

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

2764 Kensington Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0199337

FINAL AGENCY DECISION

The record indicates that 2764 Kensington Inc. (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). It is the decision of the USDA, Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retail food store in the SNAP, as imposed by the Retailer Operations Division (Retailer Operations), was appropriate.

ISSUE

The issue accepted for review is whether Retailer Operations took 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 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

By Charge letter dated July 10, 2017, Retailer Operations informed the owners that FNS had compiled evidence that Appellant had violated the SNAP regulations based on analysis of electronic benefit transfer (EBT) transactions that “establish clear and repetitive patterns of

unusual, irregular, and inexplicable SNAP activity for your type of firm.” The sanction for trafficking is permanent disqualification.

Appellant replied to the Charge letter July 12, 2017, July 21, 2017 and August 16, 2017. Retailer Operations issued a Determination letter dated September 5, 2017. This letter informed the owners that Appellant was permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the regulations.

Retailer Operations considered Appellant’s eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the regulations. The firm was deemed not eligible because insufficient evidence was submitted to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP regulations.

By letter dated September 15, 2017, the owners, via counsel, appealed Retailer Operations’ determination and requested administrative review. The appeal was granted by letter dated September 19, 2017. Counsel made a Freedom of Information Act (FOIA) request on October 16, 2017. The agency issued a reply to the FOIA request dated December 5, 2017. This office emailed counsel December 6, 2017, that any additional information should be provided no later than December 26, 2017. Counsel provided a brief to this office December 26, 2017. This brief was shared with Retailer Operations on December 27, 2017. Retailer Operations provided this office its review on February 9, 2018.

STANDARD OF REVIEW

In an appeal of an adverse action, 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 argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

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

7 CFR § 271.2 states: “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: “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...”

7 CFR § 278.6(e)(1) states: “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2.” Trafficking is defined, in part, in 7 CFR § 271.2, as “the buying or selling of SNAP benefits for cash or consideration other than eligible food.”

7 CFR § 278.6(b)(2)(ii) states: “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(i) states: “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

The issue in this review is whether, through a preponderance of the evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges on review were based on an analysis of SNAP EBT transaction data during the period of November 2016 through April 2017. This involved three patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions made from individual benefit accounts within unusually short time frames.
2. The majority or all individual recipient benefits were exhausted in unusually short periods of time.
3. Excessively large purchase transactions were made from recipient accounts.

APPELLANT’S CONTENTIONS

In reaching a decision, attention has been given to all contentions presented, including any not specifically recapitulated here.

- Appellant’s response denied that trafficking occurred at the store.
- The patterns identified by the ALERT system are not the smoking gun the Department seems to believe them to be.

- Similac accounts for a substantial number of these purchases. Between the pictures and invoices provided, it is clear that the store had a regular supply of at least 20 cans of Similac at any given time.
- It is the store's belief that a number of these transactions are exchanges of benefits for illicit items outside of the store, and outside of the store's control.
- According to regulations, the store was not permitted to ask for identification of the participant (or person) making the purchases with the benefits card. Instead, if the person had physical possession of the card and the pin, then they could make the purchase, no questions asked.
- None of the comparison stores that the Department could have found would have the same set of circumstances to make it suitable for data comparison. None of the other stores are located next to the 5 U.S.C. § 552 (b)(6) & (b)(7)(C), the street, or have the level of foot traffic that this store has. The transactions are going to appear different from other stores' due to different business realities. The store has a number of loyal customers from the surrounding residential areas, and commuters who pass by via the train, cars or foot traffic.
- The total of the Department's information is based upon the transaction patterns and the subsequent analysis of said data by an analyst whose never been to the store, may or may not have an understanding of how a retail food business is run, and then bases his or her decision upon a mountain of assumptions (beliefs held by the analyst and Section Chief that are based upon personal experience and not on data, like the system is built to accommodate) – not the least of which is the errant belief that the ALERT system identifies trafficking.
- The Department has the right to utilize inconsistent redemption data in disqualifying stores, but what the statute does not authorize is the Department to rely upon a system that inaccurately accounts for what is consistent or inconsistent.
- As for ALERT data, the system's conclusions are rebutted by the inventory and sales records provided. If the store were trafficking, then the inventory and sales data would be "inconsistent." In this instance, the sales data is less than the average markup, showing a consistent error in over ordering, but not detailing anything even close to trafficking. It's more likely that the Department has misidentified legitimate transactions because of an errant assumption about the store's inventory and clientele. All that ALERT has identified is that the local population buys a tremendous amount of Similac from the store.
- The charges levied are not only unfounded but pure conjecture.

