

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

Delta Tobacco,

Appellant,

v.

Case Number: C0207277

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Delta Tobacco, (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 June 14, 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

In a letter dated April 30, 2018, 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 during the months of September 2017 through February 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

In correspondence dated May 10, 2018, Appellant, through counsel, responded to the charge letter and generally stated that Appellant is the sole owner of a small grocery store located in a densely populated residential area. People often come to the store to buy essential groceries such as milk, bread, product and other food staples, to feed their families. Appellant stated that being new to the grocery business and accustomed to the culture of groceries in his home country to keep a “tab” or “account” for families who shopped there, he adopted a similar local practice at his store. Ownership would keep a ledger or tab or account for his regular customers who would return when their SNAP funds had been replenished, to bring their account current. The owner was utilizing a ledger system in his business and would charge even number for the items that a family owed and for the items they would buy on that date. Families would often make the same purchases every several weeks.

Counsel further stated that Appellant had a compliance policy in place to ensure that the SNAP cards were used solely for eligible food items, in accordance with a book that was provided when he received the SNAP machine and he trained his sole employee on the proper policy to ensure compliance. In abundance of caution he is deeply apologetic for the misunderstanding and has ceased using ledgers. Counsel provided a printout of an article referencing the closing of an area Walmart store.

In correspondence dated May 21, 2018, Retailer Operations Division informed Appellant that the acceptance of SNAP benefits as payment for items sold to a household on credit is a violation of SNAP regulation 278.2(f). A firm that commits such violations shall be disqualified from participation for a period of one year. The letter stated, please provide documentation to support that food items were purchased on credit as noted in the response provided on May 10, 2018. This documentation must identify specific accounts along with corresponding dates and amounts. Appellant was also informed that the requested documentation and any information, explanation, or evidence regarding the charges must be provided within 10 calendar days of its receipt of this letter.

In an email correspondence dated June 4, 2018, Appellant through counsel, provided a response and stated that the owner no longer had a ledger. He kept one in the past but when he received the initial letter and before he met with counsel, it was discarded. Appellant provided signed letters from two of his local customers attesting to credit accounts.

Retailer Operations Division issued a Determination letter dated June 14, 2018. The 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 June 23, 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...**” (*Emphasis added*)

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.”

7 CFR § 278.6(e)(4) reads, in part, “Disqualify the firm for 1 year if: (ii) The firm has accepted food stamp benefits in payment for items sold to a household on credit.”

SUMMARY OF THE CHARGES

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

1. An unusual number of transactions ended in a same cents value.
2. Multiple transactions were made too rapidly to be credible.
3. Multiple transactions were made from individual SNAP households within a set time period.
4. Excessively large purchase transactions were 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

The Appellant, through counsel, 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. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) presented evidence that he had mistakenly utilized SNAP for credit, which pursuant to Section 278.6(e)(4), ought to result in a one-year disqualification.
2. This is 5 U.S.C. § 552 (b)(6) & (b)(7)(C)s first violation. He has provided an affidavit verifying he had a program in place prior to the violation having reviewed in detail the EBT booklet when he installed the machine. After receiving the charge letter he sought additional training to ensure no further violations will occur.
3. The area is a food desert and this is one of the few local places where people in his area can purchase essential items.

Appellant provided a signed affidavit dated June 22, 2018, indicating that he regularly consulted the training booklet over the past two years as he participated in the program and kept it at the store as a resource. Appellant indicated that he also instructed his employee to review the booklet. Appellant stated that even though there was a program in place to properly use and maintain the machine in compliance with SNAP laws and regulations, and he self-trained, he misunderstood a key aspect of the program that brought this matter to USDA's attention. Appellant provided copies of four customer letters stating that they purchased food items on credit.

