

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

Super Food Mart III,

Appellant,

v.

Case Number: C0206438

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support that the permanent disqualification as imposed by the Retailer Operations Division (Retailer Operations) of Super Food Mart III (Appellant) from participation as an authorized food retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

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

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that a food retailer 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 February 20, 2018, Retailer Operations informed the owner that Appellant was in violation of the terms and conditions of the SNAP regulations based on electronic benefit transfer (EBT) transactions that establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for the type of firm. The sanction for trafficking is permanent disqualification.

The owner, via counsel, replied to the Charge letter March 2, 14, 15 16, and 27, 2018, and April 2, 3, and 6, 2018. There was a different attorney initially representing the owner. Retailer Operations sent a credit letter on March 2, 2018, delivered on March 5, 2018, requesting documentation to support the claimed violative credit accounts. The later states: “The acceptance of SNAP benefits as payment for items sold to a household on credit is a violation of SNAP regulation 278.2(f).”

Retailer Operations sent a letter dated March 15, 2018, to the counsel of record at that juncture, advising that the time to request a civil money penalty (CMP) and to provide the documentation to support a CMP request could not be extended. The reply to the Charge letter was extended to April 4, 2018.

Retailer Operations issued a Determination letter dated April 17, 2018, that informed the owner that Appellant was permanently disqualified from participation in the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. Retailer Operations considered Appellant’s eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the regulations. Retailer Operations found the firm was not eligible for as CMP because insufficient evidence was submitted timely to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter dated April 26, 2018, counsel requested administrative review. The appeal was granted by letter dated May 4, 2018.

STANDARD OF REVIEW

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

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Parts 278.6(a) and (e)(1) 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 § 271.2 states: “Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot foods and hot food products prepared for immediate consumption.”

7 CFR § 278.2(f) states: “Food stamp benefits shall not be accepted by an authorized retail food store in payment for items sold to a household on credit. A firm that commits such violations shall be disqualified from participation in the Food Stamp Program for a period of one year.”

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(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.”

SUMMARY OF THE CHARGES

The charges on review were based on an analysis of EBT transaction data during the period of October 2017 through December 2017. 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 patterns of transaction characteristics indicative of trafficking are:

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

APPELLANT’S CONTENTIONS AND EVIDENCE

In reaching a decision attention has been given to all contentions, including any not specifically listed.

- The owner did not knowingly do anything wrong. He did not know there was a dollar value cap and that he should be asking and judging his customers at to the use of their cards. He did make sure no transactions were for contraband food such as alcohol or hot foods.
- The store sells a few of the individual pizzas in a frozen state, but the wings are sold in 5 and 10 pound quantities. The owner believes this complies with the regulations because they are not cooked or heated in any way at the time of sale. These wings are rather expensive, costing upwards of \$39.95. These were in increased demand due to ball and sports teams doing well.
- Higher ticket items caused higher transactions along with the economic decline in the area causing customers to be unable to afford frequent transportation to true grocery stores.
- The store allowed some of its customers to run an account for items they needed. When the head of the household would go in to settle the accounts, the store owner typically

would break the transactions down into smaller transactions, but ran the card back to back, causing too frequent of transactions and too large of transactions, in some cases within a minute of another transaction.

- These accounts were only maintained by the store owner and he was the only person who was allowed to collect on these accounts by way of processing the cards. All credit accounts were food items and kept to necessities, however in some occasions the store owner would not be at the store when the customers came in to pay their account, but still purchased items with their cards. The customers would then come back to settle their accounts when the store owner was available.
- These credit accounts were maintained on adding machine paper with individual price and labeling of what the items were and totals with date and time and family name of each ticket. As tickets were paid, the store owner gave the register tape to the customer as a receipt for what they paid for with them. He does not know of any evidence that he can provide, other than invoices from suppliers, because the actual receipts were given to the customer.
- The owner did not mean to break any laws.
- Since the onset of Petitioner's business, there were never any violations of USDA and/or SNAP law.
- Petitioner has never been under investigation by the USDA for SNAP trafficking charges.

Appellant provided: store photos, employee statements, vendor invoices, customer affidavits, an owner affidavit, a list of items with corresponding markup percentages, and statements from customers whose EBT cards were processed manually.

