

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

Hicks Discount Beverage,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0226885

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the permanent disqualification of Hicks Discount Beverage (Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), 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(a), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

AUTHORITY

7 USC § 2021 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 April 16, 2020, the Retailer Operations Division charged 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 August 2019 through January 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 Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

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In response to the charge letter, on April 27, 2020, Appellant, through counsel, requested documents under the Freedom of Information Act (FOIA). The FOIA Office responded to the request on October 27, 2021. On November 2, 2021, the Retailer Operations Division provided counsel with ten days to provide its final response to the letter of charges. Appellant responded on November 10, 2021. Appellant, through counsel, denied trafficking and explained that the transactions were normal based on the unique circumstances of the store.

After considering the evidence and the retailer's reply, the Retailer Operations Division issued a determination letter dated February 3, 2022. The determination letter informed Appellant that it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that Appellant was not eligible for a trafficking CMP because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated February 7, 2022, Appellant, through counsel, appealed the Retailer Operations Division's determination and requested an administrative review. 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 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.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) and (e)(1) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 USC § 2021(b)(3)(B) states, in part:

... 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 § 271.2 defines trafficking, in part, as:

The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal

identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone; . . .

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**, . . .” (emphasis added)

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).

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.

7 CFR § 278.6(i) states, inter alia:

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

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from August 2019 through January 2020. This involved the following SNAP transaction patterns which are indicative of trafficking:

- Multiple transactions were made from the accounts of individual SNAP households within a set time period.
- The store conducted EBT transactions that were large based on the observed store characteristic 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

In its February 7, 2022, administrative review request, and subsequent correspondence submitted on April 1, 2022, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- The transactions are not the result of trafficking but instead the result of the Appellant's business operations, business environment, SNAP household demographics and shopping habits, and Appellant's inventory.
- It is the Department that bore the burden of proof, not the retailer at the initial stage of the proceedings.
- Appellant sells a variety and quantity of staple food items such as: beef, chicken, pork, seafood, eggs, cereal, rice, pasta, bread, cheese, milk, butter, fruit, vegetables, and additional food items.
- Appellant has never had a compliance problem with SNAP in the past and has not committed any violations in connection with the transactions set out in the Charge Letter.
- There is only one store located within one mile from Appellant.
- The inspectors' notes show the store to be sufficiently stocked to account for the transactions.
- FNS does not know what the correlation coefficient is between any of the ALERT Scans and trafficking in SNAP benefits.
- The link between the ALERT scan categories and the actual act of trafficking in SNAP benefits is weak and the presence of trafficking in stores identified to have ALERT hits is the exception to the rule.
- Appellant's inventory was more than adequate to account for the transactions.
- Co-shopping is on the rise, where both adults are responsible for the groceries.
- This is manifested in the SNAP participants that shop at Appellant in the following ways: different household members will shop separately (using the same account) to pick up different needs, and personal needs, on top of the household's list; and different household participants will travel to the Store together to make purchases, and then separate their purchases to track what amount each party has used from their benefits account.
- Households shop multiple times a day because of convenience often sending their children on separate shopping trips to pick up items from time to time.
- Households make purchases for friends, for large gatherings, or to satisfy needs.
- Appellant's inventory greatly exceeds those around it and it has a greater quality and variety than your average convenience store.
- Transportation inconsistency is another reason why Appellant's transactions appear the way they do if the transportation to another store it is not dependable.
- To satiate boredom, unemployed household member will regularly shop to find something to do.
- The inventory offered by the store is of such a variety that it is reasonable to assume a household could satisfy all their needs on a single shopping trip.
- The transactions listed in Attachment 1 consisted of innocent transactions explained by either (1) the participant forgetting an item in his/her prior transaction; (2) co-shopping; (3)

the participant making a purchase, returning home, and then returning to the Store to make a second purchase; or (4) a reflection of the normal shopping habits of SNAP participants.

- The households conducting the large transactions likely have a larger amount of SNAP household members.
- Given the higher priced items in the store, it's not difficult to imagine \$60.00 worth of groceries being purchased in a single trip and being transported by hand back to the household's residence.
- Appellant's expensive items are more than enough to account for the large purchases.
- The transactions are not trafficking and are supported by the substantial inventory and are reasonably explained by co-shopping, Appellant's pricing structure, and the reliance on Appellant as a primary grocery.
- Appellant was investigated by RIB and was found that it was not engaging in trafficking, and Appellant refused to sell minor ineligibles.