Vendor receipts, store photos, sales tax records, and two news articles were advanced.

ANALYSIS AND FINDINGS

Retailer Operations presented a case that Appellant trafficked SNAP benefits. As patterns of unusual transactions appear across multiple Attachments the case of trafficking becomes more convincing.

Attachment 1:

This Attachment lists 174 transactions in 78 sets of two or more transactions conducted by 63 different households (HHs). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Contentions:

- Multiple purchases within 5 U.S.C. § 552 (b)(6) & (b)(7)(C) after receiving benefits are not unusual.
- 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.
- 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.
- The store's SNAP participants exemplify co-shopping more than most given the higher rate of children and elderly living in their households.
- With the exception of a hand-full, all transactions occurred between the first and the tenth of their respective months. These dates directly correlate to the dates participants received their benefits.
- On a regular basis, the participants will make significant grocery purchases from the store 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of receiving the deposit into their accounts. Such patterns are supported by the Benefit Redemption Patterns in the SNAP Final Report (2009).
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- Similac transactions can be found in the data: 74, 75, 76, 77, 84, 85, 86, 87 to name a few. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The vendor invoices show that the store purchases Similac 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- Monster and Red Bull (\$66.96 per pack sold) are purchased in similar quantities (24 packs, purchased 5 - 15 packs of each at a time) once every week or two.
- This category, which is not indicative of trafficking, is the result of the ease at which many of the transactions can be processed, and the high-priced items that are involved in the sales. Many of these purchases are one item multiplied by a number of units, which are entered using different keys on the register. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The evidence is not independently indicative of trafficking. Instead, it's more likely these were transactions for eligible items, purchased on rare occasion, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The only possible explanation is that beneficiaries allow a third party to use their card. It is widely known that beneficiaries purchase merchandise and sell the purchased goods on the street. The store is in a neighborhood labeled as a center of the opioid epidemic. The transactions are not only reasonable but probable.

Store

The April 4, 2017, FNS store visit was done while the store manager was onsite. The onsite visit report does not note Similac or cases of Red Bull as high priced items. The store inventory shows 20 or more units of infant juice and soy formula and zero formula under animal based infant formula. The photos submitted by attorney **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** show cases of formula. Retailer Operations deemed it unlikely that if this quantity of formula was reflective of consistent store stock that it would have been missed during the FNS store visit inventory or on store photographs.

Retailer Operations determined that the photos submitted by the owners and the FNS store visit photos do not show cases of Red Bull or energy drinks for sale. Single cans of Red Bull are seen in some black plastic containers and jumbled in an open cardboard box. Retailer Operations determined that the vendor invoices for November and December 2016 and January 2017 documented 173 24-packs of canned energy drinks. The store photos show no signage for case sales of energy drinks. Retailer Operations concluded that if the purchase of cases of energy drinks contributed to the unusual transactions there would be some cases and case signage on display at Appellant. Rather, the store's layout and photos suggest that the majority of energy drinks were displayed for sale as single can units.

Formula

Appellant is a WIC authorized store. SNAP customers also qualify for WIC benefits. WIC limits what can be purchased with WIC benefits; therefore, WIC recipients would likely use WIC benefits rather than SNAP benefits to purchase formula. The purchase of multiple units of formula with SNAP benefits would be irregular.

Similac was alleged to be priced at \$16.99 per can. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Retailer Operations assessed the various price points and determined that the total cans of formula that would need to be purchased to cover the transactions in the Attachments was 1,235 cans.

Retailer Operations determined that of the total 11,360 SNAP transactions during the review period, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. This means that another 212 transactions of these same price points were not listed on the Charge letter. These transactions could represent another 516 cans of infant formula transacted. Some of the formula would presumably be transacted with WIC benefits, and some might be purchased by customers not using SNAP or WIC benefits.

Nine of the Similac invoices were handwritten on generic purchase orders. These handwritten invoices are hard to read and there is no vendor information listed making them suspect. Retailer Operations also reviewed a single sales summary sheet from S & K imports which did not list the name of Appellant, but shows it handwritten in the corner. The sheet summarizes total purchases of infant formula for an 18 month period. The review period was for six months. Retailer Operations used one third of the total amount and determined that 1,350 cans of formula were possibly acquired by Appellant during the review period.

