

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

**Food Basket,**

**Appellant,**

**v.**

**Case Number: C0203753**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the USDA that the record indicates that Food Basket, (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 25, 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 March 8, 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 May 2017 through October 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).

In an email correspondence dated March 19, 2018, Appellant requested an extension in which to reply to the charge letters. In an email correspondence dated March 20, 2018 Retailer Operations Division granted Appellant's request to April 9, 2018. Appellant was also informed that the time to apply for a civil money penalty (CMP) was not extended and documentation to support the request for a CMP should have been submitted by March 19, 2018. In correspondence dated April 9, 2018, Appellant replied to the charge letter and generally stated that the charges and exhibits attached to the charge letter do not detail or provide any evidence against the firm regarding the buying or selling of benefits for cash or consideration other than eligible food. Appellant, through counsel, stated that households would visit the store more than once per day and certainly more than once per week. The store is extremely large and well stocked with a deli, comparable to a large grocery store. Items may be forgotten and customers may add them shortly after initial checkout later in the day or throughout the week. The length of time between transactions cited in Attachment 1 does not reflect an unusual short time-frame, given the variety of inventory sold and norms of customer frequency. Had there been large retailer transactions from households 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which are the transaction normally seen under this particular charge that would be cause for suspicion however, that is not the case here.

Counsel also stated that the store sells many higher priced items, specifically soda and other drinks in bulk as well as higher priced consumer products. Examples included Red Bull, Monster and Arizona sold in bulk at \$18.99 per case, baby formula sold at \$24.99, Italian Beef by the case for \$59.99 and \$38.98, Beef patties for \$19.99 and cases of Pure at \$14.98. The transactions are in line with other stores that sell a similar selection of inventory and therefore, we request this charge be dismissed. Appellant provided 20 color photographs of the store's stock and two pages of an inventory recap report.

After giving consideration to the Appellant's reply and evidence of the case, Retailer Operations Division issued a determination letter dated September 25, 2018. This letter informed ownership that they were permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also states that Retailer Operations 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 October 4, 2018, 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 1977, 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 May 2017 through October 2017. 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 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. We ask that you re-review the information and evidence contained in the response and issue a dismissal of the charges, a period of supervision as the store has no prior history of violation. The store provides a unique service to the area in that the store sells name brand products and a large variety of products not typically offered in the area.
2. Households visit the store more than once per day and certainly more than once per week. The store is extremely large and well stocked with a deli, comparable to a large grocery store.
3. Items may be forgotten and customers may add them shortly after initial checkout later in the day or throughout the week.
4. The store sells many higher priced items, specifically soda and other drinks in bulk as well as higher priced consumer products. Examples included Red Bull, Monster and Arizona sold in bulk at \$18.99 per case, baby formula sold at \$24.99, Italian Beef by the case for \$59.99 and \$38.98, Beef patties for \$19.99 and cases of Pure at \$14.98.

Appellant, through counsel, provided an additional copy of the retailers response to the charge letter and a copy of September 25, 2018 determination letter. No additional documentation or explanations were provided during the review request. 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 medium grocery store on April 26, 2011. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during the January 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:

1. Two cash registers and two POS devices. There appeared to be two-checkout counter areas (approx. 2ft x 2ft) partially obstructed by other smaller items available for sale and enclosed in Plexiglas.
2. Estimated to be approximately 2500 square feet.
3. Two shopping carts (one was filled with trash) and three hand baskets available for customer use.
4. Optical scanner was available at checkout. No specialty registers present.
5. Store operates through a night window or plastic barrier with food stock behind the barrier.
6. No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.

7. No unusual pricing structure such as ending most products with 00 cents and does not round transaction totals.
8. Food is stored in an area outside of public view.
9. Store has storage freezers or coolers but not food stored off site.
10. Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
11. Store does not take telephone or online orders and does not offer delivery
12. Highest priced eligible food items were Meat Package of Ground Beef and Chicken (\$38.99), Meat Package of Ground Beef and Chicken (\$59.99), Chicken Drumsticks (\$24.99), Cold Cuts (\$33.99) and Case of Red Bull & Italian Beef Box (\$38.99).
13. 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, clothing items, party items and cleaning products.
14. Store stocks ample amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products. Limited fresh fruits or produce.
15. A kitchen/prepared food area with hot foods sold for onsite consumption. Microwave available.
16. A deli or prepared food section with stock used in preparation of food.
17. A few meat (Beef/Chicken) specials but no seafood specials or fruit/vegetable boxes sold.

