

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

High Point,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0216602

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the permanent disqualification of High Point (High Point or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

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 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.

ISSUE

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

AUTHORITY

7 USC § 2021 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 23, 2019, the Retailer Operations Division charged 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 August 2018 through January 2019. 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 Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant replied to the charges by letter dated April 27, 2019. Appellant denied trafficking and explained the transactions were the result of allowing some customers to make repayments on credit accounts with SNAP benefits. After considering the retailer's reply and the evidence, the Retailer Operations Division issued a determination letter dated May 28, 2019. The determination letter informed Appellant that it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that Appellant was not eligible for a trafficking CMP because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

By letter postmarked June 3, 2019, ownership appealed the Retailer Operations Division's determination and requested an administrative review.

CONTROLLING LAW

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

7 USC § 2021(b)(3)(B) states, in part:

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

7 CFR § 271.2 states that the definition of "coupon" includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

7 CFR § 271.2 states, in part, that, eligible foods means:

Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption.

7 CFR § 271.2 defines trafficking, in part, as:

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

7 CFR § 278.6(a) states:

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

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.

7 CFR § 278.6(i) states, inter alia:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.

7 CFR § 278.6(b)(2) states, in part:

- (ii) Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence as specified in § 278.6(i), that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). **This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).** [Emphasis added.]
- (iii) **If a firm fails to request consideration for a civil money penalty** in lieu of a permanent disqualification for trafficking **and submit documentation and evidence** of its eligibility **within the 10 days** specified in § 278.6(b)(1), **the firm shall not be eligible** for such a penalty. [Emphasis added.]

SUMMARY OF THE CHARGES

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from August 2018 through January 2019. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were multiple transactions made from an individual SNAP within a set time period.
- There were EBT transactions that are large based on the observed store characteristics and recorded food stock.

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

In its June 3, 2019, administrative review request, and subsequent correspondence postmarked July 2, 2019, Appellant provided the following summarized contentions:

- Appellant provided evidence previously that there was no trafficking at the store.
- SNAP is incredibly important to the store.
- The transactions are the purchase of SNAP compliant products.
- Appellant worked very hard to build a strong relationship with the community which encourages the customers to return.

In support of its contentions, Appellant submitted 25 customer statements.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced.

ANALYSIS AND FINDINGS

Store Visit

FNS authorized High Point as a convenience store on December 16, 2013. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an October 17, 2018, store visit 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 firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- High Point is approximately 1800 square feet with no storage outside of public view.
- There were no shopping baskets or shopping carts for customer use.
- There was one cash register and one point-of-sale device.
- There was no fresh unprocessed meat, poultry, or fish
- There were some packages of deli, hot dogs, and one package of bacon
- There was limited fresh produce including bananas, apples, and oranges.
- There were limited units of dairy included milk, cheese, margarine, and sour cream.
- Other staple foods available for purchase were cereal, bread, tortillas, eggs, juice, rice, beans, pasta, and a selection of canned goods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included hot food, gas, tobacco, health and beauty products, cleaning products, and paper products.

The most expensive items noted on the day of the store visit were pecans - \$9.99; jerky - \$7.49; and Red Bull - \$7.99. Given the available inventory as noted above, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors.

Charge Letter Attachments

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.

Charge Letter Attachment 1. Multiple transactions were made from individual benefit accounts in a set timeframe. This attachment documents 17 sets of transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits that meet the parameters of this scan. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

The SNAP transactions noted 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 nature and extent of Appellant's stock and facilities and are therefore indicative of trafficking. Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Appellant multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale. Appellant is not set up to provide for all of one's food needs and lacks an abundant depth and breadth of staple foods. The second and third transactions in each set are too large to consist of forgotten items.

Appellant explained to the Retailer Operations Division that customers live nearby and will frequent Appellant. The Retailer Operations Division reviewed three households that conducted some of these transaction sets and they live between six and ten miles from Appellant. They also shop at larger authorized stores. Thus, Appellant did not provide a convincing justification as to why these household are conducting multiple large dollar transactions at Appellant. Appellant has not offered any evidence to show that the transactions listed in Charge Letter Attachment #1 were legitimate purchases of eligible food.

Charge Letter Attachment 2: Transactions that are large based on the observed store characteristics and recorded food stock. This attachment lists 325 transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transaction amounts are questionable because they are not consistent with the store's inventory with no fresh meat and limited fresh produce. The SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, and snack foods. The frequency of high-dollar purchases in a six-month period calls into question the legitimacy of these transactions.

The Retailer Operations Division compared Appellant to two nearby similarly stocked convenience stores all located within three miles from Appellant. Appellant's average SNAP transaction amount was approximately two times greater than the other two stores. Appellant's total SNAP redemptions dollar volume was also greater than each of the other two stores.

In addition, Appellant conducted more transactions in each ten dollar 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant conducted 142 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) whereas the other two stores conducted two and three SNAP transactions in this dollar range. Similarly, Appellant conducted 44 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) whereas one of the other two stores conducted one SNAP transaction in total. Appellant conducted 14 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C), whereas the other two stores did not conduct any SNAP transactions in either of these two dollar ranges. As noted previously, the highest priced items at Appellant were a four pack of Red Bull - \$7.99, beef jerky - \$7.49, and pecans - \$9.99. The store does not stock fresh meats, sell bulk foods, or offer specials which might account for transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As such, the Retailer Operations Division considered this an indicator of trafficking considering Appellant's eligible food stock, infrastructure, and proximity to larger, better stocked stores.

