

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

Busy Town Corp,

Appellant,

v.

Case Number: C0209874

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the permanent disqualification of Busy Town Corp. (Busy Town or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), 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), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

AUTHORITY

7 USC § 2021 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 August 2, 2018, the Retailer Operations Division charged 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 January 2018 through June 2018. 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 Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant, through counsel, replied to the charges on August 8, 2018. Appellant denied trafficking and explained that that transactions were normal base on the unique circumstances of the store. After considering the evidence and the retailer’s reply, the Retailer Operations Division issued a determination letter dated September 11, 2018. The determination letter informed Appellant that it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that Appellant was not eligible for a trafficking CMP because 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.

By letter postmarked September 18, 2018, ownership, through counsel, appealed the Retailer Operations Division’s determination and requested an administrative review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear 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 matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) 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 USC § 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 § 271.2 states, in part, that, eligible foods means:

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 § 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 § 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**, . . .” (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.

7 CFR § 278.6(i) states, inter alia:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.

7 CFR § 278.6(b)(2) states, in part:

(ii) Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence as specified in § 278.6(i), that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). **This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).** [Emphasis added.]

(iii) **If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such a penalty.** [Emphasis added.]

SUMMARY OF THE CHARGES

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from January 2018 through June 2018. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were multiple transactions made from individual benefit accounts in unusually short time frames.
- There were excessively large purchase transactions made from recipient accounts.

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.

APPELLANT'S CONTENTIONS

In its September 18, 2018, administrative review request, and subsequent correspondence dated October 16, 2018, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- Appellant believes that the store is substantially larger and stocks a greater variety and quantity of ethnic food than others in the area.
- The disqualification would cause hardship to households in the area.
- It is the only store in the area open 24 hours per day.
- The SNAP program is conducted under the supervision of the owner and the owner's father and son.
- Each of these three individuals have been trained at the onset.
- There were no new employees therefore there was no need to conduct additional training.
- The prohibition of trafficking has been discussed at meetings.
- Nowhere in the Agency's brochure that were made available to Appellant is it required to create a written policy or contemporaneous written documentation of a formal training program.
- If the store was advised to keep a written log of training it would have.
- The owners and family have a tremendous financial stake in the business.
- The owner did not approve nor benefit in any way or was involved with trafficking.
- The charge letter was the first time it became aware of trafficking allegations.
- The statistical data submitted is not supported by any factual evidentiary details.
- Appellant has never knowingly violated the rules and regulations of SNAP.
- Appellant caters to mostly Hispanic customers is a middle size store open seven days a week 24 hours per day.
- The store is in a commercial building just North of Cross Bronx Expressway.
- There are small apartment buildings as well as one and two family homes plus some factories within walking distance.
- The average size of each family is between 4 and 6 persons in a household with many families somewhat larger.
- The Department is relying on information analyzed by 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). submitted to USDA in November 2005, where data is more than 15 years old.

- Many transactions averaged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in 2003.
- Appellant should not be banned from the SNAP program and WIC regarding milk formula.

In support of its contentions, Appellant submitted the results of a recent WIC review dated September 14, 2018.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced.

ANALYSIS AND FINDINGS

Store Visit

FNS authorized Busy Town as a small grocery on January 11, 2011. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a June 14, 2018, store visit 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:

- Busy Town is approximately 3,000 square feet with 600 square feet of storage outside of public view.
- The checkout space is limited and surrounded by Plexiglass.
- There were three shopping baskets but no shopping carts for customer use.
- There were two cash registers and one point-of-sale device.
- There was no fresh meat or poultry.
- There was a deli case with deli meats.
- There was packaged fish and hot dogs.
- There were no bulk packages or any advertised.
- There was a selection of fresh produce.
- Frozen food included on waffles and vegetables,
- Dairy included milk, cheese, butter, sour cream, yogurt, and infant formula.
- There was a kitchen area that prepared hot food.
- Other staple foods available for purchase were eggs, juice, rice, bread, tortillas, beans, cereal, pasta, and canned goods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included alcohol, tobacco, health and beauty products, cleaning products, and paper products.

The SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. The highest priced items noted were -Enfamil - \$21.99, Jasmine Rice - \$24.99, Nido -\$29.99, and Oil - \$34.99 and. Given the available inventory as noted above, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors.

