

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

1st Street Supermarket,

Appellant,

v.

Case Number: C0198973

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support that the permanent disqualification of 1st Street Supermarket from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against 1st Street Supermarket.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may . . . file a written request for review of the administrative action with FNS.”

CASE CHRONOLOGY

In a letter dated May 26, 2017, the 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 September 2016 through February 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated the Appellant had the right to respond to the charges within 10 days of receipt to provide explanations for the irregular SNAP transaction patterns. The letter also stated 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). The Appellant replied to the charges in a document faxed on June 6, 2017 and stated that the irregular transaction patterns were due to customers who have multiple transactions in the family. The Appellant, through counsel, followed up in a letter dated June 16, 2017 and generally stated that the store has operated for two (2) years with SNAP without any problems and believed the transactions were legitimate. The Appellant asked for a lesser penalty and indicated a trafficking CMP in the amount of \$59,000 would be too excessive.

After considering the Appellant's responses and the evidence in the case, the Retailer Operations Division issued a determination letter dated July 11, 2017. The determination letter informed the Appellant 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 the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations. The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP because the 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 postmarked July 24, 2017, the Appellant, through counsel, requested an administrative review of the Retailer Operation Division's determination. The request for administrative review was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulation under Title 7 CFR Part

278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

7 U.S.C. § 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 § 278.6(e)(1)(i) states:

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

7 CFR § 271.2 states, in part:

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

7 CFR § 271.2 states, in part:

Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption.

7 CFR § 278.6(a) states, in part:

*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(i) states, in part:

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.

7 CFR § 278.6(b)(2) states, in part:

(ii) *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 as specified in § 278.6(i), that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). **This information and evidence shall be submitted within 10 days**, as specified in § 278.6(b)(1).* [Emphasis added.]

(iii) *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.]

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from September 2016 through February 2017. This involved the following transaction patterns which are trafficking indicators:

- Multiple transactions were made from individual household benefit accounts within unusually short timeframes.
- Excessively large purchase transactions were made from recipient accounts.

Charge Letter Attachment 1: Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment lists 124 sets of 284 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Violating stores often conduct multiple split transactions from the same household account to avoid the detection of single high dollar transactions that cannot be supported by the retailer's food inventory and infrastructure.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 462 SNAP transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C). **5 U.S.C. § 552 (b)(6) & (b)(7)(C).** The substantial number of high dollar purchases atypical of a SNAP authorized small grocery store calls into question the legitimacy of these transactions.

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- The Appellant store has been authorized for almost two (2) years without any SNAP violations or problems.
- To the best of the Appellant’s knowledge, the transactions cited in the charge letter were made by customers eligible to make such transactions.
- There is only one other grocery store in the area but it does not have as many food items as the Appellant store.
- The Appellant has not engaged in trafficking and requests a lesser charge.

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Authorization History

The Food & Nutrition Service (FNS) authorized 1st Street Supermarket for the SNAP on December 22, 2015. The Retailer Operations Division classified 1st Street Supermarket as a small grocery store during the review period.

The owner signed the SNAP application for the store on October 24, 2015 and acknowledged that the owner was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking.

Store Visit Report

The case record documents that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a February 2, 2017 store visit conducted by an 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 store’s irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- 1st Street Supermarket is approximately 1,275 square feet in size and

- operates out of a freestanding building in an urban residential area.
- The store had no shopping carts or shopping baskets for customer use.
 - There were two (2) cash registers and no working point-of-sale device for SNAP transactions. A store employee stated that the store was getting another device for SNAP transactions.
 - The store had no optical scanners and no conveyor belts at the checkout.
 - There was no food stored outside of public view in a storage area.
 - The store had fresh meat and menu boards advertising meat bundles; however, the store did not appear to have sufficient quantities of fresh meat to supply the advertised meat bundles.
 - There were some empty shelves and dusty cans and packages. The dusty cans and packages indicate that the store's food inventory turnover was not frequent.
 - The checkout area consisted of a small countertop with no more than two (2) feet by two (2) feet of empty space for stacking purchases. Two cash registers were side by side adjacent to the empty counter space. Due to the limited space, the checkout area was not conducive to conducting large dollar transactions.

The inventory of food items at the time of the store visit was typical of a small grocery store with a limited amount of fresh meat and produce. The food inventory consisted mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. Accessory food items included, but were not limited to: coffee, tea, carbonated and non-carbonated drinks, condiments, and spices. The stocked ineligible items included tobacco, alcohol, lottery tickets, health and beauty products, paper goods, and household cleaning products.

Given the available inventory as noted above, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors.

