

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

**Community Foods,
Appellant,**

V.

**Retailer Operations Division,
Respondent.**

Case Number: C0246125

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Community Foods, (hereinafter 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 program, as initially imposed by the Retailer Operations Division was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant by letter dated August 2, 2021.

AUTHORITY

7 U.S.C. § 2023 and the 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

In a letter dated June 15, 2021, Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of December 2020 through March 2021. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

In a telephone conversation on June 24, 2021, Appellant requested and was granted, via a letter dated the same, an extension in which to respond to the charge letter. The extension request was granted to July 19, 2021, and Appellant was notified that the time to request a civil money penalty in lieu of permanent disqualification and to provide the documentation to support such a request could not be extended. In a facsimile dated July 19, 2021, Appellant, through counsel, replied to the charge letter and generally stated that Appellant's understands that "trafficking" is defined as the exchange of SNAP benefits for cash or consideration other than food, and he denies that he or the other three employees have ever engaged in such activity. He is confident that trafficking did not take place at his store based upon conversations with all employees and the fact that all four employees state that they would never do anything to jeopardize the family business.

With respect to Attachment 1, my client disagrees with any assertion that multiple transactions from a household's EBT card took place in unusually short time frames based upon his own analysis of the transactions listed and his own observations and experience at Community Foods. Appellant states that the store's customers line in the immediate neighborhood of the store and most live no more than a few blocks from the store and he often sees the same customer three or four times within the same day or there are times different children from the same household, spouse or significant other will come in using the same EBT card.

My client states that in Attachment 2 the transactions are in fact not large at all based upon his 27 years of experience operating Community Foods as well as his observations of purchases made by SNAP customers. Appellant states that it is common to see purchases of \$200 or more utilizing an EBT card. This was clearly within the COVID Recovery Relief period during which SNAP benefits were increased significantly for SNAP customers. In subsequent email correspondence dated July 29, 2021, Appellant provided 31 color photographs of the retail space inside the store as well as 14 photographs of the storage areas referenced in the letter that was faxed on July 19, 2021.

After giving consideration to the Appellant's reply and evidence of the case, Retailer Operations Division issued a determination letter dated August 2, 2021. This letter informed ownership that they were permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also states that Retailer Operations considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, Retailer Operations Division determined that Appellant was not eligible for the CMP because it failed to submit sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated August 12, 2021, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the 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

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) (c) and (e)(1)(i) 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(a) states, *inter alia*, that “FNS may disqualify any authorized retail food store...from further participation in the program if the firm fails to comply with the Food and Nutrition Act of 1977, 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) reads, in part, “*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. In the case of a firm subject to permanent disqualification under paragraph (e)(1)...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...”

7 CFR § 278.6(e)(1) reads, 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 “the buying or selling of SNAP benefits for cash or consideration other than eligible food.”

7 CFR § 271.2 states in part that, “Eligible foods mean: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption.”

SUMMARY OF THE CHARGES

The charges on review were based on an analysis of SNAP electronic benefit transfer (EBT) transactions dated during the four-month period of December 2020 through March 2021. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from the accounts of individual SNAP households within a set time-period.

2. Your store conducted EBT transactions that are large based on the observed store characteristics and recorded food stock.

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.

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its response to the permanent disqualification letter issued by Retailer Operations Division, and its request for administrative review to include information in subsequent correspondence dated September 24, 2021, in relevant part:

1. Since my 27 years and counting in the same store and location, I have never done anything illegal that would jeopardize my business or any of my licenses. It's only my two kids and myself working at the store and I taught them the right and wrong way of working a store especially the one working the register. My business history with the State and City speaks for itself. I am well known in the community for running a legit business the right way.
2. My store has always been stocked up whether it's the shelves or the stock room in the back. Even though my store is small, it can hold plenty of stock and I always had a fully stocked store.
3. Before the pandemic we use to order once a month from suppliers but when the pandemic began, we started ordering almost weekly because more food stamp benefits was given to almost every recipient.
4. People have been buying like crazy because of all the food stamps they have and are always in and out of the store.
5. We have multiple families with a lot of kids or people staying in the same house, whether they are related or not, come and use the same card to purchase stuff. Also, some households would sell some of the benefits they have to friends or relatives that don't get food stamps and they would come and use that same card that had been used three or four times in the day. I cannot stop that from happening because they did their little trade before coming into the store.
6. I also started to save the cash register and food stamp receipts after I received the first letter from USDA to show the transactions that was being made.

Appellant provided a total of 71 purchase receipts and invoices for the review period during this review. The preceding may represent a brief summary of Appellant's contentions in this matter however, in reaching a decision, full attention has been given to all contentions presented, including any not specifically recapitulated or referenced herein.