Charge Letter Attachments

Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

Charge Letter Attachment 1. Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment documents 27 sets of transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits that meet the parameters of this scan. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

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 Appellant's stock and facilities and are therefore indicative of trafficking. Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Appellant multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale. Appellant is not set up to provide for all of one's food needs and lacks an abundant depth and breadth of staple foods. The second and third transactions in each set are too large to consist of forgotten items.

One household conducted five SNAP transaction at Appellant **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. It is questionable why this household would make five separate trips to Appellant and transact **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits. This household also visited a supermarket during this time **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. It is curious why a household would chose to spend the majority of its SNAP benefits at Appellant, a small grocery with no fresh meat and no shopping carts, when it had access to a supermarket with a better selection of food items and likely better prices.

Appellant has not offered any evidence to show that the transactions listed in Charge Letter Attachment #1 were legitimate purchases of eligible food.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 192 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These large transaction amounts are questionable because they are not consistent with the store's inventory with no fresh meat. The SNAP eligible food stocked by the store was generally of a low dollar value, with the exception of infant formula, consisting mainly of inexpensive canned and packaged goods, and snack foods. The frequency of high-dollar purchases in a six-month period calls into question the legitimacy of these transactions.

The Retailer Operations Division compared Appellant to the average for small groceries in Bronx County, New York. Appellant's average SNAP transaction amount was 43% greater than the average transaction dollar amount for small groceries during the review period. In addition, Appellants total SNAP redemptions were **5 U.S.C. § 552 (b)(7)(E)** greater than the average for small groceries in the County.

Appellant states that many transactions averaged **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in 2003. This may be true for a supermarket or super store. However, it is unusual for a small grocery that does not sell any fresh meat to have such a large amount of large dollar transactions. In addition, Appellant does not have any shopping carts. If it was a normal practice to spend more **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** at Appellant then it is likely that the store would have shopping carts available. In addition, the checkout space is very limited and not conducive for processing large orders.

Counsel reports that the average size of each family is 4-6 persons in a household with many families somewhat larger. There was no evidence submitted to support such a statement.

With its reply to the Retailer Operations Division, Appellant submitted POS receipts for the transactions. However, these receipts do not show what items were purchased like a cash register receipt would show. Thus, this is not sufficient evidence that the questionable transactions were for eligible food items only.

Appellant explained to the Retailer Operations Division that SNAP recipients purchase cases of infant formula. On the day of the store visit there were no signs advertising the sale of cases of infant formula or other expensive cases. The available evidence shows that Appellant is authorized to accept WIC. It is unusual for a SNAP participant to use his/her SNAP benefits to purchase infant formula (or other WIC-eligible foods) as the majority of customers who are eligible for SNAP benefits are also eligible to participate in the WIC Program. As such, most SNAP customers would choose to use their WIC Program benefits to purchase high cost infant formula versus their SNAP benefits. Appellant submitted a copy of the results of its recent WIC review. However, Appellant did not submit any evidence that Appellant purchased sufficient quantities of infant formula as well as other eligible food items to support both its SNAP and WIC redemptions.

When a supermarket or super store is available, it is unlikely that a SNAP recipient would conduct excessively large SNAP transactions at a small grocery with a limited selection of staple foods like Appellant. The Retailer Operations Division determined that within a half-mile radius of Appellant there were 24 other small groceries, seven medium groceries, one large grocery, one

supermarket, and two super stores, with one of the super stores located .17 miles from Appellant. Thus, households who shop at Appellant have access to and do shop at large grocery stores, supermarkets and super stores, among all other types of authorized stores.

The Retailer Operations Division examined four households identified in the charge letter to analyze their shopping patterns at Busy Town compared to their shopping patterns at other SNAP authorized stores. However, despite this access to better stocked stores, each of the four households conducted excessively large transactions at Busy Town within a short time of shopping at a supermarket or super store. It is questionable as to why households would conduct large transactions at Appellant, when these households had just visited or planned to visit larger stores with a better selection of fresh meat and produce and likely better prices.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The inventory and layout at Busy Town Corp does not support these transactions. The firm has limited staple foods, does not sell fresh meat, with no shopping carts, and has minimal counter space. There is no compelling reason for customers to consider Busy Town, as a first choice destination to fulfill large purchases of food.

