

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

Tower Convenience Store,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0190813

FINAL AGENCY DECISION

It is the decision of the USDA, Food and Nutrition Service (FNS) that the record indicates that Tower Convenience Store (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 SNAP, as initially imposed by the Retailer Operations Division (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 its 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 2, 2017, Retailer Operations informed ownership that FNS had compiled evidence that Appellant had violated the SNAP regulations. Analysis of Appellant’s records revealed 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.

Ownership, via counsel, replied to the Charge letter on May 8, 9, and 16, 2017. Retailer Operations issued correspondence to Appellant regarding credit on May 8, 2017. Retailer Operations considered Appellant's replies and issued its Determination letter dated June 13, 2017. This letter informed counsel and the owners that Appellant was permanently disqualified from 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 civil money penalty (CMP) according to the terms of Section 278.6(i) of the regulations. Appellant was not eligible for a CMP because insufficient evidence was submitted to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

By letter dated June 23, 2017, ownership, via counsel, appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated June 29, 2017. By email dated July 12, 2017, counsel sought clarification of the deadline for information. By email dated July 12, 2017, this office restated the due date for information. Counsel provided additional information under cover letter dated July 24, 2017. This information was forwarded to Retailer Operations for review and analysis on August 2, 2017.

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 or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 CFR § 271.2 states in part: "Eligible foods means: 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 § 278.2(f) states in part: "SNAP 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 SNAP for a period of one year."

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...”

7 CFR § 278.6(e)(1) states, 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: (1) 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;”

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 on review were based on an analysis of SNAP EBT transaction data during the period of September 2016 through February 2017. This involved three patterns of EBT transaction characteristics which are indicative of trafficking:

1. Multiple transactions made from individual benefit accounts within unusually short time frames.
2. In a series of SNAP EBT transactions, the majority or all of individual recipient benefits were exhausted in unusually short periods of time.
3. Excessively large purchase transactions were made from recipient accounts.

APPELLANT’S CONTENTIONS AND EVIDENCE

The following may represent a brief summary of ownership’s contentions; however in reaching a decision, attention has been given to all contentions presented, including any not specifically referenced herein.

- Any loss of EBT privileges would be devastating to the owners and to the clients they regularly serve.
- The store denies any instances of trafficking.
- There is no evidence that the store has ever once bought or sold food stamp benefits for cash.
- The store on one occasion has admitted it gave credit to a long-term customer.
- At worse, this is a case of poor supervision and carelessness by management.

Appellant provided: 17 copies of close up photographs with prices of items sold and exchanged for SNAP benefits; register tapes documenting transactions listed in the Charge letter; 34 customer statements on behalf of the store, one had no name and was not signed; and five photographs of the street area.

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.

Attachment 1: Multiple SNAP transactions were made from individual benefit accounts in unusually short time frames. This Attachment lists 50 transactions in 19 sets of two or more transactions conducted by 11 different households (HHs). **5 U.S.C. § 552 (b)(6) & (b)(7)(C).** **5 U.S.C. § 552 (b)(7)(E).** The record confirms that Appellant was compared to four nearby authorized convenience stores just more than a half mile distant. While Appellant had 50 transactions on this Attachment the comparator stores had 7, 2, 0 and 0 transactions flagged respectively. This is irregular.

Contentions:

- The first attachment consists of 19 pages of EBT register tapes. The relevant portions of each tape are bracketed. For example, on page 1 you'll see "3" and "4" bracketed. It will correspond to Attachment 1 to the 5/2/17 letter. **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**
- The following numbers from your Attachment 1 are included: 3, 4 5, 6, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 34, 35, 36, 37, 38, 41, 42, 43 and 45. **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**
- Attached is a spreadsheet summarizing the above and it includes remarks from me in response to some of your questions.
- In response to your 5/8/17 letter, this documentation supports that food items were purchased.

