

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

T & J Cell and Tobacco,

Appellant,

v.

**Office of Retailer Operations
and Compliance,**

Respondent.

Case Number: C0224383

FINAL AGENCY DECISION

The record supports that the T & J Cell and Tobacco (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 Office of Retailer Operations and Compliance (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 January 15, 2020, Retailer Operations informed the owners 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.

Counsel responded to the Charge letter by letter dated February 19, 2020, and on February 25, 2020, and March 17, 2020. Retailer Operations issued a Determination letter dated March 30, 2020. This letter informed Appellant that it was permanently disqualified as a retail food store in accordance with Sections 278.6(c), and 278.6(e)(1) of the regulations. Retailer Operations considered Appellant's eligibility for a civil money penalty (CMP) according to Section 278.6(i) of the regulations, and found it was not eligible because insufficient evidence was submitted timely to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program to prevent violations.

By letter dated April 1, 2020, counsel appealed Retailer Operations' determination, and requested administrative review. The review was granted by letter dated April 28, 2020. An additional letter dated May 5, 2020, was provided to this office.

STANDARD OF REVIEW

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

CONTROLLING LAW AND REGULATIONS

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

7 CFR § 278.6(e)(1) states: "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined, in part, in 7 CFR § 271.2, as "the buying or selling of SNAP benefits for cash or consideration other than eligible food."

7 CFR § 271.2 states: "Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food products prepared for immediate consumption."

7 CFR § 278.6(a) states: "FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system."

7 CFR § 278.6(b)(2)(ii) states: “Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).”

7 CFR § 278.6(i) states: “FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.”

SUMMARY OF THE CHARGES

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges were based on an analysis of SNAP transaction data during the period of June 2019 through November 2019. The patterns of transaction characteristics indicative of trafficking are:

- There were a large number of transactions in repeated dollar values.
- Multiple transactions were made from the accounts of individual SNAP households within a set time period.
- EBT transactions were conducted that are large based on the observed store characteristics and recorded food stock.

APPELLANT’S CONTENTIONS

In reaching a decision, consideration has been given to all contentions as presented, including any not referenced. Counsel submitted: store photos, invoice totals by vendor for each month, spreadsheets for each review month with daily SNAP transactions listed, merchant processing statements for each month of the review period, state sales and use tax forms for each month of the review period, and a one page owner affidavit.

- The letter gave no specifics stating why our response was found to not be enough to back up our theory that he was not participating in trafficking of EBT benefits. If we could receive some clarification regarding why the violations were found to have occurred, we would appreciate it so that we could respond accordingly.
- We responded to the allegations with many documents provided by the owner which included receipts and invoices for his products sold and photos showing the size of his store and the number of products offered to his customers.
- I believe that we proved our case to the USDA that his case was not participating in trafficking of EBT benefits.
- We indicated that based on the documentation provided it proved that he did not engage in any illegal pattern of claiming reimbursement for the sale of food items.

- The owner represents that he has not exchanged cash for any EBT benefits, either by giving cash back to customers or purchasing EBT cards from eligible individuals. The inquiry comes from transaction patterns and/or categories inquiry.
- I feel that the USDA has not proven their allegations in that there have been no controlled buys, eyewitness transactions and/ or affidavits that support the allegation of fraud.
- There also has been no surveillance nor any investigation of his books.
- He absolutely represents he has not participated in any fraudulent activities with EBT cards.
- We feel that we are at a disadvantage to proving our claim anymore than we already have due to the fact that it is impossible to fully substantiate a person's purchases without knowing the identity of the individual SNAP recipients that come into the store.
- The owner is unable to tell you if the purchases made at his store are a monthly pattern or normal patterns for the individual. It is possible that their cards are used at other stores but without more information about the recipient it is impossible to show their pattern of purchases at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) store is consistent with their overall pattern of purchases. We are unable to contact the person or to look at the past purchase history and the USDA has not provided us with any information to nullify our claims. We feel that the owner could and did account for all of his SNAP transactions.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) a well-established store owner who has had several stores for a period of 30 years. He has done so without any other violations or incidents.
- A loss of the SNAP license will literally put him out of business and hurt the community that he serves. He has an excellent reputation in his local community and in Milwaukee.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) indicates that usage of a card multiple times in a month is not uncommon. This store has such a variety of items which prices range 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- A spreadsheet has been prepared by my office which shows the total amount of SNAP purchases questioned, the total amount of SNAP payments received, and the total amount of gross sales. Less than 50% of the total sales are for the SNAP purchases. The individual amounts questioned only represent less than 26% of the sales in any given month.
- Most of the questioned sales represent a fraction of the total sales. In each month that is questioned, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) has attached a listing of the total amounts purchased from his suppliers, his sales tax receipts showing valid taxable sales tax paid and the total SNAP purchases for the store.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) runs a high-volume neighborhood store and the people who shop in the store are from the immediate area. There is no immediate store of this size within several blocks. Without knowing the identity of the cardholders in question, it is impossible to show where their residence is in relation to the store. If given more time and investigation 5 U.S.C. § 552 (b)(6) & (b)(7)(C) would be more than happy to identify the individuals and have them make a statement and/ or provide affidavits to support that he is not trafficking in EBT transactions.
- It is not unusual for an individual who resides near the store to make a transaction on more than one occasion. Benefits are usually not used in full on one specific transaction, especially when the individuals shop at these neighborhood stores. A customer may come in for one item or many items.
- Benefits are issued throughout the first 15 days of each month based upon the recipient's social security numbers. An individual can come in at the end of one given month and be back at the same store in the beginning of their month and be only days or a week apart.

