

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

Yohns Grocery,

Appellant,

v.

Case Number: C0212448

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The record indicates that Yohns Grocery (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). It is the decision of the USDA, Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retail food store in the SNAP, as imposed by the Retailer Operations Division (Retailer Operations), was appropriate.

ISSUE

The issue accepted for review is whether Retailer Operations took 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 FNS.

CASE CHRONOLOGY

By Charge letter dated October 4, 2018, Retailer Operations informed the owner that FNS had compiled evidence that Appellant had violated the SNAP regulations based on analysis of electronic benefit transfer (EBT) transactions that establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for the firm type. The sanction for trafficking is permanent disqualification.

Appellant replied to the Charge letter October 8, 9, 17, and 29, 2018. Retailer Operations issued a Determination letter dated November 14, 2018. This letter informed the owner that Appellant was permanently disqualified from the SNAP in accordance with Sections 278.6(c), and 278.6(e)(1), of the 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. The firm was deemed not eligible because insufficient evidence was submitted to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP regulations.

By letter dated November 19, 2018, the owner, via counsel, appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated November 28, 2018. Counsel provided additional information dated December 19, 2018. Retailer Operations provided this office its review of the information on February 27, 2019.

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 Section 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 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 food 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(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 § 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 the 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 April 2018 through August 2018. This involved two patterns of transactions indicative of trafficking:

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

APPELLANT’S CONTENTIONS

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

- I affirm I did not commit any trafficking or intentional violation of EBT regulations.
- Our store is in an area where there are more than usual number in a family. They come and buy individually and charge the card. If any member used the same card for another purchase, it is hard for us to monitor. Most of the repeated purchase occurred in such situation.
- Store intentionally did not ring duplicate or charged large amounts for cash refund.
- Without EBT we can’t stay in business.

Counsel provided a CD with: two pages with listed purchases for transactions 1-20 and 46-70; 10 pages of copies of register z-tapes for transactions 1-20 and 46-70; 31 pages of register z-tapes for flagged transactions; a listing of 337 items with prices; 15 customer statements; 14 photos of stock; scans of vendor invoices for the five review months; a two page meat flyer/advertisement with prices; and a one page document: *Official USDA Food Plans: Cost of Food at Home at Four Levels, U.S. Average, January 2018*.

ANALYSIS AND FINDINGS

Retailer Operations presented a case that Appellant trafficked SNAP benefits. As patterns of unusual transactions appear across multiple Attachments the case of trafficking becomes more convincing.

Attachment 1: This Attachment lists 45 transactions in 16 sets of two or more transactions conducted by ten different households (HHs).

Contentions:

- The neighborhood is composed of multigenerational families living at the same address. Those individuals, all authorized to use the Access Card, have different shopping patterns. There is not one single person in the household responsible for all of the shopping.
- Possibly beneficiaries allow a third party to use their card. Based on my criminal defense experience it is my understanding that beneficiaries purchase merchandise and sell it on the street. The beneficiary solicits a shopper for cash (or something else of value to the beneficiary) in exchange for the use of the beneficiary's Access card. One need not walk too far on a hot summer day in the neighborhood where the store is situated to find individuals selling cold drinks out of a bag of ice. An Access card user that is able to enter a correct PIN for the card that they are using authenticates the transaction.
- The client has no system in place to monitor card numbers swiped on their machine for multiple purchases. No requirement exist under USDA regulations to monitor card numbers for multiple purchases.
- The store is located less than one block from a Salvation Army and it is the closest store to that facility.
- Customers are seen two or more times a day and it is easy to see how a card may be used multiple times within a short time period.
- The Salvation Army houses families and these households shop multiple times a day because of the lack of space to store cold items and foodstuffs in general. There is a legitimate fear of leaving food unattended at the shelter will result in theft.
- It follows that those individuals staying at the shelter shop for food at the store as there are no other grocers within a ten block radius. The refrigerator space allocated to each family at the shelter is quite small.

Retailer Operations noted that the different shopping priorities and needs of multiple generations residing under one roof are not necessarily portioned out via one single SNAP benefits account. The SNAP allows that if there are multiple families living in one household, and they purchase and prepare food separately, their benefits may be issued as separate households, each household with its own EBT card.

