

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

N and A Superette Inc,

Appellant,

V.

Retailer Operations Division,

Respondent.

Case Number: C0191261

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that N and A Superette Inc. (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(a) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against N and A Superette Inc. by letter dated July 27, 2020.

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 August 2, 2016, 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 2016 through June 2016. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

In correspondence dated August 12, 2016, Appellant through counsel, responded to the charge letter and generally stated that the USDA in reviewing the EBT transactions for this vendor has assumed and erroneously concluded that he and/or anyone involved with or employed by this business have engaged in said activities. The retail grocery business is open to the public seven days per week, twenty-four hours each day, and by virtue of the location of this business as substantial portion of its sales and revenues results from its participation in the Food Stamp Program. It is the EBT transactions in exchange for eligible items that constitute approximately 80 percent of this vendor's sale and provide income necessary to keep this business profitable. The owner of this business, since being authorized to accept food stamp benefits, has continuously trained and tested his employees concerning the SNAP regulations and requirements relating to the prohibitions against sale of ineligible items and exchanged cash for EBT benefits. This store is at all times stock with staple food inventory, fresh produce and a large variety of meats. I am informed that large quantities of baby formula are sold at this store. This inventory maintained is especially designed to accommodate those customers who regularly purchased items with food stamp benefits.

Attachment 1 are items that the vendor rounded out the price to the dollar value, Attachment 2 are legitimate charges for eligible items purchased by established customers of this business who do virtually all of their grocery shopping, occasionally in a short period of time at this vendor and Attachment 3 are legitimate charges for eligible items purchased by established customers of this business who do virtually all of their grocery shopping at this vendor's store. There is nothing in any of these Attachments that reveal conclusively or by a fair preponderance of the credible evidence that the vendor herein has been exchanging SNAP benefits for cash. Counsel submitted a Freedom of Information Act request for additional documentation in this case.

In its August 12, 2016, reply to the charge letter Appellant, through counsel, submitted an FOIA request. The FOIA was processed and the record reflects that the requested FOIA documentation was processed and a request for payment was sent on October 5, 2016. In correspondence dated January 13, 2017, Appellant, through counsel submitted an appeal to the FOIA response. The record reflects that the FOIA appeal was completed and closed on January 28, 2020. Counsel was informed in correspondence dated May 29, 2020 that it had 10 days in which to present additional information, explanations or evidence regarding the charges as outlined in the August 2, 2016, charge letter.

In correspondence dated June 3, 2020, Appellant, through counsel, submitted an additional response to the charge letter and generally stated that the store has not engaged in any trafficking activities, that the store is open 24 hours daily and there is always the owner or his management present with trained employees. Appellant, through counsel, stated that in Charge 1 the store owner tries to simplify his prices and structures it to the nearest dollar for the products that does not have a printed price, Charge 2 does not reflect any exchange of cash for SNAP benefits and just reflects legitimate purchases made and Charge 3 is as a result of the store being on one of the main streets in Brooklyn where there are many recipients of the EBT system who make multiple purchases which we have no control over and Charge 4 accounts for the store carrying a large amount of food items that EBT card holders can use to purchase and purchasing large amounts of eligible food items is not considered trafficking. Counsel requested that it be considered for a

civil money penalty in lieu of disqualification as a withdrawal or disqualification from SNAP will cause a hardship for the hundreds of SNAP households that rely upon this store.

After considering the Appellant's reply and evidence of the case, Retailer Operations Division issued a determination letter dated July 27, 2020. 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 August 7, 2020, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

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

CONTROLLING LAW

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) 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, in part 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(e)(1) reads, in part, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined, in part, in 7 CFR § 271.2, as "the buying or selling of SNAP benefits for cash or consideration other than eligible food."

7 CFR § 271.2 states in part that, “Eligible foods mean: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption.”

7 CFR § 278.6(b)(2)(ii) states, in part, that: “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...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).”

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.”

SUMMARY OF THE CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from January 2016 through June 2016. This involved the following transaction patterns which are trafficking indicators:

1. There were an unusual number of transactions ending in a same cents value.
2. Multiple transactions were made from the accounts of individual benefit accounts in unusually short time frames.
3. Excessively large purchase transactions were made from recipient accounts.

The first issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the identified irregular and questionable transactions were the result of trafficking in SNAP benefits.

APPELLANT’S CONTENTIONS

In its response to the charge letter and in its request for administrative review, Appellant, through counsel, made the following summarized contentions, through counsel, in relevant part:

1. The USDA has wrongfully concluded that this firm has engaged in trafficking activities as defined in Section 271.2 of the SNAP regulations. Such an erroneous conclusion was apparently based solely on a faulty analysis of transactional records, with no additional or further investigation.
2. It is the EBT transactions in exchange for eligible items that constitute approximately 75 percent of this owner’s sales and provide the income necessary to keep this business profitable.
3. The owner, since being authorized to accept food stamps in 2009, has continuously trained and tested his employees concerning the SNAP regulations relating to the prohibitions against sales of ineligible items and exchanging cash for EBT benefits. The

owner has maintained an exemplary record and such an unblemished record is evidence of his continue compliance with the law and his training and supervision of his employees.

