

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

SM Oil,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0202153

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that SM Oil (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). 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 was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against SM Oil by letter dated September 25, 2017.

AUTHORITY

7 U.S.C. § 2023 and the 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

In a letter dated September 11, 2017, Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of May 2017 through July 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR §

278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

In correspondence dated September 15, 2017, Appellant replied to the charge letter and generally stated that the transactions on the attachments showing short time frames are due to customers separating transactions. We are located near a Section 8 housing program in which these customers have frequent celebrations. Customers purchase cases of beverages, candies etc., rather than purchasing those items individually. When the customer is charged they want the purchases to be separated. The second transaction is processed as soon as the first transaction is confirmed.

After giving consideration to the Appellant's reply and evidence of the case, Retailer Operations Division issued a determination letter dated September 25, 2017. This letter informed ownership that they were permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also states that Retailer Operations considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, Retailer Operations Division determined that Appellant was not eligible for the CMP because it failed to submit sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated October 5, 2017, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an 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 matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 CFR § 278.6(a) states, in part that, "FNS may disqualify any authorized retail food store...from further participation in the program if the firm fails to comply with the Food and Nutrition Act of 1977, 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)

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 mean: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption.”

7 CFR § 278.6(b)(2)(ii) states, in part, that: “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, in part: “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 Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from May 2017 through July 2017. This involved the following transaction patterns which are trafficking indicators:

1. Multiple transactions were made from individual benefit accounts in unusually short time frames.
2. The majority or all of individual recipient benefits were exhausted in unusually short periods of time.
3. Excessively large purchase transactions were made from recipient accounts.

The first issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the identified irregular and questionable transactions were the result of trafficking in SNAP benefits.

APPELLANT'S CONTENTIONS

In its response to the charge letter and in its request for administrative review, Appellant made the following summarized contentions, in relevant part:

- My client posts a policy identified as SNAP & WIC Policy, a copy of which is enclosed herewith. My client requires all employees to sign this policy, a copy which is enclosed. Each employee is made aware of the dire consequences of a failure to comply with the policy which includes immediate termination. Once my client discovered that their employee had not been appropriately following the policy, he was terminated.
- I have printed out the SNAP Training Guide for Retailers and advised my client to study the training guide and to fully enact every suggestion identified in the guide.
- The SNAP and WIC programs are a major portion of my client's business and a loss of the programs would be a loss of a significant amount of their clientele and may put my client out of business. My client is willing to accept a penalty. A complete disqualification is a severe remedy and not equitable under the present circumstances.

Appellant, through counsel, provided a copy of the alleged SNAP & WIC policy, two color photographs showing that the policy is posted on and/or near the register and two signed copies of the policy dated 9/12/14 and 11/15/15. No other documentation or explanation was provided in the review request.

The preceding may represent a brief summary of Appellant's contentions in this matter however, in reaching a decision, full attention has been given to all contentions presented, including any not specifically recapitulated or referenced herein.

ANALYSIS AND FINDINGS

The FNS authorized the business as a convenience store on June 20, 2012. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during an August 14, 2017, store visit to the business conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Sm Oil is a gas station/food mart.
- At the time of the contractor visit, the store did not meet eligibility criteria as inventory was deficient in 3 of the 4 staple food categories
- One cash register and one POS device and no specialty register.
- Estimated to be approximately 1300 square feet.
- No shopping baskets or carts available for customers.
- An optical scanner available.

- Store operates through a night window or plastic barrier with food stock behind the barrier. Business is conducted through a “night window.” Customers cannot enter the store.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- Store has unusual pricing structure such as ending most products **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and does not round transaction totals.
- Food stored in an area outside of public view that is approximately 1000 square feet.
- Store has storage freezers or coolers but not food stored off site.
- Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
- Store does not take telephone or online orders and does not offer delivery.
- Highest priced eligible food items were Gatorade case (\$12.99), Sprite case (\$33.00), Tea-Brisk case (\$15.00), and milk (\$5.00).
- Store stocks a significant amount of non-food items such as but not limited to tobacco products, gasoline, automotive products, health and beauty aids.
- Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products. No fresh fruits or produce, no fresh meat or poultry. The only meat noticed in the store was meat jerky.
- Store is deficient in three of the four staple food categories.
- No kitchen/prepared food area with hot foods sold for onsite consumption.
- No hot food sold.
- No deli or prepared food section. Stock is not used in preparation of food.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.
- Storage consists of cold drinks.

