

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

24th Street Food Market & Deli,

Appellant,

v.

Case Number: C0195698

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of 24th Street Food Market & Deli as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

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 24th Street Food Market & Deli.

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 July 10, 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 May 2016 through October 2016. 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).

During a telephone call on July 18, 2017, the Appellant, through counsel, stated that the irregular transactions patterns were due to customers coming in to buy small items two or more times a day and that the larger transactions were due to repayments on credit accounts. In response to the Appellant's contention regarding credit repayments, the Retailer Operations Division sent the Appellant a letter that same day requesting documentation that the store was selling food on credit.

In a letter dated July 28, 2017, the Appellant denied committing any violations and offered additional explanations for the irregular transaction patterns. The Appellant also stated that after further investigation there were no records indicating that the store was maintaining credit accounts for SNAP households. The Appellant did not timely request a trafficking CMP in lieu of a permanent disqualification.

After considering the Appellant's responses and the evidence in the case, the Retailer Operations Division issued a determination letter dated August 28, 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 September 6, 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, *inter alia*:

... 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, *inter alia*:

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

7 CFR § 271.2 states, *inter alia*:

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, *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 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, *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.

7 CFR § 278.6(b)(2) states, *inter alia*:

*(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 May 2016 through October 2016. 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. 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. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar purchases atypical of a SNAP authorized convenience store calls into question the legitimacy of these transactions.

APPELLANT'S CONTENTIONS

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

- The store sells cold sandwiches (hoagies) and other grocery items. It is not unusual for a customer to make various purchases throughout the day at this neighborhood store.
- The store sells infant formula and other items **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**
- The owner initially thought that the large purchases might be due to repayments on credit accounts, but upon investigation there are no records that this is the case.

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 24th Street Food Market & Deli for the SNAP on July 27, 2011. FNS classified 24th Street Food Market & Deli as a convenience store during the review period.

The owner signed the SNAP application for the store on June 29, 2011 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 September 27, 2016 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:

- 24th Street Food Market & Deli is approximately 500 square feet in size and operates out of a freestanding building in an urban residential area.
- The store had no shopping baskets and no shopping carts for customer use.
- There was one (1) cash register and one (1) point-of-sale device.
- The store had no optical scanners or conveyor belts at the checkout.
- There was no food stored outside of public view in a storage area.
- There were no large bulk foods, international or specialty foods that might sell for a high price. There were no fresh meat/seafood bundles or fresh fruit/vegetable boxes for sale. The store did have less than 20 units of infant formula.
- The checkout area consisted of a small counter and window opening within a Plexiglas barrier. There was also a large reach-in cooler in front of the checkout window. As a result of the limited space, the checkout area was not conducive to conducting large transactions.

The inventory of food items at the time of the store visit was typical of a convenience store with limited to moderate staple food stock. 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. 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 products, lottery tickets, health and beauty products, cleaning products and general household goods. The store also had a small deli with deli meats and cheeses sold by the pound and where cold sandwiches were prepared. These made-to-order sandwiches would be ineligible for SNAP purchase as they were ready-to-eat and not intended for home preparation and consumption.

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 transaction 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 benefits 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 convenience 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 greatly exceeds the average for a Philadelphia County convenience store during the review period.

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

The Appellant states that the store sells cold sandwiches and other grocery items and that it is not unusual for a customer to make various purchases throughout the day at this neighborhood store. Regarding this contention, it is not credible that a convenience store would have suspicious SNAP transactions exceeding the average SNAP transaction of a supermarket or superstore in Philadelphia County. It is even less likely that several of these excessively large transactions would be conducted multiple times during a short time period. The sandwiches made at the store are SNAP ineligible because they are prepared ready-to-eat food not intended for home preparation and consumption; however, even if the store was selling this ineligible item, it would be unlikely to result in such large dollar amounts as the highest priced sandwich in the store visit pictures appears to be about \$3.50.

The Retailer Operations Division determined that the transactions cited in Charge Letter Attachment 1 consist of multiple large dollar transactions which are inconsistent with 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, the Appellant store 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 convenience store's stock and facilities and are thus indicative of trafficking.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). 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.

The store visit pictures also show that the store layout is not conducive to these excessively large transactions. There were no shopping carts and no shopping baskets for transporting food around the store and the checkout counter space is very limited. The store's stock is mainly inexpensive snack foods, canned/package foods and accessory food items. The store visit photographs do not show that the firm offered any fresh meat or seafood, food for sale in bulk, international items, or any other food items that would justify high dollar transactions atypical of a convenience store.

The Appellant states that the store sells infant formula and other items

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Regarding this contention, it is true that 24th Street Food Market & Deli did carry less than 20 units of infant formula. However, the Appellant store is also an authorized vendor in the WIC Program and it is more likely that a SNAP household with an infant would utilize its WIC benefits to purchase infant formula.

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 within a two-mile radius of 24th Street Food Market & Deli there are 144 SNAP authorized retailers. These consist of 102 convenience stores, 19 medium grocery stores, ten (10) supermarkets, and 13 superstores. The Retailer Operations Division looked at two (2) nearby convenience stores that were comparable in size, stock and layout to 24th Street Food Market & Deli. Despite their similarities to the Appellant store, the comparison stores did not have the irregular SNAP transaction patterns exhibited by 24th Street Food Market & Deli.

Lastly, the case record documents that the Retailer Operations Division conducted a detailed analysis of three (3) households identified in the charge letter to analyze their shopping patterns at 24th Street Food Market & Deli compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at supermarkets and superstores.

However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at 24th Street Food Market & Deli often within a day or two of shopping at supermarkets and superstores. It is highly unlikely that a convenience store with limited staple foods would have legitimate SNAP transactions comparable or greater than these larger and better stocked supermarkets and superstores.

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.

Credit Accounts

The Appellant initially claimed that the irregular transactions cited in the charge letter were due to the store accepting SNAP benefits as repayments on credit accounts. When a retailer claims it maintains credit accounts to explain 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 after committing more egregious violations such as trafficking. Credit transactions must be accounted for with substantive evidence such as the dates credit was extended, to whom, for what amount, and for what items. The Appellant was not able to provide such evidence and withdrew its contention that the irregular transactions were at least in part due to repayments of credit accounts.

CIVIL MONEY PENALTY

The Appellant did not 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 dated July 10, 2017. 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. 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 24th Street Food Market & Deli, 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

November 8, 2017