4. The training program consists of two weeks of intensive, hands on classes, overseen by the owner of this store. (An explanation on how employees are trained followed).
5. The store is at all times well stocked with staple food inventory specifically designed to accommodate those low-income customers who regularly purchase large quantities of items with SNAP benefits. It also takes telephone orders and makes deliveries upon request.
6. Charge 1 - The owner tries to simplify his prices and structure them to the nearest dollar for the products that do not have a printed price.
7. Charge 2 - just reflects legitimate purchases that were made, and large quantities of baby formula are sold at the store.
8. Charge 3 - reflects that the store is on one of the main streets in Brooklyn where there are many recipients of the EBT system.
9. Charge 4 – the store carries a large amount of food items that EBT card holders can use to purchase large amounts of eligible food items, this is not considered trafficking.
10. Please consider a civil monetary penalty in lieu of disqualification. If the charges cannot be withdrawn a disqualification from the SNAP program will cause a serious hardship for the hundreds of SNAP households that rely upon this store.

Appellant did not provide any additional documentation in support of its position during this review. 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 June 30, 2014. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a May 18, 2016, store visit to the business 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 firm’s irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- One cash register and one POS device with a small counter area partially obstructed by other smaller items available for sale.
- Estimated to be approximately 700 square feet.
- No shopping baskets or carts available for customers.
- No adding machines or optical scanners were available at checkout. No specialty registers present.
- Store does not operate through a night window or plastic barrier with food stock behind the barrier.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.

- No unusual pricing structure such as ending most products with 00 cents and does not round transaction totals.
- No food is stored in an area outside of public view.
- Store has storage freezers or coolers, but no food stored off site.
- Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
- 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, gift items, mobile phones/phone cards, pet products, alcohol and cleaning products.
- Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products. Limited amounts of fresh fruits or produce, no fresh meat or poultry. Most meats are canned or packaged.
- A kitchen or prepared foods area with a cooking grill. A prominent menu board and Specials listed for hot food items.
- Hot foods sold with a deli area showing prices posted for meats, prepared salads and prepared/made to order sandwiches.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.

The second 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 Appellant's store 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 – There were an unusual number of transactions ending in a same cents value.

This attachment lists 578 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** that end in 00, 50 and 99 cent values. When such repetitive patterns are unsupported by special pricing structures, they are a strong indicator of trafficking in SNAP benefits.

Of the 1,170 transactions analyzed in this Attachment, 209 or approximately 17.86 percent ended in 00, cents, 182 or approximately 15.56 percent ended in 99 cents, and 187 or approximately 15.98 percent ended in 50 cents. The store visit documentation indicates that Appellant does not have a special pricing structure that would account for the percentage of transactions that ended in 00, 50 and 99 cents. When there are a disproportionate amount of transactions ending in same cent value it appears the transactions are contrived and absent any compelling rationale to the contrary it is a strong indicator of trafficking. Especially when item prices end with a standard *9 it is implausible that several of these relatively inexpensive items purchased together would routinely total to a purchase amount ending in 00, 50 or 99 cents values. In addition, a store that is rounding prices up or down or an even value would not have any transactions ending in odd values.

The Appellant, through counsel, contends that the owner tries to simplify his prices and structure them to the nearest dollar for the products that do not have a printed price. Regarding

Appellant's contention, of "rounding practices" or pricing structure, this only addresses the transactions ending in 00 cents. The transactions listed in this Attachment contain transactions ending in 00, 50 and 99. Additionally, considering the store's staff, it is unlikely that store clerks would have the authority to choose when to round off amounts or to charge based on the price labels. This method of pricing would be seemingly arbitrary to store customers and would likely lead to conflicts within the store.

Multiple repetitive digits strongly indicate that many of the SNAP transaction amounts, reflected in Attachment 1, were contrived. Random data, which legitimate transaction activity approximates, is extremely difficult to produce intentionally; it is very difficult to avoid repetitive patterns when attempting to create the appearance of normal, near-random transactions. Such sets of repeating digits are highly unorthodox, implausible and do not regularly occur in legitimate transactions. Such transaction structuring, as well as breaking large transactions into a series of smaller transactions in an ostensible attempt to avoid detection and is indicative of trafficking activity.

Based on the analysis above, it appears that the transactions cited in the charge letter are contrived and therefore, in the absence of plausible evidence to the contrary, are likely the result of trafficking in SNAP benefits

Attachment 2 of the Charge letter - Multiple transactions were made from the accounts of individual benefit accounts in unusually short time frames.

There were 25 sets of 54 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.

It is noted that the Appellant, through counsel, contends that it was charged with transactions which were made too rapidly to be credible. This contention cannot be addressed as Appellant was not charged with this transaction pattern in the charge letter.

