

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

Baring Foods,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0217501

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 Baring Foods 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, when it imposed a permanent disqualification against Baring Foods.

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 May 21, 2019, 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 2018 through January 2019. 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 May 22, 2019.

The Appellant responded to the charges in a letter dated May 27, 2019. The Appellant stated that the store could not control how customers choose to spend their SNAP benefits. The Appellant also stated that the store is not always fully stocked as suppliers will not deliver in small quantities. The store allows stock to deplete to a point where it can make a large deliverable order. In the meantime, the store will purchase merchandise from large retail grocery stores. The Appellant provided register tapes for seven (7) alleged transactions, and various purchase invoices. The Appellant also stated that “if more time would have been allotted for the gathering and organizing this rebuttal, I would have complied a more in depth response.”

The Retailer Operations Division granted an extension to June 13, 2019 to respond to the charges, but noted that an extension of time to request a trafficking CMP could not be extended. The Appellant sent its second response in a letter dated June 7, 2019. The Appellant stated that it included additional purchase transactions for the time periods in question. The Appellant stated that it purchases from larger grocery store to take advantage of their discounted sale prices, but was unable to find those receipts.

After considering the evidence and the Appellant’s response, the Retailer Operations Division issued a determination letter dated July 9, 2019. The 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. The determination letter was delivered to the Appellant on July 10, 2019.

In a letter postmarked July 15, 2019, 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....

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).

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 2018 through January 2019. This involved the following transaction patterns which are trafficking indicators:

- **Charge Letter Attachment 1:** Multiple transactions were made from individual benefit accounts within a set time period. This attachment lists 23 sets of 48 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits. The largest single transaction set reached a high of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**
- **Charge Letter Attachment 2:** Excessively large purchase transactions were made from recipient accounts based on the observed store characteristics and recorded food stock. This attachment lists 288 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The transaction amounts ranged up to a high of **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:

- Store personnel refused to exchange SNAP for cash benefits in undercover investigations conducted onsite in **2014 and in 2018**.
- FNS in its FOIA response did not define what constitutes “multiple transactions made from the accounts of individual SNAP households within a set period of time.” Therefore, a retailer cannot govern itself to avoid these type of transactions.
- FNS in its FOIA response will not define the meaning of “excessively large purchase transactions.” Therefore, a retailer cannot govern itself to avoid these type of transactions.
- There is no rule or regulation that limits how many times a purchase may be made with SNAP benefits or how much may be spent. Stores are also prohibited from asking for identification or refusing a legitimate SNAP transaction.
- FNS cannot make legal transactions illegal by charging the Appellant with after-the-fact undefined terms.

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 and Compliance History

FNS authorized Baring Foods for the SNAP on May 30, 2012. During the review period of August 2018 through January 2019, Baring Foods was classified as a convenience store. The owner signed a SNAP reauthorization application for the store on October 16, 2018 and acknowledged he was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner 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 items.

The store was the subject of two separate onsite investigations conducted in 2014 and in 2018. During these investigations store personnel refused to exchange SNAP benefits for cash or other 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 September 4, 2018 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:

- Baring Foods is approximately 1,100 square feet in size.
- The store had only a single shopping cart and no handheld shopping baskets for customer use. The store appeared to be using the shopping cart for storage and restocking and it was not available for customer use at the time of the store visit.
- The store had one (1) cash register and one (1) point-of-sale device for purchases.
- There were no large bulk foods, expensive international or specialty foods that might sell for a high price. There were no fresh meat/poultry/seafood bundles or large boxes of fresh fruit and vegetables for sale.
- Some shelves were not fully stocked.
- The store did not keep food offsite or in a storage area outside of public view.
- The store did not have any optical scanners and there was no conveyor belt at the checkout area.
- The checkout area consisted of a small clear space on a long display counter which was otherwise covered by candy and snack foods stacked upon it. The small clear space for stacking purchases was approximately two (2) feet by two (2) feet. 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. There was no fresh meat, fish or poultry and no fresh produce for purchase. The store also sold a large amount of inexpensive accessory food items such as snack foods, ice cream, candy, potato chips, coffee, tea, carbonated and non-carbonated drinks, condiments, and spices. The stocked ineligible items included tobacco, automotive products, clothing and shoes, health and beauty products, paper goods, and cleaning products.

At the time of the store visit, the four (4) most expensive food items sold by the store were: two (2) stocking units of 2.5 pounds of chicken hot wings at \$10.99; four (4) stocking units of 30 ounce pizza at \$7.99; seven (7) stocking units of 20 ounce beef polishes at \$6.99; and 1.5 quarts of ice cream at \$5.99. The ice cream was the only one of these items that were available in more than ten (10) stocking units.

