

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

Siesta Food Mart,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0217348

FINAL AGENCY DECISION

The record supports that the Siesta Food Mart (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 April 30, 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.

The owner did not respond to the Charge letter by the deadline given. Retailer Operations issued a Determination letter dated May 15, 2019. This letter informed the owner that Appellant 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 May 20, 2019, counsel appealed Retailer Operations' determination and made a FOIA request. The appeal for administrative review was granted by letter dated May 22, 2019. The FOIA reply to counsel was dated June 18, 2019. By email dated June 18, 2019, counsel was notified by this office that any further information was due July 10, 2019. No additional information was received.

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, credible evidence that 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 October 2018 through March 2019. The patterns of transaction characteristics indicative of trafficking are:

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

APPELLANT’S CONTENTIONS

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

- My clients deny the allegations against them. My clients have not been provided any reliable, credible evidence of any SNAP violations that they would be responsible for, including the administrative record, thereby precluding them from fully responding to the charges against them and have been denied due process of law.
- My clients request that they be authorized to pay a Civil Money Penalty in lieu of disqualification. The store is selling a substantial variety of staple food items, and the firm’s disqualification would cause hardship to SNAP households because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices.
- We offer the enclosed affidavit of the store’s manager, which confirms that the store had an effective plan in place prior to the alleged violations of the SNAP regulations, as set forth in 7 CFR 278(b)96.
- My clients claim that being forced out of business by the permanent disqualification from the SNAP is arbitrary, capricious, and done in bad faith and a denial of my clients’ constitutional rights, including due process of law.

- The Agency’s conclusions are not based upon any reliable data or confirmation by any actual transactions conducted by undercover Confidential Informants.
- It is my understanding that the first USDA letter was not sent to me at my home address which was provided to the USDA when I submitted my application. The person at my store who received the letter did not notify me that a UPS envelope was received at the store and did not understand the significance of what was inside of it. As a result, I was deprived of my right to due process of law.
- My employees frequently experience multiple sales transactions involving eligible and ineligible items. There are many instances where the customer will bring multiple items to the register, which are eligible and non-eligible, and our employees are trained to make sure they ring the transactions up separately. Ineligible items are paid for with cash.
- No employee of my store has been requested or authorized to exchange cash for benefits.

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 60 transactions in 22 sets conducted by 16 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:

- The case involves foreign born persons who do not understand the technical legislation being applied against them, but who have worked very hard at meeting all requirements for participation in the SNAP.
- My clients maintain that by disqualifying them from the SNAP and the attendant economic disadvantages caused thereby, violates the Contracts Clause of the United States Constitution.
- This Agency must consider the nature of the alleged deprivation of property. In this case, it is apparent that the threat of a taking is significant in that it is for a permanent disqualification arbitrarily arrived at based upon mere speculation. This type of taking is unconstitutional.
- My employees frequently experience multiple sales transactions involving eligible and ineligible items. There are many instances where the customer will bring multiple items to the register, which are eligible and non-eligible, and our employees are trained to make sure they ring the transactions up separately. Ineligible items are paid for with cash.

The data shows that within a one mile radius of Appellant there are 22 other authorized retailers classified as convenience stores, small grocery stores, medium grocery stores, supermarkets, and a super store. The data supports that 62% of the HHs listed on this Attachment shopped at a

supermarket, or super store within one day of making a transaction(s) at Appellant. Thus, recipients did use other authorized shopping options to transact SNAP benefits.

Retailer Operations compared Appellant's data to two nearby authorized convenience stores. Appellant had 22 data sets flagged on this Attachment whereas the two convenience stores had no flags. Appellant's total SNAP dollar volume **5 U.S.C. § 552 (b)(7)(E)** comparable stores for the same time period. Thus, Appellant's transaction activity was unusual.

No credible itemized cash register tapes to support SNAP eligible food sales at Appellant were provided. No credible vendor invoices to support the acquisition of SNAP eligible foods were advanced by the owner to support the dollar volume of SNAP redemptions during the review period. The owner provided no recipient statements regarding their shopping behavior at the store. No federal tax records or state sales tax reports were advanced to counter the trafficking charge. No business banking records were offered to support the owner's contention that trafficking was not occurring at Appellant.

