

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

**B&H Beverage, LLC,**

**Appellant,**

**v.**

**Case Number: C0209175**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the United States Department of Agriculture (USDA), Food and Nutrition Service (FNS) that the record indicates that B&H Beverage, LLC (Appellant) likely committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support the permanent disqualification of Appellant from participation as an authorized retail food store in the Program, as imposed by the Retailer Operations Division, (Retailer Operations).

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate 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 the implementing regulations at 7 CFR § 279.1 provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 may file a written request for review of the administrative action with the FNS.

**CASE CHRONOLOGY**

By Charge letter dated June 14, 2018, Retailer Operations informed the owners that USDA had compiled evidence that Appellant had violated the SNAP. The analysis of Appellant's electronic benefit transaction (EBT) records established clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity. Based on this information, Appellant was charged with

trafficking as defined in Section 271.2 of the regulations. The sanction for trafficking is permanent disqualification. Counsel replied to the Charge letter June 27, 2018. Retailer Operations issued a credit violation letter on June 28, 2018. Counsel provided a written reply dated July 9, 2018 regarding violative credit accounts.

Retailer Operations issued a Determination letter dated July 25, 2018. This letter informed the owners that Appellant was permanently disqualified as a SNAP retail food store 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 Section 278.6(i) of the regulations, and deemed it was not eligible for a CMP because insufficient evidence was submitted to demonstrate that the owners had established and implemented an effective SNAP compliance policy and program to prevent violations.

By letter dated August 6, 2018, counsel requested review of the determination. The request for appeal was granted by letter dated August 16, 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 actions 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). Sections 278.6(a) and (e)(1) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

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 § 271.2 states: "Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco 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(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 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 transaction data during the period of November 2017 through April 2018. This involved four patterns of transaction characteristics that are indicative of trafficking:

1. An unusual number of transactions ending in a same cents value.
2. Multiple transactions made within a set time period.
3. The majority or all of individual recipient benefits were exhausted in unusually short periods of time.
4. Excessively large transactions made from recipient accounts.

### **APPELLANT’S CONTENTIONS**

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

- B&H unequivocally disputes the allegations that it has engaged in trafficking of SNAP benefits. These allegations appear to be based solely on an analysis of EBT transaction records.
- B&H serves an important social component for the community as it is the only food store within safe walking distance for dozens of homes in the community, which oftentimes results in patrons visiting the store several times a day or staying at the business for long periods of time.
- The particular nature of the community’s shopping practices and its food stocks results in the transactions being flagged as unusual.
- B&H specializes in selling local, fresh seafood in bulk when it is available. Bulk seafood is often bought in large quantities and all of the prices are sold in whole dollar prices (i.e.

ending in \$.00). Customers tend to buy the seafood in large quantities and in short amounts of time.

- B&H submitted receipts, stock price lists, and letters from customers who participated in the flagged transactions in support of its defense to the allegations of trafficking. The FNS finding letter does not address any of the evidence or explanations provided in any way. To date, FNS has provided no evidence of its own in its charge letter or otherwise to suggest that any of B&H's operations constituted trafficking.
- This periodic nature of selling fresh seafood, even pricing and the fact that people buy large quantities provides innocent explanations for three categories of flagged transactions. For the flagged transactions relating to multiple transactions in a set time period, this could also be a product of seafood sales. For example, a card holder could enter the store in the morning to purchase food, but the seafood is not in yet for the day. They could purchase some items and then come back for the bulk seafood.
- B&H acknowledges that, at this time, it does not possess precise evidence showing that each of the 179 transactions was related to the purchase of bulk seafood. However, B&H submits that this practice, which is supported by evidence and testimony, provides a plausible explanation.
- It is not B&H's position that each of the 179 transactions flagged by FNS is justified by extending credit. Rather B&H has outlined several defenses to the allegations of trafficking. Extending credit is one of those defenses.
- Although the owners now recognize the practice of credit is technically in violation of FNS regulations, this activity occurred as a good faith attempt to further the goals of the SNAP and to provide food to those in need. Extending credit and allowing benefit holders provides yet another basis for concluding the flagged transactions were not the product of trafficking.
- B&H's admissions of extending credit for some of the flagged transactions were not addressed by FNS.
- B&H provided evidence of multiple letters from customers who received credit, many of which provided the date and amount paid. FNS' failure to consider this evidence amounts to reversible error.
- There remains no basis for FNS finding that B&H has engaged in trafficking and there is no basis for permanent disqualification from the SNAP. B&H requests the administrative decision be amended to reflect the less severe charge.
- The violations do not warrant a disqualification and B&H requests a warning letter be issued.
- B&H requests the opportunity to pay a CMP for hardship pursuant to Section 278.6(f)(1).
- In lieu of any length of disqualification, B&H requests it be considered for a CMP.
- Any length of disqualification from the SNAP would cause hardship to SNAP households.
- There are currently only four authorized retailers in Port Sulphur. If B&H were disqualified it would require many recipient to trek at least a mile along a state highway without sidewalks.
- The evidence and testimony discredits the blanket allegations of trafficking.
- B&H has taken corrective action by instituting a compliance program which includes required manager approval for higher-cost SNAP transactions

