

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

ABC Beer & Liquor Depot II,

Appellant,

v.

Case Number: C0204873

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 ABC Beer & Liquor Depot II (hereinafter “ABC” or “Appellant”) 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 ABC.

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 January 16, 2018, 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 August 2017 through October 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 charge letter was delivered to the Appellant by UPS on January 17, 2018.

On January 24, 2018, the Appellant, through counsel, requested an extension of time to respond to the charge letter. The Retailer Operations Division granted an extension to February 8, 2018, but noted that it could not grant an extension of time to request a trafficking CMP under 7 CFR § 278.6(i). The Appellant did not request a trafficking CMP.

In a letter dated February 8, 2018, the Appellant, through counsel, denied that the store trafficked in SNAP benefits. The Appellant stated that customers make separate purchases within a short time frame: in order to insure they have enough benefits on their cards; to provide separate accounting for other family members; or because they made an additional purchase of items for others. Regarding the excessively large SNAP purchases, the Appellant stated, among other contentions, that these were due to the store's deals for bulk purchases. The Appellant provided store pictures, a "pseudo" price list, and signed affidavits from some of its alleged store customers to support these contentions.

After reviewing the Appellant's contentions and the evidence in the case, the Retailer Operations Division issued a determination letter dated March 27, 2018. The determination letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and 7 CFR § 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 7 CFR § 278.6(i). 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 April 3, 2018, 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, would 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 § 271.2 states that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

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 defines trafficking, in part, as:

The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone

7 CFR § 271.2 defines eligible food, in part, as:

Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods 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 August 2017 through October 2017. This involved the following transaction patterns which are trafficking indicators:

- **Charge Letter Attachment 1:** Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment lists 10 sets of 24 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

- **Charge Letter Attachment 2:** Excessively large purchase transactions were made from recipient accounts. This attachment lists 159 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

APPELLANT'S CONTENTIONS

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

- The Retailer Operation Division's determination was in error and the Appellant requests that the permanent disqualification be reversed.
- Many times customers will make two separate purchases because they do not know how much they have left on their cards. They will purchase some items while leaving other items to the side to be purchased separately after the first transaction.
- At other times, customers will shop as a family and will make separate purchases for their own "accounting" purposes while they are behind each other in line.
- There are times when customers are making a purchase and then will begin shopping again during the process because they are actually shopping for others and want the transactions to be conducted separately.
- The large purchases are due to market deals on cases of items such as soft drinks, canned foods and frozen foods.
- The store will also give discounts when certain spending thresholds are met causing higher dollar transactions.
- Customers also shop for multiple household members. In any event, the purchase amounts are not really that large as a person can easily spend a few hundred dollars in stocking up on groceries.
- Many of the customers whose transactions have been questioned have signed affidavits attesting to the legitimate nature of those purchases and explain what the purchases were.
- The Appellant has also provided a pseudo list of some of the SNAP eligible items carried by the store as well as pictures showing relatively high inventory levels.

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

FNS authorized ABC for the SNAP on June 17, 2015. During the review period of August 2017 through October 2017, the Retailer Operations Division classified the store as a convenience store.

An owner signed the SNAP application for the store on May 13, 2015 and acknowledged that the owners were aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owners 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, and other violations such as accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible non-food items.

Store Visit Report

The case record documents that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a December 3, 2017 store visit conducted by an FNS contractor to observe the nature and scope of the store’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:

- ABC is approximately 1,050 square feet in size.
- The store had no shopping carts and no handheld shopping baskets for customer use.
- The store had two (2) cash registers and two (2) point-of-sale device.
- Store personnel confirmed that there was a small storage area (approximately 100 square feet) where food was kept out of public view. The storage area mostly contained soft drinks and alcohol. However, no food was store at an offsite location.
- There were no large bulk foods, expensive international or specialty foods that might sell for a high price. There were no fresh meat/seafood bundles or large boxes of fresh fruit and vegetables for sale. The store had no signs advertising bulk purchase deals.
- Store prices generally ended in nine (9) cent amounts and store personnel confirmed that the store did not have a special pricing policy such as food items ending in even dollar amounts. Store personnel also confirmed that prices were not rounded up or rounded down at checkout.
- The checkout area consisted of two (2) tall but very narrow sliding window openings within a protective glass barrier that separated the clerks and cash

registers from the rest of the store. There was a narrow ledge running along the outside of the glass barrier and some products for sale were scattered on the ledge. There was also a cooler containing ice cream products in front of the checkout windows which further limited space. The very limited space for stacking food at the checkout area made it not conducive to conducting large transactions.

