

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

Smoke N Style #1,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0208298

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Smoke N Style #1, (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(c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant by letter dated December 19, 2018.

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

By charge letter dated May 8, 2018, Retailer Operations Division informed ownership that Appellant was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 271 – § 278, based on EBT benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm." The charge letter stated, in relevant part, that “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.”

In a May 10, 2018 telephone conversation Appellant, through counsel, requested an extension in which to respond to the May 8, 2018, charge letter. In correspondence dated May 10, 2018, Retailer Operations Division granted Appellant a 30 day extension to June 8, 2018. Appellant was informed that the time to request a civil money penalty in lieu of permanent disqualification and to provide the documentation to support such a request could not be extended and Appellant had 10 calendar days in which to request a civil money penalty. The record reflects that Appellant, through counsel, did not timely request consideration for a civil money penalty.

In correspondence dated June 8, 2018, Appellant, through counsel, responded to the charge letter and generally stated that the attachments to the charge letter do not identify the customers allegedly involved in the transactions and submitted a Freedom of Information Act (FOIA) request for all documents, records, information, etc., pertaining to the charges. Appellant, through counsel, also provided 35 signed declarations from customers stating that they have never participated in any sales transactions that might be considered trafficking. Appellant, through counsel, also stated that the store is located in an economically depressed area and many of their customers are homeless without a true address. Counsel stated that the store has established and implemented an effective compliance policy and program to prevent violations of the Food Stamp Program. Any disqualification of Smoke and Style #1 would constitute a severe hardship on many of the customers who consistently and continually rely on the store.

The record reflects that counsel denied receiving the requested FOIA documentation however, Retailer Operations Division provided documented proof that counsel did in fact receive the requested documents on May 14, 2018, and failed to provide any additional information after receipt of the requested FOIA documentation. Counsel agreed that the June 8, 2018, response was considered Appellant's final response to the charge letter.

Retailer Operations Division gave consideration to the Appellant's reply and evidence of the case, and issued a determination letter dated December 19, 2018. 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. The letter also stated that Retailer Operations Division 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 December 21, 2018, 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) (c) 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, *inter alia*, 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 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(c) reads, in part, “*Review of Evidence*. The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1)...the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS...”

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.”

SUMMARY OF CHARGES

The charges on review were based on an analysis of SNAP electronic benefit transfer (EBT) transactions dated during the four-month period of December 2017 through March 2018. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from the accounts of individual SNAP households within a set time-period.
2. 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 questionable transactions were the result of trafficking.

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its response to the permanent disqualification letter issued by Retailer Operations Division, and its request for administrative review, in relevant part:

1. My client has established and implemented an effective compliance policy and program to prevent violations of the Supplemental Nutrition Assistance Program, which you have known since their qualification as a Vendor in the SNAP and WIC programs.
2. As you know from the response already filed, a vast majority of their customers have signed declarations, under oath, to effect that they have never committed, nor participated in the commission of any trafficking violations whatsoever.

No additional documentation was provided during this review. 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 file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a March 16, 2018, store visit to the business conducted by a 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 EBT transactions at Appellant that formed patterns indicative of trafficking. The firm review summary documented the following store size, description, and characteristics:

- One cash register and one POS device with a large counter area partially obstructed by other smaller items available for sale in one section.
- Estimated to be approximately 1100 square feet.
- No shopping baskets or carts available for customers.
- No adding machines or optical scanners were available at checkout. No specialty registers present.
- Store does not operate through a night window or plastic barrier with food stock behind the barrier.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- No unusual pricing structure such as ending most products with 00 cents and does not round transaction totals.
- No food stored in an area outside of public view. No storage freezers or coolers and no 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 Beef Patties (\$12.99), Angus Beef Meatballs (\$8.99), Breast Fillet (\$12.99) and Bacon (\$6.99).

- Store stocks a significant amount of non-food items such as but not limited to paper products, household products, tobacco products, health and beauty aids, lottery tickets, and cleaning products.
- 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. Most meats are canned, packaged or frozen.
- Appellant has empty or broken coolers.
- Shelves were sparsely stocked or empty.
- No kitchen/prepared food area and 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.

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 the accounts of individual SNAP households within a set time-period.

During the review period there were 23 sets of 49 SNAP transactions that met the parameters of this attachment. Multiple transactions conducted by the same household account within a set time period is a method which violating stores use to avoid the detection of single high dollar transactions that cannot be supported by the retailer's inventory and structure. The household transaction sets **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The store visit report does not indicate any compelling reason for customers to consider Smoke N Style #1 a first choice destination to fulfill large purchases of food, or that they would have made relatively large, multiple purchases at the store within a set time period.