Without the identity of the individual, it would be impossible to defend any one transaction, based upon how benefits are distributed. Further, it is not unusual for a customer to forget an item and come back to the same store. Merely because there are two transactions relatively close is not proof of trafficking.

- When my legal assistant and I went to the store we witnessed this exact situation. A customer purchased items, walked out and immediately came back to buy another item. There is no continuous pattern seen in this store of such purchases. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** has protective glass between he and the customer. The machine to swipe the card is on the opposite side of glass than the clerk and the clerk has no access to it during the transaction due to the plexiglass separating the two sides. Only the customer can swipe the card. Attached hereto are two pictures showing each card machine set-up.
- It is impossible to fully substantiate a person's purchases without knowing the identity of the individual SNAP recipients that come into the store.
- Sometimes different members of a household will also make a purchase and subsequently a second person from that household may also come in later that day or soon thereafter and make a second purchase. No identification is needed by a customer for the purchase. The card is swiped, and **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** does not investigate them as to their identity. Without identification on the EBT card itself, it is impossible to know if a second person from the household is making a subsequent purchase. Further, the customer swipes the card and enters their pin number on a machine that is located on their side of the plexiglass.
- **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** is the main and usually the only person working the register at the store and absolutely denies any trafficking as defined by exchanging SNAP benefits for cash or other non-eligible SNAP items. The store's inventory substantiates the EBT sales. The gross sales are only a small percentage of the total sales.
- A permanent disqualification to the store would have an adverse impact on **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** as well as the small neighborhood community he serves. It is most unfair to disqualify the store without some proof that **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** is engaging in such illegal conduct. Absent proof, a disqualification should not be levied against the store. An incomplete statistical analysis to determine that the store was involved with trafficking is unfair at best. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** is left to guess what USDA wants from him. His books are open to you. He invites the USDA to monitor the store and will pay the costs to prove that he is operating in a legal fashion and not trafficking the EBT benefits.
- I substantiated the reason that this allegation could not be true. I attached invoices for each month along with a spreadsheet summarizing the months' invoices. I feel that without video/audio of controlled buys, statements of eyewitness transactions and/or affidavits that support the allegation of fraud, we are truly at a disadvantage and are having to fight unsubstantiated allegations. It is impossible to fully substantiate a person's purchases without knowing the identity of the SNAP recipients that come to the store.
- The store owner is well respected, has an excellent reputation, and he has had several stores over a period of 30 years. He has done so without any other violations or incidents.
- A loss of SNAP will put him out of business and hurt the community he serves.

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 40 transactions, 18 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These transactions are also included in Attachment 3. There is insufficient evidence to support that the listed transactions in this Attachment constitute a pattern of trafficking that is different from the pattern in Attachment 3. On review, this Attachment pattern is dismissed.

Attachment 2: Listed are 38 transactions in 17 data sets made from the accounts of 16 individual SNAP households within a set time period. The high dollar transaction amounts seen in the subsequent transactions in these sets do not appear to represent the purchase of one or two forgotten items.