ANALYSIS AND FINDINGS

The FNS initially authorized the business as a small grocery store on September 30, 1994. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during the March 7, 2021, store visit to the business conducted

by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the EBT transactions at Appellant that formed patterns indicative of trafficking. The firm review summary documented the following store size, description, and characteristics:

1. Two cash registers and one POS device with a small counter area partially obstructed by other smaller items available for sale. The second cash register is not visible in the store visit photographs and likely not used for active SNAP transactions. Counter is encased in Plexi-glass.
2. Estimated to be approximately 950 square feet.
3. Approximately seven (7) shopping basket available for customers however no shopping carts were available.
4. No adding machines or optical scanners were available at checkout. No specialty registers present.
5. Store operates through a night window or plastic barrier with food stock behind the barrier.
6. No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
7. No unusual pricing structure such as ending most products with 00 cents and does not round transaction totals.
8. Food is stored in an area outside of public view that is approximately 2000 square feet in size. (Note: storage area is much larger than the square footage of the actual store)
9. Store has storage freezers or coolers, but no food stored off site.
10. Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods, or vegetables.
11. Store does not take telephone or online orders and does not offer delivery
12. Highest priced eligible food items were Banquet Chicken (pre-cooked)(\$10.00), Pizza Snacks (\$8.99), On-Cor Chicken (\$7.99), Tennessee Pride Sausage (\$11.99), White Castle Sliders (\$6.99), Coffee (\$5.99).
13. Store stocks a significant amount of non-food items such as but not limited to paper products, household products, tobacco products, automotive products, health and beauty aids, accessory/gift items, pet food, alcohol, and cleaning products.
14. Store stocks ample amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry, and fish products. Limited amounts of fresh/frozen meats.
15. No kitchen/prepared food area
16. Hot foods sold for onsite consumption.
17. A deli or prepared food section. Stock is not used in preparation of food.
18. No meat or seafood specials or bundles or fruit/vegetable boxes sold.
19. Storage area contained additional staple and non-staple foods and non-foods. Additional staple foods also found in the coolers.

The issue for consideration is whether Retailer Operations Division has presented a convincing case that Appellant likely trafficked in 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 the Appellant firm during the review period. As there is

more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

Attachment 1 of the Charge Letter – Multiple transactions were made from the accounts of individual SNAP households within a set time period.

There were 34 sets of 83 SNAP transactions that met the parameters of this attachment. Multiple transactions conducted by the same household account within a set time period is a method which violating stores use to avoid the detection of single high dollar transactions that cannot be supported by the retailer's inventory and structure. The highest sum total transacted within a day or two was \$247.94 conducted in 4 transactions.

With regard to Appellant's contentions, through counsel, while there are legitimate reasons why SNAP recipients may visit a retailer multiple times in a day, it is unusual for them to make multiple visits and conduct high dollar transactions particularly when the second or subsequent transaction(s) are higher than the initial transaction. It is also unusual for SNAP households to purchase large amounts of snack food items multiple times in a day. The transactions in Attachment 1 also do not contain the characteristics associated with a recipient purchasing a forgotten item right after checking-out or households returning to purchase an item or two. It is not disputed that some of the transactions in this Attachment may be legitimate SNAP purchases however, Appellant has not provided any evidence that all the transactions as cited in Attachment 1, of the charge letter, are legitimate SNAP transactions. Especially, when an analysis of the shopping patterns of SNAP households shows that Appellant's store was not considered a primary source of staple foods as there were other larger SNAP authorized stores, where these households shopped, that carried a better variety and quantity of foods at lower prices.

In conclusion, it is therefore more likely true than not true that the irregular transactions cited in the charge letter Attachment 1 are due to trafficking in SNAP benefits.

Attachment 2 of the Charge Letter – Your store conducted EBT transactions that are large based on the observed store characteristics and recorded food stock.

There were 166 SNAP transactions that met the parameters of this attachment. Based on the results of the contracted store visit, the large transaction amounts are not consistent with the store's inventory of low-priced foods. The firm does not offer food in bulk or any ethnic or specialty foods that sell for a high price. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions. The record reflects that Appellant's SNAP transactions are 85 percent higher than all small grocery stores in the county. Based on information in the record, an analysis of the purchase receipts/invoices provided, and the absence of a reasonable explanation to support such large transactions during the review period, given that all transactions found to be funded by P-EBT benefits were identified, removed, and not considered in the charge letter or during the review period, these unusual, inexplicable transaction behaviors are most indicative of trafficking. In addition, the record also reflects that Appellant's transaction range compared to other nearby small grocery stores were significantly higher in the \$50-\$59.99 range, the \$60-\$69.99 range, the \$70.00-\$79.99 range, the \$80-\$89.99 range and the \$90.00-\$99.99 range with the unusual and inexplicable spikes in the

\$50-\$89.99 ranges compared to the average transactions at SNAP authorized small grocery stores located in Milwaukee County, Wisconsin.