The SNAP eligible staple food stocked by the store consisted mainly of inexpensive canned and packaged goods. The store also sold a large amount of inexpensive accessory food items such as snack foods, candy, coffee, tea, carbonated and non-carbonated drinks, condiments, and spices. The stocked ineligible items included tobacco, alcohol, lottery tickets, automotive products, health and beauty products, paper goods, and household cleaning products. The store also had an ATM and offered a money transfer service. Store personnel confirmed with the store visit contractor that the most expensive items sold by the store were a package of six (6) Raybern's Philly cheesesteak sandwiches at \$14.99; a package of six (6) gyro kit sandwiches at \$9.99; a package of bacon at \$5.99 and a 36 ounce package of chicken nibblers at \$5.99. The store did not appear to carry these items in any significant quantities.

The store pictures submitted by the Appellant were not significantly different than the pictures taken during the store visit with the possible exception that the Appellant's pictures show the store had purchased a little more stock after it was disqualified. Nevertheless, 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 offering similar food items.

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 convenience store's stock and facilities and are thus indicative of trafficking.

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 10 sets of 24 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 a convenience store with a very limited selection of staple foods would have suspicious SNAP transactions much higher than those of a supermarket or superstore. It is even less likely that these excessively large

transactions would be conducted multiple times by the same household during a short time period.

The Appellant states that many times customers will make two separate purchases because they do not know how much they have left on their cards. Allegedly, they will purchase some items while leaving other items to the side to be purchased separately after the first transaction. However, this explanation is not credible. First, it is not necessary to make a purchase to determine the balance on the EBT card as the store can perform a balance inquiry prior to the SNAP recipient making a purchase. Second, the store visit photographs show there is no room to stack large amounts of food at the checkout area because of the limited space for conducting transactions. The store also does not have shopping carts or shopping baskets that would allow a recipient to “set aside” additional food purchases. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Appellant also states that, at times, customers will shop as a family and will make separate purchases for their own “accounting” purposes while they are behind each other in line. Or there are times when customers are making a purchase and then will begin shopping again during the process because they are actually shopping for others and want the transactions to be conducted separately. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). In addition, a SNAP household is one that purchases and prepares meals together so there would no need to obtain a separate receipt for “accounting” purposes. Households that purchase and prepare meals separately are considered separate households. It is unlikely that a family relying on SNAP to supplement their nutritional needs would share these benefits with another family that purchases and prepares meals separately.

One affidavit supplied by an alleged customer of the Appellant state that he/she made multiple purchases at the store and all transactions were positive experiences. This statement may be true, but it is insufficient to explain the transactions in Charge Letter Attachment 1 where the store has multiple large dollar transactions within a short time frame whose average is so much higher than the average for a Wisconsin superstore.

It should also be noted that 15 of the 24 transactions cited in Charge Letter Attachment 1 5 U.S.C. § 552 (b)(6) & (b)(7)(C). When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits. There is no evidence that the store had a special pricing policy that would cause a disproportionate number of higher dollar transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Store personnel also stated during the store visit that the firm did not round prices up or round prices down to the nearest dollar. Based on the store visit report, the Appellant’s food inventory contains almost exclusively inexpensive canned and packaged goods, single-serving food items and accessory foods. Due to the store’s mostly low cost foods, the larger dollar transactions cited in the charge letter would normally consist of multiple food products being purchased in one transaction.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Consequently, when there are a disproportional amount of transactions that end in a same cents value, it appears that these transaction amounts are contrived and therefore, in the absence of any compelling rationale to the contrary, are another indicator that the firm is trafficking in SNAP benefits.

The store visit pictures show that is unlikely that SNAP customers would shop at ABC purchasing such a large volume of items multiple times during a short time frame. In addition, the store's small checkout area and limited counter space makes it unsuitable for conducting large transactions. The store also had no shopping carts or shopping baskets for transporting food within the store which would be required for the large dollar transactions. 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.

