

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

6 Eleven Convenience,

Appellant,

v.

Case Number: C0213103

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that 6 Eleven Convenience, (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the program, 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(c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant by letter dated October 30, 2018.

AUTHORITY

7 U.S.C. § 2023 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 October 12, 2018, 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 March 2018 through August 2018. 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 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).

In correspondence dated October 17, 2018, Appellant, through representation, replied to the charge letter and generally stated that most of the time families come together and buy SNAP items repetitively 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As soon as SNAP customers receive money in their accounts they like to spend all of the funds within a few days which is sometimes uncontrollable. Appellant stated that kids come with their parents and pressure them into purchasing items and that a lot of the transaction took place during the months of July and August when school is closed. Families repeatedly buy lunches and drinks. Appellant stated that ownership is very honest and is willing to learn/educate himself and employee to better manage SNAP. In an email dated October 26, 2018, Appellant sent additional information which was a duplicate of its response to the charge letter.

After considering Appellant's response and the evidence of the case, Retailer Operations Division issued a Determination letter dated October 30, 2018. The letter informed Appellant that it was permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also stated that Retailer Operations Division considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, Retailer Operations Division determined that Appellant was not eligible for the CMP because it failed to submit sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated October 17, 2018, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. 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 actions should be reversed. That means an 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 & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) (c) and (e)(1)(i) 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 § 278.6(a) states, *inter alia*, that “FNS may disqualify any authorized retail food store...from further participation in the program 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(c) reads, in part, “*Review of Evidence*. The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1)...the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS...”

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.” 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 § 271.2 states in part that, “Eligible foods mean: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption.”

SUMMARY OF THE CHARGES

The charges on review were based on an analysis of SNAP electronic benefit transfer (EBT) transactions dated during the six month period of March 2018 through August 2018. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from the accounts of individual SNAP households within a set time period.
2. Excessively large purchase transactions were made from recipient accounts.

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

The Appellant, through representation, made the following summarized contentions in its response to the permanent disqualification letter issued by Retailer Operations Division, and its request for administrative review, in relevant part:

1. Most of the time families come together and buy SNAP items repetitively **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. They like to spend all of their benefits within a few days.

2. Some customers ask to purchase items when they have no benefits and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) allows them to take the items on credit. When they receive benefits they pay on the accounts.
3. There were a lot of transactions in July and August which is when school is out. Sales are uncontrollable during that time with families buying lunches and cold drinks repetitively.

Appellant did not provide any additional information or documentation in support of its position. The preceding may represent a brief summary of Appellant's contentions in this matter however, in reaching a decision, full attention has been given to all contentions presented, including any not specifically recapitulated or referenced herein.

ANALYSIS AND FINDINGS

The FNS authorized the business as a convenience store on December 27, 2017. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during an August 29, 2018, store visit to the business 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 EBT transactions at Appellant that formed patterns indicative of trafficking. The firm review summary documented the following store size, description, and characteristics:

- One cash register and one POS device with a small counter area partially obstructed by other smaller items available for sale.
- Estimated to be approximately 2625 square feet. Food stored in an area outside of public view (appx. 800 sq. ft.) Consisted of drink items.
- No shopping baskets or carts available for customers.
- Optical scanner was available at checkout. One specialty register present dedicated to the sale of lottery tickets.
- Store does not operate through a night window or plastic barrier with food stock behind the barrier.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- No unusual pricing structure such as ending most products with 00 cents and does not round transaction totals.
- Store has storage freezers or coolers but not food stored off site.
- Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
- Store does not take telephone or online orders and does not offer delivery.
- Highest priced eligible food items were Rice Crispies cereal (\$5.99), Jack Links breakfast sausage (\$6.49), Honey Ham (\$5.50) and Appleton Bacon (\$5.99).
- Store stocks a significant amount of non-food items such as but not limited to paper products, household products, tobacco products, health and beauty aids, automotive products, charcoal, pet products, lottery tickets, and cleaning products.

- Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products. No fresh fruits or produce, no fresh meat or poultry. Most meats are canned, packaged or frozen.
- A kitchen/prepared food area with hot foods sold for onsite consumption.
- Food is sold for on –site consumption with a microwave available for heating.
- No deli or prepared food section.
- Stock is used in preparation of food.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.

The issue for consideration is whether Retailer Operations Division has presented a convincing case that Appellant likely trafficked in SNAP benefits. 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.

Attachment 1 of the Charge Letter - Multiple transactions were made from the accounts of individual SNAP households within a set time period.

There were 33 sets of 103 SNAP transactions that met the parameters of this attachment and were completed by 16 different households. Multiple transactions conducted by the same household account within a set time period is a method which violating stores use to avoid the detection of single high dollar transactions that cannot be supported by the retailer's inventory and structure. The store visit report does not indicate any compelling reason for customers to consider 6 Eleven Convenience a first choice destination to fulfill large purchases of food, or that they would have made relatively large, multiple purchases at the store within a set time period.