Retailer Operations also conducted an analysis of the shopping habits of three of the households identified in the charge letter. This analysis concluded that these households also shopped at other area grocery stores including full-line supermarkets and superstores that offer a much larger quantity and variety of eligible food items for likely better prices either on the same day or within days of visiting Appellant's firm. This again indicates that lack of access to other stores is not at issue. However, despite this access to large supermarkets, superstores, and other small grocery stores, these households consistently conducted much higher transactions at the Appellant firm than at better stocked supermarkets/superstores in and around the Milwaukee County area of Wisconsin. This is another strong trafficking indicator

Appellant provided several purchase receipts and invoices for the review period during this review. An analysis of those receipts/invoices showed the following: A total of 71 purchase invoices and receipts were provided during this review. 28 did not contain a date and seven (7) were dated outside of the review period and therefore considered ineligible during this review. The remaining 36 were analyzed and based on the information in the table below, Appellant's SNAP redemptions during the review period far exceeded its total allowable eligible food expenses, given the customary 40 percent markup and 20 percent allowable for cash and other payment forms. Even if a 100 percent markup was used Appellant's SNAP redemptions would still greatly exceed its allowable Eligible Food Expenses during the review period.

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

The record reflects that Retailer Operations Division compared Appellant's store to two other small grocery stores in the area and showed that Appellant's stock is neither superior to the comparable stores, nor does it provide any staple foods not found at other stores in the area. The record also reflects that Retailer Operations Division completed an analysis of Appellant's SNAP transactions from a two (2) year time frame and found that there were only five (5) SNAP transactions over \$100 (\$124.79 being the largest) within a two-year period. Appellant contends that it started saving cash register receipts after receiving the charge letter to show the transactions as they did not change after receipt of the letter however, Appellant did not provide any of those receipts during this review. Therefore, Appellant's contentions that it is normal to see SNAP purchases at its store for \$200 or more is unsupported and do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

Based on this empirical data, and in the absence of sufficient evidence as to the legitimacy of such transactions, a conclusion can be drawn, through a preponderance of evidence that the "unusual, irregular, and inexplicable" transactions and patterns cited in the charge letter evidence trafficking as the most likely explanation. In this case, ownership did not provide sufficient evidence to legitimize Appellant's transaction data as outlined in the Attachments. Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence that the store was trafficking and concluded, through a preponderance of evidence, that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

It is noted that no evidence was provided or exists to support the contention that SNAP recipients sold and/or traded their benefits with family members or others before entering the store. It is also reiterated that the record reflects that P-EBT transaction data was omitted and not considered during the review period or included in the charge letter Attachments. The transaction data and overall firm record convincingly demonstrate repetitive patterns of unusual, irregular, and inexplicable SNAP activity for this type of firm indicative of trafficking. Once Retailer Operations Division established a convincing case against Appellant, ownership 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 matter asserted is more likely to be true than not true. If this is not demonstrated, the case is to be sustained.

As noted, 7 CFR § 278.6(a) states that FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 1977, 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 inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Retailer Operations Division has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns in two attachments of EBT transaction data, the inadequacy of the firm's eligible food stock as observed and recording during the onsite visit to support such large transactions, the lack of evidence of invoices of foods in inventory to cover SNAP redemption totals for the review months, the lack of explanation for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant, and the irregular SNAP transaction data of Appellant as compared to other convenience stores in the State.

In the absence of evidence for the legitimacy for such transaction patterns based on information submitted by Appellant and a comparison of the store's characteristics and available stock to the transaction patterns cited in the charge letter, a conclusion can be drawn through a preponderance of evidence that the unusual, irregular, and inexplicable transactions and patterns evidence trafficking as the most likely explanation. While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence in the record.

The purpose of the administrative review process is to ensure that firms aggrieved by Retailer Operations Division' adverse actions have the opportunity to have their position fairly considered by an impartial review authority prior to that adverse action becoming final. Appellant has been duly given and has taken the opportunity to present to USDA through the administrative review process whatever evidence and information it deems pertinent in support of its position that Retailer Operations Division' adverse action should be reversed. Therefore, any evidence and information that Appellant presented to Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The

record does not indicate any departure from established policy or procedures with regard to Appellant's right to a fair and thorough review.

CIVIL MONEY PENALTY

Appellant was notified in the charge letter dated June 15, 2021, that it had 10 calendar days upon receipt of the charge letter to provide required documentation in order to be considered for the trafficking CMP. Appellant failed to provide Retailer Operations Division with the required documentation to be considered for a trafficking CMP in lieu of disqualification. Therefore, Retailer Operations Division correctly determined that Appellant was not eligible for a trafficking CMP as set forth in the SNAP regulations.

CONCLUSION

Ownership has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. As such, the SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have trafficked, which is that FNS shall disqualify the firm permanently.

Retailer Operations Division' analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Community Foods from participation in the SNAP. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Therefore, based on a review of all the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged by Retailer Operations Division. Based on the discussion herein, the determination to impose a permanent disqualification against Community Foods is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 1977, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right 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 you 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 (FOIA), 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.

Monique Brooks
ADMINISTRATIVE REVIEW OFFICER

April 12, 2022