

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

Crain’s Ice Cream & Liquor,

Appellant,

v.

Case Number: C0201168

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 a permanent disqualification of Crain’s Ice Cream & Liquor (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Crain’s Ice Cream & Liquor.

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.”

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified based on an analysis of EBT transaction data from December 2016 through May 2017. This involved the following transaction patterns which are common trafficking indicators:

- There were multiple transactions made from individual household benefit accounts within unusually short timeframes.
- Excessively large purchase transactions were made from recipient accounts.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Crain's Ice Cream & Liquor for SNAP participation as a convenience store on December 13, 2005. In a letter dated August 31, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred between the months of December 2016 and May 2016. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In a telephone call on September 5, 2017, the Appellant responded to the charge letter, stating that it offers in-store credit to its customers, permitting them to obtain food items on credit and then pay off their balance with SNAP benefits once the household's allotment has been replenished.

In response to the Appellant's claim that it allowed credit accounts at the store, the Retailer Operations Division sent the firm a letter dated September 5, 2017. In this letter, the Appellant was asked to provide documentation to support its claim of credit accounts. The letter stated that the documentation must identify specific accounts along with corresponding dates and amounts. It should be noted that the practice of allowing SNAP households to purchase food items on credit is prohibited by regulation. If a firm is found to have committed credit account violations instead of trafficking, the firm would be subject to a one-year disqualification from SNAP in accordance with regulations at 7 CFR § 278.2(f).

In reply to the agency's second letter, the Appellant responded with another letter, this one dated September 14, 2017. In this letter the Appellant stated that it was not aware that credit accounts were a violation. It further stated that it had been allowing a lot of credit over the previous two years due to a loss of business as a result of a chain store opening up directly across the street. The Appellant apologized for the credit violations and promised to obey all SNAP rules in the future. In support of its response, the Appellant submitted 51 pages of credit ledger documentation and 27 pages of cash register receipts that apparently represent credit accounts. In all, the firm submitted 159 separate receipts.

After considering the Appellant's response and documentation and further reviewing the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated October 31, 2017. This letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but that a CMP was not appropriate in this case because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked November 9, 2017, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

7 U.S.C. § 2021(b)(3)(B) states, in part:

...[A] disqualification under subsection (a) shall be...permanent upon...the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards...

7 CFR § 278.6(a) states, in part:

FNS may disqualify any authorized retail food store...if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, [or] evidence obtained through a transaction report under an electronic benefit transfer system....

7 CFR § 278.6(e)(1)(i) states:

FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, in part:

Trafficking means: The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone...

7 CFR § 271.2 states, in part:

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 § 278.6(b)(1) states, in part:

Any firm considered for disqualification...under paragraph (a) of this section...shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification.... The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter...

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(b)(2)(ii) states, in part:

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(b)(2)(iii) states:

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.

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...

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- The firm has been operating in the same location for many years. The town consists of several low income neighborhoods, most of which are within walking distance of the store. The store is one of only three convenience stores in town.
- Most of the firm's customers receive SNAP benefits and most have no means of transportation to shop out of town.
- The store keeps its shelves filled with canned goods and frozen food items. Many of these are sold by the case.
- The firm offers credit accounts since many customers get income only once a month.
- The credit accounts work in this manner: the customer signs a receipt, and then it gets recorded in a book. They then pay their balance the following month.
- Many customers pay off their balance and then shop for new groceries at the same time.
- Appellant tries to help out the community as much as possible, which is why it allowed customers to have credit accounts.
- The Appellant store is the only store in the area to sell the "cased" items that they sell.
- The firm depends on its ability to accept SNAP benefits, and so do the customers. If the firm is no longer able to accept SNAP, the customers will not be able to purchase cases of food for their families. If the firm cannot accept SNAP, it will lose a lot of customers.
- The firm has done nothing illegal at all.

In support of its contentions, the Appellant provided a list of 42 names and phone numbers of SNAP customers who claim to use their SNAP benefits at Crain Ice Cream & Liquor and would like to continue to be able to shop there.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The primary issue for consideration in a case based on suspicious SNAP redemption data is whether or not the Retailer Operations Division adequately established that the Appellant firm engaged in the violation of trafficking. In other words, did the Retailer Operations Division, through a preponderance of the evidence, establish that it is more likely true than not true that the irregular and unusual transactions cited in the charge letter were the result of trafficking?

