

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

An's Food Market,

Appellant,

v.

Case Number: C0203582

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that An's Food Market (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(a) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against An's Food Market by letter dated June 5, 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 November 29, 2017, 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 April 2017 through September 2017. 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 December 6, 2017, Appellant, through counsel, submitted an FOIA request for the full and complete file. The record reflects that the FOIA request was completed and received by counsel on January 24, 2018.

In correspondence dated May 11, 2018, Appellant, through counsel, replied to the charge letter and generally stated that numerous items are priced the same whereby the customer can acquire multiple items for an amount ending with 00 cents. When the store added up items, it would round the prices down to the nearest dollar amount giving the customer a discount of a few pennies so that the customer pays an even dollar amount. This is the store's business practice done in order to make the customer happy but not every transaction in this store ends in the same dollar figure. The transactions listed in Attachment 2 are easily explained. Food stamp customers come into the store many times and with multiple family members or friends. They use the card for their purchases and then allow another family member or friend to use their card for other purchases. Also the store is located in a community where people do not drive and are in walking distance where they come into the store multiple times a day. Finally, the transactions listed in Attachment 3 are because this establishment is a well-stocked store in a neighborhood and provides all grocery needs of the community. Spending \$100 in a grocery store is not an unusual transaction but rather the norm. Much of what is purchased is high dollar items such as Similac and seafood. What is supportive of this store's integrity, honesty and abidance by the Food Stamp Regulations is the fact that independent investigators made a total of three visits to this store and during these transactions, attempts were made to purchase ineligible items which were refused and no other program violations were noted or occurred. Counsel included documents in the record that were received in its FOIA request.

After giving consideration to the Appellant's reply and evidence of the case, Retailer Operations Division issued a determination letter dated June 5, 2018. This letter informed ownership that they were permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also states that Retailer Operations 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 June 7, 2018, Appellant, through counsel, 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) 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, in part 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 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 on-site investigations, inconsistent redemption data, ***evidence obtained through a transaction report under an electronic benefit transfer system...***” (*Emphasis added*)

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.”

7 CFR § 278.6(b)(2)(ii) states, in part, that: “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, 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.”

SUMMARY OF THE CHARGES

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

1. An unusual number of transactions ended in a same cents value.
2. Multiple transactions were made from individual benefit accounts in unusually short time frames.
3. Excessively large purchase transactions were made from recipient accounts.

The first issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the identified irregular and questionable transactions were the result of trafficking in SNAP benefits.

APPELLANT'S CONTENTIONS

In its response to the charge letter and in its request for administrative review, Appellant made the following summarized contentions, in relevant part:

- The explanation of the alleged violations was set forth in the letter date May 11, 2018.
- The Government has never alleged any actual investigative onsite violations of any of the Food Stamp Regulations.
- I thank you for taking the time to thoroughly examine the data and information which was previously provided.

Appellant provided photographs that were dark, grainy and indecipherable but appeared to be documentation received in the FOIA request. 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 October 28, 2015. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a November 9, 2017, 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 firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- One register and one POS device with a small counter area partially obstructed by other smaller items available for sale (2nd POS device available but only one is marked for EBT).
- The entire register area is enclosed behind a plastic barrier with a small window in which to place food items. This area also has a turn style which blocks SNAP customers from clerks once food is placed on turn style and presented for purchase.
- Estimated to be approximately 600 square feet.
- No shopping baskets or carts available for customers.
- No adding machines or optical scanners were available at checkout. No specialty registers present.
- Store operates through a night window or plastic barrier with food stock behind the barrier.
- No evidence of a 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.
- Photographs show most food item pricing ending with \$.*9 values. Some snack and drink items were priced ending in 00 cents, 50 cents and *5 cents.
- Some food stored in an area outside of public view approximately 200 square feet.
- No storage freezers or coolers and no 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 formula (\$23), Pizza (\$20), Egg Rolls (\$18) and Crab Legs (\$28.39).
- Store stocks a significant amount of non-food items such as but not limited to paper products, household products, tobacco products, automotive products, clothing items, health and beauty aids, 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 meat and minimal fresh produce. Most meats are canned, pre-packaged or frozen.
- Some frozen food item boxes appear aged and frozen foods contained ice crystals which are a sign that they could be freezer burnt and low turnover of stock.
- A kitchen/prepared food area with hot foods sold for onsite consumption. Microwave available.
- Store stock not used for in the deli/prepared food section.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.
- Appellant posted a sign that read “EBT Minimum \$1...” SNAP households are not required to have a minimum purchase amount in order to use SNAP benefits.
- Photographs show some canned goods with a layer of dust.