Appellant admits to possibly selling foods to anyone who had an EBT card and pin number, regardless of their status as a valid SNAP recipient. This practice does not show Appellant's

adherence to USDA's guidance that retailers report suspected fraud and abuse to the USDA, Office of Inspector General (OIG). The OIG contact information is clearly given in the SNAP retailer training guide, and retailers are enlisted to help preserve the integrity of the program by contacting OIG when fraud is suspected. While the owner may claim this is not his responsibility, this position evidences a disregard for the integrity of the Program from which Appellant financially benefitted.

The Charge letter cites 76 unique household numbers. Appellant advanced 15 customer statements in support of its appeal. One name was not readable, and could not be searched. Retailer Operations found ten of the individuals' names in the State Administrative Terminal. Many names were listed multiple times in the State data, and without additional information, such as SNAP ID number, address, and state card information, it was not possible to positively match eight of ten names to Charge letter transactions.

Only two names matched to transactions listed in the Charge letter. One matched individual stated that she shops at Appellant every day for herself and her kids, and she does not drive. The household transacted benefits 2.8 miles distant from Appellant during the review months, and did not conduct any transactions at Appellant in two of the five review months, contradicting her claim to shop there daily. The attestation from the other matched household noted that the affiant came to the store as a child, and now her children and grandchildren come to store. She lives nearby, it is convenient, and her grandchildren get lunchmeat, bread, packaged food, etc. The shopping history shows that this HH made many transactions at other larger stores, including a supermarket 1.84 miles distant from Appellant.

None of the affiants stated that they bought meat packages or cases of items at Appellant. None of the customer statements provided dated order forms or receipts with itemized descriptions and cost of eligible foods at Appellant. Most of the affiants want the store to be able to transact food stamps again. Retailer Operations determined that the advanced statements did not help to explain the suspicious transaction patterns listed on the Attachments.

According to the record, there is one super store, one supermarket, three small grocery stores, and 11 convenience stores authorized to redeem SNAP within a one mile radius of Appellant. The data shows that 50% of the HHs listed made a transaction(s) at a large grocery, supermarket or super store on the same day that they made a transaction(s) at Appellant, and within two days, 90% of the HHs listed, made SNAP transactions at larger store types. Thus, the data supports that the recipients had access to, and did transact benefits at other authorized retailers.

Although the existence of a Salvation Army facility is confirmed via the Internet, insufficient evidence was advanced as to the facilities' food storage and preparation area, and number of SNAP households it may have sheltered during the review period. Thus, it is not possible to assess the veracity of the contentions relative to the shelter. No banking records, no federal business tax submissions, or state sales tax forms were advanced to support that Appellant was not trafficking.

Attachment 2: Listed are 112 individual transactions conducted by 72 different households. 5 U.S.C. § 552 (b)(7)(E). . This is unusual and indicative of trafficking.

Contentions:

- We have real receipts for all listed items and the corresponding purchase of item is attached.
- This is a small grocery and deli with a wide variety of food items.
- The owner brings in merchandise on request. The store is within walking distance for many and more convenient than the bus.
- Some customer purchase cases of permissible foods. Food costs in Philadelphia area have never been so high. To classify 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as excessively large when that amount is roughly the cost of a week's worth of food for an adult according to the Official USDA Food Plans, US Average 2018 seems patently unfair.
- The store has a number of meat specials at varying price points. The owner sold those specials during the first two weeks of any given month.
- The majority of the charges occurred at the beginning of the month when EBT cards are reloaded with funds.

No detailed cash register receipts were provided. Rather the “z-tapes” show two different types of receipts. Some appear to be from a calculator such as numbers 11 and 12, and other tapes such as numbers 13 and 46, may be from a cash register. The cash register tapes list only “Grocery” for each item. The calculator tapes do not provide any information as to what was supposedly purchased. The receipts are paired with an owner-provided list of items acquired. It is unlikely that this list was prepared contemporaneous with the purported purchases. It is more likely that the listed items were prepared in response to the Charge letter. None of the tapes themselves have time stamps, the store name, or any detail as to what grocery items were supposedly acquired. As such, Retailer Operations did not find the tapes to be persuasive as to the veracity of the purchase of eligible foods.