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm's EBT transactions, but also information obtained from a June 3, 2017, store visit which was conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This store visit information was

used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report and photographs documented the following store size, description, and characteristics:

- Crain's Ice Cream & Liquor is a convenience store, approximately 1,100 square feet in size, operating in Boron, California.
- At the time of the contractor's visit, the firm had no shopping carts for customer use and had just one handheld shopping basket, which is not uncommon for stores of this size. Customers shopping in convenience stores generally do not purchase more food than they can carry in their arms.
- The store visit photographs show one cash register and agency records reflect the use of one EBT point-of-sale device.
- It appears that the store may use optical scanners to process transactions.
- The store's staple food stock is moderate in each of the four staple food categories and appears to be typical of a convenience store.
- The report also indicates that the store sells SNAP-eligible, non-staple accessory food items, such as carbonated and uncarbonated drinks, snacks, candy, and condiments. The store also sells ineligible, nonfood items, including tobacco products, alcoholic beverages, lottery tickets, and miscellaneous household merchandise.
- The checkout area consists of a standard countertop, perhaps 24 inches by 24 inches in size.
- There is no indication from the store visit report that the firm has a special pricing structure.
- While there are a few items exceeding \$5.00, most food items in the store sell for less than that amount.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a convenience store, where households normally purchase a limited number of items. There was no indication that SNAP households would be inclined to regularly visit Crain's Ice Cream & Liquor to purchase large quantities of groceries, especially considering the absence of shopping carts and the constricted checkout area.

Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of similar-sized competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment lists 13 sets of transactions (30 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E).

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

These sorts of transactions are incredibly unusual for convenience stores that have no shopping carts and that sell primarily low-priced merchandise. Such transactions are strongly suggestive of trafficking.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 273 SNAP transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with a convenience store in the state of California. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a convenience store in California was \$7.31. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Given that the Appellant firm does have a moderate inventory of staple foods, it is probable that there would be an occasional purchase where the transaction amount is high,

5 U.S.C. § 552 (b)(6) & (b)(7)(C). As such, there are almost certainly some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 2. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from similar-sized competitors, especially considering the lack of shopping carts and the constricted checkout area. The substantial number of high-dollar transactions in a six-month period calls into question the legitimacy of these transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The transactions identified in the charge letter are extraordinarily unusual for a moderately-stocked convenience store and substantially different from comparable stores in the area. As noted earlier, in an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that trafficking did not occur. Unfortunately the Appellant in this case has not offered any relevant evidence, such as itemized cash register receipts, inventory records, or other accounting documentation to verify that the specific transactions listed in the charge letter were legitimate purchases of eligible food. Without such evidence, it is reasonable for this review to conclude that the transactions listed in the charge letter were, more likely than not, the result of trafficking violations committed by the Appellant.

Based on the above analysis, it is the determination of this review that Crain's Ice Cream & Liquor likely trafficked in SNAP benefits during the review period. The attachments furnished with the charge letter adequately identify the irregular patterns of SNAP transactions which indicate that trafficking was likely taking place. Conversely, the Appellant has failed to provide a rational explanation to why such patterns might exist. As there are multiple unexplained patterns of irregular transactions, the case of trafficking is convincing.

Credit Accounts

The chief contention offered by the Appellant as an explanation for the unusual transaction patterns listed in the charge letter is a claim that the firm has a practice of allowing SNAP customers to shop on credit and then pay the store back when the household's benefit allotment is replenished. In support of this argument, the Appellant submitted 51 pages of credit ledger documentation and 159 cash register receipts that apparently indicate credit account activity.

Unfortunately, the Appellant's documentation is not adequate to prove that trafficking did not occur. Of the 159 cash register receipts, only two are from the review period in question, and neither one of those appears on the charge letter attachments. Further, there is very little indication from the receipts as to what was actually purchased. The receipts are no more descriptive than words such as "groce" (grocery), "soda," and "candy." There are also transactions for "beer," "cig" and even one that says "paid out," suggesting a transaction in exchange for cash. All of these items, both SNAP-eligible and ineligible, seem to be included in the credit accounts.

The credit ledgers themselves are also very difficult to decipher, and for the most part, do not match the transactions listed in the charge letter. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). According to agency EBT redemption records, neither of these transactions were conducted using SNAP benefits. It is possible that these were payments made with some other form of currency, but the ledgers do not distinguish between SNAP and any other kind of payment.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Was the second one a cash payment? Perhaps payment with a credit card? It's impossible to tell. But it seems highly unlikely that a single SNAP household would accrue hundreds of dollars' worth of debt solely on low-priced SNAP-eligible food items at a standard convenience store.

