

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

Santiago Food Center Inc,

Appellant,

v.

Case Number: C0207289

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification against Santiago Food Center Inc. (hereinafter Appellant) from participating 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 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant on June 20, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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

By letter dated April 26, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in September 2017 through February 2018. 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 ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant, through counsel, responded to the charges in a letter dated May 22, 2018. This letter did not request a CMP nor was any evidence submitted to be considered in support of a CMP. The Retailer Operations Division notified Appellant by letter dated June 20, 2018, that the firm was permanently disqualified from participation as a SNAP retailer in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter dated June 27, 2018, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. No subsequent correspondence was received from Appellant.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR Part 278.6(a) and Part 278.6(e)(1)(i) 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 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."

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." Trafficking is defined in part as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". Trafficking includes "Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food".

7 CFR §278.6(i) states: "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)(ii) states: “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).” Part 278.6(b)(2)(ii) further states that if a firm fails to request a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the specified 10 days, the firm shall not be eligible for such a penalty.

SUMMARY OF THE CHARGES

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. The charges on review were based on an analysis of SNAP EBT transaction data during the six month period of September 2017 through February 2018. This involved three patterns of EBT transaction characteristics indicative of trafficking:

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

APPELLANT’S CONTENTIONS

The following may represent a summary of Appellant’s contentions 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 herein:

- The store is in a heavily populated residential area and is next to two female shelters;
- There are legitimate explanations for the transactions noted in the charge letter attachments. Many items are priced in even amounts without cents. For example, ice cream is \$5.00 or \$6.00, cans of soda are .50 cents, candy is \$1.00, infant formula is \$20.00, etc. A \$21.00 charge can be a can of formula and a candy bar. These are not that common based on Attachment 1 and on average are 2-3 transactions per day;
- The multiple transactions are because the mothers from the two shelters have 2-3 kids or more and once they get their SNAP benefits, they buy a lot of items for their children;
- The excessively large transactions are not common occurring 2-3 times per month. To the best of the owner’s recollection, transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** are usually by mothers with infant children who are buying 3-5 cans of formula at \$20.00 per can along with other items;

- The charge letter was the first notice the owner ever received of allegations of trafficking. The firm has not been given an opportunity to establish an effective compliance policy and is willing to implement one immediately; and,
- A careful review is requested and after completion of this review it is requested that the disqualification be rescinded.

Appellant submitted no evidence or other rationales in support of these contentions.

ANALYSIS AND FINDINGS

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. Nevertheless, transactions having such characteristics are sometimes valid and sufficient evidence that support that they were the result of legitimate purchases of eligible food items is provided. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited and to provide evidence that they are legitimate.

The Retailer Operations Division presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant's store during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Store Background and FNS Store Visit

FNS authorized the firm as a convenience store on September 18, 2017. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a March 16, 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 suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a very small store offering a very minimal quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- The store primarily stocked traditional American brands, but also had a limited stock of Hispanic (e.g. Goya) products.
- The store visit report and photos showed no shopping carts or hand baskets for use by customers making it difficult for them to carry large amounts of food to the checkout.
- No food packages, bundles, case sales, bulk items, or other sales were evident that would explain the unusual transactions and no cased items were available for purchase.
- The store visit report specifically noted that the firm was not a specialty store and that there were no meat bundles or fruit and vegetable boxes for sale.