Appellant provided 17 photographs which are a representative sample of its products. Counsel states "These are the items sold and these are the only items exchanged for EBT. No cash has ever been exchanged. Each of the products in the store is eligible food." The photos show: tilapia fillets, \$24.50; Fruit & Veggie Blenders, \$14.99; Banquet Frozen Chicken, \$6.99; ice cream cakes, \$16.99; Brown & Serve Sausage (Beef), \$2.99; Hungary Man, \$4.99; Friendly ice cream, \$4.99; Marie Callender's pie, \$6.99; Brown & Serve Sausage (Turkey), \$2.49; Hart Pineapple Chicken, \$6.99, (\$5.99 on FNS' photo); Nestle Fruit Bars, \$4.99; Ben & Jerry's ice cream, \$5.99; frozen veal parmesan, \$5.99; frozen pound cake, \$4.99; Blue Bunny ice cream, \$6.99; Banquet Meal Starters, \$4.49; and frozen layer cake, \$4.99. Eight of these 17 items were seen in the FNS store visit photographs. Eight of 17 items are priced below \$5.99 and none of these lower cost items were seen in the FNS photographs.

The FNS onsite store visit photos dated March 17, 2017 show frozen foods in several standup freezers and some reach-in ice cream chests, one of which fronts the small checkout area that appears to be about 2 X 2 feet. The store visit report indicates there were no shopping carts or handheld baskets to transport items to the counter. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C). That these large numbers of items are transported and transacted without the benefit of carts or handbaskets strains credulity.

The cash register tapes are generic in that they provide no information on what specific food items were allegedly purchased; they are not adequate to discount that trafficking is not more likely. It is simple to tally for example of ten “frozen items” and then conduct a trafficking exchange. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). There are no items priced at \$9.99 on Appellant’s list of 17 items. Several tapes indicated 30 or more frozen food items priced at \$1.00, as for example the tape to explain transaction #24. Appellant did not provide any invoices from vendors to support the acquisition in inventory of eligible foods during the review period. The advanced evidence is not adequate to demonstrate the transactions in this Attachment are for eligible foods.

Attachment 2: In a series of SNAP EBT transactions, the majority or all of individual recipient benefits were exhausted in unusually short periods of time. This Attachment lists 38 transactions in 11 data sets conducted by seven different households whereby a single household’s account is depleted or almost depleted in a single calendar day. Retailer Operations compared Appellant’s flagged transactions to four nearby same type stores, all of which had 0 transactions flagged on this Attachment. A household’s depletion of its benefit allotment in one or a few transactions in a calendar day, leaving little or no benefits for the rest of the month, is inconsistent with the normal shopping behavior of SNAP benefit households and is indicative of trafficking.

Under review, the shopping histories for all seven households listed on this Attachment were assessed. The households appear to have benefit allotments that correspond to small households and all appear to shop frequently at Appellant. Appellant presented numerous customer statements that attest that the individuals living in the tower complex, where the store is located, are disabled, have no car, are in wheelchairs, and have a variety of stated difficulties going to other stores, including child care challenges. The store is convenient for SNAP recipients residing in the tower on the floors above the store. The FNS photos show an ambulance in front of the complex, and the exterior photos confirm the high-rise is on a slope that disabled and elderly recipients may find difficult to navigate.

This Attachment is not determined to be more persuasive of trafficking than not.

Attachment 3: Excessively large purchase transactions were made from recipient accounts. This Attachment lists 134 individual SNAP transactions made by 51 households 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The data shows that within one day of a transaction at Appellant, 30 HHs conducted a transaction at larger stores, and within three days, 37 households conducted a SNAP transaction

at a large grocery, supermarket or super store. The record shows that within a 1.2 mile radius of Appellant there are two super stores, two supermarkets, nine medium grocery stores, five small grocery stores and 52 other authorized convenience stores.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The record shows that compared to four convenience stores within a .56 mile radius, Appellant had 134 transactions flagged on this Attachment's parameters as compared to 73, 62, 30 and 13 at the other authorized stores. This is irregular.

The receipts advanced by Appellant are not itemized by individual items purchased. The highest priced item shown on the FNS onsite report of Appellant's inventory was frozen pizza for \$9.99. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The record shows that on May 16, 2017, after the Charge letter had been issued, a complaint was received by FNS from the Massachusetts Department of Transitional Assistance alleging that the store owner allowed people to buy cigarettes, scratch tickets, lottery tickets and other prohibited items, and that the owner kept the EBT card for a day or two and debits benefits. There is no further information regarding this complaint in the record.

Appellant furnished no banking records and no federal business tax filings or state tax filings on its behalf.

Credit

A credit ledger for a named individual was advanced to explain the transactions. The log pages show columns for: purchase date, items, amount, amount paid, date paid and balance due. The contention was that it would be a pity to punish the whole building because the store employees tried to help one person.