When a retailer claims that credit accounts are a reason for the irregular SNAP transactions and data patterns, FNS requires a level of detail regarding the legitimacy of the claim. This is because retailers have often made false admissions of credit in an attempt to obtain a lesser one-year disqualification penalty after committing more egregious violations such as trafficking. Credit transactions must be accounted for with substantive evidence such as the dates credit was extended, to whom, for what amount, and for what items. Such proof should also correspond with the transactions identified in the letter of charges. Unfortunately, the documentation provided by the Appellant falls far short of these expectations. The ledgers are very difficult to comprehend and very few of the transactions actually correspond to transactions listed in the charge letter. Further, nearly all of the cash register receipts fall outside of the six-month review period and offer little insight into what was actually purchased and whether those purchases were exclusively for eligible food items.

The documentation provided by the Appellant is not nearly enough for this review to conclude that the firm was, more likely than not, committing credit account violations rather than trafficking. Based on the ledgers and receipts, it is very likely that credit account activity was taking place at the Appellant firm to some degree. But the Appellant's evidence in this case is not adequate enough

for this review to eliminate trafficking as a key reason for the unusual transaction patterns identified in the charge letter.

The Appellant has argued that it only allowed credit accounts as a way to help out the community. It also implied that allowing credit to its customers increased its business after a chain store opened nearby. The Appellant has further stated that it was not aware that allowing customers to pay credit accounts with SNAP benefits was a violation of regulation. The Appellant even contended that it has “done nothing illegal at all.”

The Appellant’s admission of credit accounts plainly shows that the firm engaged in violative behavior. SNAP regulations are clear that such activity is not permissible. The case record also shows that on November 18, 2005, the Appellant owner signed an application to participate as a retailer in SNAP. By signing this application, the Appellant owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP, including not exchanging SNAP benefits for cash (i.e. trafficking) and not accepting SNAP benefits as payment on credit accounts or loans. The Appellant submitted a reauthorization application as recently as January 22, 2016, in which it agreed to comply with these same regulations. From all indications, the Appellant either misunderstood or ignored the rules that were disclosed by FNS from the earliest stages of SNAP participation. Neither provides a valid basis for dismissing the charges or for mitigating the penalty imposed.

Hardship to Appellant and SNAP Recipients

The Appellant has repeatedly stated that Crain’s Ice Cream & Liquor depends on SNAP recipients for its continued success and will lose a lot of business if the store is disqualified. At the same time, SNAP customers depend on the Appellant in order to obtain food for their families, including food sold by the case. In support of these contentions, the Appellant has provided the names and telephone numbers of 42 different SNAP customers who, according to the Appellant, use their SNAP benefits at the store and would like to continue to be able to shop there.

With regard to the contention that the community would experience hardship if the firm was disqualified, it is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and households are forced to use their benefits elsewhere. Regulations at 7 CFR § 278.6(f) do allow, in some circumstances, for a civil money penalty to be imposed in lieu of disqualification when there is an absence of other SNAP-authorized retailers in the area. However agency records reflect at least two comparable or larger SNAP-authorized stores located within a half-mile radius of the Appellant firm, including a medium-sized grocery store. The regulations are also clear that a civil money penalty for hardship to SNAP households may not be imposed in lieu of permanent disqualification for trafficking.

As for the assertion that the firm itself would suffer if the disqualification were to be upheld, Federal statute at 7 U.S.C. § 2021(b)(3)(B) makes it clear that disqualification for trafficking shall be permanent, even on the first occasion. It is recognized that some degree of economic

hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty.

To allow store ownership to be excused from being assessed administrative penalties based on a purported economic hardship to the store's ownership or to the firm itself would render virtually meaningless the 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, the Appellant's contentions that the community will be adversely affected and that the firm may incur economic hardship based on the assessment of an administrative sanction do not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Civil Money Penalty

As noted earlier, the Retailer Operations Division determined that the Appellant firm was not eligible for a civil money penalty in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and training program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a civil money penalty to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate documentation within designated timeframes. The case record shows that the Appellant did not request a trafficking CMP when it responded to the charge letter and there is no evidence that the Appellant submitted any documentation that would indicate that the firm had a compliance policy or training program of any kind.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

An analysis of the Appellant's EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify Crain's Ice Cream & Liquor from SNAP participation. This data provided sufficient evidence for this review to conclude that the questionable transactions and patterns listed in the charge letter were more likely than not the result of trafficking violations committed by the Appellant. Likewise, the Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

Based on a review of all available information in this case, the decision to impose a permanent disqualification against the Appellant, Crain's Ice Cream & Liquor, under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

May 17, 2018