

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

Sham's Grocery Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0207808

FINAL AGENCY DECISION

The record supports that the Sham's Grocery Corp. (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 May 9, 2018, 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. The owner, via counsel, responded to the Charge letter, and made a FOIA request dated May 14, 2018. The agency FOIA office provided counsel a FOIA reply dated June 14, 2018. By letter dated September 7, 2018, counsel appealed the FOIA reply.

The FOIA appeal was closed on August 14, 2019, following Appellant's withdrawal of the appeal. Counsel also asked that Appellant be withdrawn as a SNAP retail food store from the SNAP since the owner had sold the store. Retailer Operations sent counsel a letter dated August 16, 2019, that Appellant had ten days after receipt of the letter to respond relative to the Charge letter. Counsel did not respond as of September 6, 2019.

Retailer Operations issued a Determination letter dated September 9, 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 apparently misdated September 17, 2018, postmarked September 18, 2019, counsel appealed Retailer Operations' determination, and requested administrative review. The appeal was granted by letter dated October 21, 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 November 2017 through March 2018. The patterns of transaction characteristics indicative of trafficking are:

1. Multiple transactions were made from individual benefit accounts within a set time period.
2. Excessively large purchase transactions were made from recipient accounts.

APPELLANT’S CONTENTIONS

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

- My client vehemently denies that he or anyone involved with or employed by this firm has engaged in trafficking activities.
- The EBT transactions in exchange for eligible items constitute approximately 75% percent of this vendor’s sales, and provide the income necessary to keep this business profitable. This vendor would not jeopardize this source of business and his livelihood, by engaging in the illegal activity charged. An unblemished record is evidence of his continued compliance with the law and his training and supervision of his employees.

- The letter of charges is nothing more than an unsubstantiated general accusation; it has no merit and to base a decision upon such an accusation is to deprive the vendor of due process.
- I submit that the decision to permanently disqualify this vendor is based on this inadequate proof, which will deprive this vendor of his business and cause him to sustain irreparable injury and damage is inconclusive and arbitrary.
- The EBT transactions should require a more careful review before making such a major decision based totally upon computer generated reports which only create an unfounded inference and presumption of wrongdoing.
- The letter of charges relies upon an analysis of SNAP transaction records, and only furnishes this vendor a listing for a small sampling concerning those activities that allegedly constitute unlawful transactions. No specifics are set forth concerning the other transactions that occurred in the store. The vendor is not afforded the opportunity to fully answer and challenge the charges and the vendor is deprived of due process.
- You have failed to specifically describe the type of firm operated by this vendor, and you have failed to investigate and set forth which of the precise transactions constitute trafficking activities.
- The USDA has failed to establish intent, which is an essential element of the basis for its decision to permanently disqualify this vendor from the SNAP.
- Your review and statistical analysis based on the EBT transactions are not and cannot be a basis for your determination that the firm's intent was to violate the regulations.
- This agency should be investigating the benefit cardholders to determine whether they are misusing and abusing the SNAP they have applied for and which has been provided. It is not the responsibility of this owner to deny an EBT cardholder services or police violations or misuse of the benefits and enforce or address violations thereof.
- There is nothing in any of these Attachments that reveal conclusively or by a fair preponderance of the credible evidence that the vendor herein has been exchanging Benefits for cash. The Agency has not provided a basis for disqualification under 278.6(d). It is ludicrous for this agency to refuse to allow a vendor to sell large containers of Enfamil without risking allegations of trafficking.
- Your use of the EBT records in sole support of what you claim to be a serious unlawful activity is inadequate. It is not based on fact, and the conclusions reached are unfounded and without merit.