Appellant, through counsel, provided 35 signed customer declarations where 28 indicated that they were homeless. It is important to note that when purchasing food, people generally do not spend large sums at convenience stores. They usually stop at convenience stores to pick up quick snacks and/or a beverage, or for a few staple food items that they need, such as bread, milk, tortillas, or a can or two of some food, but which are not considered worth a trip to the supermarket to get. It is rare for a convenience store to have purchases such as those cited for Smoke N Style #1. There were no shopping carts or baskets with which customers could transport large orders to the check-out area or to waiting transportation. The record reflects that the firm is a typically-stocked convenience store in all relevant aspects. It is worth noting that the average SNAP purchase in a convenience store in Maricopa County Arizona, during the review period, was \$6.32 and the State average was \$6.60 which reflects that large purchases are not routinely made in this store type.

It is also important to note that transient and homeless households do not generally have the capability of transporting and/or storing more than a few food items. Although shelters provide

some meals, they do not provide long term storage or cooking facilities; therefore, it is reasonable to expect that homeless households would tend to purchase food on an “as needed” basis, making many small purchases over the month rather than one, two or three very large purchase.

Appellant, through counsel, did not provide any additional documentation to support its contentions or that the SNAP transactions cited in the charge letter were as a result of homeless household purchases. Based on the analysis above and Appellant’s failure to adequately show that all of the transaction sets were as a result of legitimate SNAP purchases, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transaction patterns cited in Attachment 1 evidence trafficking as the most likely explanation.

Attachment 2 of the Charge letter - Excessively large purchase transactions were made from recipient accounts.

During the review period, there were 254 SNAP transactions that met the parameters of this attachment. 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. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

Appellant, through counsel, contends that the store is located in an economically depressed area. With regard to this contention, Appellant, through counsel, assume that such factors as neighborhood and demographics influence how SNAP households spend their benefits, the frequency at which they spend their benefits, and in what dollar amounts. Counsel has presented no evidence that shows that there are significant differences in the profile and shopping behavior of SNAP benefit households across neighborhood and demographic differences. On the contrary, there is evidence that SNAP households are a homogeneous group. The government report on SNAP shopping patterns indicates that SNAP households, regardless of where they live, their household composition, amount of benefits, or race, display similar redemption patterns with respect to the number of transactions they make, average purchase amount per transaction, percentage of benefits they redeem at supermarkets, and rate at which their benefits are depleted. Therefore, statistical averages are more likely than not to be indicative of typical SNAP households regardless of whom they are or where they live, and are good barometers against which the redemption patterns of the customer base of particular stores may be compared.

Retailer Operations also conducted an analysis of the shopping habits of five of the households identified in the charge letter. This analysis concluded that these households also shopped at other area grocery stores including full-line supermarkets and superstores that offer a much larger quantity and variety of eligible food items for likely better prices either on the same day or within days of visiting Appellant’s firm. These household also traveled between .49 and 11.95 miles from Appellant’s store to make EBT purchases at these larger stores. This again indicates that lack of access to other stores is not at issue. However, despite this access to large supermarkets and superstores, these households consistently conducted much higher transactions at the Appellant firm than at better stocked supermarkets/superstores in and around the Maricopa

County area of Arizona. This is another strong trafficking indicator.

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 the 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 Division has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns in two attachments of EBT transaction data, the inadequacy of the firm's eligible food stock as observed and recorded during the onsite visit to support such large transactions, the lack of evidence of invoices of food in inventory to cover Appellant's reasoning for the SNAP transaction totals for the review months, the lack of explanation 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.

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 patterns 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 determined that Appellant's contentions did not outweigh the evidence in the record.

The purpose of the administrative review process is to ensure that firms aggrieved by Retailer Operations Division's adverse actions have the opportunity to have their position fairly considered by an impartial review authority prior to that adverse action becoming final. Appellant has been duly given, and has taken the opportunity to present to USDA through the administrative review process whatever evidence and information it deemed pertinent in support of its position that Retailer Operations Division' adverse action should be reversed. Therefore, any evidence and information that Appellant presented to Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The

record does not indicate any departure from established policy or procedures with regard to Appellant's right to a fair and thorough review.

Ownership 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 has established and implemented an effective compliance policy and program. It must be noted that making a statement indicating that all personnel have been appropriately trained and are kept properly informed does not provide adequate proof that this program and policy are actually in place. Appellant, through counsel, has not provided any documented proof, as required by the SNAP regulations, that Appellant in fact established and implemented an effective compliance policy and program.

The record reflects that the Appellant, through counsel, 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 May 8, 2018. 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).

With regard to the request for a hardship civil money penalty, Regulations at 7 CFR §278.6(f) (1) clearly state that "a civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a permanent disqualification."

CONCLUSION

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Smoke N Style #1 from participation in the SNAP. 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 herein, the determination to impose a permanent disqualification against Smoke N Style #1 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

July 9, 2019