In support of its contentions, counsel submitted the following documents:

- Thirteen customer affidavits.
- *Know your Core, Protect Your Core*, Convenience Store News for the Single Store Owner April 2016.
- U.S. Grocery Shopping Trends, 2016 by Food Marketing Institute.
- ALERT Correlations Coefficient Calculation.
- Profile of SNAP Households in 2018 for Florida.
- *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program in Fiscal Year 2017 Final Report* by Insight Policy Research issued in September 2020.
- Article from Special Science & Medicine by Jerry Shannon: *What does SNAP benefits usage tell us about food access in low-income neighborhoods?*
- Preventative Medicine Reports article by Alison Gustafson: *Shopping pattern and food purchase differences among Supplemental Nutrition Assistance Program (SNAP) households and non-supplemental Nutrition Assistance Program households in the United States* by Alison Gustafson, PhD, MPH, RD.
- *Food Typically Purchased by Supplemental Nutrition Assistance Program Households* by USDA, Food and nutrition Service, Office of Policy Support November 2016.

The preceding may represent only a brief summary of the Appellant's contentions presented 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.

ANALYSIS AND FINDINGS

Store Visit

FNS authorized Hicks Discount Beverage as a convenience store on January 24, 2018. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a February 16, 2020, store visit 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 firm's irregular

SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Appellant is approximately 2,400 square feet.
- There were no shopping baskets and no shopping carts for customer use.
- There was one cash register and one point of sale (POS) device.
- There was no optical scanner.
- The checkout area was small with limited space to place items.
- Dairy included milk, cheese, sour cream (three units) and butter (two units).
- The only fresh produce was bananas, some apples, and a couple of bags of mini carrots.
- There was no fresh unprocessed meat.
- There were a few packages of hot dogs and a couple of packages of deli meat.
- Other staple foods available for purchase were juice, eggs (1), bread, cereal, pasta, and a limited selection of canned goods.
- Frozen food included sandwiches, pizza, peanuts, and some pasta items.
- Much of the remaining stock consisted of accessory foods such as candy and carbonated and uncarbonated drinks.
- Ineligible items included lottery, tobacco, alcohol, paper goods, cleaning products, and health and beauty aids.

The SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. The highest priced items noted three pack of frozen pizza - \$19.99; coffee - \$14.99 and \$10.99; and peanuts - \$8.99. These higher dollar items were available in limited amounts. Given the available inventory, there was very little sign that the firm would be likely to have SNAP redemption patterns that differed significantly from those of similar-sized competitors, especially competitors that sell similar or identical food items.

Charge Letter Attachment

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.

Charge Letter Attachment 1. Multiple transactions were made from individual benefit accounts in a set timeframe. This attachment documents 22 sets of transactions conducted by nine households that meet the parameters of this scan. One household conducted five larger than average SNAP transactions within a short period that total \$188.10 in SNAP benefits (transactions #44-48). Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions

noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of Appellant's stock and facilities and are therefore indicative of trafficking. The photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Appellant multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale. The second and third transactions in each set are too large to consist of forgotten items.

Counsel explains that co-shopping results in a higher number of transactions that occur in a shorter period than expected. Co-shopping may occur, but it is unlikely the reason that Appellant has more frequent large transactions by the same household than other similar stores during the review period. This would manifest itself in these households conducting similar transaction patterns at other retailers. Yet, the Retailer Operations Division found that the five comparator stores did not conduct any similar transactions sets. This begs the question why households would be more likely to co-shop at Appellant than at other similar nearby stores.

Appellant has not offered sufficient evidence to show that the transactions listed in Attachment 1 were legitimate purchases of eligible food.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 109 SNAP transactions as large as \$158.97 and that total \$5,638.40. The Retailer Operations Division also compared Appellant to the average for convenience stores in the State. Appellant conducted 40% more SNAP transactions than the average for convenience store during the review period. Appellant's average SNAP transaction amount was 47% greater than the average for convenience stores in the State. In addition, Appellant total SNAP redemption dollar volume was 105% greater than the average for convenience stores in the State. Appellant had no fresh meat, limited fresh produce, limited selection of staple food items, and no shopping baskets or carts. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar-sized competitors.

Counsel reports that the notes from the store visit show the store to be sufficiently stocked to satisfy the transactions. This is not accurate. The store visit report simply indicated that the store met the eligibility criteria for SNAP authorization. It stocked with at least three stocking units of three different varieties in each of the four staple food categories. The store visit report does not indicate anywhere that the store stocked sufficient food to account for the questions SNAP transactions. Considering Appellant's offering of eligible food stock, these large dollar transactions are questionable and likely indicative of trafficking. Appellant did not submit any evidence to show that it stocked sufficient inventory during the review period to satisfy its SNAP redemptions.