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 79 transactions in 35 sets conducted by 29 unique households (HHs). The store is typed as a convenience store. The record shows that there are 24 other authorized SNAP retailers within approximately a quarter mile radius of Appellant, including one super store. Appellant had more data sets flagged on this Attachment than six nearby convenience

store comparators that had 1, 0, 3, 0, 1, and 0 data sets respectively. The data also supports that 31% of the HHs listed on this Attachment shopped at a supermarket, or super store within three days of making a transaction(s) at Appellant. So recipients did access and use larger authorized retailers to transact SNAP benefits. Retailer Operations determined that Appellant's activity was unusual and suspicious.

Contentions:

- These are all legitimate transactions, and none were ever in exchange for cash. Many of these resulted from individuals who live in close proximity and are going out to pick up items they need for convenience or who are picking up their children or low income seniors who live nearby and frequent the store regularly.
- It is a very busy neighborhood and comprised of numerous large multi-family complex apartment houses and other multi-story apartment buildings, all with large families, which are all within a two-block radius of the vendor. There are also projects, shelters, playgrounds and other residential housing in the immediate area. The closest supermarket is approximately a quarter mile away.
- There is a bus stop directly in front of the store. There is also a hospital in the immediate area which brings hospital workers and patients who patronize this store.
- Most of these customers do not own vehicles and need to make multiple trips to transport their purchases, which are packaged in plastic shopping bags. Many of the recipients who are the regular customers of this vendor live in the area, and don't have the capacity to carry heavy shopping bags through the street and up into their apartment buildings.
- This business allows individuals to purchase items throughout the day and night, allowing its customers to purchase breakfast, lunch and dinner for themselves and their families. This vendor is permitted to make such decisions as fits his business model and is not violative of any rule or regulation under the SNAP. Many of these multiple transactions are two or three transactions, not unusual in these business practices.
- These recipients' are free to use their cards as they see fit, whether it is to use the benefits for themselves or their extended families or for whatever purpose. Refusal to honor legitimate purchase of eligible items by a cardholder would be a violation of the vendor's obligations.
- It is patently ridiculous that this vendor would risk permanent disqualification for the paltry sum and where it is unknown by the agency as to what portion of that amount was even exchanged for cash, if any swipe amount was in fact exchanged for cash.
- This vendor provides specialty foods for the multi-ethnic community in the East Harlem section of NY, New York, with necessary items of cultural significance.
- Many of the families are large, and need to have convenient access to basic items like Enfamil, Similac, milk, eggs, baby food, cereal, bread, juice and other infant and child care products. The baby food items are expensive with cans of Enfamil selling at \$20.00 per small container, \$24.99 per midsize container, and \$34.99 per large container which is a common item sold in volume.
- Regular customers will often call the store to place their large grocery orders, and either personally pick-up these orders at which time they pay for the telephone orders and purchase additional items, which they cannot do at a supermarket or have the order delivered after they make payment for same. They also buy items on their way home from picking up their children or to and from church. The business practices which result in

multiple transactions from individual benefit accounts in short time frames or large purchase transactions are not unusual or excessively large or for any unlawful purpose.

- Such transactions are merely the result of this vendor's business model which is designed to accommodate the needs of regular and repetitive customers of this business.

Most of the stock seen in the FNS photos taken during the onsite visit of December 29, 2017, appears to be accessory foods such as snacks and beverages. There were no noted or observed fresh produce, fresh meat or specialty or ethnic items in the store during the FNS-contractor's onsite review. In regards to the contention that Appellant is well-stocked, based on the FNS inventory checklist and photos, Appellant did not appear to meet the SNAP eligibility requirements to justify retention of its authorization as a SNAP retail food store. On the date of the onsite inventory, the firm appears to have been deficient in foods in two of the four staple food categories. The owner's own reauthorization application shows that he estimated that 42% of his retail sales were for tobacco products, alcohol, and other non-food items. The application shows he estimated only 28% of his sales in staple foods, and 30% of sales in accessory foods.

