flagged on this Attachment conducted a SNAP transaction(s) at a supermarket, or super store within one day of making a transaction at Appellant. Appellant's average SNAP transaction amount was 51% higher than the same store type in the state, and 48% higher than the same type store in Cook County. Retailer Operations determined that Appellant's SNAP dollar volume was 31% higher than the average SNAP transaction dollar volume of convenience stores for the same timeframe in the state of Illinois. Appellant had many more flags on this Attachment as compared to three nearby convenience store which had 7, 67, and 1 transactions flagged respectively for the same time period. Retailer Operations found that this data was indicative of trafficking.

Contentions:

- My client is being forced to prove his innocence of the allegations. No retailer can effectively mount a defense unless it knows how the system's data is being used to target them. The subjective assumption process must be disclosed for a fair and open examination of its reliability and trustworthiness. The Department must disclose not only

how it determined what is a “large transaction,” and what is “store characteristics and recorded food stocks,” but how such transactions amount to trafficking.

- I believe that a false flag of data emerged due to: 1) the very low threshold of 5 U.S.C. § 552 (b)(6) & (b)(7)(C); 2) the equally low high dollar amount of merely 5 U.S.C. § 552 (b)(6) & (b)(7)(C); and 3) inclusion of one abnormal month (January) in the analysis.
- I have compared the “Review Period Redemption” chart data found in the Case Analysis to the alleged transactions. The allegations identified a mere 24 transactions ranging from 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The 24 total 10% of the 237 alleged “large” transactions. However, the 24 transactions are a mere .01% of the total 2,271 transactions recorded during the six month test period.
- The allegations identified 213 transactions ranging between 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as being “large.” That compromises 90% of the 237 “large” group and .094% of the total recorded SNAP transactions for the entire period.
- The total transactions of 2,271 minus the targeted 273 transactions equal 2,034. Each remaining transaction necessarily must be less than 5 U.S.C. § 552 (b)(6) & (b)(7)(C) each. This remaining “small” group is 89.6% of the total SNAP dollar volume noted in the Case Analysis. Most importantly, the average transaction rate for all the remaining 2,034 transactions during the target period 5 U.S.C. § 552 (b)(6) & (b)(7)(C). That is lower than the “store type State average” of \$6.92!
- The high dollar transactions top out at 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 115 of the 235 high dollar transactions were less 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The criteria for high dollar apparently start at 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The inclusion of the January 2019 data further skewed the analysis in that the dollar total for that single month almost twice that of each of the following five months. It was a statistical anomaly which may have been caused by many factors which have not been disclosed but may be common to all retailers in the area.
- The huge disparity between the average transaction amounts 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for 89.6% of SNAP redemptions bolsters my original argument that USDA should have conducted normal investigative procedures to corroborate the targeting. That, coupled with the disclosure that two undercover investigations during the prior year showed no trafficking at my client’s store, raises serious questions relating to the integrity of this case.
- The available sample register tapes corresponding to items noted in attachment 2 show a variety of items being purchases at the date of and time noted. The dollar amounts match the merchandise noted in the general store characteristics and associated USDA photos of the store found in the tendered CAD.
- The Department failed to corroborate purported trafficking in light of its own recent investigation which affirmatively disproved it.
- There are no transactions that exceeded 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in the entire five month study. 115 of the 235 “high dollar” transactions were less 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The criteria for “high dollar” transactions apparently start at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) I doubt that the programmers who pegged the criteria have ever been shopping for groceries. One can carry 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of groceries in your hands at today’s price.

Appellant, a convenience store, sells nonfood, ineligible items including: lottery tickets, tobacco products, alcohol, health and beauty aids, paper goods, cleaning products, and housewares. The store visit report shows Appellant had no shopping carts or handheld baskets. Based on the store visit report, Retailer Operations found that the store did not offer specialty food items, or meat or bulk food bundles that would support high dollar SNAP transactions.

Retailer Operations conducted a review of several households' shopping patterns at Appellant. These show that indeed households did shop at supermarkets and super stores on the same date or within a day or two of conducting some larger dollar SNAP transaction totals at Appellant. Some of the larger stores were at a distance from Appellant, supporting that the HHs had transportation options to get to other authorized retailers with greater staple food stock, with better or comparable costs.

As to the court case cited by counsel, the administrative review process should determine whether FNS followed the Food and Nutrition Act and the regulations issued under the Act when it took action against the retailer. The administrative review officer is not responsible for determining whether any legal case cited by counsel applies to Appellant's situation. If the final agency decision is appealed to the federal district court, the judge is responsible for determining whether case law cited by counsel is on point and applicable to Appellant's case.

While some households may have conducted legitimate SNAP transactions at Appellant, insufficient evidence was presented to support this argument. No vendor invoices of eligible food items acquired in inventory were advanced to support that Appellant had sufficient foods to cover its SNAP redemptions for the period. The owner provided no itemized cash register tapes for the review months depicting sales of eligible items. The tapes provided only listed "Food Stamp" with an associated price. No pricing information for eligible items was advanced. No beneficiary statements were provided to support the alleged shopping behaviors of recipients at Appellant. No federal business tax returns or state tax filings were provided, and no business banking statements were submitted. Thus, the owner has not provided a preponderance of evidence that the transactions on the Attachment patterns are for eligible foods rather than the result of trafficking.

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 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. Given these considerations, it is clear that the statute and the regulation allow no flexibility below the level of this stated standard.

A substantial submission to support that an effective SNAP compliance policy and training program was in place prior to the Charge letter issuance was not advanced. Thus, Retailer Operations determined that the retailer was not eligible for a CMP in lieu of permanent disqualification.

Upon review it is determined that the firm did not meet the criteria for a trafficking CMP. The record supports that Appellant did not make a submission to support a CMP request.

CONCLUSION

Retailer Operations' analysis of Appellant's SNAP transaction data was the primary basis for its determination to permanently disqualify Appellant for trafficking. The record also included onsite store photographs, an onsite store inventory report, and HH shopping analyses that provided 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 transaction patterns presented by Appellant, the evidence more supports 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. The decision shall take effect 30 days after the date of delivery to the firm.

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 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

March 11, 2020