

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

Dan's Maile 76,

Appellant,

v.

Case Number: C0208404

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Dan's Maile 76, (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the program, as initially imposed by the Retailer Operations Division was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant by letter dated September 11, 2018.

AUTHORITY

7 U.S.C. § 2023 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

By charge letter dated June 7, 2018, Retailer Operations Division informed ownership that Appellant was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 271 – § 278, based on EBT benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm."

The letter of charges stated, in relevant part, "As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification."

In correspondence dated June 15, 2018, Appellant, through counsel, requested additional time in which to respond to the charge letter. In correspondence dated June 21, 2018, Retailer Operations Division granted Appellant a 10 day extension to July 18, 2018 and informed counsel that the time to request a civil money penalty in lieu of permanent disqualification and to provide the documentation to support such a request could not be extended.

In correspondence dated July 18, 2018, Appellant, through counsel, replied to the charge letter and generally stated that Dan's 76 denies that it was involved in any sort of trafficking as defined by federal law. The interior of the store is relatively small however; the bulk of products carried by Dan's is stored in a back-storage area of the station. Appellant provided a listing of all products for sale as Appendix 1 to the response. Appellant, through counsel, stated that the Attachment 1 transactions were because of customers living nearby and not possessing vehicles. Dan's sells large ticket items like bags of rice, canned meats sold by the case and froze food items. Large transactions frequently occur in the first two weeks of the month. Customer commonly return to the store later the same day because they have family members or children who have forgotten something or desire an additional item. Appellant, through counsel, stated that the Attachment 2 transactions were because Dan's sells several large ticket items and items sold in bulk cases as noted. Dan's 76's inventory and invoice purchases support this. Appellant indicated that because Dan's is a 76 gas station it must run two cash registers. One is for gas purchases, which are taxed, and one if for EBT transactions, which can charge no tax. The EBT register does not itemize transactions, but Dan's has receipts, which they are willing to go over with USDA.

Retailer Operations Division considered the Appellant's reply and evidence of the case, and issued a determination letter dated September 11, 2018. This letter informed Appellant that it was permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also stated that Retailer Operations Division considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, Retailer Operations Division determined that Appellant was not eligible for the CMP because it failed to submit sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated September 20, 2018, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) (c) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 CFR § 278.6(a) states, *inter alia*, that “FNS may disqualify any authorized retail food store...from further participation in the program if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system ...”

7 CFR § 278.6(c) reads, in part, “*Review of Evidence.* 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)...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...”

7 CFR § 278.6(e)(1) reads, in part, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.” Trafficking is defined, in part, in 7 CFR § 271.2, as “the buying or selling of SNAP benefits for cash or consideration other than eligible food.”

7 CFR § 271.2 states in part that, “Eligible foods mean: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption.”

SUMMARY OF CHARGES

The charges on review were based on an analysis of SNAP electronic benefit transfer (EBT) transactions dated during the five-month period of December 2017 through April 2018. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from the accounts of individual SNAP households within a set time-period.
2. Excessively large purchase transactions were made from recipient accounts.

The first issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking.

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its response to the permanent disqualification letter issued by Retailer Operations Division, and its request for administrative review, in relevant part:

1. The interior of the store is relatively small however; the bulk of products carried by Dan's is stored in a back-storage area of the station.
2. Attachment 1: Dan's sells large ticket items as can be seen from its price list. Large bags of rice, canned meats sold by the case and frozen food items.
3. Large transactions frequently occur in the first two weeks of the month because food stamp beneficiaries receive their SNAP distributions during this period.
4. Customers commonly return to the store later the same day because they have family members or children who have forgotten something or desire an additional item.
5. Attachment 2: Dan's has several large ticket items including various frozen meats and rice and canned goods sold in bulk cases.
6. Counsel quoted case law *Skyson USA, LLC v. U.S.*

Appellant provided a copy of a 10-page Grocery Inventory sheet that includes pricing for cooked foods and assorted food baskets. The preceding may represent a brief summary of Appellant's contentions in this matter however, in reaching a decision, full attention has been given to all contentions presented, including any not specifically recapitulated or referenced herein.

ANALYSIS AND FINDINGS

The FNS initially authorized the business as a convenience store on June 6, 2000. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a March 26, 2018, store visit to the business conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock and facilities. This information was then used to ascertain if there were justifiable explanations for the EBT transactions at Appellant that formed patterns indicative of trafficking. The firm review summary documented the following store size, description, and characteristics:

- One checkout area, with two cash registers and one POS device. Small counter area partially obstructed with other smaller items for sale.
- Estimated to be approximately 285 square feet.
- No shopping baskets or carts available for customers.
- No adding machines or optical scanners were available at checkout. No specialty registers present.
- Store does not operate through a night window or plastic barrier with food stock behind the barrier.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- Store does have an unusual pricing structure such as ending most products with 00 and 95 cents and does not round transaction totals.
- Food is stored in an area approximately 780 square feet out of public view.

