

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

Falcon Grocery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0201146

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Falcon Grocery, (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 August 22, 2017.

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 July 31, 2017, 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 January 2017 through June 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 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).

The Appellant, through counsel, replied to the charges by letter dated August 7, 2017, and generally stated that there are six subsections to the definition of “trafficking” under 8 C.F.R. § 271.2 (sic) and none of them are related to short time frames. The only red flag in these transactions, that have been raised, is that they were within short time frames. There is nothing indicating that anything in the transactions was for ineligible food items or any fraudulent dealings thereof. Appellant, through counsel, stated that the many transactions in a short time have rational explanations such as, customers making a purchase and then purchasing forgotten items in a second order; and customers being unsure of how much they have on the card and making a purchase which would show their balance and, once confirmed that they had sufficient funds, they continue to lawfully purchase more items.

Retailer Operations Division issued a Determination letter dated August 22, 2017. 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 August 28, 2017, Appellant 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.”

SUMMARY OF THE CHARGES

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

1. Multiple transactions were made too rapidly to be credible.
2. Multiple transactions were made from individual benefit accounts in usually short time frames.
3. The majority or all of individual recipient benefits were exhausted in unusually short periods of time.
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 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:

- The charge letter did not specify which subsection of trafficking, my client was alleged to have violated of the eight (8) subsections in the statute. None of the subsections address trafficking in terms of “multiple transactions in short time frames”. Nor does the statute offer an actual definition of trafficking.
- Customers purchase a single item with their SNAP card to check the balance of funds that remain on the card then, when they are certain of the amount, they purchase more items.
- Customers forgot to purchase items in the first transaction and purchased them in a separate transaction.
- The transactions, without more, contain no proof or indicia of fraudulence.

In subsequent correspondence dated September 27, 2017, Appellant, through counsel, provided copies of the charge letter dated July 31, 2017, its response to the charge letter dated August 7, 2017, determination letter dated August 22, 2017, an affidavit from the Appellant, and 34 pages of customer affidavits, some which were duplicated and/or re-written in Spanish, attesting to the store’s services.

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 small grocery store on September 13, 2005. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a June 24, 2017, 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, approximately 2ft x 2ft, partially obstructed by other smaller items available for sale and enclosed in Plexiglas.
- No shopping baskets or carts available for customers.
- No adding machines or optical scanners were available at checkout. No specialty registers present.
- No unusual pricing structure such as ending most products with **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** cents and does not round transaction totals.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- A kitchen/prepared food area with hot foods sold for onsite consumption. Microwave available.
- Store has a deli or prepared food area and stock is being used in the prepared food section (meat, cheese, and vegetables used to make sandwiches). Menu board for sandwiches available.

- No meat or seafood specials or bundles or fruit/vegetable boxes sold.
- Estimated to be 500 square feet with no food stored in storage area out of public view.
- No food stored off site and no storage coolers or freezers.
- Store takes telephone orders but does not offer delivery.
- Store operates through a night window or plastic barrier with food stock behind the barrier.
- Store is not a delivery route, farmers' market or specialty food store primarily selling one food type such as meat, poultry, seafood, bread, fruit or vegetables.
- Highest priced items were Similac Formula (\$17.99), Corn Oil (\$19.99), Goya Rice (\$10.99), and Crisco oil (\$8.99).
- Store stocks a significant amount of non-food items such as but not limited to paper products, household products, tobacco products, health and beauty aids, cleaning products, and automotive products.
- Store stocks sufficient amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products.
- Narrow aisles.

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 – Multiple purchase transactions were made too rapidly to be credible.

During the review period, this attachment lists 18 sets of 36 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 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.

More importantly, it is noted that the second transaction was conducted by a different household in all but two of the transaction sets. Given Appellant is a typical small grocery store that sells canned and packaged items, some fresh and perishable staple food items, some WIC eligible items, and accessory and snack food items; there are no shopping baskets and/or carts; the check-out counter operates behind a plastic barrier; there is only one cash register and one POS device; and given the steps required to process a SNAP purchase, it is implausible that the transactions in this Attachment are legitimate SNAP purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant, through counsel, did not offer, with its review request, any explanation or related evidence in an attempt to clarify or justify the specific transactional behavior noted in the Attachment 1 of the charge letter therefore, based on the analysis above and in the absence of

any compelling evidence to the contrary, the irregular and unusual transaction pattern cited in the charge letter is unlikely and a strong indicator of trafficking in SNAP benefits.

Attachment 2 of the Charge Letter - Multiple transactions were made from individual accounts in unusually short timeframes.

During the review period, this attachment lists 50 sets of 111 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The store visit report does not indicate any compelling reason for customers to consider Falcon Grocery a first choice destination to fulfill large purchases of food, or that they would have made relatively large, multiple purchases at the store **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

Appellant, through counsel, contends that customers forgot to purchase items in the first transaction and purchased them in a separate transaction. With regard to this contention, it must also be noted that SNAP households have no limits on the number of times they may use their SNAP cards or how much eligible food they may purchase. The transactions in this Attachment do not contain the characteristics associated with a recipient purchasing forgotten items a short time after checking out or households returning to purchase a forgotten item or two. It is certainly not unusual for a small number of SNAP households to conduct multiple transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. For example, mothers may shop and later send a child to the store to pick-up a forgotten item nonetheless; it is unusual that the second transaction amount would be for more than a nominal amount. The SNAP transactions in Attachment 2 of the Charge letter are not consistent with shopping patterns of someone who may have forgotten an item or two during the first trip. Appellant also accepts WIC however; it is important to note that most SNAP households with infants or small children are WIC participants and therefore would be purchasing infant formula using WIC vouchers, not SNAP EBT.