(5 U.S.C. § 552 (b)(6) & (b)(7)(C)) and documentation and independent quarterly review of all SNAP transactions.

- The June 27, 2018 letter might have been missing crucial evidence. On page 2 the bulk seafood price list is discussed and noted as Exhibit 2. It appears that the seafood price list was inadvertently excluded from the submission. As such, this additional information should now be considered. The seafood list established that B&H sold bulk seafood for prices that refute FNS' trafficking allegations.

Counsel provided exhibits as follows: a one page list of fresh seafood prices and frozen food prices; copies of handwritten, dated sales tabs noted as "Order Info" showing items reportedly sold with prices and dates; three pages of items with prices listed; copies of photographs of store stock; six signed copies of preprinted statements attesting to shopping at Appellant for food with some SNAP ID information; copies of handwritten statements by individuals attesting to receiving credit at Appellant; a list of authorized retailers in Port Sulphur and copies of three Google maps; and counsel's July 9, 2018 response with customer statements.

## ANALYSIS AND FINDINGS

Retailer Operations presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the Charge letter represents the questionable patterns of SNAP transactions indicative of trafficking which were conducted at Appellant during the review period. As patterns of unusual transactions appear across multiple Attachments the case of trafficking becomes more convincing.

**Attachment 1:** Listed are 90 transactions with 00 end cent values, which represent 22% of the total transactions at Appellant 5 U.S.C. § 552 (b)(6) & (b)(7)(C) during the review months. The four highest priced items recorded on the onsite store visit report at Appellant on May 11, 2018, all ended in 99 end cent values. Price lists of mostly beverages were provided that show items priced to end in 89 and 99 cent values. When there are a disproportionate number of transactions that end in a same cent value it appears that these amounts are contrived and therefore, in the absence of any compelling evidence to the contrary, are indicative of trafficking.

The record states that during the onsite firm visit there was no signage indicating the availability of bulk frozen food or fresh seafood. The refrigerators and freezers were largely empty. Owner Akera Alexis signed the store review consent form. The record shows no mention by this owner of bulk frozen food or fresh seafood to the FNS contractor when completing the onsite store report. The store visit report documents that there was not an unusual price structure noted at Appellant. The store visit report documents that Appellant sold ineligible items including: lottery, alcohol, tobacco products, automotive products, paper goods, clothing items, and cleaning products. The photos also show that Appellant appears to be a convenience store with accessory foods including snacks, beverages, and candy. There were no fresh fruits, fresh vegetables, or fresh meat, not even deli meats noted at Appellant.

A fresh seafood and frozen food price list with all items ending in 00 cent values was presented to support what items were priced to end in 00 end cent values. This one page list of "Fresh

Seafood” and two listed frozen foods is on simple white paper with no date and no store information. No advertisements of seafood sales were provided, and as noted no evidence of seafood sales was noted during the onsite visit. Copies of handwritten sales receipts were advanced and show that some individual prices of items listed ended in 00 cent values and some receipts totaled 00 amounts. However, Appellant did not provide evidence by means of vendor invoices of the acquisition of bulk seafood from the local fisherman or any vendor invoices to support the stock of SNAP-eligible food and frozen foods at Appellant.

Counsel furnished photographs in Exhibit 5. Retailer Operations determined that these show basically the same inventory as the photos from the May 2018 onsite visit. There are two signs that were not visible in the FNS contractor photos: one indicating two 12 packs of soda for \$10, and another indicating the price of ice at \$3 and \$5. Also, a single photo of fresh shrimp was provided. No shrimp stock or other seafood stock was documented at the time of the store visit. Retailer Operations determined that the photos and other submissions did not adequately explain the suspicious transactions listed on the Attachment such that they were more likely than not the result of legitimate transactions rather than the result of trafficking as charged.