Retailer Operations analyzed the advanced invoices for the review period of April 2018 to August 2018. Some of the documents were not dated, some were dated outside of the review period, and others listed another store name, or were not itemized invoices. Retailer Operations did not include those documents, and it excluded non-eligible items. Retailer Operations applied a 40% markup to the invoices it counted, and determined that with the markup, Appellant was short 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of documentation to cover the total SNAP redemptions for the period. Appellant would also have had cash sales, credit sales, and hot food sales during the period, which would increase the shortfall.

Retailer Operations reviewed the invoices for purchased meat items. Invoices for these 5 U.S.C. § 552 (b)(6) & (b)(7)(C), about 9% of the total food inventory documented before a markup. Retailer Operations concluded that the amount of meat items purchased did not appear to be sufficient to support the owner's claim to sell large volumes of meat packages as listed on the meat flyer submitted. The flyer advertised various meat packages containing ground beef, chicken breast, chicken legs, chicken wings, beef cubes, beef steaks, meatballs, pork chops, and sausages/hot dogs. However, the store visit photographs and store visit survey did not show large amounts of meat stock at Yohns Grocery. Likewise, the photos submitted by counsel did not show volumes of meat as would be expected given the purported meat package offerings.

The FNS onsite store visit survey confirms that Appellant has a grill and prepared hot foods that incorporated meats. Hot foods are not allowed for purchase with SNAP benefits. The vendor receipt evidence under review does not more support the contention that transactions of eligible items were more likely than trafficking.

The retailer provided a price list containing 377 items, priced from \$.25 to \$129.99. It included higher priced items such as 25 lb. bags of frozen chicken wings for \$25.99, 5 lb. boxes of hot sausages for \$28.00, cases of 20 oz. coca cola drinks for \$28.00, and meat package pricing from \$37.99 to \$129.99. The FNS store visit conducted on July 21, 2018, included a photo of a flyer advertising various meat packages. However, the store photographs and store survey did not show large amounts of meat stock. Appellant did not submit meat purchasing invoices to convincingly support the advanced meat flyer pricing. Overall, the price list without adequate invoice evidence to support the acquisition of the items listed, does not explain the transactions cited on the Attachments.

Appellant had its highest volume of SNAP redemptions on the 13th, 8th, 12th, 13th and 10th of the respective review months. SNAP benefits are issued in the state during the first ten business days of every month (excluding weekends and holidays) based on the last digit of the client's case number. Invoices for documented meat purchases show these occurred throughout each month. For example, in August, the month with the highest dollar value of meat invoices provided, the invoices are dated on day 3, 6, 7, 13, 15, 20, 27, and 30. The invoice evidence does not support that Appellant sold more meat in the first two weeks of the review months. In August, 82% of the value of the meat acquired at Appellant was on invoices dated August 15, 20, 27 and 30, the last two weeks of that month.

The burden to disprove trafficking rests with Appellant. While some transactions flagged may be legitimate exchanges of eligible foods for benefits, insufficient evidence was advanced to support this contention. The cash register receipts were not actually itemized, rather a list of what was purportedly purchased was matched to the tapes, which were not timestamped. The vendor invoices counted by Retailer Operations did not document eligible items sufficient to cover Appellant's SNAP redemptions. The photo submissions from the owner did not show volumes of meat items at his store. Only two customer statements could be matched to transactions cited in the Charge letter. Each of the matched households shopped at larger stores, and neither attested to purchasing meat in bulk, or cases of eligible items. Given the claims of fraudulent activities by recipients in the store's vicinity, the veracity of the proffered recipient statements was undermined.

Permanent disqualification is warranted on the first occasion of trafficking. An Appellant that seeks to set aside an Agency sanction must focus its probative efforts on providing evidence by a preponderance that the transaction activity cited is not due to SNAP benefit trafficking. Appellant has not met its burden.

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). Retailer Operations found that Appellant did not meet 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 in SNAP benefits. The review of all the evidence does not support by a preponderance, that legitimate SNAP purchases, more likely than trafficking, accounted for the transactions listed on the Attachments. Upon review of all of the evidence in this matter, it is determined that it more substantially supports a conclusion that the SNAP transaction activity at Appellant was due 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 substantial 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 SNAP regulations.

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. 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

March 14, 2019