- The sole checkout area was approximately 1.5 feet deep and 2.0 feet wide with many displays and a PIN pad taking up space on both sides leaving limited space for customers to place their purchases. The very small checkout area would make it problematic to process large orders. The checkout area had one cash register, no optical scanner, and a POS terminal as confirmed by a store employee.
- The store had a very minimal stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, and other drinks as well as many ineligible items.
- Interior and exterior signage advertised a wide variety of hot/cold, prepared, ready-to-eat foods that included hot/cold sandwiches, hot entrees, hot breakfast items, wraps, burgers, Panini sandwiches, hot/cold side orders, salads, and hot drinks.
- The store had a large deli display case and a sizeable commercial kitchen/food prep area with a wide range of equipment that included a cooktop grill, deep fat fryers, sandwich press, commercial slicer, commercial exhaust hood, prep tables, and chest freezers. Per a store employee, store staple food stock such as deli meats and cheeses are being used in preparing hot/cold, ready-to-eat prepared foods making it difficult to determine if a food item in the deli case is actually for sale or for use in hot/cold food preparation.
- The store had no fresh unprocessed meat, no fresh unprocessed seafood, no frozen unprocessed meat, no frozen unprocessed seafood, a very limited quantity and variety of processed meats (jerky, canned meat/poultry/fish, deli meat, sausages, & enchilada meat), no processed seafood except for canned fish, no packaged lunch meats, no bacon, no hot dogs, no frozen entrees, no frozen dinners, only two dozen eggs, a limited selection of fresh fruit and vegetables, no frozen fruits or frozen vegetables, an extremely limited stock of canned soups, no Ramen noodle soups, a minimal quantity and variety of canned and packaged staple food items, a limited variety of deli cheese, a minimal stock of packaged cheese, yogurt, sour cream, no butter, no margarine, a very limited stock of baby cereals/foods/ juices, a very limited stock of infant formula, no dry pasta, no dry noodles, no all-purpose flour, no corn meal, a moderate selection of bread/rolls/tortillas/ tostadas, no pita bread, and very few expensive staple food items.
- Ineligible items included: tobacco, tobacco accessories, hot foods, hot drinks, health and beauty items, household products, paper products, ATM, candles, incense, newspapers, clothing, cell phones/phone cards, and diapers while accessory foods included: candy, spices, condiments, snacks, baked goods, coffee, tea, cooking oil, sugar, single serving ice cream, ice cream, un/carbonated drinks, and cold ready-to-eat prepared foods.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- The store's hours of operation were open 24/7 as confirmed by a store employee. The store employee also stated that the business did not take telephone or online orders, did not deliver groceries; and did not round prices up/down.
- Many food items were priced with all visible food prices ending in .x9 cents except for a very few items priced differently such as some baked goods with manufacturer's pricing of .50 cents, split top wheat bread with manufacturer's pricing of two for \$5.00, and canned soda priced at .50 cents. Comments on the FNS store visit report

by the contract reviewer specifically stated that most of the food prices ended in .x9 cents. A price ending in .x9 cents is the most common pricing structure for stores of this type.

- The FNS store visit report listed the four most expensive food items costing more than \$5.00 for sale in the store as being a 12.5 ounce can of Enfamil priced at \$19.99, deli meats priced at \$9.49/pound, a 10 pound bag of rice priced at \$9.99, and a 1.1 quart bottle of Pedialyte priced at \$7.99. This listing of the most expensive items was provided by a store employee during the store visit.
- While the firm did stock a limited selection of baby foods and infant formula, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers, not SNAP EBT.
- The store visit photos and report showed several empty or marginally stocked shelves and display racks indicating a slow turnover of stock.
- The quantity and variety of the store's staple food inventory was much less than that seen during the previous FNS store visit on September 1, 2017.

Unusual numbers of transactions ending in a same cents value

This attachment lists 878 transactions ending in the same cents value of .00 cents.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These include an unusually high number of transactions for the exact same dollar amount that are not supported by store inventory or pricing. When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits. The FNS store report and photos revealed no signs posted to indicate special food packages, bundles, case sales, or other sales that would explain the unusual number of transactions ending in these same cents values and no bulk items were available for purchase. Based on the contractor visit, the store's inventory contained almost exclusively inexpensive single-serving, prepared food items and accessory foods. As such, it is implausible that several of these relatively inexpensive items purchased together would routinely total to a purchase amount ending in .00 cents. The high percentage of same cent transactions combined with the large number of high dollar transactions is irregular and suspicious for this type store.

Appellant contends that many items are priced in even amounts without cents. For example, ice cream is \$5.00 or \$6.00, cans of soda are .50 cents, candy is \$1.00, infant formula is \$20.00, etc. A \$21.00 charge can be a can of formula and a candy bar. These are not that common based on Attachment 1 and on average are 2-3 transactions per day.

The inventory report and photos from the 2018 FNS store visit show the Appellant firm offered a very minimal stock of staple foods that included only a small number of expensive staple food items making it questionable that such a large number of high dollar SNAP transactions could be for legitimate food purchases. Contrary to Appellant's claim, the store visit report specifically notes that Appellant's pricing structure has the majority of food prices ending in .x9 cents and this fact is reinforced by numerous photos of store stock. The purchase of several items with prices ending in .x9 cents would most likely not result in a total ending in a same cents value of .00 cents as multiples of nine seldom have a value ending in this amount making it statistically impossible that this many store transactions would end in this amount with legitimate food

purchases. This is further supported by the number of high dollar value transactions in the third Attachment that do not end in .00 cents. Additionally, it is noted that the can of infant formula cited by Appellant as being priced at \$20.00 and accounting for transactions in this Attachment is actually priced at \$19.99 as evidenced by the store visit report and photos, not \$20.00 as claimed by Appellant.

While some of the transactions in this Attachment may have been for legitimate staple food purchases, particularly those in the lower dollar amounts, there is insufficient evidence that these repeating same cent transactions are legitimate. When many transactions end in a same cents amount, it appears that these transaction amounts are contrived and therefore, in the absence of compelling evidence to the contrary, are suggestive of trafficking. As such, the transactions in this Attachment have not been adequately documented as legitimate.