The Retailer Operations Division determined that 42 percent of the flagged transactions occurring at High Point are in the transaction range 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 21.6 percent of the flagged transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Retailer Operations Division indicated that firms that are trafficking tend to concentrate transactions at particular dollar amounts and that this pattern of clustering transactions around these transaction amounts is suggestive of transaction structuring and SNAP trafficking.

The Retailer Operations Division determined that there were 99 households that conducted the 338 flagged transactions conducted the review period. The Retailer Operations Division examined three households identified in the charge letter to analyze their shopping patterns at

High Point compared to their shopping patterns at other SNAP authorized stores. Each of the households conducted excessively large transactions at Appellant within a short time of shopping at a supermarket or super store. For example, on September 16, 2018 Household 5 U.S.C. § 552 (b)(6) & (b)(7)(C) conducted SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at a supermarket and two different super stores and then conducted two transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at Appellant. Similarly, on December 8, 2018, Household 5 U.S.C. § 552 (b)(6) & (b)(7)(C) conducted two SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at Appellant, and in between these two transactions conducted a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at a supermarket. Similarly, on September 8, 2018, Household 5 U.S.C. § 552 (b)(6) & (b)(7)(C) conducted a SNAP transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at Appellant, conducted a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at a super store, and then returned to an conducted another SNAP transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Retailer Operations Division determined that each of the three households' residences were more than ten miles from Appellant. It is questionable as to why households would travel to Appellant and conduct large transactions at Appellant, when this household had just visited or planned to visit larger stores with a better selection of fresh meat and produce and likely better prices.

Cash Register Receipts

Appellant provided the Retailer Operations Division with cash register receipts. However the receipts were not itemized and only states food stamps; therefore there was no evidence to support what items were actually purchased. In addition, there were only nine receipts that matched any of the 364 SNAP transactions listed on the Charge Letter. Thus, the receipts were not sufficient evidence that the transactions were for eligible food items only.

Given that Appellant does stock an adequate inventory of staple food items, it would make sense that there would be some occasional purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As such, there may be some legitimate SNAP transactions scattered among the transactions listed in Attachment 2. The receipts provided may have been provided for legitimate SNAP purchases. It is not clear why Appellant did not submit all of its cash register receipts but it is likely that it did not have register receipts for all of its transactions because some transactions were not rung up on the register and were only swiped a the EBT POS device for trafficking.

Invoices

Appellant provided invoice totals for two months of the review period. Ownership did not provide that actual invoices to support its purchases. Although the invoice summary sheets do not show what were for eligible food items, the Retailer Operations Division gave the retailer the benefit of the doubt that it purchased a sufficient quantity of food to support its SNAP redemptions.

However, the Retailer Operations Division determined that even with sufficient food stock at Appellant to mathematically support high dollar transactions, there does not appear to be

anything that would reasonably attract SNAP households to shop there and spend substantial amounts of their SNAP benefits. The large dollar transactions remain questionable even when there is sufficient food inventory to support such transactions when consideration is made of there being only a limited variety of stock in the store, no fresh meat and limited fresh produce, a greater variety of foods at lower prices at other stores, including supermarkets at which many customers also shop, no shopping baskets or carts, and little counter space to place food for purchase at the checkout counter.

Customer Statements

Appellant submitted 27 unique customer statements indicating that they are customers of Appellant and make regular purchases. The Retailer Operations Division analyzed the household statements and attempted to verify their transaction history. One household's information was illegible, one household did not provide its EBT card information, and one household could not be located. Fourteen of the remaining 22 households did not conduct any SNAP transactions at Appellant during the review period. Three households conducted some SNAP transactions at Appellant during the review period but these transactions were not flagged as suspicious and were not listed on the Charge Letter Attachments. Five households that submitted statements did conduct transactions listed on the charge letter attachments. These five households conducted one of the 17 transactions sets listed on Charge Letter Attachment 1 and 22 transactions listed on Charge Letter Attachment 2. These customer statements is not sufficient to explain the questionable transactions and that the questionable transactions were for eligible food items only.

Evidence

The transactions reports are derived from the ALERT system, a computerized fraud detection tool to identify SNAP transactions that form patterns having characteristics indicative of trafficking.

However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still conduct an extensive analysis of the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether the questionable transactions were, more likely than not, the result of trafficking.

The legality of this method is supported by 7 CFR §278.6(a) which states, inter alia, "FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, **evidence obtained through a transaction report under an electronic benefit transfer system . . .**" [Emphasis added.]

The documentation and evidence provided by the Retailer Operations Division was thoroughly examined. From all indications, the Retailer Operations Division obtained the EBT data (provided by ALERT), found it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough investigation before concluding that trafficking was likely occurring.

Appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed and that the transactions detailed in the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. Appellant offered no relevant evidence to prove that the transactions listed in the charge letter were legitimate purchases of eligible food. In the absence of compelling information or documentation weighed in comparison to the evidence provided by the Retailer Operations Division, the evidence weighs in favor of the Retailer Operations Division's determination that SNAP-benefit trafficking substantially produced the transaction activity at issue in the present case.

Summary

In summary, Appellant's layout, business structure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. 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 to legitimize 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.

CIVIL MONEY PENALTY

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR § 278.6(i). Appellant was informed that it would need to provide both the request and supporting evidence within ten calendar days of receiving the charge letter and that no extension of time could be granted for making the request or for providing the required evidence. Appellant did not 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.

Even if a timely request had been submitted, 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 compliance policy to prevent SNAP violations. Therefore, the Retailer Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

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

The Retailer Operations Division also determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations. Under review, the denial of a trafficking CMP was deemed correct and proper.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. If a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant's owners 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, 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

September 24, 2019