Retailer Operations found that there were no promotional, special, bulk, or package deal offers advertised at Appellant. There was a small checkout area with one cash register, and one point-of-sale device. There were no scanners or conveyor belts to expedite high dollar or rapid consecutive purchases. The store visit report notes that there were no shopping carts or handheld baskets for recipients to transport large numbers of food items that would total to the high dollar transaction amounts listed on the Attachments. The store inventory report shows that the FNS contractor confirmed by observation and by asking store personnel that there were fewer than four eligible items priced at \$5 or higher at the firm. As to the contention that the transactions listed are the result of regular customers calling to place an order, then picking-up the order, and then purchasing additional food items, or that beneficiaries had orders delivered, Retailer Operations noted that per the December 29, 2017 store report, the FNS-contractor recorded that the grocery did not take telephone or online orders and did not offer delivery.

No itemized cash register tapes to support the contention of legitimate SNAP food sales to recipients were advanced. No recipient statements were provided to support the contentions of counsel such as recipients: having no vehicles, shopping at Appellant multiple times a day or in short periods, making phone orders and getting deliveries from Appellant, or other shopping behaviors described. Retailer Operations compared Appellant with six nearby authorized convenience stores and determined that none of the nearby convenience stores had anywhere near the number of flags recorded as Appellant on this data pattern. This is an indicator that area recipients are not expending their SNAP benefits in the manner alleged by counsel.

No vendor invoices were provided to support that Appellant stocked adequate eligible foods to cover its SNAP redemptions for the review period. No Enfamil inventory receipts were advanced to support the acquisition of this expensive item. The store is not authorized for WIC and Enfamil is typically acquired by SNAP recipients with WIC benefits at WIC authorized stores. No business federal tax records or state sales tax reports were advanced. No business banking records were offered to support the owner's contention that trafficking was not occurring at Appellant. Appellant has the burden to provide relevant evidence to rebut the trafficking charges. This burden has not been met.

Attachment 2: Listed are 339 transactions conducted by 191 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 54 percent of the households flagged on this Attachment conducted a transaction(s) at a supermarket, or super store within two days of making a transaction(s) at Appellant. Appellant had many more flags on this Attachment as compared to six nearby same type convenience stores which had 150, 158, 37, 1, 37, and 48 transaction flags respectively. Appellant had 5 U.S.C. § 552 (b)(7)(E) higher SNAP dollar volume than same type stores in the state, and 5 U.S.C. § 552 (b)(7)(E) higher SNAP dollar volume than same type convenience stores in New York County. This is unusual.

The onsite store visit report confirms that Appellant did not sell fresh meats, seafood, produce, have an onsite bakery, specialty and ethnic items, or staple food items that would reasonably classify it as anything but a convenience store. Appellant was estimated to be 600 square feet, with minimal counter space at a restricted checkout window area. The store report indicates there were no handheld baskets and no shopping carts to gather items that might total to large dollar transaction amounts of eligible foods. Nonfood, SNAP ineligible items included: tobacco products, alcohol, health and beauty aids, cleaning products, and paper goods. The record supports that this is a small convenience store that offered a selection of snacks and beverages, as well as a limited variety of canned and packaged foods. Retailer Operations found it more likely than not that the large dollar transactions were indicative of trafficking.

Contentions:

- Many of these purchases are made immediately after the benefits are added to the cards. The recipients use much of the balance of their account in this store. None were, or are, indicative of trafficking activities in this store, and all resulted from well established customers placing advance large orders and paying for same when they were picked-up or delivered at a time when they needed to provide for their households.
- If the agency averages out the amount of the purchases, one would find that the average purchase is in the forty to fifty dollar range, which is not unusual.
- During this past winter, I submit that numerous customers only wanted to go out when they needed to and bought in bulk to avoid going out numerous times in the cold weather.
- A customer's shopping habits should not be interpreted in a negative manner with an inference that trafficking has occurred. Many of these resulted from customers who had budgeted their benefits and some had placed telephone orders at a time in the month when they know they can use the balance of their benefits for food and eligible items.
- At some point the card would have to be exhausted, it makes sense that the cardholder would use it at their neighborhood store.
- Many of these transactions resulted from customers who had budgeted their benefits and some had placed telephone orders, and from deliveries at a time in the month when they know they can use the balance of their benefits for food.
- While there are larger stores in the area those supermarkets are not preferred by the residents, as they are crowded with long lines, selling the same items for similar prices. In fact, there is nothing unusual or inexplicable about customers in New York City using a grocery store to buy their groceries. It is a cultural way of life.

