

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

Tobacco Deals #3,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0212001

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Tobacco Deals #3, (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 November 20, 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

In a letter dated October 25, 2018, 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 April 2018 through July 2018. 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 November 8, 2018, Appellant, through counsel, replied to the charge letter and generally stated that it does not contest the merits of the allegations in Attachment 1 and Attachment 2 but contest the disqualification from the program and ask for strong consideration for the CMP program based upon the following explanation and documentation of how these transactions occurred and how they will be prevented from happening in the future:

1. The violations that occurred during the months of April 2018 and July 2018 were committed by an employee. He quit after committing these infractions and left the country. We also found that he was the catalyst to a robbery and a few burglaries to the business.
2. This was an isolated incident concerning the fraudulent transactions at the business which services a very high crime area with low income people.
3. This was due to greed of one employee.

Appellant, through counsel, provided the following documentation:

- Three documents for training classes that were in effect (#1a, 1b, 1c).
- Attendance verification forms (#2a, 2b).
- Surveillance Camera Program Application (#3).
- Profit and Loss Statement, Tobacco Deals #3 (#4).
- List of eligible and ineligible items (#5).
- Copies of receipts with food stamp sale affixed to them (#6, 6a).
- Batch totals (#7).
- Milwaukee Police Report robbery offense dated 10/24/18, (8 pages).

After giving consideration to the Appellant's reply and evidence of the case, Retailer Operations Division issued a Determination letter dated November 20, 2018. The 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 November 29, 2018, Appellant, through counsel, 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 THE CHARGES

The charges on review were based on an analysis of SNAP electronic benefit transfer (EBT) transactions dated during the four month period of April 2018 through July 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 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

No Contentions were presented during this review. In subsequent correspondence dated December 26, 2018, Appellant, through counsel, provided documents alleging that training classes were attended on February 10, 2017 and October 1, 2018, four pages of employee agreements of termination for fraudulent transactions, all dated October 1, 2018, two customer letters regarding the store accepting SNAP and copies of airline tickets for travel outside of the country May 28, 2018 to June 19, 2018 for the owner.

ANALYSIS AND FINDINGS

The FNS authorized the business as a convenience store on June 16, 2015. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during an August 14, 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 small counter area completely enclosed in Plexiglas.
- Estimated to be approximately 1500 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 operates through a night window or plastic barrier with 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.
- Food stored in an area outside of public view in an area approximately 256 square feet.
- 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
- No items over \$5.00 located in the store.
- Store stocks a significant amount of non-food items such as but not limited to cleaning products, tobacco products, paper products, clothing items, .
- Store stocks scarce amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products. The store does not carry bread, cereal, deli products, fresh meats, fresh produce, frozen foods, baby food, baby formula, specialty or ethnic foods
- Food items contained a layer of dust indicating slow turnover.
- No kitchen/prepared food area and no hot food sold.
- No deli or prepared food section.

- No meat or seafood specials or bundles or fruit/vegetable boxes sold.
- Deficient in the dairy products category.

The 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 the Appellant firm 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 accounts in unusually short timeframes

There were 11 sets of 33 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. **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

Ownership does not deny the charges and admits that they were conducted by an employee who also robbed the store. Appellant, through counsel, did not offer, with its review request, any explanation or related evidence in an attempt to clarify or justify the specific transactional behavior noted in the Attachment 1 of the charge letter therefore, based on the analysis above and in the absence of any compelling evidence to the contrary, the irregular and unusual transaction pattern cited in the charge letter is unlikely and a strong indicator of trafficking in SNAP benefits.

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 - Excessively large purchase transactions were made from recipient accounts

There were 41 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. **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

Ownership does not deny the charges and admits that they were conducted by an employee who also robbed the store. Appellant, through counsel, did not offer, with its review request, any explanation or related evidence in an attempt to clarify or justify the specific transactional behavior noted in the Attachment 2 of the Charge letter therefore, based on the analysis above and in the absence of any compelling evidence to the contrary, the irregular and unusual transaction pattern cited in the charge letter is unlikely and a strong indicator of trafficking in SNAP benefits.

It is important to note that any program violations which may have occurred and would have been handled by an employee rather than by Appellant, cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. Even if it was not Appellant who violated program regulations, as owner of the store, Appellant is liable for all volatile transactions handled by store personnel. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of FSP benefit transactions. The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food Stamp Act and the enforcement efforts of the USDA.

Additionally, the store visit report and photographs document that the Appellant firm was deficient in dairy products and tends to indicate that the firm may not have been eligible to maintain SNAP authorization on the day of the store visit.

Based on this empirical data, and in the absence of sufficient evidence as to the legitimacy of such transactions, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the charge letter evidence trafficking as the most likely explanation. In this case, ownership did not provide sufficient evidence to legitimize Appellant’s transaction data as outlined in the Attachments. Retailer Operations Division determined that Appellant’s contentions did not outweigh the evidence that the store was trafficking and concluded, through a preponderance of evidence, that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

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 recording during the onsite visit to support such large transactions, the lack of evidence of invoices of

foods in inventory to cover SNAP redemption 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 charge letter. 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 Division 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' 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 deems pertinent in support of its position that Retailer Operations Division's 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.

CIVIL MONEY PENALTY

The Appellant, through counsel, contests the disqualification from the program and ask for strong consideration for a CMP. Appellant, through counsel, provided three documents for training classes that were allegedly in effect during the SNAP violations. With regard to this contention, it is noted that Appellant provided documents alleging that training classes were attended on October 1, 2018 and February 10, 2017, four pages of employee agreements of termination for fraudulent transactions and all were dated October 1, 2018. It is also noted that the employee, that ownership stated quit and left the country, appears on the training documentation dated October 1, 2018 which is after Appellant stated that the employee left the country. Therefore, it appears that these documents were contrived in an attempt to justify its contention and request for a CMP

It is the determination of this review that Appellant failed to provide Retailer Operations Division with the required documentation to be considered for a trafficking CMP in lieu of disqualification. The documentation provide during this review was insufficient to be considered for a trafficking CMP. Therefore, Retailer Operations Division correctly determined that Appellant was not eligible for a trafficking CMP as set forth in the SNAP regulations.

CONCLUSION

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.

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Tobacco Deals #3 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 Tobacco Deals #3 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

June 12, 2019