The second 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 Appellant’s store 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 - An unusual number of transactions end in a same cents value.

There were 198 SNAP transactions, totaling 5 U.S.C. § 552 (b)(6) & (b)(7)(C) that met the parameters of this attachment. When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits.

The store visit documentation indicates that Appellant does not have a special pricing structure that would account for the percentage of transactions that ended in 00 cents and 50 cents. When there are a disproportionate amount of transactions ending in same cent value it appears the transactions are contrived and absent any compelling rationale to the contrary it is a strong indicator of trafficking. Especially when item prices end with a standard *9 it is implausible that

several of these relatively inexpensive items purchased together would routinely total to a purchase amount ending in 00 cents and 50 cents. In addition a store that is rounding prices up or down or an even value would not have any transactions ending in odd values.

Appellant, through counsel, contends that when the store added up items, it would round the prices down to the nearest dollar amount giving the customer a discount of a few pennies so that the customer pays an even dollar amount. With regard to this contention, the record reflects that Question #19 on the store visit survey form dated November 9, 2017, which was completed in collaboration with store personnel, shows that the store doesn't round purchase transaction totals. If Appellant rounded all of its transaction amounts down to the nearest dollar, not only would they lose money over a period of time but Appellant wouldn't have any other transaction amounts ending in other cent values and 60 of the 198 transactions, in this Attachment, would not have ended in .50 cents. Additionally, the store visit photographs show a few snack and drink items ending in 00 cents, .50 cents and *5 cent values. There were three of the four highest priced items in the store, one being formula, that ended in a 00 cent value. The majority of Appellant's food stock ends in a *9 cent value. Moreover, the WIC Program provides participants with vouchers to obtain free baby formula, as well as other products for lactating women, infants and children, from participating vendors. It is noted that Appellant was an authorized WIC vendor and redeemed approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per month in WIC in 2017. It would be more reasonable for WIC recipients to use their WIC vouchers to obtain free formula rather than to pay for formula using their SNAP benefits.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is important to note that the fact that one of the investigative transactions ended in a .00 cent value does not explain or justify the even dollar transactions in Attachment 1 of the charge letter. Furthermore, investigative visits conducted during the on-site investigation have no bearing on the current charges in this case. The inventory, layout and pricing structure of Appellant's store does not support the transactions cited in this Attachment.

Attachment 2 of the Charge letter - Multiple transactions were made from individual benefit accounts in unusually short time frames.

There were 24 sets of 52 SNAP transactions, totaling 5 U.S.C. § 552 (b)(6) & (b)(7)(C) that met the parameters of this attachment. Multiple transactions conducted by the same household account within a short time frame 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 firm's staple food stock is limited and includes canned and pre-packaged foods, minimal fresh produce, some deli meats and cheeses, and some frozen foods. The firm doesn't sell fresh meat, doesn't have shopping carts or baskets, and has a plastic barrier in front of the checkout with only a small turnstile window it is therefore, implausible that households would return to Appellant's store multiple times during a certain time period and spend more than \$100. Also, if SNAP households were shopping with other family members and friends, allowing them to use the EBT card, then the majority of the transactions in this attachment would be minutes apart and not hours apart. Furthermore, Retailer Operations Division conducted an analysis on four of the 19 households listed in this Attachment and determined that these households lived anywhere

from 2.2 miles up to 10.5 miles away from Appellant's store. The record reflects that there is a superstore less than a half mile from Appellant's store. It would be more reasonable that SNAP households would expend large amounts of SNAP benefits shopping at the larger better stocked superstore, with seemingly better pricing than at Appellant's store where the stock is limited.