Appellant, through counsel, contends that these transactions just reflect legitimate purchases and that large quantities of baby formula are sold at the store. Regarding this contention, a review of the contracted store visit conducted on May 18, 2016, shows that Appellant did in fact have an ample quantity of formula for sale. The argument that many of the cited violations occurred due to the sale of infant formula is not compelling, especially considering that Appellant was also a WIC Program authorized vendor for four out of the six review months (January 2016-April 2016). As a WIC Program vendor, the Appellant is required to offer for a sale a certain amount of infant formula, which likely explains the 20 plus units of formula that was available. But it is important to note that a SNAP participant who would need infant formula would also be eligible for WIC and would receive infant formula using WIC benefits. It is possible that a SNAP participant may purchase infant formula on an emergency basis, however, it's unlikely that a SNAP participant would use his/her SNAP benefits to purchase large amounts of infant formula (or other WIC-eligible foods). As such, most SNAP customers would likely choose to use their WIC Program benefits to purchase high cost infant formula.

It is acknowledged that it is not uncommon to see back-to-back purchases in the case of a forgotten item or impulse item of a nominal total. However, in many of the Attachment 2 transactions, the subsequent transaction(s) were for amounts that exceed any nominal, afterthought purchase. In addition, of the 25 transaction sets, several sets contained a follow up transaction that exceeded the previous transaction in the set.

It is also acknowledged that it is not Appellant's responsibility to control how SNAP recipients spend their benefits. The transactions cited in this Attachment are not questionable simply due to their frequency. In fact, SNAP households have no limit on the number of times they may use their SNAP cards or how much eligible food they may purchase, 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 that is inconsistent with the information available about the stores available stock, characteristics and structure. Multiple transactions conducted within a set time period are often methods which stores use to avoid the detection of single high dollar transactions that cannot be supported by the store's inventory and structure.

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 - Excessively large purchase transactions were made from recipient accounts.

There were 188 SNAP transactions that met the parameters of this attachment. Based on the results of the contracted store visit, the large transaction amounts are not consistent with the store's inventory of low-priced foods. The firm does not offer food in bulk or any ethnic or specialty foods that sell for a high price. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

The Appellant states that, the store carries a large amount of food items that EBT card holders can use to purchase large amounts of eligible food items and this is not considered trafficking. Despite the attorney's claims that the store is well stocked and therefore SNAP recipients do all their grocery shopping at Appellant's store, the record reflects that household analyses display that many households are shopping at larger and better stocked stores.

This analysis concluded that of the 54 households, 35 (over 64 percent) also shopped at other area grocery stores including large grocery stores, 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/superstores in and around the Kings County area of New York. This is another strong trafficking indicator. Appellant's transactions exceed the area small grocery stores in almost all ranges **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The appearance, quality and quantity of stock does not merit SNAP recipients conducting so many high dollar transactions at Appellant's store. In fact, the store visit proves that this store does not sell any

unique items that cannot be purchased at other stores in the area. It also did not show that Appellant sold items in bulk or in large quantities. The average transaction amount of small grocery stores during the review period was \$11.82. Appellant's largest transaction amount was 5 U.S.C. § 552 (b)(6) & (b)(7)(C) higher than the average transaction amount of small grocery stores in Kings County, New York during the review period.

Based on the above analysis, the Retailer Operations presented a convincing case that the N and A Superette Inc. trafficked in SNAP benefits which the Appellant failed to adequately rebut. The attachments furnished with the charge letter identify the irregular patterns of SNAP transactions which indicate that trafficking was taking place at the firm during the review period. As there is more than one pattern of trafficking, a determination that the Appellant firm engaged in trafficking becomes more convincing.

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 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 inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Retailer Operations has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns identified in the charge letter, the lack of food inventory necessary to support the firm's SNAP redemptions as observed and recorded during the onsite visit, the lack of purchase invoices of foods to cover SNAP redemption totals for the review months, the lack of adequate explanations 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.

Generally, stores caught in trafficking violations consistently display particular characteristic transaction patterns including those cited in the charge letter and, in the absence of evidence for the legitimacy of such transaction patterns, based on information submitted by the Appellant and a comparison of the store's characteristics and available stock to the transaction patterns cited in the charge letter, a conclusion can be drawn through a preponderance of evidence that the unusual, irregular, and inexplicable transactions and patterns 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 owner has not provided sufficient evidence to rebut the convincing case that Appellant most likely trafficked in SNAP benefits. As such, the SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have trafficked, which is that FNS shall disqualify the firm permanently.

CIVIL MONEY PENALTY

The Appellant, through counsel, requested consideration of a civil monetary penalty in lieu of disqualification. The record reflects that 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 dated August 2, 2016. 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.

Appellant, through counsel, indicated that ownership continuously trained and tested his employees concerning the SNAP regulations and maintained an exemplary record, which is evidence of his continued compliance with the law and his training and supervision of employees however, Appellant did not provide any documentation to demonstrate that it had established and implemented an effective SNAP compliance policy and program prior to the violations. Therefore, it is the determination of this review that the Retailer Operations Division' decision, not to impose a trafficking CMP in lieu of disqualification, is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

Retailer Operations Division' analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify N and A Superette Inc. 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 above, the determination to impose a permanent disqualification against N and A Superette Inc. 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

January 12, 2021