

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

Chickenman,

Appellant,

v.

Case Number: C0202980

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 Chickenman (Chickenman 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 October 17, 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 February 2017 through July 2017. 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 charges on October 26, 2017.

Appellant denied trafficking and explained the transactions were normal due to the unique circumstances of the store.

After considering the retailer's reply and the evidence, the Retailer Operations Division issued a determination letter dated December 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 postmarked December 18, 2017, Appellant 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 February 2017 through July 2017. 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 appeal request postmarked December 18, 2017, Appellant provided the following summarized contentions, in relevant part:

- Appellant already explained its large transactions.
- Appellant has discontinued its bulk sales.
- Appellant has served the community for five years without any issues.

In support of its contentions, Appellant submitted the following documents on January 22, 2018:

- Copy of its October 26, 2017, reply to the Retailer Operations Division’s charge letter; and
- Five employee compliances sheets.

In Appellant’s reply to the charges dated October 26, 2017, Appellant provided the following explanations for the unusual transactions:

- Appellant sells a lot of soda, water, and juice in cases.
- Appellant has a very active deli and sells cold cut subs.
- Appellant sells bags of frozen chicken wing dings for \$30.00; 16 piece chicken bags for \$18.00 or two for \$30.00; and Australian goat cubes for \$25.00 or two for \$40.00.
- The store has been authorized since 2011 but started selling these large dollar items this past year to increase their sales.
- Appellant's supplies from Sysco, its largest supplier, totaled 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in June.
- During the summer it sells two cases of water for \$10.00.
- Families come in and buy large quantities 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- Some transactions for milk, bread, eggs, and groceries 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- Customers come to the store over and over again.
- Appellant provided a list of its suppliers and invoices.
- The closest store is only open until 8 pm and Appellant is open to 12 pm six days per week.
- There are five stores in town but only two have a deli.

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 Chickenman as a convenience store on July 15, 2011. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an August 8, 2017, 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:

- Chickenman is approximately 1600 square feet.
- There were no shopping carts or shopping baskets for customer use.
- The store does not offer any promotional specials, packaged, or bulk items
- There was no fresh unprocessed meat, poultry, or fish.
- There was a limited selection of deli meat, canned meat, canned fish, and jerky.
- There was limited fresh produce including six watermelons and tomatoes that were likely used for the prepared food.
- There was limited dairy including milk and ice cream.
- The most expensive items sold at the store were 15 bottles of limon pepino for \$10.00; a turkey sub for \$8.99; a cold cut sub for \$7.99; and 40 bottles of water for \$5.00.
- Other staple food items included limited amounts of bread, cereal, pasta, rice, eggs, and a limited selection of canned goods.

- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- There was an extensive menu of hot food items with a couple of cold sandwiches listed.
- Ineligible items included include tobacco products, lottery, automobile products, health and beauty aids, and cleaning 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. 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. Moreover, on the day of the store visit Appellant did not meet SNAP authorization criteria as it had only two varieties of food in the dairy category including milk and ice cream. Firms are required to have at least three varieties in each of the food staple food categories.

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 10 sets of transactions **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. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. 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, or significant bulk items for sale. The transactions are too large to consist of a forgotten item or two.

Appellant explained to the Retailer Operations Division that customers return over and over for lunch and dinner because of the cold cuts and platters they sell. The menu advertises mostly hot food items which are not eligible for purchase with SNAP benefits. There are a couple of cold sandwiches advertised but there is no sign advertising cold platters. Moreover, the deli meat available was limited in quantity and selection. The Retail Operations Division determined that the transaction sets could not be explained as customers returning to the store for lunch and dinner. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Even if two of these transactions were for lunch and dinner, the other large dollar transactions remain questionable.

The Retailer Operations Division determined that households that are conducting rapid, repetitive, and large transactions at Appellant are frequently shopping at better-stocked and more

competitively-priced grocery stores, sometimes on or about the same day they shopped at Appellant. Based on the shopping patterns of these SNAP customers, transportation to other stores did not appear to be an issue.

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, with no fresh meat, limited fresh produce, and no shopping carts or baskets. 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 132 SNAP transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C). As noted previously, 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 offering similar food items. Appellant did not stock a profusion of high dollar staple food items such as meat, poultry or seafood. Appellant's eligible stock consisted of limited staple foods and accessory foods. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

Appellant explained to the Retailer Operations Division that families come in and buy large quantities 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and that some transactions for milk, bread, eggs, and groceries 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Again, these transactions are suspicious not because they exceed a certain amount but rather because they display characteristics of use inconsistent with the nature and extent of the store's stock and facilities and are therefore indicative of trafficking. The store photographs indicate that the store carries minimal staple food stock and do not indicate any compelling reason for customers to consider Chickenman as a first choice destination to fulfill large purchases of food, or to make cumulative purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C) resulting in large amounts. Also, there is no evidence of a price advantage or custom or special services rendered.

