

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

Kappys Korner,

Appellant,

v.

Case Number: C0201680

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of Kappys Korner as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against Kappys Korner.

AUTHORITY

7 U.S.C. § 2023 and its 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 August 24, 2017, the 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 February 2017 through July 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated the Appellant had the right to respond to the charges within 10 days of receipt to provide explanations for the irregular SNAP transaction patterns. The letter also stated 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 received the charge letter on August 24, 2017 as documented by a UPS delivery notice in the casefile.

The Appellant contacted the Retailer Operations Division on August 30, 2017 and requested an extension of time to respond to the charge letter. In a letter dated August 30, 2017, the Retailer Operations Division granted an extension of time to respond to September 15, 2017. However, the letter noted that an extension of time to request a trafficking CMP in lieu of a permanent disqualification could not be extended under the regulations. The Appellant store received the extension approval letter on August 31, 2017 as documented by a UPS delivery notice in the casefile.

The Appellant did not request a CMP in lieu of permanent disqualification within 10 days of receiving the charge letter. Also, the September 15, 2017 extended deadline passed without a response from the Appellant.

After considering the evidence in the case, the Retailer Operations Division issued a determination letter dated September 26, 2017. The determination letter informed the Appellant 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 the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations. The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP because the 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.

In a letter postmarked October 10, 2017, the Appellant requested an administrative review of the Retailer Operation Division's determination. The request for administrative review was granted.

STANDARD OF REVIEW

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

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

7 U.S.C. § 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 § 278.6(e)(1)(i) states:

FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, in part:

***Trafficking** means...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 ...*

7 CFR § 271.2 states, in part:

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 § 278.6(a) states, in part:

*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(i) states, in part:

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 CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from February 2017 through July 2017. This involved the following transaction patterns which are trafficking indicators:

- **Charge Letter Attachment 1: Multiple transactions were made from individual benefit accounts in unusually short time frames.** This attachment lists 28 sets of 82 transactions
5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits.
5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- **Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts.** This attachment lists 251 SNAP transactions
5 U.S.C. § 552 (b)(6) & (b)(7)(C).
5 U.S.C. § 552 (b)(6) & (b)(7)(C).

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- The Appellant requested an extension of time to respond to the charge letter because one owner lived in Houston where the store paperwork was kept and that area was suffering from the impact of Hurricane Harvey. Apparently, no additional time was given despite the assurance of the Retailer Operations Division.
- Kappys Korner is not a convenience store, but is instead set up like a grocery store.
- Rural customers come in either individually or in larger groups which appear to be family members. They will stand together in a line with their individual food purchases and pass the EBT card to the next person standing in line.
- One of the store owners also owns a butcher shop that has chicken, beef, pork, rabbit, sausage, hog head cheese and other items. Customers at Kappys Korner order these products and they are later delivered to them at Kappys Korner. This causes the store to have large transactions.
- A permanent disqualification will cause a hardship to SNAP customers as Kappys Korner is the only store within a three-mile plus radius and there is no other store in the area selling as large a variety of staple foods at comparable prices.
- The store requests a CMP in lieu of a permanent disqualification. The store has had a compliance policy and program in operation since it first opened in December 2016. When the store opened, it hired and trained two new employees. Each was given training on the SNAP rules and regulations.
- Since the store opened, it has terminated seven (7) store employees for poor performance and misconduct with the exception of one employee who started in July 2017. The store now has employees who are fully trained in all aspects of the business. The store also has SNAP compliance signs posted.
- One store owner lives in Sugar Land, Texas and the other lives in Lafayette. The store owner in Lafayette monitors the store on a daily basis. At no time did either owner approve of, or benefit from, any SNAP violations. At no time was either aware of any violations.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Extension Request

The Appellant contends that it requested an extension of time to respond to the charge letter and that no additional time was given despite the assurance of the Retailer Operations Division. This claim is not supported by the evidence in the casefile.

The casefile documents that the Appellant contacted the Retailer Operations Division on August 30, 2017 and requested an extension of time to respond to the charge letter. In a letter dated August 30, 2017, the Retailer Operations Division granted an extension of time to respond to September 15, 2017. However, the letter noted that an extension of time to request a trafficking CMP in lieu of a permanent disqualification could not be extended under the regulations. The Appellant store received the extension approval letter on August 31, 2017 as documented by a UPS delivery notice in the casefile. Even after the extension deadline of September 15, 2017 had passed without a response from the Appellant, the Retailer Operations Division waited until September 26, 2017 before issuing its permanent disqualification letter.

Authorization History

The Food & Nutrition Service (FNS) authorized Kappys Korner for the SNAP on January 3, 2017. A store owner signed the SNAP application for the store on December 5, 2016 and acknowledged that the owners were aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owners would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking.

