

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review
Alexandria, VA 22302**

Big B Supermarket)	
)	
Appellant,)	
)	
v.)	Case Number: C0191715
)	
Retailer Operations Division,)	
)	
Respondent.)	
_____)	

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Big B Supermarket (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 Big B Supermarket by letter dated September 8, 2016.

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 August 4, 2016, 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 2016 through June 2016. 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).

7 USC 2018 (b)(7)(e). The local community center, Jackson Center, is involved in sports activities, and many of the participants (including coaches) purchase drinks from the store.

7 USC 2018 (b)(7)(e). Appellant requested an extension to August 25, 2016, in which to reply to the Charge letter. During the telephone conversation and in a letter dated August 22, 2016, Retailer Operations Division granted Appellant the requested extension. Appellant was also notified that the time in which to request a civil money penalty in lieu of permanent disqualification and to provide documentation to support such request had not been extended.

In email correspondence dated August 25, 2016, Appellant stated that it was sending receipts for purchases of drinks and chips in the months of April 2016 through June 2016 and provided approximately 124 receipts in nine separate emails.

After giving consideration to the Appellant's reply and evidence of the case, Retailer Operations Division issued a determination letter dated September 8, 2016. This letter informed Appellant that it was permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also stated that Retailer Operations Division considered Appellant's eligibility for a trafficking 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 September 14, 2016, Appellant appealed the Retailer Operations Division' determination 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 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(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 CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from April 2016 through June 2016. This involved the following transaction patterns which are trafficking indicators:

1. There were an unusual number of transactions ending in a same cents value.
2. Multiple purchase transactions were made too rapidly to be credible.
3. Multiple transactions were made from individual benefit accounts in unusually short time frames.
4. 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:

- Due to our proximity to the Jackson Center sport complex, it is quite common for customers to come into our store more than once a day while attending activities at the Center.
- Since we are a neighborhood store the community, from time to time, relies on us advancing food, water, and dairy products to regular customers who run accounts with us until they receive their food stamps.

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 on February 13, 2014. The record reflects that Appellant's store was re-categorized as a convenience store on May 2, 2016 based on the store visit that took place prior to the reporting period. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a July 18, 2016, 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:

- 1 register and 1 POS device, a small counter area, approximately 2ft x 2ft in size, partially obstructed by other smaller items available for sale.
- No shopping baskets or carts available for customers.
- No adding machines or optical scanners available at checkout
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- Hot foods sold for take-out but not for onsite consumption.
- No deli or prepared food section. Prepared sandwiches were in a frozen state.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.
- Estimated at 1300 square feet with no food stored in storage area out of public view
- Does not operate through a night window or plastic barrier with food stock behind the barrier.
- Store is not a delivery route, farmers' market or specialty food store primarily selling one food type such as meat, poultry, seafood, bread, fruit or vegetables.
- Store stocks a significant amount of non-food items such as but not limited to household products, personal hygiene products, tobacco products, alcohol, lottery tickets, clothing items, automotive products, and pet products.

- Store stocks minimal amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products.
- Some empty shelves.
- Some canned/packaged food items were either expired/outdated and/or contained a layer of dusty.

The second issue for consideration is whether Retailer Operations Division has presented a convincing case that Appellant likely trafficked in SNAP benefits. Examples of the irregular transactions from the charge letter attachments are shown below:

CHARGE LETTER ATTACHMENTS

Attachment 1: Unusual number of transactions ending in a same cents value. [7 USC

2018 (b)(7)(e)]

[7 USC 2018 (b)(7)(e)]

[7 USC 2018 (b)(7)(e)].

Appellant’s description of its business operation and, likewise, the information in the record reflecting its operations, do not explain the transaction activity in Attachment 1 of the Charge letter. As noted, information in the record regarding the firm’s pricing and inventory, including the store visit, reveals no basis for SNAP customers’ apparent attraction to the firm, there being no superior selection of staple foods, no price advantage, no large package or bulk items, no extensive variety of otherwise unavailable ethnic food items and no custom or special services rendered.

[7 USC 2018 (b)(7)(e)].

[7 USC 2018 (b)(7)(e)].

Attachment 2: Multiple purchase transactions were made too rapidly to be credible. [7

USC 2018 (b)(7)(e)]. Retailer Operations Division considered this to be a strong indicator because the second purchase of items would have to be transported to the limited counter area without shopping carts, handled by the cashier, price determined, amount keyed at the register, a total given, a card swiped, a pin entered, an approval indicated, a receipt printed, and items bagged and/or removed from the counter space. [7 USC 2018 (b)(7)(e)]:

[7 USC 2018 (b)(7)(e)]

Appellant did not offer, with its review request, any explanation or related evidence in an attempt to clarify or justify the specific transactional behavior noted in the Attachment 2 of the Charge letter. It is reasonable to expect subsequent purchases to be for a nominal amount because it is quite rare to find very expensive items positioned at the checkout area, especially in smaller stores. However, all of the subsequent transaction(s) were followed by a

transaction for a different household.

Though it may be possible to conduct rapid transactions for SNAP recipients who may have one or two small inexpensive items; given that there were no promotional, special, bulk or package deals offered or advertised; and the firm's stock did not appear substantial enough to support customers consistently making large rapid transactions, it is unlikely that the Attachment 2 transactions are legitimate SNAP transactions.