Given the available inventory and store layout 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 Set Time Period

The Appellant stated that it cannot control how SNAP households choose to use their benefits and that there is no regulation to limit SNAP purchases. It is true that 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 this convenience store's stock and facilities and are thus indicative of trafficking.

5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(7)(E)

The evidence in the case file documents that it is unlikely that SNAP customers would shop at the store and purchase such a large volume of items multiple times during a set time frame. In addition, the store's small checkout area and limited counter space makes it unsuitable for conducting large transactions. The store had no shopping baskets and only a single shopping cart which appeared to be in use by the store for storing or restocking its products and was not available for customer use. Shopping carts and shopping baskets would be needed for customers to transport such a large volume of food within the store. 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

The Appellant stated that it cannot control how SNAP households choose to use their benefits and that there is no regulation that limits the size of the purchase. It is true that 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 regulatory limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of this convenience store's stock and facilities and are thus indicative of trafficking.

5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(7)(E)

The store visit pictures show that the store layout is not conducive to these excessively large transactions. There were no shopping baskets for transporting food around the store and only a single shopping cart which appeared to be used by the store for storage and restocking. The checkout counter space is very limited and not conducive to stacking multiple items for purchase. In addition, the store's stock is mainly inexpensive canned and packaged goods, snack foods, single serving food items and accessory food items. The store visit report and pictures do not show that the firm offered any specialty or international items, fresh meat/seafood bundles, or boxes of fresh produce that would justify high dollar transactions atypical of a convenience store. The Retailer Operations Division properly considered these factors in making its determination that the transaction patterns cited in the charge letter are, more likely than not, due to trafficking.

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, the Retailer Operations Division determined through agency mapping systems that there were 15 SNAP authorized stores within a one-mile radius of Baring Foods during the review period. These SNAP authorized stores included six (6) convenience stores, four (4) combination grocery stores, a small grocery store, two (2) medium grocery stores, a supermarket and a superstore. 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 like Baring Foods with a limited selection of staple foods.

The case record also documents that the Retailer Operations Division conducted a detailed analysis of four (4) households with irregular transactions identified in the charge letter to analyze their shopping patterns at Baring Foods 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 larger and better stocked stores, these sampled households conducted excessively large transactions at Baring Foods on the same day or within a few days of shopping at a supermarket or superstore. It is highly unlikely that a convenience store with more limited staple foods would have legitimate SNAP transactions comparable or larger than these SNAP authorized supermarkets and superstores.

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 baskets support

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

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.

Invoices

The Appellant submitted its purchase invoices from the review period in an attempt to show it had sufficient food inventory to support its SNAP redemptions. The food purchases in these invoices were totaled by the Retailer Operations Division and a 40 percent markup was applied to arrive at an estimated retail food sales figure of just over 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for the review period. However, this indicated a shortfall of food inventory as the firm had over 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP redemptions during the review period.

Assuming that the store also had cash, debit and credit card sales of food, the actual shortfall of food inventory should be even greater. However, it should be noted that even if the store had sufficient inventory to support its SNAP redemptions, this would still not explain the irregular transaction patterns cited in the charge letter. It is not unusual for violating stores to conduct largely legitimate SNAP transactions while conducting a smaller number of trafficking transactions with a few trusted households.

Prior Investigations

The Appellant correctly states that store personnel refused to exchange SNAP for cash benefits in undercover investigations conducted onsite in 2014 and in 2018. The Appellant believes that this exculpates the store from the current determination that the store trafficked in SNAP benefits. However, it is not unusual for a store that is actively trafficking to refuse to conduct a violation with someone they do not. Instead these stores will conduct trafficking transactions with only trusted households known to the store personnel.

Therefore, FNS employs a computerized fraud detection tool to identify SNAP transactions that form patterns having characteristics indicative of trafficking. However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still analyze the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether questionable transactions were, more likely than not, the result of trafficking.

The legality of this method is supported by 7 CFR §278.6(a) which 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.]

FOIA Contentions

The Appellant references several issues it had with the agency's official FOIA response. If the Appellant is still aggrieved about the FOIA response it may request a FOIA appeal. That process is entirely separate from the administrative review process under 7 CFR § 279. Accordingly, no further findings or conclusions are rendered in regard to this issue.

CIVIL MONEY PENALTY

The Appellant did not 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 request for 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. Stores caught in trafficking violations consistently display particular, characteristic patterns of transactions, including 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 Baring Foods, 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

October 22, 2019