- Store has storage freezers or coolers but no food stored off site.
- Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
- Store does not take telephone or online orders and does not offer delivery
- Highest priced eligible food items were 25lb bag of Rice (\$19.95), Folgers Coffee (\$12.99), Cereal (\$12.99) and Beef Jerky (\$9.99).
- Store stocks a significant amount of non-food items such as but not limited to paper products, cleaning products, mobile phones and phone cards, automobile products, tobacco products, health and beauty aids and gasoline.
- Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products. No fresh fruits or produce, no fresh meat or poultry. Most meats are canned, packaged or frozen.
- Kitchen area and food preparation area with hot foods sold also for on-site consumption with a microwave for heating.
- A deli or prepared food section. Stock not used for deli/prepared food section.
- No meat or seafood specials, bundles or fruit/vegetable boxes sold.
- Sever amount of flies in the store and a flycatcher located on the hot food dispenser.
- Store visit suggests that Appellant may not have been eligible for SNAP authorization as it was deficient in the dairy products category.

The second issue for consideration is whether Retailer Operations Division has presented a convincing case that Appellant likely trafficked in SNAP benefits. Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking that were conducted at Appellant's store during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

Attachment 1 of the Charge letter – Multiple transactions were made from the accounts of individual SNAP households within a set time-period.

During the review period there were 23 sets of 75 SNAP transactions that met the parameters of this attachment. Multiple transactions conducted by the same household account **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** is a method which violating stores use to avoid the detection of single high dollar transactions that cannot be supported by the retailer's inventory and/or structure.

Appellant, through counsel, contends that customers commonly return to the store later the same day because they have family members or children who have forgotten something or desire an additional item. With regard to this contention, it is important to note that the SNAP transactions identified 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 store's layout, the extent of the Appellant's stock and facilities and are indicative of trafficking. It is acknowledged that customers will sometimes forget an item or two and decide to purchase it after they have already completed their transaction. In such instances, it is reasonable to expect the subsequent purchase to be for a nominal amount however, in a number of the questionable transactions in this Attachment, the subsequent transactions were for amounts that exceed any nominal, afterthought

purchase. In some cases, the amounts of subsequent transactions exceeded the preceding transaction amount, which is unusual and questionable.

Appellant, through counsel, contends that Dan's sells large ticket items as can be seen from its price list. Large bags of rice, canned meats sold by the case and frozen food items. With regard to this contention, consideration has been given to the extensive price list provided with the retailer reply to the charge letter and during this administrative review. Some notable discrepancies raise questions regarding the accuracy of the price list information. First, the store visit documentation does not mention 50lb bags of rice at \$34.99; it seems highly unlikely that the contractor would thoroughly photograph the store and storage area yet miss such a large & conspicuous item. In addition, the price of the "25lb bag rice of \$21.99" as listed on the price sheet is higher than indicated in the store visit documentation. Next, the reply to the charge letter mentions, "canned meats sold by the case" and "Corned Beef...sold in bulk cases" yet the price list only provides prices for individual cans not bulk cases. Strangely, the price list shows numerous "Seasonal Baskets" but neither the contractor interview nor the store photos reveal any evidence of these baskets deals in the store on 3/26/2018.

Furthermore, a large box of Rice Krispies costing \$55.00, as listed on the price sheet, should be very noticeable but it is not visible in any of the 45 store photographs taken. The prices show items such as cheeses, butter, & whipped cream that are not reflected on the store visit checklist. In fact, the store visit documentation only lists milk and coconut milk, which means Appellant, was actually deficient in the dairy product category necessary for SNAP authorization and suggests that Appellant may not have been minimally qualified to hold its SNAP authorization during the store visit. Due to these various inconsistencies, the price list information seems to be somewhat unreliable. Some prices may be exaggerated in order to appear that Appellant carries high priced items and in an attempt to justify the SNAP transactions cited in the charge letter.

Appellant, through counsel, contends that large transactions frequently occur in the first two weeks of the month because food stamp beneficiaries receive their SNAP distributions during this period. With regard to this contention, it may be true that SNAP recipients make large purchases during the first few days of receiving their benefits, however it is unlikely that these households will make such large purchases at a minimally stocked convenience store.

As an example: A household visited Appellant's store on 12/5/17, and conducted three transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C), after its last transaction, visited a superstore and made a purchase 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is questionable that this household purchased 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP eligible foods, given Appellant's depth and breadth of stock or that Appellant would carry SNAP eligible foods that this household could not have purchased at the better stocked with seemingly better prices, superstore.