During the review period of February 2017 through July 2017, the Retailer Operations Division classified Kappys Korner as a convenience store. The Appellant states that Kappys Korner is a grocery store and not a convenience store. However, a review of the store visit report indicates that FNS properly classified Kappys Korner as a convenience store during the review period.

Store Visit Report

The case record documents that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a July 11, 2017 store visit conducted by an 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 store's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Kappys Korner is approximately 1,300 square feet in size.
- The store had one (1) cash register and one (1) point-of-sale device.
- The store had no optical scanners or conveyor belts at the checkout.
- The store had no shopping carts and only four (4) handheld shopping baskets for customer use. The handheld shopping baskets were located outside of the store next to an ice machine.
- Store personnel confirmed that there was no food stored outside of public view in a storage area and that no food was stored offsite.
- There were no large bulk foods, international or specialty foods that might sell for a high price. There were no fresh meat/seafood bundles or boxes of fresh fruit and vegetables for sale. The most expensive food item was beef jerky at \$6.99. Store personnel stated there were only four (4) food items priced above \$5.00.
- The store visit pictures showed that some shelves were empty or sparsely filled with food products.
- The checkout area consisted of a small countertop no more than two (2) feet by two (2) feet in size. There was plastic shelving with products for sale on one side of the counter and a hot pizza rack on the other side of the counter. The limited space at the checkout area made it not conducive to conducting large transactions.

The inventory of food items at the time of the store visit was typical of a convenience store with limited staple food stock. At the time of the store visit, Kappys Korner was only marginally eligible in the dairy products staple food category. The SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. Accessory food items included, but were not limited to: coffee, tea, carbonated and non-carbonated drinks, condiments, and spices. The stocked ineligible items included tobacco products, alcohol, mobile phones/phone cards, automotive supplies, health and beauty products, paper goods, cleaning items, gift items, and souvenirs. The store also had a kitchen and microwave and sold SNAP ineligible hot food in the form of pizza, boudin links and hot dogs.

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 transaction patterns significantly different from similar-sized competitors.

Multiple Transactions within a Short Time Period

SNAP households have no limit on the number of times they may use their SNAP cards or how much eligible food they may purchase. However, 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 a convenience store's stock and facilities and are thus indicative of trafficking.

Violating stores often conduct multiple split transactions from the same household account as a method to avoid the detection of single high dollar transactions that cannot be supported by the retailer's food inventory and infrastructure. Charge Letter Attachment 1 lists 28 sets of 82 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(7)(E)**. It is not credible that a convenience store with limited staple foods would have suspicious SNAP transactions greatly exceeding the average SNAP transaction of a superstore or supermarket in St. Landry Parish. It is even less likely that these excessively large transactions would be conducted multiple times by the same household during a short time period.

The Appellant contends that rural customers come in either individually or in large groups which appear to be family members. Allegedly, they will stand together in a line with their food purchases and pass the EBT card to the next person standing in line. However, the Appellant offers no reliable evidence to support this. A SNAP household is defined as a household that purchases and prepares meals together so there would be no need to obtain a separate receipt. Households that purchase and prepare meals separately are considered separate households. It is unlikely that a family relying on SNAP to supplement their nutritional needs would share these benefits with another family that purchases and prepares meals separately. Even if the Appellant's contention was legitimate, it would not explain the 19 sets of transactions **5 U.S.C. § 552 (b)(7)(E)**.

The store visit pictures show that is unlikely that SNAP customers would want to shop at this store multiple times during a short time frame, 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. In addition, the store's small checkout area and limited counter space makes it unsuitable for conducting large transactions. The store also had no shopping carts for transporting food within the store. Based on the analysis above, and in the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

Excessively Large Transactions

SNAP households have no limit on the amount of eligible food they may purchase (subject to the remaining balance on the card). However, 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 a convenience store's stock and facilities and are thus indicative of trafficking.

Charge Letter Attachment 2 cites 251 SNAP transactions
5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E).

The Appellant states that one of the store owners also owns a butcher shop that has chicken, beef, pork, rabbit, sausage, hog head cheese and other items. Allegedly, customers at Kappys Korner order these products and they are later delivered to them at the store and this causes the store to have large transactions. However, the Appellant offers no evidence to support this contention. In addition, during the store visit, store personnel confirmed that there was no food stored outside of public view in a storage area and that no food was stored offsite. There was also no signage in the store advertising fresh or frozen meat, poultry, fish or delivery services.