ANALYSIS AND FINDINGS

Retailer Operations presented a case that Appellant trafficked SNAP benefits. Each Attachment represents the questionable and unusual patterns of SNAP transactions conducted at Appellant during the review period which were indicative of trafficking. As patterns of unusual transactions appear across multiple Attachments the case of trafficking becomes more convincing.

Attachment 1: Listed are 98 transactions in 30 sets of two or more transactions conducted by 17 different households (HHs). **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

Contentions:

- Each transaction in the charge letter is the exchange of qualified goods for benefits.
- The USDA has failed to show how any goods besides qualified food items were part of the transaction.
- Once the customer makes their first purchase, the customer asks how much money is left on their card and based on the reply purchases more groceries. They normally make a test purchase of a grocery item and plan for future purchases normally made within minutes of finding out the money remaining on their card.
- The SNAP manual disallows owners from questioning the purchasing of qualified items, see page 7.

- Each household card can be used numerous times throughout the day for the reason that there are numerous individuals in each large family and that there are a significant number of unemployed customers that frequent the store.
- Petitioner's customers normally have a large number of children per family. As a result, the children of the cardholder do much of the family's shopping. They routinely return to Petitioner's business numerous times, sporadically, to pick up more items to take home. For this reason, the transactions are not bundled together to the likes of a family living in the suburbs where it is normal for one adult in the home to do the shopping for the family, with maybe 1–2 more shopping trips for the rest of the week.

Data shows that within a one mile radius of Appellant there other authorized stores including one super store, three combination groceries and ten other convenience stores. Within two days of making a transaction at Appellant, 82% of the households (HHs) listed on this Attachment conducted a transaction at a supermarket, a large grocery store, or a super store. Thus, the data supports that the flagged households did access other larger stores to use their SNAP benefits. Retailer Operations also compared Appellant to three convenience stores within a 0.87 mile radius and found it had more transactions on this Attachment than the other local stores, each of which had zero.

There is no need for recipients to make a purchase to conduct a benefit balance check; in fact the regulations are clear that households “shall be permitted to determine their SNAP account balances without making a purchase or standing in a checkout line. The State agency shall ensure that the EBT system is capable of providing a transactions history for a period of up to two calendar months to households upon request.” The customer statements advanced do not support that these individuals received credit. None admits to receiving credit and none specifically states the HH shopped at Appellant multiple times during a set timeframe. Rather two attest to shopping regularly at Appellant and one states the HH shops there for day to day needs.

Credit is often claimed by retailers in an effort to garner a lesser sanction than permanent disqualification. A firm that commits a credit violation is sanctioned with a one year disqualification period. A one year disqualification for credit cannot be entertained when by a preponderance of the evidence it is determined that trafficking has more likely than not occurred. If the retailer does not provide adequate proof of credit, the retailer shall be permanently disqualified for trafficking.

When the owner signed the certification to become a SNAP retailer, he confirmed his understanding of and agreement to abide by program rules and regulatory provisions. He agreed to accept responsibility on behalf of the firm for violations of the SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. These include violations such as accepting SNAP benefits as payment on credit accounts or loans and trafficking. The certification is clear that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal or disqualification from the SNAP. Despite agreeing to abide by SNAP rules and regulations, the owner now claims he allowed credit accounts, a clear violation of SNAP regulations and rules.

At the time of authorization each retailer is provided a USDA SNAP training guide that states that credit and trafficking are not allowed. Thus, the owner was provided multiple and redundant resources through which a thorough knowledge of program rules and requirements could be readily obtained. The training guide is also available online and in many languages. This guide states that SNAP customers must pay for their purchases at the time of sale and that a retailer may not accept SNAP benefits as payments on credit accounts. The training packet includes:

- A video and book that explain the SNAP rules.
- Information that the store owner is responsible for carefully reviewing the program rules and making sure all employees fully understand these rules.
- Information that failure to follow the rules can result in disqualification, fines, civil and/or criminal action.