As a second example, a household visited a superstore on 2/7/18 and made a purchase 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) later visited Appellant's store and conducted a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is questionable that this transaction was for SNAP eligible foods when the household could have purchased those items at the better-stocked and seemingly better-priced superstore. Especially when the store visit documentation and photographs indicated that Appellants highest priced item is a 25lb bag of

rice at \$19.95. Appellant has no meat bundles or vegetable boxes so a customer would have to purchase more than 18 of the 25lb bags of rice to reach its highest transaction amount **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

Appellant, through counsel, did not provide any additional documentation to support its claim that shoppers were making purchases of forgotten items and to justify all of the transaction sets in this Attachment. Based on the analysis above and Appellant's failure to adequately show that all of the transaction sets were as a result of legitimate SNAP purchases, a conclusion can be drawn, through a preponderance of evidence that the "unusual, irregular, and inexplicable" transaction patterns cited in Attachment 1 evidence trafficking as the most likely explanation.

Attachment 2 of the Charge letter - Excessively large purchase transactions were made from recipient accounts.

There were 135 SNAP transactions that met the parameters of this attachment. Based on the results of the contracted store visit, the large transaction amounts are not consistent with the store's inventory of low priced foods. There were only a few bags of rice, in bulk form, but Appellant does not offer any ethnic or specialty foods that sell for a high price. The largest transaction, during the review period, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, which is more than 34 times the state average. Based on the store visit photographs and documentation, it is implausible that a household could purchase **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP eligible foods at Appellant's store. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

Appellant, through counsel, again contends that Dan's has several large ticket items including various frozen meats and rice and canned goods sold in bulk cases. Appellant, through counsel, also contends that the store is relatively small however; the bulk of products carried by Dan's is stored in a back storage area of the station. With regard to these contentions, photographs, taken during the store visit, of the storage room show a significant amount of cleaning products, large bags of pet food, paper cups & disposable containers used in the hot food business and several equipment items. Photos also show cases of beverages that are sold individually in the store, cases of ramen, large bags of rice, and some canned foods. It is unclear how much of this supply room stock is used in the hot food business versus eligible food sales. It also does not appear that the items in the storage area or the main store area are packaged to be sold in bulk or in cases. In addition, food items shown in the back freezers appears to be items used for hot/prepared foods and not for individual sale. Appellant also did not provide any evidence that it sells large quantities of meat, canned foods or bulk bags of rice.

Retailer Operations also conducted an analysis of the shopping habits of eight of the households identified in the charge letter. This analysis concluded that these households also shopped at other area grocery stores including full-line supermarkets and superstores that offer a much larger quantity and variety of eligible food items for likely better prices either on the same day or within days of visiting Appellant's firm. This again indicates that lack of access to other stores is not at issue. However, despite this access to large supermarkets and superstores, these households consistently conducted much higher transactions at the Appellant firm than at better-stocked supermarkets/superstores in and around the Honolulu County area of Hawaii. This is

another strong trafficking indicator.

The transaction data and overall firm record convincingly demonstrate repetitive patterns of unusual, irregular, and inexplicable SNAP activity for this type of firm indicative of trafficking. Once Retailer Operations Division established the convincing case against Appellant, ownership bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. If this is not demonstrated, the case is to be sustained.

Appellant, through counsel, quoted case law *Skyson USA, LLC v. U.S.* With regard to this contention and quoting of case law, it is important to note that this administrative review decision is limited to whether the Retailer Operations Division appropriately followed the Food and Nutrition Act of 2008, as amended, and the regulations and agency policy promulgated under that act. Therefore, any application of a supposed judicial precedent would best be addressed in a judicial review.

As noted, 7 CFR § 278.6(a) states that FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Retailer Operations Division has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns in two attachments of EBT transaction data, the inadequacy of the firm's eligible food stock as observed and recorded during the onsite visit to support such large transactions, the lack of evidence of invoices of food in inventory to cover Appellant's reasoning for the SNAP transaction totals for the review months, the lack of explanation for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant, and the irregular SNAP transaction data of Appellant as compared to other convenience stores in the State.

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Therefore, based on this empirical data, and in the absence of evidence for the legitimacy for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the unusual, irregular, and inexplicable transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation. While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations determined that Appellant's contentions did not outweigh the evidence in the record.

The purpose of the administrative review process is to ensure that firms aggrieved by Retailer Operations Division's adverse actions have the opportunity to have their position fairly

considered by an impartial review 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 deemed pertinent in support of its position that Retailer Operations Division' adverse action should be reversed. Therefore, any evidence and information that Appellant presented to Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review 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.

Ownership has not provided sufficient evidence to rebut the convincing case that Appellant most likely trafficked in SNAP benefits. As such, the SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have trafficked, which is that FNS shall disqualify the firm permanently.

CIVIL MONEY PENALTY

The Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i) even though it was informed of the right to do so in the charge letter dated March 29, 2016. Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program prior to the violations. Therefore, the Retailer Operations Division' decision, not to impose a trafficking CMP in lieu of disqualification, is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

Retailer Operations Division' analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Dan's Maile 76 from participation in the SNAP. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Therefore, based on a review of all the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged by Retailer Operations Division. Based on the discussion herein, the determination to impose a permanent disqualification against Dan's Maile 76 is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act (FOIA), 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.

Monique Brooks
Administrative Review Officer

April 9, 2019