Retailer Operations considered how many cans of formula were transacted at Appellant using WIC benefits. The state of Pennsylvania reports WIC redemptions quarterly so there is not an exact match to the review period. The information from the state WIC office shows that Appellant claimed to sell at least 70 cans of formula a month to WIC recipients, for an estimate of 420 cans of formula for a six month period. When 420 cans of formula are deducted from the total cans purportedly purchased by the firm, 930 cans are possibly available for sale with SNAP, cash, credit or debit. This number of cans of formula would not be sufficient to explain most if not all of the transactions listed in the Attachments.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Thus, Retailer Operations determined that insufficient evidence was advanced to demonstrate that Appellant acquired enough cans of formula to explain the transactions in the Attachments.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). For example, transaction numbers 45, 46, and 47, are all for the same amount, but not at a price point cited. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The claimed Similac transaction amounts could easily have been the result of a direct exchange of cash for benefits at various set price points without any exchange of eligible food for benefits. Such transactions are very quick to process. The transactions in this Attachment are by a preponderance of the evidence determined to be more likely the result of trafficking than not.

Appellant admits to knowingly selling cans of formula and Red Bull/energy drinks to recipients and anyone who had an EBT card and pin number regardless of their status as a recipient, as high demand items that served as currency in the area to support drug habits. This practice does not show Appellant's adherence to reporting suspected fraud and abuse to the USDA, OIG, which is encouraged by the USDA. The OIG contact information is clearly given in the SNAP retailer training guide and retailers are enlisted to help preserve the integrity of the program by posting fraud posters. While the owners may claim this is not their responsibility, this position betrays a distinct and blatant disregard for the integrity of the program from which they were financially benefitting.

Attachment 2:

Listed are 219 individual transactions conducted by 84 different households.

Contentions:

- Appellant cannot control how quickly its SNAP customers spend their money, nor should they be responsible or required to turn away their business because they choose to continue to make significant purchases from the store. There's no statutory or regulatory basis for the Department to punish 5 U.S.C. § 552 (b)(6) & (b)(7)(C). for such actions over which it has no control, and which would harm the firm's continued existence without reasonable basis.
- Many of the purchases are Similac (233, 234, 236 and 238), interspersed with other purchases of eligible food items and deli meats. Large transactions which were clearly intended to wipe out an account balance (transactions 231 and 232) do not tell the whole story of the purchase because while the benefits are exhausted, it's impossible to tell how much cash or charge card was applied to the balance after the benefits reduced

the total. These transactions are likely those of the benefits-for-drugs exchanges that happened outside of the store.

- If an apparent participant wanted to spend his/her entire monthly benefit balance on Similac, Red Bull, or some other non-staple food item, the store has no standing to decline the transaction.
- The exhaustion of benefits in a short period of time is likely a component of what happens with unemployed and homeless that spend time around the store. If they have nothing to do all day, but do have money to shop, then they're likely to shop several times over the course of a day and deplete their benefits as a result of boredom, hunger or entertainment.
- These transactions were not trafficking, and there is no evidence to support the idea that trafficking occurred.
- A beneficiary dissipating their account in a short time is indicative of spendthrift instant gratification behavior that is indicative of a drug addict. It most certainly does not lend itself to a conclusion that the store is trafficking.

Depletions/Near Depletions

This is not a fish and chip outlet as contended by counsel. The owners claim they were selling eligible foods in short timeframes to recipients or persons with EBT cards with the PINs, who were drug addicts, had nothing to do all day, were bored or wanted to use the benefits quickly to call in the cards as lost. They contend none of these reasons is against the regulations and such sales do not constitute trafficking.

The rapid depletion of a household's benefits is indicative of trafficking. Retailer Operations rejected the contention that the transactions listed were for eligible foods including large amounts of formula and energy drinks. Retailer Operations conducted an invoice analysis on three months of vendor invoices advanced by the owners. The only invoices provided were for formula and snack items. While Appellant stocked other items, vendor invoices to support the acquisition of these items were not advanced.

Retailer Operations determined that Appellant's evidence of eligible stock was not sufficient to cover its SNAP redemption amounts. Retailer Operations found that in November 2016, vendor receipts with a 40% markup 5 U.S.C. § 552 (b)(6) & (b)(7)(C), 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Thus, the contention that transactions of eligible items were more likely by a preponderance of the evidence than trafficking is not supported by the vendor evidence under review. No itemized cash register receipts were provided, no banking records were advanced, no federal business tax submissions were advanced, and pricing for eligible items, other than formula and energy drinks was not provided.