The second issue for consideration is whether Retailer Operations Division has presented a convincing case that Appellant likely trafficked in 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’s store during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

Attachment 1 of the Charge letter - Multiple transactions were made from individual benefit accounts in unusually short time frames.

This attachment lists 183 sets of 526 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Households conducted anywhere from two to six transactions in this Attachment. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

While it is possible that various household members might shop together and request separate transactions, it is unreasonable in such situations that there would need to be separate SNAP transactions processed through the EBT-POS device. As each party’s order is allegedly rung up separately on a cash register to determine each of their totals, there would be separate register receipts that could be used for tracking costs therefore, conducting two or more separate EBT

transactions, in addition to already having done so on the store's cash register, would be a duplication of effort and would also be time consuming. Appellant's inventory appeared to consist mainly of snack items, prepackaged convenience foods, candy, and soft drinks which call into question the legitimacy of the amounts and number of transactions.

It is more reasonable to have a single combined SNAP transaction for a total of all of the orders. It is not reasonable to conduct more than one SNAP transaction to separate and keep track of purchases when a corresponding number of cash register receipts would suffice. Additionally, the transactions in this Attachment do not contain the characteristics associated with a recipient purchasing a forgotten item right after checking out or households returning to purchase a forgotten item or two. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The EBT transactions are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of the store's stock and facilities, the makeup and shopping patterns of SNAP households, and the households' proximity to other stores in the area.

Sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. Although Appellant may be located near a large number of low-income SNAP customers, this contention does not explain the SNAP transactions in the charge letter given that there are at least 37 SNAP authorized retailers within a one mile radius of Appellant at which many of the households shopped on the same day or within a day or two of visiting Appellant's store.

In conclusion, it is therefore more likely true than not true that the irregular transactions cited in the charge letter Attachment 1 are due to trafficking in SNAP benefits.

Attachment 2 of the Charge letter – The majority or all of an individual recipient benefits were exhausted in unusually short periods of time.

This attachment lists 65 sets of 202 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Studies of historical transaction data shows that SNAP recipients do not normally exhaust their benefits in one or two transactions on the same day. A government report¹ on SNAP shopping patterns indicates that after the first day of benefit issuance, on average, 80 percent of a household's allotment remains unspent. Even after seven days, 40 percent of benefits still remain unspent. It takes two weeks to deplete 80 percent of one's benefits, and three weeks to deplete 90 percent.

Although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefits in only a few transactions or in a single day. Depleting one's entire allotment in one or two days, or in a single large transaction, leaving no benefits for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP benefit households. Additionally, Appellant is a minimally stocked convenience store with no fresh meat and no fresh fruits or produce. In fact the only meat noticed in the store was meat jerky. Based on the contracted store visit report and photographs, there appears to be no basis for exceptional customer attraction to SM Oil, there

¹ U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program*, by Laura Castner and Juliette Henke. Project officer: Anita Singh, Alexandria, VA: February 2011

being no great price advantage, profusion of specialty or ethnic goods, or special or custom services rendered therefore, it is inconceivable that households would expend their entire monthly allotment in this store.

When one considers that SNAP benefit allotments are calculated to provide households with a bare minimum of food security, it is unreasonable to believe that households would spend a large majority of their monthly benefits at a minimally stocked convenience store like Sm Oil. The store's inventory does not support the documented EBT activity or redemption levels. More importantly, the store visit documentation and photographs indicate that the Appellant firm was deficient in three (3) of the four (4) staple food categories. This is not consistent with the Appellant's contentions and does not support average to expensive shopping trips. In fact, the store visit report tends to indicate that the firm may not have been eligible to maintain SNAP authorization on the day of the store visit.