Enclosures provided by FNS to retailers when authorized include:

- A SNAP Permit
- SNAP Training Guide for Retailers and a training video
- Report Abuse of the SNAP Poster - MUST BE POSTED IN YOUR STORE
- We Accept SNAP Benefits - Window Sticker and Poster
- Using SNAP Benefits Poster
- Dos and Don'ts for Cashiers/Penalties for Violations of the SNAP: Double-sided sign
- EBT Fact Sheet
- From the "SNAP EBT Dos and Don'ts card (FNS-136, included in the authorization package) "Do not accept SNAP benefits (EBT) as payment on credit accounts."
- From the SNAP Training Guide for Retailers (page 9): "SNAP customers must pay for their purchases at the time of sale. You may not accept SNAP benefits as payments of credit accounts. You may not hold customers' SNAP EBT cards or card account information at your store for future use."

In regards to ownership's admission to accepting SNAP benefits for payment on credit accounts, a program violation, the agency requires that to refute charges of trafficking, the retailer must provide adequate proof that credit accounts existed at the time the suspicious transactions occurred, and that such proof is to be compared with transactions outlined in the Charge letter. Ownership did not provide any supporting documentation to validate his claim that he extended credit to customers. Without relevant documentation, it is impossible to make comparisons against the transactions outlined in the Attachments, or substantiate that such transactions were indeed the result of credit account repayments.

No itemized cash register tapes were provided to show that the transactions were for eligible foods. Appellant carried ineligible items including tobacco products, alcohol, lottery tickets, gasoline, mobile phones/phones cards, automobile products, health and beauty items and other household items. Appellant has the burden to provide a preponderance of evidence that the transactions listed are legitimate. That burden has not been met.

Attachment 2: Listed are 334 transactions that are at least three times higher than the average purchase amount for this store type in this state. The average SNAP transaction amount for this

type store in the state of Georgia was \$6.85 and in Laurens County it was \$7.04.
5 U.S.C. § 552 (b)(7)(E).

Contentions:

- Petitioner has a high volume of sales and cost of goods incorporating both EBT and NOT EBT sales.
- It is common for transactions to be excessively large since there are sometimes 7 children living in the same home with different needs. Petitioner sells large amounts of frozen chicken wings that are sold at \$36.50 per bag, which account for the large transactions.
- Petitioner sells a high volume of meat that account for what has been determined by the USDA to be “excessively large transactions.”
- Most of the customers of Petitioner’s business buy groceries for their entire household as would a customer at a fully-fledged grocery store.
- There are a significant number of individuals that do not own automobiles and buy in bulk. Among these items are chicken wings and soda.

Retailer Operations determined that the store photos indicate the checkout area is limited and enclosed by a plexiglass barrier. The FNS-contractor noted one point of sale device for EBT benefits, no optical scanner, no adding machine and no evidence of wholesale business such as a separate entrance for wholesale customers. The record shows Appellant had no shopping carts and no shopping baskets. This would hamper the movement in the store of large quantities of eligible items that would total high dollar amounts.

Appellant provided some vendor invoices which were analyzed by Retailer Operations. Some of the Walmart tapes are dated outside of the review period. There are three receipts from Food Depot, two of which are dated outside of the review period; 15 from Hunt Brothers Pizza some with no dates and many outside of the review months, and one from Wholesale of Lexington. Even with the markups applied to the relevant invoices provided, Retailer Operations determined that Appellant did not advance sufficient vendor invoice evidence to support its SNAP redemption volume. Retailer Operations also found that the owner failed to provide sufficient documentation to support the contention that Appellant sold a high volume of meat. Appellant is a convenience store with a profusion of soda and accessory food stock. The meat seen consisted primarily of lunch deli packs and hot dogs.

A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or mitigate the impact of the violations. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees. Further, the regulations stipulate “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2.”

This review encompasses and documents the examination of the information in the record to determine whether the owner demonstrates by a preponderance of the evidence that the permanent disqualification should be reversed. While the owner contends that the transactions on the Attachments are legitimate, no itemized cash register receipts were advanced as

evidence of eligible foods sold at Appellant during the review period. Further, the vendor invoices provided were not sufficient to cover Appellant's SNAP redemptions. No bank records or federal or state tax records were provided. The customer statements did not attest to credit accounts. As such the owner has not provided a preponderance of evidence that trafficking does not account for the transactions cited in the Charge letter. Further, while the owner claims he has not violated the regulations he has admitted to violating said regulations by allowing credit accounts.