The Retailer Operations Division compared Appellant to five similarly stocked convenience stores. The Retailer Operations Division determined that the transaction pattern of Appellant exceeded the other store, as seen on the table herein. The data from this nearby store shows that the transaction patterns at the Appellant firm were unusual.

Store	Attachment 1 Pattern	Attachment 2 Pattern
Appellant	22	109
Store #1	0	1
Store #2	0	22
Store #3	0	0
Store #4	0	10
Store #5	0	33

Counsel contends that transportation inconsistency is another reason why the store’s transactions appear the way they do if transportation to other stores is not dependable. Sometimes a firm may have higher than average SNAP transaction amounts due to the lack of access to other SNAP authorized stores. The Retailer Operations Division determined that within a two-mile radius, there are least 20 other authorized firms. Counsel contends that Appellant is located almost one mile from other authorized retailers. This is true and it may result in some increased food traffic at Appellant but it does not explain the larger than average SNAP transactions or the flagged SNAP transactions.

The Retailer Operations Division reviewed the transaction activity of three households that conducted some of the flagged transactions. Each of these households conducted SNAP transactions at a super store or supermarket within one day of its flagged transaction at Appellant. Moreover, the Retailer Operations Division determined that 20 of the 28 unique households that conducted transaction listed on this Attachment conducted a transaction at a large grocery store, supermarket, or super store within one day of completing a its flagged transaction at Appellant. The evidence supports that these households had access to transportation within a short time frame of their unusual large transactions at Appellant. It is questionable as to why households would conduct large transactions at Appellant, when these households had just visited or planned to visit larger stores with a better selection of fresh meat and produce and likely better prices.

Previous RIB Investigation

Counsel contends that Appellant was investigated by the USDA during the review period and was found not to be trafficking. The available evidence does show that there was a previous undercover investigation. However, that Appellant refused to traffic to an unknown undercover investigator is not sufficient evidence that Appellant always enforces the SNAP rules and regulations. The refusal might simply evidence that Appellant personnel do not commit SNAP violations with unknown personnel; or that the unidentified clerk did not wish to commit SNAP violations at the given time.

Customer Statements

Appellant submitted 13 client affidavits in support of the questionable transactions. The Retailer Operations Division conducted a thorough analysis of the shopping transaction activity of these 13 households. The Retailer Operations Division determined that are several discrepancies between the affidavits and the households’ SNAP transaction activity. Four of the households did not have any flagged transactions at Appellant and two of the households did not conduct any SNAP transactions at Appellant during the review period. Seven household that submitted affidavits did

conduct flagged transactions at Appellant. However, the Retailer Operations Division determined that there was no evidence to support that the transactions were for eligible food items only. Each of these households also shopped at between two and eight different super stores and supermarkets during the review period. The SNAP activity of these households does not support Appellant as a primary, exclusive, or first choice food source. The customer statements submitted are not sufficient evidence to explain the flagged transactions.

Evidence

The ALERT system is a computerized fraud detection tool to identify SNAP transactions that form patterns having characteristics indicative of trafficking. However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still conduct an extensive analysis of the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether the questionable transactions were, more likely than not, the result of trafficking.

The legality of this method is supported by 7 CFR §278.6(a) which states, inter alia, “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 based on 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.]

The documentation and evidence provided by the Retailer Operations Division was thoroughly examined. From all indications, the Retailer Operations Division obtained the EBT data (provided by ALERT), found it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough investigation before concluding that trafficking was likely occurring.

Appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed and that the transactions detailed in the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. Appellant offered insufficient evidence to prove that the transactions listed in the charge letter were legitimate purchases of eligible food. In the absence of compelling information or documentation weighed in comparison to the evidence provided by the Retailer Operations Division, the evidence weighs in favor of the Retailer Operations Division’s determination that SNAP-benefit trafficking substantially produced the transaction activity at issue in this case.

CIVIL MONEY PENALTY

Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i) even though it was informed of the right to do so in the charge letter. SNAP regulations at 7 CFR § 278.6(b)(2)(iii) states that “if a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility **within the 10 days** specified in § 278.6(b)(1), the firm **shall not be eligible** for such a penalty.” [Emphasis added.] Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of

disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program prior to the violations. The Retailer Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

The Retailer Operations Division's 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 violations 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 occur as charged by the Retailer Operations Division. The determination to impose a permanent disqualification against Appellant is sustained. The Retailer Operations Division's determination that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations is also sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

July 12, 2022