Additionally, the firm's checkout counter area offered very little surface space on which to place items for large purchases and precluded the processing of more than one customer at a time. Taking into consideration the time required to process a legitimate purchase and the steps involved:

1. Placing items on the counter to be purchased and, in this case, holding items that didn't fit on the counter due to the size of the counter space or going back to gather additional items that could not be carried to total the large transaction amounts;
2. Separating eligible from ineligible items;
3. The cashier's handling of individual items to determine the price;
4. Weighing individual items if sold by weight;
5. Entering prices into the register;
6. Bagging the items for carry out;
7. Handing the customer bagged items to make room for more food items the customer is either holding or bringing to the counter;
8. Informing customer of the totals;
9. Pressing the "SNAP transaction key" on the point-of-sale device;
10. Swiping the card and cashier pressing the appropriate sales buttons and entering the sale amount;
11. Customer entry of the required pin number;
12. The system processing and approving of the transaction given the recipient has adequate SNAP benefits;
13. Printing out the receipt;
14. Totaling ineligible items, if applicable, for a cash or credit payment;
15. Customer removing purchased items from the check out area in order for the next customer to in line to begin the next transaction.

While such transactions may well be done in succession, performing these processes on large transactions generally are not done rapidly. The amount of time required is, by and large, proportional to the dollar amount of the transaction; typically, the larger the dollar amount transacted the longer the time period between transactions. Appellant firm processed orders considerable faster than supermarkets typically process them, yet the firm has only one small checkout counter, no optical scanners and none of the logistical tools such as conveyor belts, rotating bagging platforms or order separators that are routinely used in rapid throughput operations.

Based on the analysis above and in the absence of any compelling evidence to the contrary, the irregular and unusual transaction pattern cited in the charge letter is unlikely and a strong indicator of trafficking in SNAP benefits.

Attachment 3: Multiple transactions were made from individual benefit accounts in unusually short time frames. [7 USC 2018 (b)(7)(e)]:

[7 USC 2018 (b)(7)(e)]

The Appellant contends that due to the proximity of the store to the Jackson Center Sports Complex, it is quite common for customers to come into the store more than once a day while attending activities at the center. Regarding this contention, 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. 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 Big B Supermarket. More importantly, the store visit photographs indicate that there were some empty shelves, no evidence of cases of water, soda, or sports drinks, as stated by Appellant, and some canned and packaged food items were either expired, outdated or contained a layer of dust which is an indication that stock is not selling or being replaced on a consistent basis.

Sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, the USDA SNAP Retailer Locator Webpage, www.snapretailerlocator.com, confirmed that 25 SNAP authorized retailers are within approximately one mile of Appellant's store and includes supermarkets and large grocery 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.

Additionally, Retailer Operations Division conducted an analysis of three households that shopped at Appellant during the review period and determined these households also shopped at full-line supermarkets and superstores that offer a much larger quantity and variety of eligible food items for likely better prices. This indicates that lack of access to other stores is not an issue. In conclusion it is more likely true than not true that the irregular transactions cited in the charge letter for Attachment 3 are due to trafficking in SNAP benefits.

Attachment 4: Excessively large purchase transactions were made from recipient accounts. [7 USC 2018 (b)(7)(e)]. The large transaction amounts are not consistent with the store's limited inventory which mostly consists of low dollar items and limited amounts of meat, poultry and fish products. The firm does not offer food in bulk or any ethnic or specialty food that sell for a high price. Therefore the substantial number of high dollar purchases calls into question the legitimacy of these transactions. [7 USC 2018 (b)(7)(e)]:

[7 USC 2018 (b)(7)(e)]

[7 USC 2018 (b)(7)(e)]

Appellant contends that from time to time it advances food, water, and dairy products to regular customers who run accounts until they receive their food stamps. 7 USC 2018 (b)(7)(e). Since attributing suspicious EBT transactions to credit may be an attempt to avoid a more serious sanction, which is appropriate for a trafficking violation indicated by the available evidence, to refute charges of trafficking, as part of the retailer's reply to the charge letter, the retailer must provide adequate proof that credit accounts existed at the time the suspicious EBT transactions occurred. It is imperative that the retailer provide evidence to refute charges of trafficking.

While credit accounts were claimed to explain the transactions listed in the attachments, exculpatory evidence was not provided. In this case, exculpatory evidence would be in the form of an accounts receivable ledger, which lists the full name of each recipient, their SNAP number, address or other contact/identifying information, as well as the dates and amounts of each credit transaction, and what eligible items were purchased and what transactions were to repay outstanding balances. Absent this type of detailed documentation, it is not possible to compare alleged credit payments against the transactions outlined in the charge letter attachments to determine if these were legitimate.

The determining office shall compare the credit information provided by the retailer against the transactions outlined in the letter of charges and the recipient personal identifying information available from the State EBT administrative terminals. The retailer shall be assessed a fiscal claim for each transaction determined to be a credit account violation. If the retailer is not able to account for all of the suspicious EBT transactions for which it has been charged, the determining office must evaluate the remaining transactions and determine whether trafficking has occurred. If the retailer does not provide adequate proof, the determining office shall permanently disqualify the retailer for trafficking.

Based on the above analysis, the Retailer Operations Division presented a convincing case that Big B Supermarket trafficked in SNAP benefits which the Appellant failed to adequately rebut. Although some of the irregular transactions may be repayments on credit accounts, this contention was inadequate to explain most of the irregular transactions. 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, might 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 Division 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, the lack of explanation for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant, and the irregular SNAP transaction data of Appellant as compared to other convenience stores in Orange County Florida.

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 patterns cited in the letter of charges evidence trafficking as the most likely explanation.

While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence in the record. The 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 August 4, 2016. Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program *prior* to the violations. Therefore, the Retailer Operations Division' decision, not to impose a trafficking CMP in lieu of disqualification, is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

Retailer Operations Division' analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Big B Supermarket. 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 Big B Supermarket is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 USC §2023) and to Section 279.7 of the Regulations (7 CFR §279.7) with respect to your rights 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), it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

Monique Brooks
Administrative Review Officer

November 29, 2016

DATE