FNS conducted an onsite store visit on December 8, 2019. Appellant had one register, no optical scanner, and one POS device. The report indicates the store had six handbaskets, but no grocery carts to transport items throughout the store or to the register. One shopping cart is seen in the storage room. The checkout counter is via a barricaded pass-through window bordered by product displays that limits space for conducting large dollar transactions. The survey noted Appellant did not round prices up or down at the checkout, the store did not have an unusual price structure, and it did not take phone orders or provide delivery service. Store photos show staple food inventory included canned foods, some frozen foods, a variety of cereal products, packaged deli meats, milk and juices. There were many accessory foods including sodas and snack items. The inventory report does not indicate advertised staple food specials or promotional items. The store photos did not show food bundles/packages. The highest priced eligible foods were listed as priced from \$14.99 to \$25.00. Appellant stocked a variety of nonfood items including: tobacco products, health and beauty aids, paper products, cleaning supplies and automotive products.

The record shows that there are more than 90 authorized firms within a two mile radius of Appellant including: two supermarkets, four super stores, nine medium groceries, five small grocery stores, and more than 70 additional convenience stores. This supports that there are other nearby authorized retailers at which SNAP recipients could purchase eligible foods. Retailer Operations analyzed SNAP households' transaction histories at Appellant and these confirmed that recipients did access and conduct SNAP transactions at other authorized firms.

Appellant had an average SNAP transaction amount that was 19% higher than convenience stores in the County. Appellant's average SNAP dollar volume was 5 U.S.C. § 552 (b)(6) & (b)(7)(C) higher than the same store type in the same County. Retailer Operations compared Appellant to a three nearby authorized convenience stores, and found that

Appellant had a higher number of transactions flagged on this Attachment. The comparator stores had no flags, four flags, and two flags respectively. This is unusual.

Attachment 3: Listed are 278 transactions by 136 different households that are large based on the observed store characteristics and recorded food stock. The amounts listed exceed the average transaction amount for the same store type in the same state by three times or more. The data supports that 78% of the households listed on this Attachment made a transaction(s) at a super store, or supermarket within one day of making a SNAP transaction(s) at Appellant. Appellant had many more transactions that met the parameters of this scan as compared to three nearby same type comparator stores that had 10, 37 and 103 flags on the parameters of this Attachment during the same timeframe.

The owner submitted vendor invoices to support the store's stock. Retailer Operations determined that sufficient food was purchased to cover Appellant's SNAP redemptions for the review period. Retailer Operations conducted a review of several households' shopping patterns at Appellant. These patterns show that households made transaction(s) at larger store types on dates proximate to, or on the same date as at Appellant, while conducting lower dollar SNAP transactions at the larger store types. While some households may have conducted legitimate SNAP transactions at Appellant, Retailer Operations determined that there was insufficient evidence presented to support that the Attachment patterns were more the result of eligible food purchases than of the trafficking charged. Retailer Operations determined that the invoice analysis confirmed that the store offers mainly snacks foods and beverages, and that the purchase of such items did not explain the transaction patterns in the Attachments. No detailed itemized cash register receipts were provided. No federal business tax returns were provided. No price list of eligible foods was provided. No customer affidavits were advanced..

The regulations at 7 CFR § 278.6(a) state that FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, and that such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system. The owners have the burden of providing credible, relevant evidence, which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true. The responding owner has not provided a preponderance of evidence to support that the transactions listed in two of three Attachment patterns were for eligible foods rather than the result of trafficking.

CIVIL MONEY PENALTY

The regulations at 7 CFR Section 278.6(i) specify the criteria for a firm's eligibility for a CMP in lieu of permanent disqualification for trafficking. The four criteria listed at the cited regulation are identified as a minimum standard that firms must meet in order to be eligible for CMP consideration. The responding owner did not request or submit substantive documentation to support a trafficking civil money penalty in lieu of permanent disqualification as required by the regulations.

Given the lack of a substantial evidence submission which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations, the owner did not meet the criteria for a CMP. Retailer Operations properly denied it.

CONCLUSION

Retailer Operations' analysis of Appellant's SNAP transaction data was the primary basis for its determination to permanently disqualify Appellant. The record also included onsite store photographs, an onsite store report, and household shopping analysis that provided evidence that the questionable transaction patterns during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. In the absence of a preponderance of evidence presented by Appellant of the legitimacy of two transaction patterns, the entirety of the record, more supports that violations did occur as charged by Retailer Operations.

Retailer Operations denial of a trafficking CMP was also proper per the applicable regulations. Therefore, the decision to impose a permanent disqualification against Appellant is sustained. This decision is effective 30 days from delivery to Appellant.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008, and to 7 CFR § 279.7 of the regulations, with respect to applicable rights to judicial review of this decision. If judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which Appellant's owners 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 delivery 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 29, 2020