Appellant, through counsel, contends that customers purchase a single item with their SNAP card to check the balance of funds and once they are certain of the remaining amount, purchase more items. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Considering that transactions would entail customers placing a large amount of eligible food items on the counter, the clerk handling individual items to determine the price, ringing them up on the register, possibly bagging the items, informing customer of the total, pressing the “FSP transaction key” on the POS device, swiping the card, entering the PIN, and waiting for the transaction to be processed by the system, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. More importantly, if customers were purchasing an item, for the purpose of checking their SNAP balance, it is more plausible that the first transaction in the set would be for a nominal amount. This was not the case in this Attachment.

It is important to note that the EBT point-of-sale machine is programmed to permit immediate balance inquires without having to first process a purchase. There is also a toll-free 800 telephone number that can be called to find out account balances. Therefore, it is not necessary for customers to make a purchase just to find out what they have on balance in their SNAP benefit accounts. In addition, many of the questionable transaction sets cited were conducted at the beginning of the month, in some cases on the very day the customers’ benefits were replenished and plentiful. It would be unusual for such customers to be concerned about their account balances with so many benefit dollars on hand. In conclusion, it is therefore more likely

true than not true that the irregular transactions cited in the charge letter Attachment 2 are due to trafficking in SNAP benefits.

Attachment 3 of the Charge Letter - The majority or all of an individual recipient benefits were exhausted in unusually short periods of time.

This attachment lists 12 sets of 15 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Studies of historical transaction data shows that SNAP recipients do not normally exhaust their benefits in one or two transactions on the same day. A government report¹ on SNAP shopping patterns indicates that after the first day of benefit issuance, on average, 80 percent of a household's allotment remains unspent. Even after seven days, 40 percent of benefits still remain unspent. It takes two weeks to deplete 80 percent of one's benefits, and three weeks to deplete 90 percent. Although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefits in only a few transactions or in a single day. Depleting one's entire allotment in one or two days, or in a single large transaction, leaving no benefits for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP benefit households.

Appellant, through counsel, did not offer, with its review request, any explanation or related evidence in an attempt to clarify or justify the specific transactional behavior noted in the Attachment 3 of the charge letter therefore, based on the analysis above and in the absence of any compelling evidence to the contrary, the irregular and unusual transaction pattern cited in the charge letter is unlikely and a strong indicator of trafficking in SNAP benefits.

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

This attachment lists 248 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. 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 any ethnic or specialty foods and only offered cooking oil and rice at \$19.99 and \$10.99 respectively. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The average SNAP transaction for small grocery stores in Lehigh County Pennsylvania during the review period was \$12.83. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

Retailer Operations Division also conducted an analysis of the shopping habits of four 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 and superstores in and around the Lehigh County area of Pennsylvania.

¹ U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program*, by Laura Castner and Juliette Henke. Project officer: Anita Singh, Alexandria, VA: February 2011

This is another strong trafficking indicator.

Appellant, through counsel, did not offer, with its review request, any explanation or related evidence in an attempt to clarify or justify the specific transactional behavior noted in the Attachment 4 of the charge letter therefore, based on the analysis above and in the absence of any compelling evidence to the contrary, the irregular and unusual transaction pattern cited in the charge letter is unlikely and a strong indicator of trafficking in SNAP benefits.

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.

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 a 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, contends that the charge letter did not specify which subsection of trafficking that it violated and the transactions contain no proof or indicia of fraudulence. With regard to this contention, the extensive analysis of Appellant’s EBT transaction record, upon which charges of violations are based, provides substantial evidence that questioned transactions during the focus period have characteristics that are not consistent with legitimate sales of eligible food to EBT customers at a store of this type and size. Rather, the characteristics are indicative of illegal trafficking in program benefits. In addition to the raw data of suspicious transactions, the file also notes that Appellant has no shopping carts or shopping baskets available for customers to carry the many items no doubt necessary for questioned transactions as large as listed.

In addition, Appellant has only one register and one EBT device, very limited counter space, and insufficient stock to explain as legitimate the program redemptions. A review of the record has yielded no indication of error or discrepancy in the reported findings by Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it appears the Retailer Operations has provided substantial evidence of trafficking violations, in the four patterns of EBT transaction characteristics indicated in the letter of charges, and that it is more likely true than not that program violations did, in fact, occur as charged.

CFR § 278.6(a), which establishes the authority upon which FNS may disqualify any authorized retail food store, reads, in 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.” Therefore, that the Retailer Operations used computer printouts of transaction data and other reports, in addition to store visit observations and an analysis of household shopping behavior, in rendering a finding that violations indicative of trafficking are occurring, is as valid a means of establishing facts as direct evidence obtained through an on-site investigation and the eye witnessing of trafficking.

Summary

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 small grocery 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’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 deems pertinent in support of its position that Retailer Operations Division’s 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 July 31, 2017, 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 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 Falcon Grocery 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 Falcon Grocery 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

November 8, 2017