

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

Butler's Foodarama,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0195895

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 Butler's Foodarama (Appellant or Butler's Foodarama) 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 April 11, 2017, 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 June 2016 through November 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 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 replied to the charge letter by letter dated April 18, 2017. After considering the retailer's reply and the evidence, the Retailer Operations Division issued a determination letter dated July 12, 2017. 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.

In a letter postmarked July 19, 2017, Appellant, through counsel, appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted.

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 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 as: "(1) 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, inter alia, 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 on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an **electronic benefit transfer system**, . . .” (emphasis added)

7 CFR § 278.6(b)(2)(ii) states, inter alia: “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(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.”

SUMMARY OF THE CHARGES

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from June 2016 through November 2016. 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 administrative review request dated July 14, 2017, and subsequent correspondence dated September 10, 2017, Appellant provided the following summarized contentions, in relevant part:

- There were false allegations in the charge letter.
- There was information that referred to “terminal 1”, “terminal 2”, and “terminal 3” that is incorrect because the store only has one terminal.
- The owners were not provided an opportunity to refute the charges.
- After it received the letter, Appellant has followed the guidelines.
- Appellant provided vendor receipts, ledger entries, and pictures of its food items.

- Customers were purchasing hot sandwiches in bulk, between five and ten at a time.
- Public assistance customers need Appellant and Appellant needs the business of these households.
- Customers purchase cases of soda, boudin, and sausages.
- SNAP customers purchase cases of meat for their dinners, Sunday school feeding program, and fundraisers.
- Sometimes transactions are processed and then reversed, requiring the transaction to be inputted again.

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 Appellant as a convenience store on June 24, 1986. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a November 12, 2016, 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:

- Appellant is approximately 1100 square feet, with no additional food outside of public view.
- There were no shopping baskets or shopping carts for customer use.
- There was one cash register and one point-of-sale device.
- There was no optical scanner for the speedy processing of transactions.
- The counter space was small and limited.
- There were no meat/seafood specials or bundles that might sell for high prices.
- There was a deli case with limited deli meat and six packages of cheese.
- There was no unprocessed fresh meat, poultry, or fish.
- There was limited fresh produce including seven onions and eleven potatoes.
- There was limited dairy including milk, cheese, butter, and ice cream.
- Other staple foods available for purchase were eggs (2), juice, bread, cereal, rice, pasta, and limited canned goods.
- There were many empty shelves.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included hot food, tobacco products, alcohol, and health and

beauty products.

In support of its contentions, Appellant submitted photographs of a box of boudin that sells for \$40.00 per box; a box of hot sausage that sells for \$49.00; and a hot sandwich that sells for \$5.00. Appellant also submitted its invoices for the review period along with its accounting ledger.

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. 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 26 sets of transactions that total **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

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 legitimate 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. The second and third transactions in each set are too large to consist of a forgotten item or two.

Appellant explained in its reply to the charges that households may share their benefits. There was no evidence submitted to support this contention. Each of the transactions listed in this attachment are significantly larger than the average SNAP transaction for similar type stores. Therefore, even if sharing benefits, these transaction sets are unusual given Appellant's limited inventory of eligible food items. Furthermore, when one considers that SNAP benefits are calculated to provide households with a bare minimum of food security, it is unlikely that households would share significant portions of their benefits with other household members.

Appellant also explained that any transactions processed close together were the result of transactions being reversed and then processed again. The Retailer Operations Division

determined that this was not a credible explanation because there were no reversals during the review period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

While there are legitimate reasons why a SNAP household may shop at a given store multiple times in a day, the repetitive transactions cited in Attachment 1 is not normal shopping behavior at a convenience store. 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.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 164 SNAP transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transaction amounts are not consistent with the store's inventory. Based on the store visit report, the firm does not offer food in bulk or any specialty foods that might sell for a high price. Instead, the store carries a limited selection of mostly inexpensive canned and packaged goods and single-serving food items. There was no fresh unprocessed meat and limited fresh produce on the day of the store visit. There were no shopping carts or shopping baskets for transporting significant amounts of low dollar eligible food items to the register. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

The Retailer Operations Division determined that the average SNAP transaction dollar amount for Appellant during the review period was 5 U.S.C. § 552 (b)(6) & (b)(7)(C) greater than the average SNAP transaction dollar amount for convenience stores in the State.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering Appellant's eligible food stock, infrastructure, and proximity to larger, better stocked stores this is highly unlikely and likely indicative of trafficking.

There were also several unexplainable repeating transactions amounts.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant did not provide any prices for items that would support such transactions totals. Without a reasonable explanation for these repeated amounts, they appear to be contrived and are more likely than not indicative of trafficking.

Appellant explains that households purchase some meat items in bulk. Appellant submitted photographs of boxes of boudin and sausage that sold for \$40.00 and \$49.00 respectively. On the day of the store visit, there was no evidence that the store sold meat in bulk. On the day of the visit, there were no cases of boudin or hot links advertised for sale in the photographs or visible. It is more likely that Appellant sells these meat items individually and prepared hot. Appellant also explained that it sold cases of soda. There were some cases of soda visible on the day of the store visit. However, these cases of soda could not possibly explain each of these large dollar transactions.