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 authorized the business as a convenience store on October 3, 2016. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a February 3, 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 cash register and one POS device with a small counter area partially obstructed by other smaller items available for sale.
- Estimated to be approximately 1200 square feet.
- No shopping baskets or carts available for customers.
- No adding machines or optical scanners were available at checkout. No specialty registers present.
- 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.
- No unusual pricing structure such as ending most products with 00 cents and does not round transaction totals.
- No food stored in an area outside of public view
- Store has storage freezers or coolers but not 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 Matador Jerky (\$6.99) and Folger's Coffee (\$5.99).
- Store stocks non-food items such as but not limited to tobacco products alcohol products, lottery ticket and health and beauty aids, clothing items.
- 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.
- No kitchen/prepared food area with hot foods sold for onsite consumption.
- No hot food sold.
- No deli or prepared food section. Stock is not used in preparation of food.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.
- Store visit documentation indicates that Appellant was deficient in the dairy products category (only carrying milk) and the meat/poultry/fish category (carrying only beef jerky) and appeared to be ineligible to maintain SNAP authorization.
- Photographs indicate that Appellant stocked very few staple food items. Store stock consisted of canned and packaged good and snacks and carried no fresh fruits or vegetables.

The 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 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.

Attachment 1 of the Charge Letter – An unusual number of transactions ended in a same cents value.

There were 67 SNAP transactions that met the parameters of this attachment. When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits.

The store visit documentation indicates that Appellant does not have a special pricing structure that would account for the percentage of transactions that ended in 00 cents, 19 cents and 29 cent values and that it does not round pricing. When there are a disproportionate amount of transactions ending in same cent value it appears the transactions are contrived and absent any compelling rationale to the contrary it is a strong indicator of trafficking.

Attachment 2 of the Charge Letter – Multiple purchase transactions were made too rapidly to be credible.

There were 9 sets of SNAP transactions that met the parameters of this attachment. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These types of rapid transactions at a firm with only one register and limited counter space are indicative of trafficking in EBT benefits. Retailer Operations considered this to be a strong indicator because the second purchase of items would have to be transported to the limited counter area without shopping carts, keyed at the register, a card swiped, a pin entered, and approval indicated and a receipt printed.

Attachment 3 of the Charge Letter – Multiple transactions were made from accounts of individual SNAP households within a set time period.

There were 15 sets of 43 SNAP transactions that met the parameters of this attachment. Multiple transactions conducted by the same household account within a set time period 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 structure.

Attachment 4 of the Charge Letter - Excessively large purchase transactions were made from recipient accounts.

There were 136 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. The firm does not offer food in bulk or any ethnic or specialty foods that sell for a high price. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions. With regard to the four Attachments to the charge letter, Appellant, through counsel, specifically contends that the transactions cited in the charge letter are as a result of credit accounts. Appellant was provided

an opportunity to present, as evidence, documentation proving that the transactions were as a result of credit accounts. The record reflects that Retailer Operations Division presented Appellant with an opportunity to provide additional documentation and any information, explanation or evidence in support of its claim of credit accounts. Appellant was notified that the documentation must identify specific accounts along with corresponding dates and amounts to qualify as adequate proof of credit accounts. Appellant, through counsel, indicated that when Appellant received the charge letter dated April 30, 2018, and before consulting with counsel, that the credit ledgers were discarded. Instead Appellant provided four signed customer letters indicating that they utilizing credit and paid the accounts using SNAP benefits.

It must be noted that SNAP regulations at § 278.2(f) provides, inter alia, that: “Food stamp benefits shall not be accepted by an authorized retail food store in payment for items sold to a household on credit. A firm that commits such violations shall be disqualified from participation in the Food Stamp Program for a period of one year.” Since attributing suspicious EBT transactions to credit may be an attempt to avoid a more serious sanction which is appropriate for a trafficking violation indicated by the available evidence, to refute charges of trafficking, as part of the retailer’s reply to the charge letter, the retailer must provide adequate proof that credit accounts existed at the time the suspicious EBT transactions occurred. It is imperative that the retailer provide evidence to refute charges of trafficking so that the Retailer Operations Division can compare such proof with the transactions outlined in the Charge letter. If the retailer does not provide adequate proof, the determining office shall permanently disqualify the retailer for trafficking.

The determining office shall compare the credit information provided by the retailer against the transactions outlined in the letter of charges and the recipient personal identifying information available from the State EBT administrative terminals. The retailer shall be assessed a fiscal claim for each transaction determined to be a credit account violation. If the retailer is not able to account for all of the suspicious EBT transactions for which it has been charged, the determining office must evaluate the remaining transactions and determine whether trafficking has occurred. If the retailer does not provide adequate proof, the determining office shall permanently disqualify the retailer for trafficking.

Appellant failed to provide sufficient evidence that the transactions cited in the charge letter are as a result of credit accounts. Therefore, Appellant’s contentions that the charge letter transactions were due to customers paying off credit accounts does not constitute valid grounds for dismissal of the current charges or for mitigating the impact of those charges.