The identified HH was matched to its SNAP shopping history. This HH was responsible for five of the transactions on Attachment 2 and 16 transactions listed on the three Attachments combined. On review, the shopping history supports that the HH typically conducted two or three transactions on the 14th of each month. The data supports that this HH appears to have been offered violative credit. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). We use [sic] to have credit and when our food stamp came in we even up." This evidence supports that more than one HH was likely advanced improper SNAP credit by the owners.

When the owner(s) 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, or disqualification from the SNAP. Despite agreeing to abide by SNAP regulations, the owners now admit that they allowed at least one credit account, a clear violation of SNAP regulations. As noted, the evidence supports that there may have been other HHs to which violative credit was also extended.

At the time of authorization each retailer is provided a USDA SNAP training guide that states that credit and trafficking are not allowed. The training guide is 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."

Thus, the owners were provided multiple and redundant resources through which a thorough knowledge of program rules and requirements could be readily obtained.

Credit accounts have long been claimed by retailers as a defense for trafficking in an effort to garner a lesser sanction than permanent disqualification. Therefore, to refute charges of trafficking, the owners must provide adequate proof that credit accounts existed at the time the suspicious transactions occurred so that Retailer Operations can compare such proof with transactions listed on the Charge letter. 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 an owner is not able to account for all of the suspicious EBT transactions for which a store has been charged, the determining office must evaluate the remaining transactions and determine whether trafficking has occurred. While credit may account for some of the transactions listed in this matter, Attachments one and three list more than 100 unique transactions. Thus, credit does not explain the bulk of the transactions listed in the Charge letter. If the retailer does not provide adequate proof of purported credit accounts, the appropriate penalty is permanent disqualification.

Customer Affidavits

Counsel submitted affidavits from individuals who stated generally that they shopped for food at Appellant, they were elderly or disabled, and Appellant was their primary food source since it was convenient. Retailer Operations determined that ten names were illegible. Twenty-five names were searched in the State administrative terminal, and 13 SNAP client records were found. One household was previously analyzed as a credit account, and one HH had no record of SNAP transactions at Appellant.

The shopping histories of the remaining 11 households did not help explain the transactions listed in the Charge letter. Only three households had transactions flagged at Appellant. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. All 11 households conducted transactions at supermarkets and/or super stores more than mile from Appellant. The data did not confirm that Appellant was a primary food store for these households, and they were not spending the bulk of their SNAP benefits at Appellant.

The evidence that Appellant violated the SNAP regulations is furnished in the Charge letter Attachments. An Appellant that seeks to set aside an agency determination bears the burden of proof by a preponderance of the evidence. Under the regulations, FNS may permanently disqualify a retailer on the basis of EBT data. Since permanent disqualification is warranted on the first occasion of trafficking, it is Appellant's burden to raise material issues of fact as to each of the transactions set forth as suspicious by FNS. This burden has not been met.

While counsel contends that the transactions are legitimate, the cash register receipts advanced as evidence of eligible foods purchased are not sufficiently detailed to substantiate this claim. Further, no evidence was provided by means of vendor invoices or receipts of Appellant's acquisition and stock of eligible foods. No price list of eligible stock was advanced by Appellant. As noted, the evidence of credit was limited to one HH. No banking or tax records were provided.

CIVIL MONEY PENALTY

To be considered eligible for a trafficking CMP, a firm must establish by substantial evidence, its fulfillment of each of the criteria listed at 7 CFR § 278.6(i). The criteria as a whole are specifically identified as a minimum standard that firms must meet in order to be eligible for such a penalty. No evidence was produced that Appellant met the requirements to qualify for a CMP in lieu of permanent disqualification.

CONCLUSION

Retailer Operations' analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits.

Upon review of all of the evidence in this matter it is determined that the evidence in two of the three Attachments supports by a preponderance the conclusion that the transaction activity at Appellant was due primarily to SNAP benefit trafficking. Thus, based on the discussion herein, the decision to impose a permanent disqualification against Appellant is sustained.

Appellant did not provide any documentation for consideration for a CMP in lieu of permanent disqualification. Thus, Retailer Operations properly denied a CMP according to the terms of Section 278.6(i) of the regulations.

RIGHTS AND REMEDIES

Your 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 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 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

September 8, 2017