

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

Phillips 66 Kincaid,	)	
	)	
Appellant,	)	
	)	
v.	)	Case Number: C0192039
	)	
Retailer Operations Division,	)	
	)	
Respondent.	)	
_____	)	

**FINAL AGENCY DECISION**

It is the decision of the USDA that there is sufficient evidence to support a finding that the permanent disqualification of Phillips 66 Kincaid from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

**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 Phillips 66 Kincaid.

**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 17, 2016, 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 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 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 charge letter was delivered to the store on August 18, 2016. The Appellant did not reply to the charge letter.

After considering the Appellant's lack of reply and the evidence in the case, the Retailer Operations Division issued a determination letter dated September 28, 2016. 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 dated October 3, 2016, 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 or selling of ... [SNAP] benefits 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).*

*(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 January 2016 through June 2016. This involved the following transaction patterns which are trafficking indicators:

- Multiple transactions were made from individual household benefit accounts within unusually short timeframes.
- Excessively large purchase transactions were made from recipient accounts.

**Charge Letter Attachment 1: Multiple transactions were made from individual benefit accounts in unusually short time frames. 7 USC 2018 (b)(7)(e):**

7 USC 2018 (b)(7)(e)

**Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. 7 USC 2018 (b)(7)(e):**

7 USC 2018 (b)(7)(e)

### **APPELLANT'S CONTENTIONS**

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

- The Appellant initially stated that it did not receive the charge letter, but later admitted that it had found the letter which had been lost in the store.
- The store sells frozen pizza and frozen chicken which is then cooked free for customers at the store.
- The store is run by its employees.
- The store has an employee meeting once per month to make sure that all employees are informed what can be purchased with SNAP benefits.

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**

#### **Authorization History**

The Food & Nutrition Service (FNS) initially authorized Phillips 66 Kincaid for the SNAP on May 20, 2010. During the review period, Phillips 66 Kincaid was classified by FNS as a convenience store.

#### **Store Visit**

The case file documents that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a July 19, 2016 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:

- Phillips 66 Kincaid is approximately 2,000 square feet in size and operates out of a freestanding building in a rural commercial area.
- The store had no handheld shopping baskets and no shopping carts for customer use.
- There were two (2) cash registers and one (1) point-of-sale device.
- There was no food stored outside of public view in a storage area.
- There were no large bulk foods, international foods or other specialty foods that might sell for a high price. There were no fresh meat/seafood bundles or fresh fruit/vegetable boxes for sale. The store did not sell infant formula.
- The food inventory was minimal and there were some empty shelves.
- The checkout area consisted of a two small countertops (no more than 2 x 2 feet) divided by cash registers. The small checkout area was not conducive to conducting large transactions.

The inventory of food items at the time of the store visit was typical of a convenience store. However, the store was deficient in all four required staple food categories and likely did not meet SNAP eligibility requirements at the time of the store visit. The SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive 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, alcohol, lottery tickets, gasoline, household goods, pet food and automotive supplies. The store also had a kitchen with menu boards where SNAP ineligible hot prepared ready-to-eat food was sold.

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.

#### Multiple Transactions by the Same Household Within a 24-hour Period

7 USC 2018 (b)(7)(e).

7 USC 2018 (b)(7)(e). In addition, the store did not have any handheld shopping baskets or shopping carts for transporting large amounts of 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

7 USC 2018 (b)(7)(e)

The store visit pictures show that the store layout is not conducive to these excessively large transactions. There were no shopping carts or handheld shopping baskets for transporting food around the store and the checkout counter space is very small. In addition, the store's stock is mainly inexpensive snack foods, single serving food items and

accessory food items. The store visit report and pictures do not show that the firm offered any food for sale in bulk, international items, fresh meat/seafood bundles, or boxes of fresh produce that would justify high dollar transactions atypical of a convenience store. The Retailer Operations Division properly considered these factors in making its determination that the transaction patterns cited in the charge letter are more likely than not due to trafficking.

The Appellant claims that it sells frozen chicken and frozen pizza which it then cooks for its customers for free after the sale and that this accounts for the excessively large SNAP transactions. However, the store visit photographs do not show any frozen pizza and the chicken products in the store are clearly sold as hot prepared food not intended for home preparation and consumption. The hot chicken is marketed and sold as *Krispy Krunchy Chicken* and as *Barn Box Specials* with biscuits, fries and other side items such as corn dogs, fried okra, mashed potatoes and fried corn on the cob. These are clearly intended to be hot at the time of purchase and are thus ineligible for purchase with SNAP benefits. Even if the store was selling ineligible hot prepared food in exchange for SNAP benefits, the prices for these products are unlikely to explain the excessively large SNAP transactions cited in Charge letter Attachment 2.

Sometimes a firm may have higher than normal SNAP transactions amounts due to a recipient's lack of access to other SNAP authorized stores. However, agency mapping systems show that there are 13 SNAP authorized firms located within a seven-mile radius of Phillips 66 Kincaid. These SNAP authorized stores include a medium grocery store, a large grocery store and two (2) superstores. The medium grocery store is located within a 0.13 mile radius and has fresh meats and fresh produce. This medium grocery store is much more likely to be a preferred shopping destination for SNAP customers in the area instead of Phillips 66 Kincaid. In addition, all of the larger stores offer a greater variety and amount of staple food at likely better prices. Therefore, a lack of SNAP authorized stores does not explain the abnormally high transactions at the Appellant firm.

The Retailer Operations Division also conducted a shopping analysis of some of the households that were identified in the charge letter. The Retailer Operations Division compared the shopping patterns of four (4) households at the Appellant store to their shopping patterns at other SNAP authorized stores. All of these households shopped at large grocery stores, supermarkets and superstores during the review period. This again indicates that lack of access is not an issue for these households. However, despite this access to larger and better stocked stores, these households conducted large transactions at Phillips 66 Kincaid that were either comparable to, or larger than, the transactions conducted at these larger stores. 7 USC 2018 (b)(7)(e). There is no credible explanation why these households would spend such a large amount of their benefits at the Appellant store when they had access to these much larger and better stocked stores.

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 very limited staple food inventory, limited availability of counter space, and the lack of shopping carts and shopping baskets support the Retailer Operations Division determination. Customers purchasing such large quantities of food items would

have to hold them in their arms, or enlist the help of others while shopping, all without the benefit of shopping carts or hand baskets.

### Owner Not Involved in Violations

The Appellant states that Phillips 66 Kincaid is an employee run store. Although the owner was allegedly not involved in the violations, it cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. Regardless of whom the ownership of a store may utilize to handle store business, the ownership is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Lastly, Miteshkumar Patel signed the FNS application to become a SNAP authorized retailer on April 21, 2010, which included a certification and confirmation that the owner(s) 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.” These violations included the exchange of SNAP benefits for cash, otherwise known as trafficking.

### Summary

Based on the above analysis, the Retailer Operations Division presented a *prima facie* case that Phillips 66 Kincaid 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 the Appellant store was trafficking during the review period. As there is more than one pattern of irregular transactions, the case of trafficking is convincing.

## **CIVIL MONEY PENALTY**

The Appellant claims that the store has an employee meeting once per month to make sure that all employees are informed what can be purchased with SNAP benefits. However, 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. 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. 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 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 Phillips 66 Kincaid, 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 (FOIA), it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

RONADL C. GWINN  
ADMINISTRATIVE REVIEW OFFICER

November 28, 2016  
DATE