Multiple Transactions by the Same Household within a Short Time Period

SNAP households have no limit on the number of times they may use their SNAP cards or how much eligible food they may purchase. However, 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 a small grocery store's stock and facilities and are thus indicative of trafficking. It is also noteworthy that every single transaction in each group of transactions cited in the charge letter exceeds the average for an Alabama small grocery store during the review period.

Violating stores often conduct multiple split transactions from the same household account as a method to avoid the detection of single high dollar

transactions that cannot be supported by the retailer's food inventory and infrastructure. Charge Letter Attachment 1 lists 124 sets of 284 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. It is not credible that the Appellant store would have suspicious SNAP transactions exceeding the average SNAP transaction of a supermarket or superstore in Alabama. It is even less likely that these excessively large transactions would be conducted multiple times during a short time period.

The Appellant's initial reply stated that the irregular transaction patterns were due to customers who have multiple transactions in the family. This statement is insufficient to fully explain why the irregular transactions are occurring. The Appellant also states that the transactions cited in the charge letter were made by customers eligible to make such transactions. This also does not explain the irregular nature of the SNAP transactions cited in the charge letter.

The Retailer Operations Division determined that the transactions cited in Charge Letter Attachment 1 consist of multiple large dollar transactions which cannot be supported by the conditions observed at the store. The store visit pictures show that is unlikely that SNAP customers would want to shop at this store multiple times during a short time frame, 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. In addition to the store's limited checkout space which is unsuitable for large transactions, 1st Street Supermarket has no shopping carts and no shopping baskets for transporting food within the store. Based on the analysis above, and in the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

Excessively Large Transactions

SNAP households have no limit on the amount of eligible food they may purchase (subject to the remaining balance on the card). However, 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 a small grocery store's stock and facilities and are thus indicative of trafficking. The Appellant did not offer an explanation for the irregular transactions cited in Charge Letter Attachment 2.

Charge Letter Attachment 2 cites 462 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(7)(E)**. As noted previously, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors offering similar food items.

In addition, the store visit pictures show that the store layout is not conducive to

these excessively large transactions. There were no shopping carts or shopping baskets for transporting food around the store and the checkout counter space is limited. The store's food stock is mostly inexpensive canned and packaged foods and accessory food items. Although the store sold some fresh meat and menu boards advertised bulk meat packages, the quantity of meat in the store appeared insufficient to supply these meat specials.

The Appellant states there is only one other grocery store in the area but it does not have as many food items. It is true that sometimes a store may have higher than normal SNAP transactions due to the lack of other SNAP authorized stores in the area. However, the Retailer Operations Division determined that during the review period there were 14 SNAP authorized stores located within a one-mile radius of 1st Street Supermarket. These included three (3) combination grocery stores, two (2) small grocery stores and two (2) medium grocery stores. The Retailer Operations Division determined that the two (2) medium grocery stores had a superior depth and breadth of food including a larger amount of fresh meats and meat packages. Therefore, a lack of SNAP authorized stores in the area does not explain 1st Street Supermarkets irregular SNAP transactions.

Lastly, the Retailer Operations Division conducted a detailed analysis of three (3) households that were cited in the charge letter to compare their shopping patterns at 1st Street Supermarket to those at other SNAP authorized stores. All of these households had access to, and shopped at, supermarkets and superstores. However, despite this access to larger and better stocked stores, these sampled households conducted excessively large transactions at 1st Street Supermarket on the same day or within one or two days of shopping at these larger stores. It is highly unlikely that a small grocery store would have legitimate SNAP transactions comparable or exceeding these larger stores which have a superior breadth and depth of stock at likely better prices.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts and baskets support the Retailer Operations Division determination. It is not plausible that the store's customers are carrying large amounts of food around the store without the benefit of shopping carts and shopping baskets. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on a preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 2 are more likely than not the result of trafficking in SNAP benefits.

No Prior Violations

The Appellant states that 1st Street Supermarket has been SNAP authorized for almost two (2) years without any violations or problems. With regard to this contention, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges. Trafficking in SNAP benefits is an extremely serious violation and both 7 U.S.C. §2021(b)(3)(B) and 7 CFR §278.6(e)(1)(i) state that a first time violation warrants a permanent disqualification.

CIVIL MONEY PENALTY

The 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. Therefore, under the regulations at 7 CFR § 278.6(b)(2) the Appellant is not eligible for a trafficking CMP. Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP 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. Therefore, 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 the Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify the retailer. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges.

In the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did in fact occur as determined by the Retailer Operations Division. Based on the discussion above, the decision to impose a permanent disqualification against 1st Street Supermarket, Appellant, is sustained.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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, 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.

RONALD C. GWINN
Administrative Review Officer

September 27, 2017