

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

Triple E Express & Grill,)	
)	
Appellant,)	
)	
v.)	Case Number: C0191279
)	
Retailer Operations Division,)	
)	
Respondent.)	
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FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that the **Permanent Disqualification** from participation as an authorized retailer in the Supplemental Nutrition Assistance Program¹ was improperly imposed against **Triple E Express & Grill** (hereinafter “Triple E Express & Grill” and/or “Appellant”) and its owners of record, Trong Ngoc Phan and Linh Xuan Phan by the Retailer Operations Division of the FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a Permanent Disqualification against Triple E Express & Grill in a letter dated September 29, 2016.

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.

¹ Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

CASE CHRONOLOGY

In a letter dated August 16, 2016, the Retailer Operations Division informed Appellant that it was in violation of the terms and conditions of the SNAP regulations, 7 CFR §§ 270-282, based on Electronic Benefit Transaction (EBT) SNAP benefit transactions considered to “establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm.”

The Retailer Operations Division record reveals that Appellant responded to the letter of charges with a request for provision of the attachments to the letter of charges formatted by date and time to support research of business records to be used to refute the charges. The record shows that Retailer Operations Division referred Appellant to the FNS Freedom of Information Act (FOIA) office for the provision of those materials. Upon verification with the FOIA office that no request for materials had been received the Retailer Operations Division advised Appellant of a final determination of permanent disqualification from participation in the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1) for trafficking violations, in a letter dated September 29, 2016, documented to have been delivered to Appellant on October 6, 2016.

In a letter dated October 17, 2016, received in the offices of the Administrative Review Branch on October 18, 2016, Appellant, through its owners of record, submitted an appeal of the Retailer Operations Division’ assessment requesting an administrative review of the action. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an 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 AND REGULATIONS

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)², 7 U.S.C. § 2021 and promulgated through regulation under Title 7 of the Code of Federal Regulations (CFR),³ part 278. In particular 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.

² Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246.

³ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

7 U.S.C. § 2021(b)(3)(B) states, *inter alia*:

... a disqualification under subsection (a) shall be ... permanent upon...the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards...

7 CFR § 278.6(e)(1)(i) states, *inter alia*:

“FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.”

7 CFR § 271.2 states, *inter alia*:

*“**Trafficking** means the buying or selling of ... [SNAP] benefits for cash or consideration other than eligible food...”*

7 CFR § 271.2 states, *inter alia*:

“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, *inter alia*:

*“FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food & 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(c) states, *inter alia*:

“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...”

7 CFR § 278.6(b)(2)(ii), states, *inter alia*:

*“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).**”*
[Emphasis added]

7 CFR § 278.6(i), states, *inter alia*:

*“FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 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.”* [Emphasis added]

7 CFR 278.6(b)(1), states, *inter alia*:

“...Any firm considered for disqualification...shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination.”

SUMMARY OF THE CHARGES

The Retailer Operations Division materials and the charge letter dated August 16, 2016, reveal that charges were based on an analysis of EBT SNAP benefit transaction data during the six (6) month period of January through June 2016 and involved three (3) patterns of EBT transaction characteristics indicative of trafficking as follow:

Attachment #1 lists **multiple SNAP EBT transactions made from individual benefit accounts in unusually short timeframes** 7 USC 2018 (b)(7)(e).

Attachment #2 lists transactions in which the **majority or all of the individual recipient benefits were exhausted in unusually short periods of time.** 7 USC 2018 (b)(7)(e).

Attachment #3 lists **excessively large purchase transactions made from the accounts of SNAP recipients** 7 USC 2018 (b)(7)(e).

APPELLANT’S CONTENTIONS

Appellant’s request for appeal letter, dated October 17, 2016 indicates that ownership has been in the United States since 1994 and work very hard in the business to assure that nothing is done in violation of SNAP. Appellant’s requests copies of the charge letter attachments in date and time order to support the research through cash register journals in order to respond to the charges, indicating that this same request has been made repeatedly to FNS to no avail.

Appended to the appeal request Appellant provided copies of two (2) e mails evidencing attempts to obtain materials from the Freedom of Information Act (FOIA) office of FNS. The first e mail dated August 31, 2016 includes a request for the provision of Attachment #3 materials to the letter of charges sorted by date and time instead of by amount. The second e mail also dated August 31, 2016 evidences receipt of an automatic response from the FOIA office advising that the materials had been received in absence of the addressee, and would be responded to upon her return scheduled for September 6, 2016.

The preceding represents only a brief summary of Appellant’s contentions in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

On review, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed.

With regards to Appellant's contentions in explanation of questionable transactions, the issue in review is whether there is sufficient evidence, through a preponderance of that evidence, that it is more likely true than not true that the questionable transactions were the result of trafficking.

Request for Information:

The record includes a copy of a facsimile transmission dated August 24, 2016, addressed to Retailer Operations Division, requesting the provision of the attachments to the letter of charges in alternative sorting format. The record further includes documentation regarding a telephonic discussion held on August 25, 2016 wherein Retailer Operations Division advises Appellant ownership that requesting information in a different format is considered a request for documentation only available through the FOIA process; and, that Appellant's ownership is advised to contact the FOIA office directly to obtain the requested materials.

In Appellant's request for review it is stated that a letter was routed to the FOIA office on August 26, 2016, and that the letter was supplemented with an e mail dated August 31, 2016 addressed to the FNS FOIA Officer again requesting the reformatted charge letter attachment materials. No copy of the August 26, 2016 original letter to the FOIA office was provided for consideration.

Retailer Operations Division documents having been advised on September 29, 2016 by the FOIA office that no request for FOIA was identified in the FOIA system. Retailer Operations Division therefore completed a determination of permanent disqualification based on the documented lack of the FOIA request.

The record clearly documents that between August 19, 2016 and August 29, 2016, the 10 days following documented delivery of the letter of charges, Appellant made attempts to obtain the charge letter attachment materials in alternative sort format.

Via facsimile dated August 24, 2016, addressed to Retailer Operations Division, Appellant clearly requests the attachments to the letter of charges in date and time order sort. Although Appellant did not provide a copy of the reported August 26, 2016 letter to FOIA, the e mail attachments dated August 31, 2016 support Appellant's continuing attempt to obtain the materials as described.

As cited in 7 CFR § 278.6(b)(1) Appellant "*...shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination.*" This regulatory requirement is supported with internal agency procedures that require the provision of request for information to the FOIA office with the forwarding of the initial request materials to the FOIA e mail box. In the instant case the FOIA request was made via facsimile to the Retailer Operations Division on August 24, 2016.

Appellant indicates on appeal that Triple E Express & Grill operates with the use of a scanning device. The use of a scanning device is affirmed in the store visit materials dated May 6, 2016. Therefore Appellant's indication that having the charge letter attachment materials in alternative format could aid in the identification of documentation to refute the charges identified in the attachments to the letter of charges is reasonable; albeit not a given because the level of specificity of the scanning device journals is unknown.

CONCLUSION

This review finds that Appellant was not afforded the opportunity to submit response to the August 16, 2016 letter of charges as required in 7 CFR § 278.6(b)(1), which states, in relevant part "Any firm considered for disqualification...shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination."

RIGHTS AND REMEDIES

Under the Freedom of Information Act (FOIA), it may be necessary to release this document and related correspondence and records upon request. If such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released could constitute an unwarranted invasion of privacy.

February 2, 2017

NANCY BACA-STEPAN
ADMINISTRATIVE REVIEW OFFICER

DATE