Appellant states that when it was allowed to sell hot food to SNAP recipients, customers were purchasing hot sandwiches in bulk (5 U.S.C. § 552 (b)(6) & (b)(7)(C)). It is plausible that some of the large transactions are from the purchase of multiple sandwiches. However, it is unlikely that each of these excessively large purchases during the review period are from customers purchasing more than five sandwiches at a time or other hot food items in bulk. Similarly, Appellant explained that SNAP customers purchase cases of meat for their dinners, Sunday

school feeding program, and fundraisers. When one considers that SNAP benefits are calculated to provide households with a bare minimum of food security, it is unreasonable that households would continue to make such purchases, perhaps depleting their allotments, every month for such events.

Appellant explains that many of its customers would have to travel a distance to purchase food items. It is true that sometimes a firm may have higher than average SNAP transactions amounts due to the lack of access to other SNAP authorized stores. However, the Retailer Operations Division determined that within a one-mile radius of Appellant, there are seven other authorized firms, including a supermarket. It is not plausible that the firm's customers would regularly purchase large amounts of merchandise at Appellant when larger, better stocked stores are readily available and in the vicinity of the Appellant firm.

Lastly, the Retailer Operations Division examined three households identified in the charge letter to analyze their shopping patterns at Appellant compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at supermarkets and superstores. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This is unusual. These transactions cannot be explained by not having access to other stores or being allowed to purchase hot foods. Despite this access to better stocked stores, all of the sampled households conducted excessively large transactions at Appellant 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of shopping at a supermarket or super store. It is highly unlikely that a convenience store without shopping carts or baskets would have legitimate SNAP transactions comparable to supermarkets or super stores which have a superior breadth and depth of stock at likely better prices.

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.

Opportunity to Refute the Charges

Counsel contends that Appellant was not provided with an opportunity to refute the charges. The record shows that Appellant replied to the charge letter on April 18, 2016, and explained the questionable transactions. The determination action followed the agency's due process procedures which are two-fold in nature. First, the retailer is afforded an opportunity to reply to the charges. The second level of due process involves an administrative review, in the process of which Appellant was granted an additional three weeks within which additional information may be provided in support of the request for review. The purpose of the administrative review process is to ensure that firms aggrieved by FNS's adverse actions have the opportunity to have their position fairly considered by an impartial reviewing authority prior to that adverse action

becoming final. Appellant has been duly given, and has taken, the opportunity to present to USDA through the administrative review process whatever evidence and information it deems as pertinent in support of its position that the Retailer Operations Division's adverse action should be reversed.

Therefore, any evidence and information that Appellant presented to the Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to Appellant's right to a fair and thorough review.

Different Terminals

Counsel explains that the report is questionable because the store only had one terminal and the charge letters documents two additional terminals. It is important to note that the charge letter shows two different terminals and not three terminals. The record shows that the Retailer Operations Division determined that the two terminals were not used at the same time. One of the terminals was replaced during the review period. It is correct that Appellant only used one terminal at a time. The two different terminals do not factor into the trafficking charges.

Invoice Analysis

Appellant submitted 128 pages of invoices for the eligible food items it purchased during the review period to support its SNAP redemptions. Each of the invoices was analyzed. A couple of the invoices were excluded because they did not contain a complete date. Even with a 40% mark-up, the Retailer Operations Division determined that the submitted invoices did not support the firm's SNAP redemptions during the review period. Consideration also has to be given to cash and credit card sales. Thus, the submitted invoices do not support that Appellant purchased sufficient inventory to support its SNAP redemptions during the review period.

The large dollar transactions remain questionable even if there was sufficient food inventory to support such transactions when consideration is made of there being no fresh meat and limited fresh produce, a large inventory of low-dollar value snack food and beverages, a greater variety of food at lower prices at other stores which many customers also shop, no shopping baskets or carts, and little counter space to place food for purchase for checkout. There does not appear to be anything that would reasonably attract SNAP households to shop there, a convenience store, and spend substantial amounts of their SNAP benefits.

Corrective Action

Appellant contends that after it received the charge letter, it has followed the guidelines. It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of Retailer Operations Division. This review is limited to

what circumstances existed at the time that was the basis of the of the Retailer Operations Division's action. It is not the authority of this review to consider what subsequent remedial actions may have occurred or be planned so that a store may begin to comply with program requirements. In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of alleged or planned after-the-fact corrective actions implemented subsequent to investigative findings of program violations. Therefore, Appellant's contention that corrective action has taken place or that further remedial actions are planned does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Household Hardship

Appellant states that the customers rely on its business. 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, the regulations at 7 CFR § 278.6(f)(1) clearly state 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.

Appellant Hardship

It is recognized that economic hardship is a likely consequence whenever a store is permanently disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To excuse ownership from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that the firm will incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposition.

Denies Trafficking

Appellant insists that there were false allegations in the charge letter. This review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is to determine whether Appellant demonstrates by a preponderance of the evidence that the permanent disqualification should be reversed. Assertions that the firm has not violated

program rules, by themselves and without sufficient supporting evidence do not constitute valid grounds for dismissal of the current charges of violations or mitigate their impact.

Appellant must provide a preponderance of evidence 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 in order for the administrative action to be reversed. Appellant did not provide any compelling justifications for the transactions listed on the charge letter attachments. 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.

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 ten 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. 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.

Even if a timely request had been submitted, 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 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 is also sustained.

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 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

February 1, 2018