

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

Zake Convenience,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0230057

FINAL AGENCY DECISION

It is the decision of the USDA that there is not sufficient evidence to support a finding that Zake Convenience (Appellant), should be permanently disqualified from participation in the Supplemental Nutrition Assistance Program (SNAP) for trafficking. The permanent disqualification determination by the Office of Retailer Operations and Compliance (Retailer Operations) is hereby reversed.

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 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 June 24, 2020, Retailer Operations informed the owner 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.

Previous counsel responded to the Charge letter in writing on July 6, 2020. Retailer Operations issued a Determination letter dated August 3, 2020, that informed Appellant 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 August 14, 2020, current counsel appealed Retailer Operations' determination, and requested administrative review. The appeal was granted by letter dated September 4, 2020. Counsel provided additional information by two emails dated September 25, 2020. Retailer Operations provided its assessment of the additional information to this office by email dated October 28, 2020.

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, credible 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 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, and 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 transaction patterns were the result of trafficking. The charges were based on an analysis of SNAP transaction data during the period of October 2019 through January 2020. The patterns of transaction characteristics indicative of trafficking are:

- Multiple transactions were made from individual benefit accounts within a set time period.
- The store conducted EBT transactions that are large based on the observed store characteristics and recorded food stock

APPELLANT’S EVIDENCE AND CONTENTIONS

In reaching a decision, consideration has been given to all contentions including any not referenced.

- Two pages of vendor inventory invoices with multiple receipts of eligible foods.
- Copies of 17 pages of 2019 federal and state business tax returns.
- Ten photos of store stock.
- A one page owner statement.
- Two videos of customers shopping.
- Copies of 24 pages of cash register tapes with corresponding EBT receipts.
- My client is not engaging in trafficking as defined in Section 271.2 of the SNAP regulations.
- According to the daily customers, Zake Convenience is the only store in the area that accepts Link and has a variety of stock, and is selling in bulk. It attracts customers who are unfortunate and can only go a certain distance due to the lack of transportation and harsh weather in the winter. Not many people can afford cars or uber rides which gives them a reason to shop at the closest stores near them that accept Link, which is Zake.
- In reviewing the communications between the parties, it appears that the basis of the denial in participation in SNAP benefits is a statistical analysis by the department of a number of sales which took place in a prescribe period of time. Based upon the frequency and size of the

cited purchases, the department has presumed that the sales were improper or fraudulent and reached the conclusion that participation by my client in the program be denied.

- While my client does not dispute that there were a number of sizeable purchases in that period of time, the presumption that those purchases were fraudulent or improper does not bear up once certain facts and circumstances affecting the store are put into context.
- It is a misnomer to call the store a convenience store. The term implies that the store is akin to a gas station convenience store with individuals coming in and out and making small food or drink purchases while buying gasoline. This does not fit the operation of the store at all.
- This store is what you would more commonly understand to be a corner grocery store. It is located in an older urban area and serves as a main provider of grocery products for those in the immediate area. The immediate area around the store is an older urbanized area which has a disproportionately large urbanized poor, immigrant and disabled population.
- My client firmly states there has been no wrongdoing here and the denial of the store in participation in SNAP will be damaging to the store and to the neighborhood residents.
- If the residents do not have the ability to use their SNAP benefits here, then the requested items and general staple items that are carried for the benefit of local residents will have to be scaled back or removed. This seems unjust that this loss to all parties involved is only occurring based upon what the statistical model viewed as some unusual charges.
- We ask that the store be reinstated. In the alternative, and if a full immediate restoration of participation would not be possible for any reason, we would be willing to consider any safeguards or procedures that the department would suggest to us to address its concerns over the statistics pointing to the type of sales which raised concern in the first place.
- I have attached video of the corner store showing the layout and purchasing of food products including frozen food products, showing things to be consistent with how they have been presented here. Also included is considerable documentation related to purchasing and showing generally purchasing was done consistent with filling the need of the clientele.

ANALYSIS AND FINDINGS

The primary issue for consideration in this case is whether or not Retailer Operations established by a preponderance of the evidence, that Appellant engaged in trafficking which warrants a permanent disqualification. There is no way for this review to definitively conclude that trafficking did not, at any point, occur at the firm. Based on an assessment of the evidence in the record, this reviewer finds that there are more likely legitimate explanations other than trafficking, that could account for the Attachment patterns at Appellant.

CONCLUSION

It is the determination of this review that Appellant has met its burden, by a preponderance of the evidence, to support that the transaction patterns listed in the Charge letter were more likely than not, the result of allowable SNAP purchases. The determination to impose a permanent disqualification against Appellant for trafficking is therefore reversed. Please contact Rebekah Hilty at (334) 523-2315 regarding reinstatement and operations questions.

RELEASE OF INFORMATION

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

November 19, 2020