

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

Dream Foods LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0223211

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 Dream Foods LLC (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 November 20, 2019, 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 April 2019 through September 2019. 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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Appellant, through counsel, replied to the charges on December 17, 2019, 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 July 1, 2020. 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.

By a letter dated July 13, 2020, 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 April 2019 through September 2019. 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 July 13, 2022, administrative review request, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- Appellant is distinct from other small food stores because it offers specific unique fresh food items which are healthy, filling, relatively inexpensive, and popular with customers.
- Appellant is well known for its egg rolls and sells approximately 33 fresh egg rolls per day.
- The egg rolls sell for three for \$9.99 and customers purchase multiples with charges of \$19.98, \$29.97, \$39.96 or more just on egg rolls.
- One of the biggest selling items are the “sub deals” which include four subs, four bags of chips, and four sodas for \$24.99.
- Appellant sells freshly sliced cold cuts such as ham - \$7.99 per pound; turkey - \$8.99 per pound; corned beef - \$11.99 per pound; and cheese \$9.99 per pound.
- Appellant sells real fruit smoothies for \$5.49.
- Appellant also sells other foods such as frozen pizza, canned soups, canned fish, cereal, bread, fruit, and milk.
- Appellant has a reputation for being a nice clean store with good fresh food.
- The 304 large transactions only average 1.5 per day and is not surprising given the nature and cost of the most popular foods sold.
- Customers will often purchase multiple egg roll or sandwich deals which add up quickly.
- The multiple transactions averaged less than one per week and most occurred on consecutive days with only eight sets occurring on the same date.
- Many of the customers walk to Appellant and then return the next day to make similar purchases.
- The multiple transactions on the same day can be explained by a purchase of something that they forgot, or some family members asks for, or of decided they wanted to could afford to buy.

In support of its contentions, Appellant provided the following documents:

- Restaurant Depot receipts.
- Photographs of food stock.
- Customer affidavits.
- December 17, 2019, response to the charges.

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 Dream Foods LLC as a convenience store on October 25, 2018. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an October 25, 2019, 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 1100 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 had limited space and occurred through a small window.
- Dairy included milk, cheese, and butter.
- Fresh produce included some lemons.
- There were also some tomatoes, a head of lettuce, and one green pepper that appeared to be used for the prepared food items.
- There was no fresh unprocessed meat, poultry, or fish.
- The frozen food available appeared to mostly be used for the prepared and hot food items prepared by the store.
- Other staple foods available for purchase were eggs juice, bread, cereal, pasta, and a limited selection of canned goods.
- Much of the remaining stock consisted of accessory foods such as candy and carbonated and uncarbonated drinks.
- There was a hot food menu for pizza, chips and cheese, nachos, fries, and loaded potatoes.
- Ineligible items included tobacco, paper goods, cleaning products, paper goods, 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 included corned beef - \$10.99 per pound; cheese - \$9.99 per pounds; turkey- \$7.99 per pound; and a sub meal - \$6.99. 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 29 sets of transactions conducted by 22 households that total \$3,281.77 in SNAP benefits that meet the parameters of this scan. One household conducted two larger than average SNAP transactions in the exact same amount of \$60.56, on May 14 and May 15, 2019 (transactions #27 and #28). Similarly, another household transacted \$64.49 on August 12, 2019, and returned the following day, August 13, 2019, and transacted \$64.09. It is curious what the households could be purchasing on consecutive days in the exact same total or close to the same total. 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.

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, or price advantage. 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 second and third transactions in each set are too large to consist of forgotten items.

The evidence further shows that each of the households who conducted the transactions in Attachment 1 had access to and shopped at large supermarkets and super stores. For example, the household mentioned above that transacted \$211.97 at Appellant on August 6, 2019, also shopped at a super store on the same day and transacted just \$22.99. It is likely that households would shop at a convenience store for food items to supplement their overall grocery needs or to pick up snacks or drinks for immediate consumption, even on a repetitive basis. However, there does not appear to be an explanation for SNAP households would spend large portions of their monthly allotments at Appellant, particularly when they have access to larger, better stocked stores. Moreover, none of the 15 households conducted similar transaction sets at any of the other stores that they shopped. This begs the question why households would be more likely to conduct multiple transactions within a set time at Appellant than at other similar nearby stores that they frequent.