Appellant, through representation, contends that most of the time families come together and buy SNAP items repetitively **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and they like to spend all of their benefits within a few days. With regard to these contentions, it is important to note that SNAP households have no limit on the number of times they may use their EBT cards or how much eligible food they may purchase. The EBT transactions are questionable not because they exceed any limit of use, but rather because they display characteristics of use inconsistent with the nature and extent of the store's stock and facilities, the makeup and shopping patterns of SNAP households, and the households' proximity to other stores in the area; characteristics that are indicative of trafficking.

While there are legitimate reasons why a SNAP recipient might return to a convenience store during a short period of time, the transactions cited in Attachment 1 indicate a series of purchases that total to large amounts. In this regard, it is implausible that customers, who must rely on SNAP benefits to make ends meet, would prefer to pay higher prices and spend a substantial amount of their benefits at a minimally stocked convenience store. It is unlikely that customers spending large amounts of their benefits in a store of this type, when there are other larger food stores where they also shop and which carries a better variety of foods at a lower cost, are conducting legitimate food purchases.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions within a set time period however, it is unusual to conduct multiple transactions in the same store within a 48 hour period for amounts greater than the average for a store of its type. 6 Eleven Convenience's transaction activity is unusual as every single transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and the average convenience store transaction in Maryland during the review period was \$7.52 and in Baltimore County it was \$7.58. The transactions in Attachment 1 do not contain the characteristics associated with a recipient purchasing a forgotten item or two right after checking out or households returning to purchase an item or two. In many of the transaction sets, the second and/or combined subsequent transaction amounts exceeded the initial transaction amount. Transaction behavior of this sort cannot be reasonably explained. Given the common practice of violating retailers breaking up large, suspicious transactions into multiple, somewhat smaller transactions to avoid detection, affirms why explanation for these repetitive SNAP transactions occurring should be both rational and compelling. Appellant's contentions, through representation, in this regard are neither. It is unreasonable to believe that the sets totaling to large amounts are the result of family members shopping together and repetitively buying items. It is not logical why this would be an established practice at this particular store and not the average convenience store in Baltimore County.

Appellant, through counsel, contends that some customers ask to purchase items when they have no benefits and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) allows them to take the items on credit. When they receive benefits they pay on the accounts. With regards to this contention, SNAP regulations at § 278.2(f) provides, inter alia, that: **"Food stamp benefits shall not be accepted by an authorized retail food store in payment for items sold to a household on credit. A firm that commits such violations shall be disqualified from participation in the Food Stamp Program for a period of one year"**.

Since attributing suspicious EBT transactions to credit may be an attempt to avoid a more serious sanction which is appropriate for a trafficking violation indicated by the available evidence, to refute charges of trafficking, as part of the retailer's reply to the charge letter, the retailer must provide adequate proof that credit accounts existed at the time the suspicious EBT transactions occurred. It is imperative that the retailer provide evidence to refute charges of trafficking so that the Retailer Operations Division can compare such proof with the transactions outlined in the charge letter. In this case, Appellant's admission to providing credit accounts, without sufficient proof of those accounts, do not provide adequate proof that credit accounts actually existed and were settled with SNAP benefits during the review period. If the retailer does not provide adequate proof, the determining office shall permanently disqualify the retailer for trafficking.

Appellant did not provide any documentation to support its position during this review therefore, Appellant's contentions, through representation, do not constitute valid grounds for dismissal of the current charges or for mitigating the impact of those charges. In conclusion, it is therefore more likely true than not true that the irregular transactions cited in the charge letter Attachment 1 are due to trafficking in SNAP benefits.

Attachment 2 of the Charge Letter - Excessively large purchase transactions were made from recipient accounts

There were 226 SNAP transactions that met the parameters of this attachment. Based on the results of the contracted store visit, the large transaction amounts are not consistent with the store's inventory of low priced foods. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The firm does not offer food in bulk or any ethnic or specialty foods that sell for a high price. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

The store's layout, infrastructure and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount for a convenience store in Baltimore County, Maryland. In addition to the statistical irregularity of such high dollar transactions, the lack of shopping carts and baskets would mean that customers would have to hand-carry a large number of items to the counter to substantiate the transaction amounts in this Attachment. Large transactions for the purchase of legitimate food items (which at this store would have been a substantial number of lower priced items); relying solely on hand carrying items is unlikely to frequently occur. Considering all these factors the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

6 Eleven Convenience does have an adequate inventory of staple food and non-staple foods for a convenience store and therefore it is possible that there would be an occasional purchase where the transaction amount is high, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As such, there may well be some legitimate SNAP transactions scattered among the transactions listed in Attachment 2. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from nearby, similar-sized competitors.