The administrative review process does not include an assessment of the constitutionality of the laws, or regulations under which the agency imposed adverse actions, but rather whether the agency's actions were proper pursuant to those laws and regulations, and sustainable by a preponderance of evidence review standard. As such, this office does not have the authority to assess whether the United States Congress, in its enactment of legislation, has conformed to Constitutional mandates. Additionally, challenges to the laws and regulations governing the SNAP are more appropriately the province of judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

Counsel appears to misconstrue the initial SNAP authorization of the firm as having bestowed upon Appellant a right and entitlement to SNAP income and a corresponding perpetual and irreversible ownership and/or property interest in its SNAP authorization. It must be impressed upon Appellant that, SNAP authorization is an administratively-granted privilege subject to the terms and conditions for participation detailed in the Act and the regulations. Thus, if a firm does not conform to the applicable statutes and regulations, the same provide for the firm's removal from the program in accordance with the provisions detailed therein. That a firm has profited or otherwise benefited from a SNAP authorization does not create a property interest which supersedes the statute and implementing regulations which clearly detail applicable sanctions for violations of said regulations.

As to the court cases cited by counsel in the record, 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 cases cited by counsel apply 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.

Attachment 2: Listed are 105 SNAP transactions conducted by 47 unique households, for amounts that exceed the average transaction amount for the same store type in the same state by

three times or more. Besides eligible food items, the firm sells ineligible gasoline, lottery tickets, tobacco products, alcohol, paper goods, and cleaning products. The photos in the record support that Appellant is a gas station/convenience store stocked with common canned goods, packaged goods, snacks, and drinks, deli meat/cheese.

Appellant does not appear to be stocked with significant staple food inventories in the four staple food categories. The store's food inventory appears to consist primarily of accessory foods that do not count towards eligibility to be a retail food store in SNAP. Appellant does not appear to offer specialty or ethnic themed food items. There does not appear to be anything unique about Appellant that would compel a SNAP recipient to consider it as the primary or a main source for their staple food needs, or to generate large transaction amounts. The owner's own SNAP application to be authorized shows that he estimated only 9% of his total retail sales to be in staple foods, while 80% of his sales were noted to be for gas, lottery, tobacco, alcohol, hot foods that are not allowed for SNAP purchase, and other non-food items.

The data shows that Appellant's total SNAP dollar volume for the review months was 5 U.S.C. § 552 (b)(7)(E) higher than the average SNAP dollar volume amount for convenience stores in the state, and 5 U.S.C. § 552 (b)(7)(E) higher than the same type store in Harris County. Retailer Operations determined that two nearby stores from Appellant, each had lower SNAP dollar volume, one 64% lower and the other 5 U.S.C. § 552 (b)(7)(E) lower. This is unusual.

Of the households flagged on this Attachment, 64% conducted a transaction(s) at a large grocery, supermarket, or super store within one day of making a transaction(s) at Appellant. Within two days of transaction(s) at Appellant, the percentage of households making transactions at the larger stores rose to 74%. This indicates that the households were aware of other nearby authorized retailers, and transacted benefits at larger stores.

Retailer Operations presented shopping histories of recipients that had flagged transactions at Appellant. For example, one household traveled more than 17 miles from Appellant to conduct SNAP transactions at 30 other stores including supermarkets and super stores. The household appears to have adequate transportation to travel long distances to conduct SNAP transactions. The household conducted most of its flagged SNAP transactions at Appellant for large dollar amounts. This and other HH transaction histories in the record are irregular and suspicious.

No credible vendor invoices of SNAP eligible items acquired in inventory to support Appellant's SNAP redemptions were advanced to support the high SNAP volume redemption total for the review months. The owner provided no credible itemized cash register tapes of SNAP sales for the review months. No customer affidavits were advanced. 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 Attachments are for eligible foods rather than the result of trafficking.

The evidence that Appellant violated the SNAP regulations is furnished in the Charge letter Attachments. SNAP transaction data is provided to FNS via each State's EBT processor on a daily basis in a single layout and format that is standardized nationwide. The USDA uses pre-defined criteria or patterns for potential fraud detection. A computer system provides a series of

reports that compare a specific store's data to the average for its firm type or to user-selected comparison stores. While the system identifies a retailer for further investigation, the actual case of trafficking is made by Retailer Operations staff on the basis that the transaction patterns cannot be explained based on the store size, layout, inventory, and other factors.