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 transactions were made from the accounts of individual SNAP households within a set time-period.**

There were 122 sets of 278 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. When the same household makes large, multiple purchases at the same store within a narrow timeframe, that is not reflective of normal shopping behavior and is likely an indicator of trafficking.

Appellant, through counsel, contends that households visit the store more than once per day and certainly more than once per week. With regard to this contention, it must 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 occurred in multiples of 2, 3 or 4 transactions that took place **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and 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 in a set time-period. 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 or subsequent transaction amount would be for more than a nominal amount. Additionally, it is questionable why households would visit Appellant up to four times 5 U.S.C. § 552 (b)(6) & (b)(7)(C) expending benefits in amounts 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Although some transaction amounts may be justified by price points on the meat package list, they do not justify all of the transactions in this Attachment or explain households multiple visits with high dollar transactions. Particularly those transactions that were only 5 U.S.C. § 552 (b)(6) & (b)(7)(C) given that store visit photographs only showed one available shopping cart and three hand baskets and Appellant's register area does not appear capable to accommodate the amount of items required for the transaction amounts. This coupled with the steps required to complete a SNAP transaction makes it questionable that these transaction are all legitimate SNAP transactions.

In conclusion, it is therefore more likely true than not true that the irregular transactions cited in the charge letter Attachment 1 are due to trafficking in SNAP benefits.

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

There were 482 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 offers a limited amount of foods in bulk form and meat plans but does not carry any ethnic or specialty foods that sell for a high price. Therefore, the substantial number of high dollar transactions in the Attachment calls into question the legitimacy of these transactions.

Appellant, through counsel, contends that the store sells many higher priced items, specifically soda and other drinks in bulk as well as higher priced consumer products. Counsel provided examples of Red Bull, Monster and Arizona sold in bulk at \$18.99 per case, baby formula sold at \$24.99, Italian Beef by the case for \$59.99 and \$38.98, Beef patties for \$19.99 and cases of Pure at \$14.98. Appellant, through counsel, provided invoices and receipts of inventory in support of its position. With regard to this contention, Retailer Operations Division conducted an analysis of the eligible purchase invoices and receipts provided by Appellant in its reply to the Charge letter and determined that Appellant's purchases, including a 40% mark-up, were insufficient to account for Appellant's total SNAP redemptions during the review period.

Based on the review of the invoices, provided by Appellant, Table 1 below shows that Appellant's purchases do not justify its redemptions. It is reasonable to conclude that, if Appellant's sales are significantly higher than its available stock, the increase in the sales amount is most likely a result of trafficking. It is also important to note that there were a number of invoices that were ineligible as they were dated outside of the review period, did not contain dates, were illegible, showed the name and address of another store, were duplicates or did not contain eligible food items.

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

### **Table 1**

Additionally, the invoices show (Table 2) that the amount of meat purchased in which to create the meat plans advertised, and infant formula purchases was minimal. The minimal amount of purchases of these items limited the number of meat plans that could have been sold containing the amount of meat items advertised. Moreover, the inventory value document that was provided from February 19, 2018 is invalid and not reflective of Appellant's inventory during the review period which was May 2017 through October 2017. As seen below, Appellant's meat purchases were significantly lower than its redemptions during the review period.

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

### **Table 2**

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Appellant, through counsel, contends that the store has no prior history of violations and provides a unique service to the area in that the store sells name brand products and a larger variety of products not typically offered in the area. With regard to these contentions, it is important to note that a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the present serious charge of trafficking. There is no provision in the Act, regulations, or agency policy that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

Additionally, Retailer Operations 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. It was also determined that Appellant's firm did not carry any special items that these larger stores did not carry. 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 Cook County area of Chicago. This is another strong trafficking indicator.

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.

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 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 medium 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 October 5, 2016, 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 Food Basket 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 Food Basket 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 24, 2019