- These excessively large purchase transactions are nothing more than the expensive cost of goods in New York City, where all food items are costly.
- It is ridiculous that after years of participation in the SNAP that this vendor would risk permanent disqualification for the mere sum cited. Here too, it is unknown by the agency as to what portion of that amount might have been exchanged for cash, if any swipe amount was in fact exchanged for cash.

No evidence was provided, such as call logs, or order/delivery slips, or beneficiary attestations, to substantiate the claim that phone order and deliveries, contributed to the transactions on this Attachment pattern. In fact, the FNS-contractor's store visit report contradicts the claim, since it records that the store did not offer delivery or take orders by telephone, online, or other methods. The data supports that there are many 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. These show that HHs made transactions at several supermarkets and a nearby super store on dates proximate to or on the same date as conducting lower dollar SNAP transactions at these larger venues. This is suspicious, particularly as Appellant carried limited staple foods and accessory foods. 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 could cover Appellant's SNAP redemption volume were provided. The owner provided no itemized cash register tapes for the review months. No pricing information was advanced other than the Enfamil prices. No listing of eligible foods sold 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 in evidence as to shopping behaviors at the firm. 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.

The USDA employs a computerized fraud detection tool to identify EBT transactions that form patterns that have characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. Retailer Operation's staff analyzes the transaction data and patterns along with other documentation such as, information from the onsite store visit report including photographs of stock and the store layout, an analysis of recipient shopping behavior, and comparisons with similar store types in local area, to render a determination as to whether or not the questionable transaction patterns were, more likely than not, the result of trafficking. 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.

Prior to a disqualification determination, the firm was given ample opportunity to reply to the Charge letter and provide any information to justify as legitimate the transaction patterns detailed in the Charge letter Attachments. Thus, the agency has afforded the owner his due process rights. Appellant was also given an additional opportunity to provide a response to the Charge letter after the FOIA appeal was closed, however, no correspondence or communication to

Retailer Operations was provided by counsel. On review, counsel submitted essentially the same reply as his initial May 2018 response, which was absent documentation and evidence to support the contentions and explanations advanced to support the denial of trafficking. 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.

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.

Contention:

- Since being authorized, the owner has continuously trained and tested his employees concerning the SNAP regulations and requirements relating to the prohibitions against sales of ineligible items and exchanging cash for EBT Food Benefits.

The owner did not provide any documents as evidence that the store had a compliance policy in place. No documentation of the development and/or operation of a policy to terminate violating employees was advanced. No documentation of development and/or operation of procedures/policy to implement corrective action in response to complaints of violations was provided. No documentation of development and/or operation of procedures providing for internal review of employees' compliance was provided. As such Criterion 1 was not met.

Appellant did not provide documentary evidence which establishes that the firm's compliance policy and program were in operation prior to the occurrence of the violations at issue. As such Criterion 2 was not met. The owner did not submit any documentation or details on Appellant's training program. He did not provide documentation of dated training curricula and dates of training sessions prior to the violations, records of dates of employment of all firm personnel, or contemporaneous documentation of participation of violating personnel in initial and follow-up training prior to violations. As such, Criterion 3 was not met.

Overall, the record reflects that Appellant did not submit substantial evidence in support of a CMP in lieu of permanent disqualification. Given the lack of a substantial evidence submission which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the program in support of a CMP, it is clear that the owner did not meet the criteria for a 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 HH 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 of the legitimacy of the transaction patterns presented by Appellant, 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. 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 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

December 11, 2019