Charge Letter Attachment 2 cites 159 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 convenience store calls into question the legitimacy of these transactions. 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.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These included 108 out of the 159 transactions in Charge Letter Attachment 2. Due to the store's mostly low cost foods, the larger dollar transactions cited in the charge letter would normally consist of multiple food products being purchased in one transaction. It is implausible that several of these relatively inexpensive items purchased together would disproportionately result in total purchase prices 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Consequently, when there are a disproportional amount of transactions that end in a same cents value, it appears that these transaction amounts are contrived and therefore, in the absence of any compelling rationale to the contrary, are another indicator that the firm is trafficking in SNAP benefits.

The Appellant states that the large purchases are due to times when the business will market deals on cases of items such as soft drinks, canned foods and frozen foods. However, there is nothing in the casefile that supports that the store sells food in bulk. The store visit pictures do not show any advertisers, posters or flyers advertising bulk sales. The store also does not sell fresh meat, seafood, poultry or fresh produce which are products which are typically sold in bulk by other stores. The Appellant provided an undated “pseudo” list of alleged store prices, but these are not sufficient to explain the irregular SNAP transactions cited in Charge Letter Attachment 2.

The Appellant states that the store will also give discounts when certain spending thresholds are met. However, the Appellant provided no evidence that it has such a program. In addition, the store layout and infrastructure is not set up to easily conduct large dollar transactions.

The Appellant states that its customers also shop for multiple household members. That may be true, but that would be equally as true for other SNAP authorized convenience stores which do not exhibit the irregular transaction patterns shown at the Appellant store.

The Appellant states that the purchase amounts in Charge Letter Attachment 2 are not really that large as a person can easily spend a few hundred dollars in stocking up on groceries. Regarding this contention, while a household can spend a few hundred dollars stocking up on groceries they are unlikely to spend such amounts at a convenience store with a limited selection of mostly inexpensive canned and packaged dry goods. It is true that sometimes a store may have higher than normal SNAP transactions due to the lack of access to other SNAP authorized stores in the area. However, agency mapping systems show that there are 25 SNAP authorized stores within a one-mile radius of ABC. These include a supermarket and two (2) superstores. A government report¹ on SNAP benefit redemption patterns revealed that households most often redeemed their benefits at supermarkets and superstores with only four (4) percent of all households never shopping in a supermarket or superstore. Thus, when a supermarket or superstore is available, it is highly unlikely that a SNAP recipient would conduct excessively large SNAP transactions at a convenience store with a limited selection of staple foods like ABC.

The Appellant provided twelve (12) affidavits signed by the store’s alleged customers stating that they had the transactions cited in the charge letter but that these transactions were only for legitimate purchases of SNAP eligible foods. However, these customers did not provide any receipts or other documentary evidence supporting their claims. In general, the affidavits have limited probative value because it would be against the vested self-interest of these SNAP recipients to admit that they participated in SNAP violations so they would be more likely to

¹ “Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program,” report prepared by Mathematica Policy Research for the Food and Nutrition Service, February 2011.

say that their transactions were legitimate. In addition, the casefile documents that the Retailer Operations Division examined the shopping history of these SNAP recipients and determined that all but one (1) shopped at larger stores including combination groceries, medium grocery stores, supermarkets and superstores within a day or two of shopping at ABC making it less likely they would have excessively large transactions atypical of a convenience store.

The case record also 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 ABC compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at, supermarkets and/or superstores. However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at ABC on the same day or within a few days of shopping at supermarkets and/or superstores. It is highly unlikely that a convenience store with limited staple foods would have legitimate SNAP transactions comparable or larger than these SNAP authorized supermarkets and superstores.

Lastly, the Retailer Operations Division also examined two (2) nearby comparison convenience stores similar in size and food inventory to the Appellant store. None of these stores exhibited the same type of irregular SNAP transactions as ABC. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Based on the store's food inventory, there is no legitimate reason why the store would have such an abnormal spike in SNAP transactions at those high dollar levels.

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 shopping baskets support the Retailer Operations Division determination. 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.

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. The SNAP regulation at 7 CFR § 278.6(b)(2)(ii) mandates that a trafficking CMP along with supporting documentation shall be submitted within ten (10) days of receipt of the charge letter.

The SNAP regulation at 7 CFR § 278.6(b)(2)(iii) also states, in part, that “if a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days ... the firm **shall not be eligible** for such a penalty.” [Emphasis added.]

Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program prior to the violations. 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 ABC Beer & Liquor Depot II, 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, FNS is 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

June 15, 2018