Multiple transactions in unusually short time frames

This Attachment documents 77 individual transactions in 33 sets of two or more transactions conducted by 25 different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends the multiple transactions are because the mothers from the two shelters have 2-3 kids or more and once they get their SNAP benefits, they buy a lot of items for their children.

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment 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 the store's stock and facilities and are thus indicative of trafficking. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant's contentions also provide no explanation as to why households would conduct three or four sizeable transactions at the Appellant firm within a short period of time.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that subsequent transaction dollar amounts are substantial in these transaction sets and that all of the sets in this Attachment 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average convenience store SNAP transaction amount in New York County during the review period was \$8.30. These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby like type grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review.

The Retailer Operation Division's analysis of the shopping patterns for households listed in this Attachment shows that they have ready access to transportation as evidenced by their shopping at a variety of larger food stores located nearby and at a distance from Appellant's location, including a variety of super stores and supermarkets. Appellant's contentions fail to offer any explanation or rationale as to why households who are regularly shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases totaling to high dollar values at a very minimally stocked store. Common sense dictates that it is improbable that households would choose to spend large dollar amounts at the Appellant firm if their purchases consisted solely of eligible food items that could be purchased at any of the super stores and/or supermarkets they were already regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant firm.

For example, one of the households analyzed conducted three of the 33 transaction sets in this Attachment. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). A review of the other two sets conducted by this household showed similar patterns. There is no legitimate reason why a household would spend so much of its SNAP allotment at this very minimally stocked convenience store when it clearly had access to and frequently shopped at supermarkets and super stores located nearby and at a distance. The more plausible explanation is that this household was trafficking at the firm. Other households analyzed by the Retailer Operations Division had similar suspicious shopping patterns indicative of trafficking.

While reviewing the Retailer Operations Division's shopping pattern analysis for the above household, this Review Officer noticed it displayed an unusual pattern of swiped and manually key entered transactions at the Appellant firm, often within hours of each other. Manually keyed transactions are those in which the magnetic strip on the EBT card is not being read by the store's POS terminal when swiping the card and the clerk must manually enter the lengthy EBT card number into the POS terminal. When the magnetic strip on an EBT card fails, it can no longer be swiped and replacement EBT cards contain different identification numbers. This household used the same EBT card throughout the review period. On-site investigations into trafficking at retailers have found it is not uncommon for retailers to have the SNAP recipient's PIN and EBT card number in order to facilitate trafficking SNAP benefits in exchange for cash without the need for the recipient to be physically present. The retailer manually enters the EBT card number as the recipient has the actual EBT card and then enters the PIN. A review of other EBT transactions on the date of these manual transactions show that Appellant's POS terminal was functioning properly as there are swiped transactions immediately before and after the manually keyed transactions. This household conducted 86 swiped transactions at 17 stores located 0.04-6.91 miles away from Appellant's location that included four super stores and one supermarket. It conducted 46 transactions at the Appellant firm, 12 of which were manually keyed transactions. A pattern of manually keyed and swiped transactions using the same EBT card is indicative of trafficking. Appellant offered no explanation as to why this household would conduct large transactions at its firm before and/or after conducting substantial transactions at larger stores that included super stores and supermarkets when they would offer a greater quantity and variety of eligible food items at lower prices or why it would have manually keyed transactions within hours or a day of swiped transactions at the Appellant firm.

There may be legitimate reasons why a SNAP household might return to a store during a short period of time, but the examples in this Attachment indicate a series of SNAP purchases that total to large dollar amounts. Multiple transactions over a short period of time, especially those of high dollar values, are indicative of attempts to obscure trafficking by dividing a large dollar value transaction into a series of smaller dollar value transactions and are a method which violating stores use to avoid high dollar transactions that cannot be supported.

High Dollar Value Transactions

This Attachment lists 249 individual EBT transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The substantial number of high dollar transactions is uncharacteristic for a store of this size offering a very minimal stock of staple foods and calls into question the legitimacy of these transactions. The SNAP transactions listed are also substantially higher than the average SNAP transaction amount of \$8.30 for this store type in New York County. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores, located nearby as well as at a distance from Appellant's location, that offer a greater quantity and variety of eligible foods items for better prices than customers can find at the Appellant firm. While households residing in areas with extremely limited grocery store options may conduct high dollar value transactions at convenience stores out of necessity, this is not the case when households have better alternatives. FNS records show 65 other retailers located within a 0.5 mile radius that includes four super stores and two supermarkets. There is one supermarket, two large grocery stores, and one medium grocery store located within 440 yards of Appellant's location with the supermarket located approximately two blocks away. These large dollar transactions remain questionable when considering the proximity of the other stores that would be better shopping options for consumers. Based on their shopping patterns, transportation does not appear to be an issue for these households. Yet, these recipients continue to shop and spend suspicious high dollar amounts at the Appellant firm, where the eligible food stock is limited, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of their purchases at larger food stores. It is also noted that the Appellant firm is located on a street with scheduled fixed route bus service and NYC Metro service that would facilitate shopping at other stores.

