

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

Country Food #3,
Appellant,

v.

Retailer Operations Division,
Respondent.

Case Number: C0240141

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Country Food #3, (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 July 29, 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 March 8, 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 May 2020 through October 2020. 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 correspondence dated March 15, 2021, Appellant, through counsel, responded to the charge letter and generally stated that the petitioner wishes to prove that it had implemented a legitimate

training program for its employees. The violations were an act of kindness in a time of need by the retailer's employees (sic), but they understand that this is a violation against store policy. Appellant, through counsel, stated that it invested a significant amount of money opening a grocery store in an impoverished section of the city where any grocery store depends heavily on its EBT sales to stay in business. The loss to the local community will be significant if it is permanently disqualified. Appellant, through counsel, gave explanations of Appellant's alleged effective compliance policy, claimed to have offered credit to customers, requested that a civil money penalty in lieu of disqualification be issued, and that it has not violated SNAP law because their transactions are based on the sale of qualified merchandise.

In correspondence dated April 7, 2021, Retailer Operations Division informed Appellant that the acceptance of SNAP benefits as payment for items sold to a household on credit is a violation of SNAP regulation 278.2(f). A firm that commits such violations shall be disqualified from participation for a period of one year. Please provide documentation to support that food items were purchased on credit as noted in the response provided on March 18, 2021. Please provide the requested documentation and any information, explanation, or evidence you have regarding the charges outlined in our letter on February 19, 2021, within 10 calendar days of your receipt of this letter.

In subsequent email correspondence dated April 19, 2021, Appellant, through counsel, replied to the April 7, 2021, letter and provided four (4) documents labeled P1-P4 containing documentation to support the claim of providing credit to customers. The documentation consisted of copies of a handwritten document where a name was placed on the top of each sheet, a series of dates and amounts in support of the alleged credit accounts. Appellant also provided several purchase invoices, black and white photographs of the stores stock as well as the outside of the store to include a photograph of a sign posted on the window.

Retailer Operations Division issued a Determination letter dated July 29, 2021. The letter informed Appellant that it was permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also stated that Retailer Operations Division 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 2, 2021, Appellant, through counsel, appealed the Retailer Operations Division' 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 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) 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 six-month period of May 2020 through October 2020. 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, in relevant part:

1. This written request is evidence that Petitioner implemented a legitimate training program for its employees.
2. Petitioner shows violations were an act of kindness in a time of need. The USDA, FNS handbook stated, "Redeeming SNAP benefits in excess of your food sales may result in a temporary disqualification," for the reason stated the petitioner qualifies for a suspension period.

Appellant, through counsel, provided the following in Exhibit form:

Exhibit A: Owner Affidavit and Training Process,

Exhibit B: Employee Affidavit

Exhibit C: Employee Training Agreement

Exhibit D: Customer Affidavit

Exhibit E: Invoices (dark and/or illegible)

Exhibit F: Store Pictures (17) black and white dark and unclear

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 authorized the business as a convenience store on June 15, 2018. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during an August 1, 2020, 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. • One cash register and one POS device with a small counter area partially obstructed by other smaller items available for sale. Counter area is completely encased in Plexi-glass.
2. • Estimated to be approximately 1800 square feet.
3. • No shopping baskets or carts available for customers.
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 400 square feet in size.
9. Store has no storage freezers or coolers, and no food is 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 Hellmann's (\$5.99), Aquafina Water (\$6.99), Jack Links (\$6.99), and 12 Pack Soda (\$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, pet food, charcoal, gasoline, health and beauty aids, lottery, hats, alcohol, and cleaning products.
14. Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry, and fish products. No fresh fruits or produce, no fresh meat or poultry. Stock consists mainly of snack items and prepackaged/canned foods
15. A kitchen/prepared food area but it looked unused according to the store visit photographs.
16. Hot foods sold for onsite consumption with three tables and stools outside in front of the store.
17. No 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. Appellant is a 24-hour gas station/convenience store with limited staple foods. Store also advertised a car wash.