The Appellant states that Kappys Korner is the only store within a three-mile plus radius and there is no other store in the area selling as large a variety of staple foods at comparable prices. It is true that sometimes a store may have higher than normal SNAP transactions due to the lack of other SNAP authorized stores in the area. However, the Retailer Operations Division determined that there is a SNAP authorized superstore located only 2.5 miles away from Kappys Korner. A government report on SNAP benefit redemption patterns¹ revealed that households most often redeemed their benefits at supermarkets and superstores with only four (4) percent of all households never shopping in a supermarket or superstore. Thus, when a supermarket or superstore is available, it is highly unlikely that a SNAP recipient would conduct excessively large SNAP transactions at a convenience store with very limited staple foods like Kappys Korner.

Lastly, the case record documents that the Retailer Operations Division conducted a detailed analysis of eleven (11) households identified in the charge letter to analyze their shopping patterns at Kappys Korner compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at supermarkets and/or superstores. However, despite this

¹ "Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program," report prepared by Mathematica Policy Research for the Food and Nutrition Service, February 2011.

access to better stocked stores, these sampled households conducted excessively large transactions at Kappys Korner often on the same day or within a day or two of shopping at supermarkets and superstores. It is highly unlikely that a convenience store with limited staple foods would have legitimate SNAP transactions comparable or larger than better stocked supermarkets and superstores.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts support the Retailer Operations Division determination. It is not plausible that the store's customers are carrying large amounts of food around the store with no shopping carts. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on a preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 2 are more likely than not the result of trafficking in SNAP benefits.

Hardship to SNAP Community

The Appellant states that a permanent disqualification will cause a hardship to SNAP customers as Kappys Korner is the only store within a three-mile plus radius and there is no other store in the area selling as large a variety of staple foods at comparable prices. The Appellant also submitted a signed list of alleged customers wanting the store to remain authorized.

Where there is a hardship to SNAP households due to a lack of authorized stores in the area, FNS may impose a hardship CMP on a firm in lieu of a less than permanent disqualification. However, the regulations at 7 CFR § 278.6(f)(1) clearly state that "a civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a **permanent** disqualification." [Emphasis added.] Because the Retailer Operations Division has taken action to permanently disqualify the Appellant firm, a hardship CMP in lieu of disqualification cannot be granted.

It should also be noted that agency mapping systems show there are seven (7) comparable or larger SNAP authorized stores located within a three-mile radius of the Appellant store including a superstore located 2.5 miles away. Therefore, it is unlikely that the local SNAP community will suffer a hardship as opposed to a mere inconvenience due to the permanent disqualification of Kappys Korner.

CIVIL MONEY PENALTY

The Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i) even though it was informed of the right to do so in the charge letter. SNAP regulations at 7 CFR § 278.6(b)(2)(ii) and (iii) mandate that both the trafficking CMP request and supporting documentation and evidence must be submitted within ten (10) days of the receipt of the charge letter. Therefore, the Appellant is not eligible for a trafficking CMP.

Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program prior to the violations.

The criteria for a trafficking CMP in lieu of disqualification is defined under 7 CFR § 278.6(i) which reads, in part:

*In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by **substantial** evidence its fulfillment of each of the following criteria:*

*Criterion 1. The firm shall have developed an **effective** compliance policy as specified in §278.6(i)(1); and*

*Criterion 2. The firm **shall establish** that both its **compliance policy and program were in operation** at the location where the violation(s) occurred **prior to the occurrence of violations** cited in the charge letter sent to the firm; and*

*Criterion 3. The firm had developed and instituted an **effective** personnel training program as specified in §278.6(i)(2); and*

*Criterion 4. **Firm ownership** was not aware of, did not approve, **did not benefit from**, or was not in any way involved in the conduct or approval of trafficking violations; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm [Emphasis added.]*

All of the evidence provided by the Appellant in its untimely request for a trafficking CMP is dated after the review period. There are no compliance policy documents or training documents dated prior to the review period which establish

that the Appellant store had established and implemented an effective SNAP compliance policy and program.

It should also be noted that the Appellant provided a photocopy of the *Using SNAP Benefits* compliance poster affixed to the plastic shelving next to the store checkout counter. However, the pictures taken during the July 11, 2017 store visit do not show this poster affixed to the plastic shelving next to the checkout counter. It appears therefore that this poster was only put up after the violations.

Regarding Criterion 4, in an EBT system, settlements are made directly to the owners' bank account, and therefore, the owners have benefited from the violations even if they did not have knowledge or approve of the violations. The Appellant has provided no evidence that this fund settlement did not go to the owners' bank account or that the owners did not benefit from the violative transactions.

Based on the above analysis, even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of a permanent disqualification. In conclusion, 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 the Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify the retailer. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. 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.

In the absence of any reasonable explanations 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. 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 in fact occur as determined by the Retailer Operations Division. Based on the discussion above, the decision to impose a permanent disqualification against Kappys Korner, Appellant, is sustained.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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, FNS is 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.

RONALD C. GWINN
Administrative Review Officer

December 12, 2017