Appellant explained to the Retailer Operations Division that it sells bags of frozen chicken wing dings for \$30.00; 16 pieces of chicken for \$18.00 or two for \$30.00; and Australian goat cubes for \$25.00 or two for \$40.00. However, on the day of the store visit, these items were not visible for purchase. According to the submitted receipts, Appellant purchased 70 pounds of Australian goat cubes during the review period. This item is advertised on the hot food menu and sold as a platter. Appellant also submitted invoices for the chicken that was purchased in July. Appellant paid \$56.27 per bag. It is therefore highly unlikely then that Appellant is selling each bag for \$30.00 and taking a loss on the item. These items are likely sold hot and prepared and not sold in bulk as alleged by the store owner. Furthermore, on the day of the store visit, the owner confirmed that the highest priced items available for purchase was 15 bottles of limon pepino for \$10.00; 40 bottles of deer park water for \$5.00; a turkey sub for \$8.99; and a cold cut sub for \$7.99. Thus, the evidence does not support that these large dollar SNAP transactions are due to the sale of bulk bags of meat.

The Retailer Operations Division compared Appellant to a nearby store that had a similar selection of food items. Each of the two transaction patterns of Appellant exceeds the other authorized store, as seen on the table. Appellant's total SNAP redemption dollar value was five

time that of its nearby competitor. Appellant's average SNAP transaction amount was almost double the average SNAP transaction of its competitor. The Retailer Operations Division considered this an indicator of trafficking.

5 U.S.C. § 552 (b)(7)(E)

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

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 19 households that conducted these large dollar transactions conducted at least 90% of their transactions more than 10 miles from Appellant. These households have access to transportation and do not rely on Appellant for all of its grocery needs.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant also contends that it is one of the only two nearby stores that have a deli. Again, Appellant's deli has a limited selection and quantity of meat available. In addition, the menu advertises mostly hot prepared food with the exception of two cold sandwiches. It is therefore unlikely that Appellant's unusual transactions are due to it being one of two stores that has a deli.

The Retailer Operations Division analyzed the shopping patterns of three households identified in the charge letter. All of these households had access to, and shopped at supermarkets and super stores. However, despite this access to better stocked stores, each of the three households conducted excessively large transactions at Chickenman 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of shopping at a supermarket or super store. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Based on the large transactions conducted at supermarkets and super stores, it is clear that this household does not depend on Appellant for their major food item needs. There is no legitimate reason why households would conduct large transactions at Appellant when this household had just visited or planned to visit larger stores with a better selection of staple foods including fresh meat and produce and 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.

Invoice Analysis

Appellant submitted invoices for the eligible food items it purchased during the review period to support its SNAP redemptions. Each of the invoices was analyzed. Most of the invoices were

for the hot food items that Appellant sells. Although the receipts and invoices show that the store purchased sufficient food inventory to account for the firm's SNAP redemption volume, sufficient inventory alone does not explain the suspicious patterns of SNAP transactions, such as rapid and consecutive transactions by individual during the same store visit or in a single day. The large dollar transactions remain questionable even when there is sufficient food inventory to support such transactions when consideration is made of there being only a limited variety of stock in the store, no fresh meat and limited fresh produce, a greater variety of foods at lower prices at other stores, including supermarkets at which many customers also shop, and no shopping baskets or carts. Furthermore, the inventory receipts submitted show that Appellant purchased candy, cakes, snacks, chips and soda, and these items do not sufficiently explain the large dollar transactions.

No Previous Violations

Appellant contends that it has not had any previous SNAP violations. A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

Denies Trafficking

Appellant denies trafficking. 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, 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 submitted five Employee Training & Compliance documents signed July 15, 2011, January 3, 2014, January 2, 2015, September 1, 2016, and December 2, 2016. Appellant also submitted the 2016 W-2 forms for employees and employee affidavits of training that coincide with the dates of the Employee Training & Compliance documents.

The criteria for a trafficking civil money penalty in lieu of disqualification is established 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 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 cited in the charge letter sent to the firm; and

Criterion 3. The firm had developed and instituted an effective 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 violations; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm . . .”

The Retailer Operations Division determined that the training agreements submitted were not credible. There were two agreements signed by the owner and one employee indicating that training occurred on July 15, 2011. The record shows that Appellant was authorized to accept SNAP on July 15, 2011. The training documents would have been mailed to the retailer on this day. Thus, it is unlikely that these employees were trained before they were provided with the documents. It is more likely that these documents were created for the purpose of responding to the charge letter.

The documentation submitted by Appellant is not substantial evidence that Appellant met all four criteria required by 7 CFR § 278.6(i). For example, there is no contemporary documentary evidence that all employees were provided SNAP compliance training on their initial hire date. There is also no indication that quizzes or tests were conducted to insure that the employees understood any training that was provided to them. Appellant provided no documentation of any internal review procedures.

The record is clear that Appellant did not submit sufficient evidence to establish that Appellant had an effective compliance program and policy in effect 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 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 6, 2018