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 30 sets of 95 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 record reflects that 17 of the 30 transaction sets in this Attachment ranged from 33 seconds to just under one minute. Likewise, sets that contained four or more SNAP transactions also showed just a few seconds to a minute or two between transaction sets during same day transactions.

Appellant, through counsel, contends that this showed an act of kindness in a time of need and

the USDA, FNS handbook stated Redeeming SNAP benefits in excess of your food sales may result in a temporary disqualification." Regarding this contention, although Appellant contends that it maintained credit accounts, the documentation provided was insufficient to establish that credits accounts were the root cause for the transaction pattern in this Attachment. Additionally, though possible, it is unlikely that Appellant would satisfy a credit account then a few seconds later complete a SNAP purchase when it would have been more feasible to settle the credit account and purchase at the same time. No receipts were provided as evidence to corroborate this possibility. It is important to note that Appellant's staple food stock does not appear to justify the SNAP transactions and transaction patter as cited in the charge letter.

In conclusion, and without further evidence to justify the SNAP transactions cited in this Attachment, 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 128 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. These transactions ranged from \$34.47 to \$101.65. The record reflects that 128 of Appellant's transactions were 85 percent higher than all convenience store SNAP purchases. The record also reflects that Appellant's transaction pattern contained repetitious transaction amounts appear suspicious given Appellant's available stock and the fact that the highest dollar per unit SNAP-eligible items are priced at \$5.99 and \$6.99. Given the explanation above and without adequate explanation for these repetitious transactions, they appear to be indicative of trafficking.

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 and superstores, these households consistently conducted much higher transactions at the Appellant firm than at better stocked supermarkets/superstores in and around the Brazoria County area of Texas. This is another strong trafficking indicator especially since Appellant is a gas station/convenience store and has very limited staple food stock.

It is important to note that when a claims of credit accounts are given as the reason for the irregular SNAP transactions and data patterns, FNS requires a level of detail regarding the legitimacy of the claim. This is because retailers have often made false admissions of credit in an attempt to obtain a lesser one-year disqualification penalty after committing more egregious violations such as trafficking. Credit transactions must be accounted for with substantive evidence to justify the transactions identified in the letter of charges. The documentation

provided by Appellant, through counsel, falls far short of the specified requirements for credit. 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.

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 the 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 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 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 and County.

Generally, stores caught in trafficking violations consistently display particular characteristic transaction patterns including those cited in the charge letter and, in the absence of evidence for the legitimacy of such transaction patterns, based on information submitted by the 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

The Appellant requested consideration for a Civil Money Penalty (CMP), as a consequence, in lieu of permanent disqualification and contends that it had implemented a legitimate training program for its employees. Appellant, through counsel, also contends that it implemented an effective compliance program to prevent violations of SNAP and meets the eligibility requirements for a CMP. Appellant was notified in the charge letter dated March 8, 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.

In support of Appellant's contention that the firm is eligible for a CMP, it described its compliance policy and practice and provided a few documents to show that employee training took place. In this regard, the various statements made by Appellant and the documents provided are not "substantial evidence" that fulfills each of the four criteria of 7 CFR § 278.6(i), demonstrating "that the firm had established and implemented an effective compliance policy and program to prevent violations." The standards for eligibility of a trafficking CMP are high in that they require that it be substantially shown that there is an established and implemented compliance policy and program, and that it had been in place prior to the occurrence of violations. This was perhaps to thwart efforts of firm's attempting to falsely present compliance policies and programs that really were not implemented prior to violations. In the absence of any such documentation provided by the firm, a CMP was not imposed in lieu of permanent disqualification by the Retailer Operations Division. Upon review of the documentation provided during this review, it does not rise to the level required by SNAP regulations to show that Appellant had a compliance policy in place prior to the SNAP violations. That decision is sustained as appropriate pursuant to 7 CFR § 278.6(b)(1); § 278.6(b)(2)(ii) and (iii); and, § 278.6(i).

CONCLUSION

Ownership has not provided sufficient evidence to rebut the convincing 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 Country Food #3 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 Country Food #3 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

June 6, 2022