It is important to note that the record reflects that ownership signed the SNAP application September 3, 2016. **As part of the certification and signature page, ownership agreed to:**

“I accept responsibility on behalf of the firm for violations of the Supplemental Nutrition Assistance Program regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. These include violations such as, but not limited to:

- Trading cash for Supplemental Nutrition Assistance Program benefits (i.e. trafficking);

- Accepting Supplemental Nutrition Assistance Program benefits as payment for ineligible items;
- **Accepting Supplemental Nutrition Assistance Program benefits as payment on credit accounts or loans;**
- Knowingly accepting Supplemental Nutrition Assistance Program benefits from people not authorized to use them.”

Additionally, Appellant received the same Authorization Kit that is sent to all retail food stores when they are newly authorized in the SNAP, including various information booklets, signs and posters indicating the Do’s and Don’ts, rules of the SNAP available in several languages, a copy of the SNAP regulations, and a training video. Moreover, periodic newsletters have been sent to all retailer food stores participating in the SNAP with a reminder in almost every newsletter sent that accepting SNAP benefits for payment on credit accounts is a violation. Therefore, Appellant’s contention that there was not enough training to uphold the rules and regulations of SNAP cannot be accepted as a valid basis for dismissing the charges or for mitigating the penalty imposed. If Appellant had reviewed, in detail, the training materials provided, as indicated, then he would have read, each time that “You must not extend credit to be paid by SNAP benefits late” on page 14 of the training manual.

It must also be noted that upon review of the store visit documentation, the store visit report and photographs document that the Appellant firm was deficient in dairy products and the meat/poultry/fish products categories and only had marginal stock in the fruits and vegetables category and the breads or cereal category. This is not consistent with the Appellants argument that it had food inventory which would support average to expensive shopping trips or gave food on credit. **In fact, the store visit report tends to indicate that the firm may not have been eligible to maintain SNAP authorization on the day of the store visit.**

Based on this empirical data, and in the absence of sufficient evidence as to the legitimacy of such transactions, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the charge letter evidence trafficking as the most likely explanation. In this case, ownership did not provide sufficient evidence to legitimize Appellant’s transaction data as outlined in the Attachments. Retailer Operations Division determined that Appellant’s contentions did not outweigh the evidence that the store was trafficking and concluded, through a preponderance of evidence, that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

Appellant, through counsel, contends that the store is located in a food desert and is one of the few local places where people in the area can purchase essential items. With regard to this contention, food deserts are defined as parts of the country void of fresh fruit, vegetables, and other healthful whole foods, usually found in impoverished areas. This is largely due to a lack of grocery stores, farmers’ markets, and healthy food providers. The record reflects that, based on Appellant’s response, through counsel, regarding the store being in a food desert, Low-income census tracts where a significant number of the population is greater than ½ mile from the nearest supermarket, supercenter, or large grocery store for an urban area or greater than 10 miles for a rural area. Using this measure, an estimated 54.4 million people, or 17.7 percent of

the U.S. population, live in tracts that are low-income and low access and are more than ½ mile or 10 miles from the nearest supermarket. Although the record reflects that Appellant's store may be located in a defined food desert, it does not mean that SNAP recipients do not have access to larger better stocked stores. The record reflects that there are 144 authorized SNAP retailers within a 9.95 mile radius which includes 24 superstores, 12 supermarkets, and a number of other grocery store types. In fact, Appellant's lack of fresh fruits and vegetables and other healthful whole staple foods tend to add to the food desert problem and not diminish it.

Summary

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.

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 four 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 foods in inventory to cover SNAP redemption 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 Division 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' 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 deems 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.

CIVIL MONEY PENALTY

Appellant was notified in the charge letter dated April 30, 2018, that it had 10 calendar days upon receipt of the charge letter to provide required documentation in order to be considered for the trafficking CMP.

Appellant failed to provide Retailer Operations Division with the required documentation to be considered for a trafficking CMP in lieu of disqualification. Therefore, Retailer Operations Division correctly determined that Appellant was not eligible for a trafficking CMP as set forth in the SNAP regulations.

CONCLUSION

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.

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Delta Tobacco 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 Delta Tobacco 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

October 16, 2018