**Attachment 2:** Listed are 34 transactions in 17 sets of two or more transactions conducted by 11 different households. Multiple transactions made from individual benefit accounts in set time frames are indicative of trafficking. The data shows that there is at least one super store and one combination store within a one mile radius of Appellant. The record supports that SNAP clients that transacted benefits at Appellant also conducted transactions at super stores and other authorized stores. The record indicates that there were no shopping carts or baskets at Appellant, and there was no optical scanner. This makes transactions such as numbers 91 and 92 suspicious.

The owners claim that credit was advanced to beneficiaries, a violation of the SNAP regulations. Statements from eight individuals were advanced to attest to credit being advanced to them by Appellant. Seven of these households transacted benefits at Appellant on the same day they made transactions at nearby super stores. Retailer Operations’ household analysis documents that two other households also shopped at super stores the same day they made flagged transactions at Appellant.

The evidence of credit accounts was not supported by detailed evidence of what was allegedly purchased by the individuals. One individual referenced the purchase of shrimp, several referred to seafood purchases, while the others referred to food and drink purchases. The truth of such statements cannot be verified. Customers engaging in trafficking transactions would be unlikely to admit to this behavior. On the contrary, customer statements would be expected to attest to the legitimacy of questionable transactions regardless of whether they were, in fact, legitimate. These statements were not dated, notarized or taken under the penalty of perjury.

Credit is often claimed by retailers in an effort to garner a lesser sanction than permanent disqualification. A firm that commits documented credit violations is sanctioned with a one year disqualification period and may incur fiscal claims. If the retailer does not provide adequate proof of credit, the retailer shall be permanently disqualified for trafficking. A one year

disqualification for credit cannot be entertained when by a preponderance of evidence it is determined that trafficking has more likely than not occurred.

At the time of authorization each retailer is provided a USDA SNAP training guide that states that credit and trafficking are not allowed. The training guide is also available online and in many languages. This guide states that SNAP customers must pay for their purchases at the time of sale and that a retailer may not accept SNAP benefits as payments on credit accounts. The training packet includes:

- A video and book that explain the SNAP rules.
- Information that the store owner is responsible for carefully reviewing the program rules and making sure all employees fully understand these rules.
- Information that failure to follow the rules can result in disqualification, fines, civil and/or criminal action.

Enclosures provided by FNS to retailers when authorized include:

- A SNAP Permit
- SNAP Training Guide for Retailers and a training video
- Report Abuse of the SNAP Poster - **MUST BE POSTED IN YOUR STORE**
- We Accept SNAP Benefits - Window Sticker and Poster
- Using SNAP Benefits Poster
- Dos and Don'ts for Cashiers/Penalties for Violations of the SNAP: Double-sided sign
- EBT Fact Sheet
- From the "SNAP EBT Dos and Don'ts card (FNS-136, included in the authorization package) "Do not accept SNAP benefits (EBT) as payment on credit accounts."
- From the SNAP Training Guide for Retailers: "SNAP customers must pay for their purchases at the time of sale. You may not accept SNAP benefits as payments of credit accounts. You may not hold customers' SNAP EBT cards or card account information at your store for future use."

Thus, the owners were provided multiple and redundant resources through which a thorough knowledge of Program rules and requirements could be readily obtained. By signing the certification to become a SNAP retailer, the owner-signatory confirmed understanding of and agreement to abide by the rules and regulatory provisions. The certification requires owners to agree to accept responsibility on behalf of the firm for violations of the SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. These include violations such as accepting SNAP benefits as payment on credit accounts or loans and trafficking. The certification is clear that violations of Program rules can result in administrative actions such as fines, sanctions, withdrawal or disqualification from the SNAP.

Retailer Operations determined that the owners failed to provide sufficient evidence for the legitimacy of the transactions listed on the Attachment. The information presented regarding advanced credit was not adequate to convince Retailer Operations that the suspicious transactions represented credit account transactions for eligible SNAP foods more likely than trafficking transactions.

Exhibit 6 consists of copies of pre-printed fill-in-the-blank statements from six customers. The statements were not in the individuals' own words. The statements note the store is close to the signee's house, fresh seafood is always purchased when available, the signatory shops at the store for food, and the store is always open. Retailer Operations identified five of the six SNAP recipients identified in the state administrative terminal. One individual was not identified due to illegible writing including the spelling of the recipient's name. Using SNAP information, Retailer Operations determined that five of the six individuals did have transactions listed on the Charge letter; however it found that the statements were not exculpatory as to trafficking.

**Attachment 3:** Listed are 17 transactions involving seven households whereby the majority or all of a household's benefits were exhausted in unusually short periods of time. Depleting the household's entire SNAP balance in one or a few transactions is inconsistent with the normal shopping behavior of SNAP recipients. As noted, the record documents that other authorized stores were available to the recipients flagged on the four Attachments. Both trafficking and allowing credit warrant a SNAP penalty. The regulations do not provide that a warning letter be issued in cases of trafficking or the violative advancement of credit.