In summary, Appellant's layout, business structure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. 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 to legitimize 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.

Evidence

Counsel contends that the Department is relying on information analyzed by 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). submitted to USDA in November 2005, where data is more than 15 years old. The transactions reports are actually derived from the ALERT system, 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 conduct an extensive analysis of 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 the 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, inter alia, "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.]

The documentation and evidence provided by the Retailer Operations Division was thoroughly examined. From all indications, the Retailer Operations Division obtained the EBT data (provided by ALERT), found it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough investigation before concluding that trafficking was likely occurring.

Appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed and that the transactions detailed in the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. Appellant offered no relevant evidence to prove that the transactions listed in the charge letter were legitimate purchases of eligible food. In the absence of compelling information or documentation weighed in comparison to the evidence provided by the Retailer Operations Division, the evidence weighs in favor of the Retailer Operations Division's determination that SNAP-benefit trafficking substantially produced the transaction activity at issue in the present case.

Household Hardship

Counsel stated that Appellant believes that its store is substantially larger and stocks a greater variety and quantity of ethnic food than others in the area and that a disqualification would cause hardship to households in the area. Counsel further reasons that Appellant is the only store in the area open 24 hours per day.

As indicated, the Retailer Operations Division determined that within a half-mile radius of Appellant there were 24 other small groceries, seven medium groceries, one large grocery, one supermarket, and two super stores, with one of the super stores located .17 miles from Appellant. Moreover, where there is a hardship to SNAP households, FNS may impose a hardship CMP on a firm in lieu of a disqualification where there is a lack of authorized stores in the area. However, 7 CFR § 278.6(f)(1) clearly states that "a civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a permanent disqualification." Because the Retailer Operations Division has taken action to permanently disqualify Appellant's firm, a hardship CMP in lieu of disqualification cannot be granted.

CIVIL MONEY PENALTY

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR §278.6(i). Appellant was informed that it would need to provide both the request and supporting evidence within 10 calendar days of receiving the charge letter and that no extension of time could be granted for making the request or for providing the required evidence. The criteria for a trafficking CMP in lieu of permanent disqualification is defined under 7 CFR §278.6(i) which reads, *inter alia*:

In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish

by **substantial evidence** [emphasis added] its fulfillment of each of the following criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in §278.6(i)(1); and

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred **prior to the occurrence of violations** [emphasis added] cited in the charge letter sent to the firm; and

Criterion 3. The firm had developed and instituted an **effective** [emphasis added] personnel training program as specified in §278.6(i)(2); and

Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violation

Appellant indicated in its reply to the charges that it trained its employees but it did not submit any documentation. The Retailer Operations Division determined that Busy Town was not eligible for a CMP because there was insufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program prior to the SNAP violations in this case. For example, there were no documentary evidence showing what the alleged SNAP training consisted of when it was provided to its employees.

Appellant, through counsel, states that the owner, the owner's father, and the owner's son are the only employees and that they discuss SNAP at meetings and were trained initially. The record shows that ownership signed the FNS retailer reauthorization application on December 18, 2010, which 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 for cash, as payment for ineligible items, and as payment on credit accounts. The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations. That the store employees are all family does not excuse it from establishing training program outlined above.

Counsel contends that nowhere in the Agency's brochure that were made available to Appellant is it required to create a written policy or contemporaneous written documentation of a formal training program. Counsel further states that if the store was advised to keep a written long of training it would have. FNS sends all firms the SNAP Retailer Training Guide and instructional video in their approval package and requires ownership to share it with all employees to ensure compliance with rules and regulations. Firms are required to read the SNAP Retailer Training Guide and watch the instructional video. In addition, all authorized retailers were mailed a notice in 2013 reminding them of the available SNAP training materials and resources to assist them in ensuring that all employees are following the rules. This notice described what a minimally acceptable SNAP training program should include and how a firm should document its SNAP training program.

Appellant did not submit any evidence to demonstrate that the firm had established and implemented an effective compliance policy to prevent SNAP 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 Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. 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 occur as charged by the Retailer Operations Division. The determination to impose a permanent disqualification against Appellant is sustained.

The Retailer Operations Division also determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations. Under review, the denial of a trafficking CMP was deemed correct and proper.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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 owner resides or is 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

April 17, 2019