CIVIL MONEY PENALTY

To be considered eligible for a CMP a firm must establish by substantial evidence its fulfillment of each of the criteria under 7 CFR § 278.6(i) of the regulations. The Charge letter states that if a CMP is requested the owner must meet each of the four criteria listed, provide supporting documentation within ten calendar days, and that no extension of time can be granted for making a request for a trafficking CMP or for providing supporting documentation. Retailer Operations states that the owner/attorney had until March 5, 2018, to provide documentation supporting the CMP request. The criteria are, as a whole, specifically identified as a minimum standard that firms must meet in order to be eligible for such a penalty. Given these considerations, the statute and the regulations allow no flexibility below the level of this stated standard.

Contentions:

- The owner requests a civil money penalty in lieu of permanent disqualification. His store is in a poor area and there would be hardship on his clientele in the event that he had to close his store or not offer services under the SNAP program.
- Only the owner and his wife operate the register and they are complying and there shall be no infractions going forward.
- A compliance policy was in operation prior to the occurrence.
- He and his wife are sufficiently trained.
- This is the first occasion in which the business has been cited for this type of violation.

By the regulatory due date, the firm failed to submit sufficient documentation that there was an effective compliance policy in place prior to issuance of the Charge letter. No written compliance policy was submitted and no evidence of training was provided. Retailer Operations properly denied the CMP for lack of documentation of fulfillment of the regulatory criteria.

By responses dated April 2 and April 26, 2018 current counsel contends:

- Petitioner in business since 2004 has been active in ensuring full compliance.
- Petitioner in business since 2012 has been an authorized EBT vendor since 2013.
- Petitioner's compliance policy states: there will be no exchange for cash for benefits; customers cannot share EBT cards; EBT card questions must be addressed to the owner; any employee engaging in EBT misuse will be terminated and employees can only sell qualified EBT items.
- Petitioner has been active in ensuring full compliance with his employees and their obligations to FNS/USDA.

- The compliance policy is current and petitioner has tried to comply with all government regulations.
- The USDA has not taken into account that Petitioner's employees run the business for the majority of the time and that the compliance policy that they had in effect has not actual training protocol as prescribed by the USDA.
- Employee training and documented evidence of anti-trafficking policies do not have an effect on this case because there is no true guideline on acceptable methods of documentation.

Counsel refers to an in-house booklet provided to employees and states that EBT issues are addressed quarterly. No evidence was presented of the booklet or of any quarterly meetings. As to Criterion 2, counsel contends that the petitioner stopped customers from purchasing large amounts of meat and also bulk package sales. They no longer use the manual entry system. SNAP benefits may be used for meat and eligible bulk items. Manual transactions are also allowed when a card does not function. These contentions are not relevant to the CMP regulations.

No evidence was provided by the regulatory due date that Appellant had an effective SNAP compliance policy or SNAP training program. The undated employee statements were not submitted until after the CMP due date, and they are not contemporaneous to said delivery of training prior to the Charge letter. While significant effort may be required to develop and maintain a compliance policy and program, if such fails to meet the requirements, that level of effort even if substantial, does not mitigate the insufficiency. The standard of substantial evidence required for CMP consideration is difficult to meet; indeed impossible if such policy and program are not implemented and documented prior to violations. Nevertheless, such is the regulatory standard to which Appellant is held under review.

Based on review of the initial CMP submission, Retailer Operations correctly determined that Appellant did not qualify for a CMP in lieu of a permanent disqualification based on the insufficiency of its submission to meet the regulations.

CONCLUSION

Upon review of all of the evidence in this matter it is determined that the evidence by a preponderance supports a conclusion that Appellant's SNAP transaction activity was likely due to SNAP benefit trafficking. Retailer Operations' analysis of Appellant's EBT transaction data provided substantial evidence that the questionable transactions had characteristics that are consistent with trafficking violations in SNAP benefits. Thus, based on the discussion herein, the decision to impose a permanent disqualification against Appellant is sustained. It is also determined that Retailer Operations properly denied a CMP.

RIGHTS AND REMEDIES

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

Under the Freedom of Information Act, 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

June 20, 2018