The store sells a variety of hot foods which are SNAP ineligible but also sells SNAP eligible cold sandwiches and bagels. The menu indicated that an eligible 6 inch Sub with fries (hot food) and soda is priced at \$6.99. Even though a portion of this combo is ineligible for purchase with SNAP benefits (French fries), it is inconceivable that SNAP households were purchasing large amounts of this sandwich combo to account for the transactions cited in this attachment. The store visit documentation indicated that meat and cheese were sold by the pound but no pricing was advertised and that these items were also used in preparing the items listed on the menu. It is noted that a small portion of Attachment 2 may be the result of cold sandwich and cold cut sales but it is unlikely that these items are routinely sold in large quantities to SNAP recipients who rely on their benefits to make food purchases throughout the month. Appellant also did not provide any documentation to indicate that many of the SNAP transactions were as a result of selling deli meats/cheeses or cold sandwiches.

Appellant is a typical convenience store that does not appear to stock many expensive food items or any food items that are not available at larger better stocked retailers where the SNAP households also shopped. In reviewing the contractor's store visit photos and report, there is no great attraction to this store for SNAP households to spend a large amount of their SNAP benefits rather than going to a nearby supermarket where prices are likely lower, where inventory is significantly larger, and where shopping carts would help facilitate the purchase of a large number of items. The food stock and facilities do not appear to be set up to provide for all of one's nutritional needs based on the quality, quantity and variety of staple and non-staple food stock which consisted mainly of inexpensive canned/package foods, deli items and accessory foods.

Even if a statistical anomaly of SNAP households purchasing unreasonable quantities of inexpensive food were the case, the fact still remains that the store's facilities are not setup for such large transactions and thus makes it unlikely that large legitimate food purchases were occurring.

Appellant, through representation, contends that there were a lot of transactions in July and August because school was out and that children pressure their families to buy food items. With regard to this contention, it is unlikely that these transaction are the result of school not being in session and children pressuring parents to make purchases. The record reflects that equally large sales were made throughout the review period. Furthermore, it is not logical that children are pressuring their parents into buying such large sums of SNAP eligible items and parents have no choice other than to buy. It is logical to believe that children do pressure parents into buying candy, chips and other snack foods of that nature but these transactions would generally be for nominal amounts. Based on a preponderance of the evidence, the irregular transactions cited in Attachment 2 of the charge letter are more likely than not the result of trafficking in SNAP benefits.

Retailer Operations also conducted an analysis of the shopping habits of six of the households identified in the charge letter. This analysis concluded that these households also shopped at other area grocery stores including full-line supermarkets and superstores that offer a much larger quantity and variety of eligible food items for likely better prices either on the same day or within days of visiting Appellant's firm. This again indicates that lack of access to other stores is not at issue. However, despite this access to large supermarkets and superstores, these households consistently conducted much higher transactions at the Appellant firm than at better stocked supermarkets/superstores in and around the Baltimore County area of Maryland. This is another strong trafficking indicator.

Based on this empirical data, and in the absence of sufficient evidence as to the legitimacy of such transactions, a conclusion can be drawn, through a preponderance of evidence that the "unusual, irregular, and inexplicable" transactions and patterns cited in the charge letter evidence trafficking as the most likely explanation. In this case, ownership did not provide sufficient evidence to legitimize Appellant's transaction data as outlined in the Attachments. Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence that the store was trafficking and concluded, through a preponderance of evidence, that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

The transaction data and overall firm record convincingly demonstrate repetitive patterns of unusual, irregular, and inexplicable SNAP activity for this type of firm indicative of trafficking. Once Retailer Operations Division established the convincing case against Appellant, ownership 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. If this is not demonstrated, the case is to be sustained.

As noted, 7 CFR § 278.6(a) states that FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 1977, 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 inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Retailer Operations Division has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns in two attachments of EBT transaction data, the inadequacy of the firm's eligible food stock as observed and recording during the onsite visit to support such large transactions, the lack of evidence of invoices of foods in inventory to cover SNAP redemption totals for the review months, the lack of explanation for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant, and the irregular SNAP transaction data of Appellant as compared to other convenience stores in the State.

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 Charge letter. Therefore, based on this empirical data, and in the absence of evidence for the legitimacy 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. While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence in the record.

The purpose of the administrative review process is to ensure that firms aggrieved by Retailer Operations Division's adverse actions have the opportunity to have their position fairly considered by an impartial review authority prior to that adverse action becoming final. Appellant has been duly given, and has taken the opportunity to present to USDA through the administrative review process whatever evidence and information it deems pertinent in support of its position that Retailer Operations Division's adverse action should be reversed. Therefore, any evidence and information that Appellant presented to Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to Appellant's right to a fair and thorough review.

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 dated March 29, 2016. 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' decision, not to impose a trafficking CMP in lieu of disqualification, is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

Ownership has not provided sufficient evidence to rebut the convincing case that Appellant most likely trafficked in SNAP benefits. As such, the SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have trafficked, which is that FNS shall disqualify the firm permanently.

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify 6 Eleven Convenience from participation in the SNAP. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking 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, in fact, occur as charged by Retailer Operations Division. Based on the discussion herein, the determination to impose a permanent disqualification against 6 Eleven Convenience is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to 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 (FOIA), 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.

Monique Brooks
Administrative Review Officer

June 4, 2019