The transactions listed on this Attachment are presumably addressed by the credit contention. One recipient statement refers to credit in an amount and on a date that corresponds to transaction number 131 listed on this Attachment. The other credit amounts stated by the recipients are not listed on this Attachment, but are listed on Attachment 4. The suspicious transactions on this Attachment have not been adequately addressed by the evidence advanced.

**Attachment 4:** Listed are 176 transactions that are for amounts that exceed the average transaction amount for the same store type in the same state **5 U.S.C. § 552 (b)(6) & (b)(7)(C).** **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

While Appellant maintains it specializes in selling local, fresh seafood in bulk, its own photo submission does not show an abundance of fresh seafood in bulk. One photo of a close-up of 10 shrimp was presented. As noted, no vendor invoices for the acquisition of seafood were advanced for review. No business banking records were provided. No federal business tax filings or state business tax filings were provided. The individuals who attested to violative credit had no related supporting documentation that the credit was used to acquire eligible SNAP foods other than their unsworn statements.

Government analyses of stores caught trafficking during on-site investigations has found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include in part those cited in the letter of charges. Computer transaction data in addition to store visit observations and an analysis of household shopping behavior were used in rendering a finding that violations indicative of trafficking were occurring at Appellant. The regulations allow for disqualification of a retail food store based on a finding of a violation on the basis of evidence that may include facts established through inconsistent redemption data and/or evidence obtained through a transaction report under an electronic benefit transfer system.

This review encompasses and documents the examination of the evidence in this case to determine whether Appellant demonstrates by a preponderance of the evidence that the



permanent disqualification should be reversed. While some of the hundreds of transactions listed on the Attachments may have been the result of violative credit, the credit documentation was not adequate by a preponderance of the evidence to persuade the transactions flagged were not more likely the result of trafficking. There was no vendor evidence of stock or photos beyond one, to support that Appellant stocked the fresh seafood it lists on its Exhibit 2 price list. No crab bushels priced at \$100 are seen or recorded, as are no snails at \$30 a sack or oysters at \$40 a half gallon. Retailer Operations questioned the veracity of the receipt slips. There is no way to verify that the handwritten Order Info slips were produced as the result of actual sales of eligible items on the dates listed.

There are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective actions implemented subsequent to findings of program violations. Therefore, Appellant's contention that corrective actions such as instituting a compliance program and quarterly review of all SNAP transactions do not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

In appeal of this matter, 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. Appellant has not met this burden.

### **CIVIL MONEY PENALTY**

Consideration of hardship per Section 278.6(f)(1) of the regulations is not applicable in this matter. Rather, 7 CFR § 278.6(i) specifies the criteria for a store's eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. The criteria listed therein are, as a whole, specifically identified as a minimum standard that firms must meet in order to be eligible for such a penalty. Accordingly, Retailer Operations correctly determined that Appellant did not qualify for a trafficking civil money penalty in lieu of a permanent disqualification. The owners neither requested, nor submitted any documentation for review of the firm's eligibility for a trafficking CMP.

### **CONCLUSION**

Retailer Operations' analysis of Appellant's SNAP transaction record was the primary basis for its determination to permanently disqualify Appellant. Appellant's data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits.

The contentions offered for the transaction patterns were not persuasive by a preponderance of the evidence. No recipient affidavits were advanced to support the shopping pattern cited to explain Attachment 2. No federal or state sale tax submissions were advanced to rebut the trafficking charge. No business banking records were provided. No itemized cash register tapes or automated date-stamped sale receipts were advanced. No vendor invoices of acquired eligible

food stock to support the high volume of SNAP redemptions were provided. Only one photo of ten shrimp was advanced to support the contention of bulk seafood sales to explain the transactions flagged.

Appellant admitted to allowing violative credit, a sanctionable offense, but its evidence of credit did not include a credit log with dates, names, SNAP ID information, and items sold on credit. As such, the credit evidence was not exculpatory as to trafficking. Based on the analysis of the transaction data in the Attachments, a conclusion can be drawn through a preponderance of evidence that the unusual, irregular, and inexplicable transaction patterns in the letter of charges evidence trafficking at Appellant as the most likely explanation.

Retailer Operations also properly determined that Appellant was not eligible for a trafficking CMP according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations. Therefore, based on the discussion herein, the decision to impose a permanent disqualification against Appellant is sustained.

### **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to applicable rights to 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

September 30, 2018