

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

Sarita Mini Market,)
Appellant,)
)
 v.)
)
Retailer Operations Division,)
Respondent.)

FINAL AGENCY DECISION

The record indicates that Sarita 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 a finding that the permanent disqualification from participation as an authorized retailer in the program, as initially imposed by the Retailer Operations Division, (Retailer Operations) was appropriate.

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.6(a), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS.”

CASE CHRONOLOGY

By Charge letter dated October 7, 2016, Retailer Operations informed the owner that Appellant was in violation of the terms and conditions of the SNAP regulations based on EBT benefit transactions that “establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm.” The letter of charges states, that “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.” The record shows that Appellant replied to the Charge letter October 27, 2016.

Retailer Operations issued a Determination letter dated December 22, 2016. This letter informed Appellant that it was permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. Retailer Operations considered Appellant's eligibility for a civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. Appellant was not eligible for the CMP because insufficient evidence was submitted timely to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP per the regulations cited.

By letter dated December 30, 2016, the owner, via counsel, appealed Retailer Operations' determination and requested administrative review of this action. The appeal was granted by letter dated January 11, 2017.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). 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, in part, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined, in part, in 7 CFR § 271.2, as "the buying or selling of SNAP benefits for cash or consideration other than eligible food."

7 CFR § 271.2 states in part that, "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 that "FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an *electronic benefit transfer system...*" (*emphasis added*)

SUMMARY OF THE CHARGES

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges on review were based on an analysis of SNAP electronic benefit transfer (EBT) transaction data during the period of March 2016 through August 2016. This involved three patterns of EBT transaction characteristics which are indicative of trafficking:

1. There are an unusual number of transactions ending in a same cents value.
2. Multiple transactions made from individual benefit accounts within unusually short time frames.
3. Excessively large purchase transactions were made from recipient accounts.

APPELLANT'S CONTENTIONS

The following may represent a brief summary of the contentions in this matter however, in reaching a decision, attention has been given to all contentions presented, including any not specifically recapitulated or reference herein. The contentions are:

- The store has numerous items marked at even or round numbers. Many of the products sold are \$1.00 and \$1.50, or 25, 50, or 75 cents. These items include sodas, potato chips, eggs, etc. which make up for the bulk of a neighborhood "bodega". This may account for the unusual amount of transactions ending in the same cents value.
- Customers hang out in front of the store and many of the stores in the 21st Avenue corridor. It is not uncommon for customers to enter several times in the course of the day since they do not stray far from the store. Many recipients live above the location or nearby which may account for some of the purchases.
- We have been fortunate that many of the recipients do not have a vehicle and cannot get to get to the super markets for grocery shopping. We stock most of their food needs. Those account for the large purchases.

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: There are an unusual number of transactions ending in a same cents value. **7 USC 2018 (b)(7)(e).**

Appellant listed some prices of some specific items but provided no evidence of pricing at Appellant. Appellant has not by a preponderance of evidence demonstrated that the transactions listed are for eligible foods.

Attachment 2: Multiple SNAP purchase transactions were made from individual benefit accounts in unusually short time frames. 7 USC 2018 (b)(7)(e).

Appellant is a convenience store. According to the data there are 28 authorized convenience stores within a one mile radius of Appellant. There are many nearby stores of various types including a super store at .52 miles and supermarkets at .58 miles and .63 miles. 7 USC 2018 (b)(7)(e).

7 USC 2018 (b)(7)(e).

7 USC 2018 (b)(7)(e).

The record shows that Retailer Operations assessed some recipient shopping habits, and the three households reviewed conducted SNAP transactions at other authorized stores during the review period including supermarkets and super stores. Appellant is approximately 700 square feet, with limited staple food inventory, no optical scanner, a small check-out counter bordered by products and displays, and no shopping carts and two baskets to assist customers. A household transacted large dollar SNAP amounts at Appellant within a day or a few days of making small transaction amounts at supermarkets and super stores. 7 USC 2018 (b)(7)(e).

Insufficient evidence was advanced that the transactions listed were for eligible SNAP foods. No invoices of inventory of eligible food stock were advanced to support the multiple high SNAP redemptions at Appellant within a short time. No itemized cash register tapes were provided as evidence of eligible food sales. 7 USC 2018 (b)(7)(e). Thus, the transactions on this Attachment have not been addressed by a preponderance of the evidence to be legitimate.

Attachment 3: Excessively large purchase transactions were made from recipient accounts. 7 USC 2018 (b)(7)(e).

Appellant does not have shopping carts and apparently only two hand baskets to facilitate large quantities of eligible items to make up the large dollar transactions listed. These items would need to be handled on a limited counter space in small checkout area of about two feet by two feet bordered by product displays and fronted by a reach in freezer. The large dollar transactions remain questionable when considering the proximity of other larger authorized stores located in a radius of a mile from this location. A shopping analysis shows that recipients who frequented Appellant also shopped at other stores, yet inexplicably spent large dollar amounts at Appellant. When one considers that SNAP benefit allotments are calculated to provide households with a bare minimum of food security, it is unreasonable that households would spend large sums of their monthly benefit allotments at a convenience store. The record supports that there are 13 larger stores within a one mile radius of Appellant including four large stores, five supermarkets, and four super stores.

Appellant carries ineligible SNAP items including: tobacco products, paper products, health and beauty items, pet foods, general merchandise, and household goods. The large dollar transactions remain questionable when considering the store's products such as accessory foods including candy and soda, and single serve items rather than bulk items, and the proximity of other stores, some of which are larger, that would more likely than not carry larger quantities and varieties of eligible foods at comparable or lower prices.

No evidence of store pricing was provided. While some FNS photos show pricing for some items, Appellant did not provide a pricing list. No recipient affidavits attesting to their shopping patterns at Appellant were advanced. No vendor invoices of eligible products in stock were provided. No federal or state tax returns or banking information was advanced.

While the charged owner was given the opportunity to provide evidence of the legitimacy of the questionable transactions cited, in this case, Retailer Operations determined the explanations provided did not outweigh the evidence in the record, and it acted to permanently disqualify Appellant. Therefore, based on empirical data, and in the absence of a preponderance of compelling evidence for the legitimacy for such transaction patterns, a conclusion can be drawn, through a preponderance of evidence that the "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation.

CIVIL MONEY PENALTY

Retailer Operations determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations. The owner did not submit documentation to prove that Appellant met the CMP requirements in lieu of permanent disqualification for trafficking as stipulated at 7 CFR Section 278.6(i). The criteria listed therein are, as a whole, specifically identified as a minimum standard that firms must meet in order to be eligible for such a penalty. It is clear that the statute and the regulations allow no flexibility below the level of this stated standard. Accordingly, Retailer Operations determined that Appellant did not qualify for a civil money penalty in lieu of a permanent disqualification.

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. Therefore, based on a review of all of the evidence in this case, by a preponderance of the evidence, it is more likely true than not true that program violations did occur as charged by Retailer Operations. Therefore, the decision to impose a permanent disqualification against Appellant is sustained.

Retailer Operations also determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations. Under review, the denial of a trafficking CMP is deemed correct.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 and to Section 279.7 of the regulations (7 CFR § 279.7) with respect to applicable rights to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant's owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act (FOIA), it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

/s/ _____

M. VIENS

ADMINISTRATIVE REVIEW OFFICER

February 8, 2017

DATE