Based on Appellant's data, and in the absence of compelling evidence to support such transaction patterns, a conclusion can be drawn, that the patterns cited in the letter of charges evidence trafficking as the most likely explanation. Nevertheless, transactions having such characteristics are sometimes the result of legitimate purchases of eligible food items, and opportunities were afforded to the charged owner to provide evidence of the legitimacy of the questionable transactions cited. It should be noted that within the timeframe for submission, counsel provided no additional evidence following receipt of the agency FOIA reply. While some households may have conducted legitimate SNAP transactions at Appellant, insufficient credible evidence was presented to support this argument

The regulations at 7 CFR §278.6(a), establish the authority upon which FNS may disqualify any authorized retail food store. 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. In this case, Retailer Operations determined that the owner's contentions and evidence, did not outweigh the evidence in the record. Retailer Operations used transaction data and system reports, in addition to an onsite store visit report, and an analysis of household shopping behavior, in rendering a finding that violations indicative of trafficking were occurring at Appellant, and it acted to permanently disqualify Appellant.

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 owner failed to submit substantial documentation timely to show that he met the four regulatory criteria to qualify for a CMP. Accordingly, Retailer Operations determined that Appellant was not eligible for a trafficking civil money penalty.

Contentions:

- I have been employed with Siesta Food Mart since 2015 and have been in charge of all of the SNAP training programs for the store and have been conducting this training for all of the employees of Siesta Food Mart since then. We take SNAP sales and what are eligible and non-eligible products very seriously.
- Our employees are trained via a video that is provided by the USDA's website and training is given to them upon hire and/or when new products enter the market. Our store also has posted notices for our employees to constantly look at for reference to know what is eligible and non-eligible for SNAP benefits. They are also aware that they are not allowed to give cash back to any SNAP customers.
- Prior to the USDA investigation, all of the employees of Siesta Food Mart were trained in SNAP Policies, were required to and did watch the online videos provided by the USDA

for training, are required to follow the Policies and Rules and Regulations of the SNAP Program.

- The first letter from the USDA to the owner of the store was received by me. I did not notify the owner, that a UPS envelope was received at the store and did not understand the significance of what was inside of it. The owner is not physically at the store all of the time and had not been at the store to get any mail since prior to April 30, 2019 until May 16, 2019 when he came to the store and picked up his. I did not understand that the envelope contained a time sensitive letter.
- The manager of the store who had received the letter, put it aside for the owner when he would return to the store. (See the affidavit of the manager.) As a result, the owner was denied due process of law.

The record shows that on Appellant's SNAP application to be authorized, the owner left the store mailing address blank. As such the store location address was used to mail the Charge letter, by delivery service with signature of receipt upon delivery. As such, the agency met its obligation of delivery "by any method that provides evidence of delivery of any notice of FNS...will constitute notice to the addressee of its contents." Furthermore, the Charge Letter was sent in a UPS Next Day Air envelope. The UPS Next Day Air envelopes are clearly marked with the words "Extremely Urgent" in red on the outside of the envelopes. That the store employee failed to deliver the letter to the owner in a timely manner and set it aside with no urgency, is a failure by the manager. On review, it is found that the delivery of the Charge letter, was executed according to the regulatory obligation of the agency for proper delivery of notices.

The owner provided no verifiable evidence to support the manager's contentions that Appellant developed an effective compliance policy and program and that these were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the Charge letter sent to the firm. Other than the manager's contentions, no extemporaneous evidence was advanced that the firm had indeed developed and instituted an effective personnel training program as specified in §278.6(i)(2) to meet Criterion 3. No evidence regarding Criterion 4 was provided.

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 inventory and store visit report, household shopping analyses, and other reports that provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits.

Based on empirical data and in the absence of a preponderance of evidence of the legitimacy of the transactions presented by Appellant, it is more likely than not that violations did occur as charged by Retailer Operations. The record confirms that 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 a judicial review of this decision. 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 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

July 23 2019