Attachment 3:

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These were made by 149 households
5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Contentions:

- The vast majority of the transactions are explained by purchases of Similac, and those that remain involve some combination of Similac, energy drinks, and legitimate food purchases.
- Sandwiches, the sliced by the pound meats and other items can easily account for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of a purchase, and could be added on in any combination to arrive at some of the purchase amounts above and beyond what Similac and the energy drinks account for.
- The exchange of benefits for drugs that occurs outside the store also accounts for the high purchase amounts. The dealers or third parties who the dealers give the benefits to are interested in withdrawing as much of the benefits as possible as quickly as possible before the card can be called in as lost by the participant.
- They purchase the items that the third party or drug dealer can resell thus, the selection of Similac and energy drinks, which have no particular storage requirements or short expiration periods. Those purchases appear to be large because they are, though not as the result of wrong-doing on the part of the store.
- Sales Tax returns show the store was reporting sales of non-taxable food items to the clip of roughly 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per month. This amount exceeds the 2012 estimates which were a bit lower than the store's 2016 and 2017 sales.

Targeted Purchases

Retailer Operations identified three other WIC authorized medium groceries with similar SNAP total dollar volumes as Appellant. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This suggests that this unusual pattern at Appellant is not explained by habits of customers in the area. It appears to be unique to Appellant and supports that the repeating amounts were not due to actual purchases, but are contrived amounts in order to mask violative trafficking transactions.

Sales Tax

Total gross sales at Appellant for the months provided averaged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per month. Reported non-taxable sales averaged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per month. These self-reported tax submissions support that 84% of sales reported to the state were non-taxable. However, non-taxable items are not necessarily eligible to be acquired with SNAP benefits. Appellant stocked health and beauty aids, paper goods and cleaning products, none eligible for purchase with benefits. Appellant also operates a hot food kitchen, and hot foods are not eligible for purchase with benefits, neither are tobacco products or alcohol also stocked by Appellant. Retailer Operations did not find the provided state sales tax returns to be of assistance in explaining the suspicious transactions at Appellant.

The burden to disprove trafficking rests with Appellant. While some transactions flagged may be legitimate exchanges of eligible products for benefits, insufficient evidence was advanced to

support this contention. No itemized cash register receipts were provided as evidence of eligible foods purchased by recipients at Appellant during the review period. The vendor invoices of Similac were suspect and lacked critical details typically seen on vendor receipts. The quantities of Similac allegedly acquired were not sufficient to support the numbers of transactions at the Similac price points cited. The overall vendor invoices did not document eligible items to cover Appellant's SNAP redemptions. The tax submissions list gross sales which does not distinguish non-taxable items that are not eligible for purchase with SNAP benefits.

The USDA does data analysis of transactions to ascertain violation that may be occurring at authorized stores. An Appellant who seeks to set aside an agency sanction must focus its probative efforts on providing evidence by a preponderance that the transaction activity at issue is not due to SNAP benefit trafficking. Since permanent disqualification is warranted on the first occasion of trafficking, it is Appellant's burden to raise material issues of fact as to each Attachment set forth as suspicious by FNS. This burden has not been met.

CIVIL MONEY PENALTY

To be considered eligible for a CMP a firm must establish by substantial evidence its fulfillment of each of the criteria under 7 CFR § 278.6(i). Previous counsel stated the owners were committed to operating in a matter consistent with SNAP regulations and policies. Counsel described that Appellant had a training program at for employees and new hires. However, no contemporaneous documentation was advanced as evidence to support that Appellant met the four regulatory criteria listed. As such, Retailer Operations found that Appellant did not meet the requirements to qualify for a CMP in lieu of permanent disqualification.

CONCLUSION

Retailer Operations' 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 in SNAP benefits. The review of all the evidence does not support by preponderance that Similac and energy drinks, more likely than trafficking, accounted for the transactions listed on the Attachments. Upon review of all of the evidence in this matter, it is determined that it more substantially supports a conclusion that the SNAP transaction activity at Appellant was due primarily to SNAP benefit trafficking. Thus, based on the discussion herein, the decision to impose a permanent disqualification against Appellant is sustained.

Appellant did not provide documentation for consideration for a CMP in lieu of permanent disqualification. Thus, Retailer Operations properly denied a CMP according to the terms of Section 278.6(i) of the SNAP regulations.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 and to 7 CFR § 279.7 of the regulations with respect to applicable rights 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 the Appellant's owners 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.

M. Viens
Administrative Review Officer

February 22, 2018