Appellant, through counsel, contends that it is located in a community where people do not drive and are in walking distance where they come into the store multiple times a day. It must be noted that SNAP households have no limit on the number of times they may use their EBT cards; 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 the store's stock and facilities and are indicative of trafficking. The Appellant firm is a convenience store that does not compare in size and stock to the larger superstores and grocery stores where SNAP households often shop.

Sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, the record reflects that there are at least 50 authorized SNAP retailers within one mile of Appellant that include two superstores, eight medium grocery stores, nine small grocery stores and 31 additional convenience stores. Therefore, lack of access to other stores does not appear to be an explanation for the Appellant firm's abnormally high SNAP transaction amounts.

Retailer Operations also conducted an analysis of the shopping habits of four 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 higher transactions at the Appellant firm than at the better stocked supermarkets/superstores and grocery stores in and around the Baltimore City County area of Maryland. This is another strong trafficking indicator.

In conclusion, it is therefore more likely true than not true that the irregular transactions cited in the charge letter Attachment 2 are due to trafficking in SNAP benefits.

Attachment 3 of the Charge letter - Excessively large purchase transactions were made from recipient accounts.

There were 161 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. 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.

Appellant, through counsel, contends that it is not unusual to walk out of a grocery store spending in excess of \$100 but rather the norm. Although this may be true, Appellant's firm is a convenience store and the inventory and store layout does not support the transactions cited in

this Attachment. When purchasing food, people generally do not spend large sums at convenience stores. They usually stop at convenience stores to pick up quick snacks and/or a beverage, or for a few staple food items that they need, such as bread, milk, eggs, or a can or two of some food, but which are not considered worth a trip to the supermarket to get. It is rare for a convenience store to have purchases such as those cited for this Attachment.

Based on the store visit documentation and the items listed as the highest priced items in the store, SNAP recipients would need to purchase large amounts of these four items to justify the SNAP transactions in this Attachment. It is implausible that SNAP households would purchase large amounts of Egg Rolls, Pizza, Crab Legs or Baby Formula from a convenience store. Additionally, Appellant did not appear to stock the number of items that would be required to accommodate multiple purchases of these items. According to the store visit photographs, there only appeared to be two bags of crab legs which had an excessive amount of ice crystals inside the bags. This is a sign that they could have been freezer burnt or had been sitting for a while and some of the canned goods contained a layer of dust, both which are signs of a low turnover rate. Appellant also did not provide purchase receipts or invoices to justify selling large amounts of these items or any other staple food items in the store.

More importantly, Appellant's counter area would not accommodate the purchase of large amounts of eligible food. The counter has a turnstile where food items are placed and turned so that the clerk could process the purchase. Appellant also had no hand baskets or shopping carts in which to help accommodate large amounts of food items that would be required for these transaction amounts. All these factors make these transaction amounts questionable. As previously mentioned there is a superstore less than a ½ mile away.

Based on the above analysis, the Retailer Operations presented a convincing case that the An's Food Market trafficked in SNAP benefits which the Appellant failed to adequately rebut. The attachments furnished with the charge letter identify the irregular patterns of SNAP transactions which indicate that trafficking was taking place at the firm during the review period. As there is more than one pattern of trafficking, a determination that the Appellant firm engaged in trafficking becomes more convincing.

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 a 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 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 inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Retailer Operations has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns identified in the charge letter, the lack of food inventory necessary to support the firm's SNAP redemptions as observed and recorded during the onsite visit, the lack of purchase invoices of foods to cover SNAP redemption totals for the review months, or to show continued purchases of certain high priced items, the lack of adequate explanations 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 County and 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 letter of charges. 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 patters 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 owner 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.

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 November 29, 2018. 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

Retailer Operations Division' analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify An's Food Market. 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 above, the determination to impose a permanent disqualification against An's Food Market 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

October 11, 2018