

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

Tommy's Mini Mart,

Appellant,

v.

Case Number: C0208969

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is insufficient evidence to support the determination by the Retailer Operations Division (“ROD”) to impose a permanent disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) against Tommy’s Mini Mart (“Appellant”).

ISSUE

The purpose of this review is to determine whether the ROD took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a Permanent Disqualification against Appellant on June 26, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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 June 5, 2018, the ROD charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations. This charge was based on a series of SNAP transaction patterns that “establish clear and repetitive patterns of unusual, irregular, and inexplicable activity for your type of firm.” This letter of charges states: “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.” The letter also

states that “. . . under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of a permanent disqualification of a firm for trafficking.”

Appellant replied to the ROD’s charges in writing. The record reflects that the ROD received and considered the information provided prior to making a determination. The ROD determined that Appellant’s contentions did not outweigh the evidence that the store was trafficking. Based on the preponderance of evidence, the ROD concluded that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

The ROD issued a determination letter dated June 26, 2018. This letter informed Appellant that it was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6 (c) and 278.6(e)(1) for trafficking violations. The letter also states the ROD considered Appellant’s eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. The ROD determined that Appellant was not eligible for the CMP because Appellant had not submitted insufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

On July 6, 2018, Appellant appealed the ROD’s determination and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as insufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) 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 engaged in trafficking of SNAP benefits.

7 CFR § 278.6(a) states, in part:

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**

(Emphasis added.)

7 CFR § 278.6(a) states, in part:

Any firm considered for disqualification ... under paragraph (a) of this section... shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification. The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter . . .

7 CFR § 278.6(c) reads, in part:

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) of this section, 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, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(e)(1)(i) reads, in part:

FNS shall . . . [d]isqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

Trafficking is defined in 7 CFR § 271.2, in part, as:

The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone”

Also at 7 CFR § 271.2, eligible food is defined as:

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

7 CFR § 278.6(b)(2)(ii) states, in part:

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(b)(2)(iii) states:

If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such a penalty.

SUMMARY OF CHARGES

The charges under review were based on an analysis of SNAP Electronic Benefit Transfer (EBT) transaction data during the period from December 2017 through April 2018. This analysis identified the following patterns of SNAP transaction activity that indicate trafficking:

- Multiple transactions made from the same accounts in unusually short time frames; and,
- Excessively large transactions.

The attachments enclosed with the charge letter specify the questionable and unusual SNAP transactions indicative of trafficking which were conducted at Appellant during the review period.

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- Appellant is located in a rural area with few SNAP-approved stores located nearby. The closest grocery store is located 10 miles away. Appellant provided directions from Google Maps and 24 statements from customers;
- Appellant carries a variety of food products including frozen foods and meats which explains the large purchases. Appellant provided 15 store pictures;
- Appellant has longer hours than other stores in the area;
- Appellant requests a CMP;
- Appellant denies the allegations;
- The charge letter identifies only two patterns of trafficking. The first includes only 16 sets of back-to-back transactions and the second only 174 excessively large transactions, less than the amount of transactions typically cited by FNS to support a trafficking definition;
- Appellant is 2,040 square feet. Appellant provided a county tax card;
- Appellant sells a variety of expensive items including packs of frozen pizza for \$39.99, butter for \$7.49, canned meats and vegetable costing up to \$7.99, coffee \$12.99, and infant formula up to \$43.99;
- Multiple purchases in a short period of time are because customers do not have cars;
- A comparison of Appellant's average daily SNAP sales from July 2017 to November 2017 with those during the review period shows only about a

5 U.S.C. § 552 (b)(6) & (b)(7)(C) increase over the baseline figure. Appellant provided a thumb drive with an Excel spreadsheet document¹;

- Sales increased at Appellant because of the closing of Mt. Misery Road for construction;
- Multiple purchases are because children come multiple times for snack and drink purchases;
- Only one customer made large back-to-back transactions more than once during the review period; and,
- Case law supports that suspicious EBT patterns are insufficient to establish trafficking.

These explanations may represent only a brief summary of Appellant's contentions.

ANALYSIS AND FINDINGS

A review of the ROD case file indicated the ROD failed to establish that Appellant trafficked in SNAP benefits. Accordingly, it is unnecessary to address Appellant's contentions in this matter. However, in reaching a decision, full attention and consideration have been given to all contentions presented.

CONCLUSION

A review of the evidence in this case supports that it is more likely true than not true that program violations did not occur as charged. Based on the discussion above, the determination by the Retailer Operations Division to impose a permanent disqualification against Tommy's Mini Mart from participation as an authorized retailer in SNAP is reversed.

RIGHTS AND REMEDIES

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.

RICH PROULX
Administrative Review Officer

September 6, 2018

¹ Appellant stated it included handwritten monthly sales reports on the thumb drive provided, but these documents were not present.