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 305 transactions as large as \$67.49, and that total \$16,420.66. The substantial number of high-dollar transactions in a six-month period call into question the legitimacy of these transactions.

Appellant explains that it sells fresh deli meat by the pound. The deli case was just a small amount of meat and cheese available. It is unlikely that customers were coming in for these items. If deli meat was a popular item, it is likely that the stock would be much larger and appealing. In addition, counsel explained that the store was well known for its cold subs. Again, if this was the

case, the available cold cuts would likely be more robust and there would be a menu advertising these alleged popular sandwiches. There were also no advertisements posted for the famous egg rolls special or the very popular sub meal deals. The Retailer Operations Division determined that the appearance and quantity of the stock does not merit the transactions. Appellant did not submit sufficient evidence to show that they questionable transactions were due to subs, egg rolls, or deli meat.

The Retailer Operations Division compared Appellant to the average convenience store in Milwaukee County during the review period. Appellant's total SNAP dollar volume was 129% greater than the average convenience store's dollar volume in Milwaukee County. Appellant also conducted 48% more SNAP transactions than the average for convenience stores in the County. Furthermore, Appellant's average SNAP transaction was 54% greater than the average convenience store transaction in the County. Appellant had no fresh meat and limited fresh produce. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar-sized competitors. In addition, Appellant conducted more SNAP transactions between \$20.00- \$69.99 in each ten-dollar range, with a usual spike in the \$60.00- \$69.99 range. The data from this nearby store shows that the transaction patterns at the Appellant firm were unusual. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar-sized competitors.

The Retailer Operations Division also noted that there were 86 transaction amounts that were repeated on this Charge Letter Attachment. For example, there were 26 transactions for \$60.89; 22 transactions for \$61.09; and 17 transactions in the amount of \$60.56. During the store visit, the firm did not appear to offer any stock, bundles or packages that would routinely end in these dollar values. Counsel cited egg roll packages available at \$9.99 or a sub packaged for \$24.99. None of these repeating transaction totals appear to be the result of these promotion food bundles now offered by the firm. Repeating transaction totals (without special packages, pricing strategies or promotions to explain the unusual repeating totals) appear contrived and in the absence of compelling evidence to the contrary and are suggestive of trafficking.

Transaction Amount	Number of Transactions
\$40.09	8
\$40.89	16
\$41.09	9
\$50.09	10
\$60.09	16
\$60.56	17
\$60.89	26
\$61.09	22
\$61.89	8

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 there are 44 other authorized stores within a one-mile radius of Appellant. The Retailer Operations Division determined that of the 120 households that conducted the flagged large dollar transactions, 97 household, or 81%, conducted a transaction at a large grocery, supermarket, or super store within one day of its flagged transaction at Appellant. This shows that the majority of households had access to transportation. 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.

Invoice Analysis

During the initial determination, counsel submitted inventory invoices/receipts. The Retailer Operations Division analyzed the remaining invoices submitted by the firm and determined that they did not cover Appellant's SNAP redemptions and other cash and credit sales during the review period. However, even with sufficient food stock purchased at Appellant to mathematically support high dollar transactions, the frequent repeated large dollar transactions and large dollar transactions conducted at a convenience store while these households shopped at larger stores with greater inventory are still questionable.

Household Affidavits

Counsel submitted seven household affidavits from household to explain their shopping habits and to justify the large dollar transactions. Collectively these households conducted 25 of the 300 flagged large dollar transactions. The affidavits are not convincing evidence that the flagged SNAP transactions are for eligible food items only.

Decrease in Unusual Transactions

The Retailer Operations Division determined that after receipt of the charge letter on November 22, 2019, Appellant's total SNAP redemption dollar value for December decreased significantly. Transactions that met the parameters of each of the Charge Letter Attachments also decreased. There were also no transactions that met the criteria for Charge Letter Attachment 1 in December 2019, and the large dollar transactions decreased by nearly 57%. The Retailer Operations Division determined that this decrease in unusual activity after receipt of the charge letter is a strong indicator that more likely than not, trafficking was occurring during the months of the review period and decreased or ended upon receipt of the charge letter.

Evidence

Counsel contends that there is no direct evidence of trafficking, and the charges are based on the ALERT system. 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 the present 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

December 1, 2022