In conclusion, it is therefore more likely true than not true that the irregular transactions cited in the charge letter Attachment 2 are due to trafficking in SNAP benefits.

Attachment 3 of the Charge letter - Excessively large purchase transactions were made from recipient accounts.

This attachment lists 1,030 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. During the review period, the average transaction amount for convenience stores in Los Angeles County was \$6.83. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

Based on the results of the contracted store visit, the large transaction amounts are not consistent with the store's inventory of low priced foods. The firm does not offer food in bulk or any ethnic or specialty foods that sell for a high price. The store carries a significant amount of non-food inventory including gasoline, tobacco, auto products, and health & beauty aids. Customers cannot even enter the store to select their items, and must place their orders through the "night window." It is problematic that SNAP customers would spend such significant benefit amounts at a convenience store that they could not enter and had to place orders through a small window. This also calls into question the store's ability to process so many high dollar transactions.

Moreover, the large dollar transactions remain questionable when considering the store's minimal inventory and the proximity of other stores, some of which are larger, including several grocery stores and superstores that would carry larger quantities and varieties of eligible foods, at lower prices. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions. As previously stated, the store visit report and photographs evidence that Appellant was deficient in three of the four staple food categories.

Based on the above analysis, the Retailer Operations presented a convincing case that the SM Oil trafficked in SNAP benefits which the Appellant failed to adequately rebut. The attachments furnished with the charge letter identify the irregular patterns of SNAP transactions which indicate that trafficking was taking place at the firm during the review period. As there is more than one pattern of trafficking, a determination that the Appellant firm engaged in trafficking becomes more convincing.

Appellant, through counsel, contends that SNAP and WIC programs are a major portion of the business and a loss of the programs would be a loss of a significant amount of clientele and may put the store out of business. With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. Furthermore, giving special consideration to economic hardship of the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, ownerships contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

The transaction data and overall firm record convincingly demonstrate repetitive patterns of unusual, irregular, and inexplicable SNAP activity for this type of firm indicative of trafficking. Once Retailer Operations Division established a convincing case against Appellant, ownership 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 matter asserted is more likely to be true than not true. If this is not demonstrated, the case is to be sustained.

As noted, 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 inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Retailer Operations has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns identified in the charge letter, the lack of food inventory necessary to support the firm's SNAP redemptions as observed and recorded during the onsite visit, the lack of purchase invoices of foods to cover SNAP redemption totals for the review months, the lack of adequate explanations for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant, and the irregular SNAP transaction data of Appellant as compared to other convenience stores in the State and County.

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Therefore, based on this empirical data, and in the absence of 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 patters cited in the letter of charges evidence trafficking as the most likely explanation. While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence in the record.

The owner has not provided sufficient evidence to rebut the convincing case that Appellant most likely trafficked in SNAP benefits. As such, the SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have trafficked, which is that FNS shall disqualify the firm permanently.

CIVIL MONEY PENALTY

The Appellant, through counsel, contends that it maintains a compliance policy, posts the policy and requires all employees to sign the policy. Appellant also submitted two signed copies dated September 12, 2014 and November 15, 2015. With regard to this contention, it is the determination of this review that the documents provided by Appellant do not meet the criteria pursuant to 7 CFR § 278.6(i) and are considered insufficient to establish that Appellant maintained an effective SNAP compliance policy and program prior to the cited violations.

Additionally, the Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i) even though it was informed of the right to do so in the charge letter dated September 11, 2017. Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program *prior* to the violations. Therefore, the Retailer Operations Division's decision, not to impose a trafficking CMP in lieu of disqualification, is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify SM Oil. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Therefore, based on a review of all the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged by Retailer Operations Division. Based on the discussion above, the determination to impose a permanent disqualification against SM Oil is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right 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 you reside or are 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), 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.

Monique Brooks
Administrative Review Officer

January 8, 2018