The difference in the average SNAP transaction dollar amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for New York County convenience stores during the review months and at the Appellant firm is significant. Appellant's SNAP transaction dollar volume is 59.08 percent larger than that of New York County convenience stores and its average SNAP transaction dollar amount is 32.41 percent larger than the County average while its average SNAP transaction count is 20.08 percent larger than like type stores. The unusually high number of SNAP transactions is an indication the firm may be dividing larger transactions into multiple smaller transactions in an effort to circumvent detection as previously discussed. A comparison of Appellant's SNAP redemptions to that of nearby like type stores having redemptions for the review period shows that none exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant firm even though all are located in proximity

to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is a further indication that the transactions in this Attachment and the others do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of store and the store's stock. An analysis of shopping patterns by the Retailer Operations Division shows that households in this Attachment are regularly shopping at much larger stores, and conducting transactions of large dollar amounts, yet are conducting comparable or higher dollar value transactions at the Appellant firm. It makes no sense for a household that regularly shops at larger stores and apparently has no transportation limitations to spend large dollar amounts at the Appellant firm since its cost of goods is higher than that of larger stores such as supermarkets or super stores.

Appellant contends the store is in a heavily populated residential area and is next to two female shelters. The excessively large transactions are not common occurring two-three times a month. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

As previously stated, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers, not SNAP EBT. The supermarket located two blocks away is a WIC vendor as are both of the large grocery stores and the medium grocery store all located within less than 440 yards of Appellant's location.

Information obtained during the FNS store visit on March 16, 2018, shows that the Appellant firm offers a very minimal quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Much of the inventory for sale consists of inexpensive snacks, candy, condiments, drinks, and single serving foods as well as many ineligible items. Since the firm offers no fresh unprocessed meat, no fresh unprocessed seafood, no frozen unprocessed meat, no frozen unprocessed seafood, a very limited quantity and variety of processed meats (jerky, canned meat/ poultry/fish, deli meat, sausages, & enchilada meat), no processed seafood except for canned fish, no packaged lunch meats, no bacon, no hot dogs, no frozen entrees, no frozen dinners, only two dozen eggs, a limited selection of fresh fruit and vegetables, no frozen fruits or frozen vegetables, an extremely limited stock of canned soups, no Ramen noodle soups, a minimal quantity and variety of canned and packaged staple food items, a limited variety of deli cheeses, a minimal stock of packaged cheeses, yogurt, sour cream, no butter, no margarine, a very limited stock of baby cereals/foods/ juices, a very limited stock of infant formula, no dry pasta, no dry noodles, no all-purpose flour, no corn meal, a moderate selection of bread/rolls/tortillas/tostadas, no pita bread, and very few expensive staple food items, these patterns are deemed to be suspicious. The fact that tobacco, tobacco accessories, hot foods, hot drinks, health and beauty items, household products, paper products, ATM, candles, incense, newspapers, clothing, cell phones/phone cards, and diapers are not eligible for use or purchase with SNAP benefits also provides no justification for the high transaction amounts.

Higher food prices make it even more unlikely that SNAP recipients, with very limited food benefits, would want to spend a considerable part of their benefits in a store that does not address

all of their food shopping needs when they are already shopping at larger, fully-stocked stores that would offer a greater variety of foods at lower prices. Many of these stores would also offer store brand products at lower prices, offer weekly specials, and have shopping carts and checkouts with built-in scanners and conveyor belts to facilitate processing purchases quickly. Additionally, Appellant furnished no itemized cash register and corresponding EBT receipts for the period under review to document the legitimacy of these excessively large transactions and no evidence was provided of SNAP eligible store stock via receipts of products taken into inventory for the relevant review months. The firm has a very small checkout area and no shopping carts thereby making it difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. Therefore, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of multiple carts and more likely that the amounts were contrived. It is also noted that the store visit photos and report show several empty or marginally stocked shelves and display racks and also that the quantity and variety of the store's staple food inventory was much less than that seen during the previous FNS store visit on September 1, 2017.

It is further noted that SNAP redemptions at the Appellant firm decreased following receipt of the charge letter on April 27, 2018. The average SNAP transaction dollar amount decreased 24.21 percent from April 2018 to May 2018 while the volume of SNAP redemptions decreased 22.28 percent during the same timeframe. A pronounced decrease in SNAP redemptions following receipt of the charge letter is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

Based on this discussion, Appellant did not provide adequate evidence to support the legitimacy of the excessively large transactions in this Attachment.

Other Contentions

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. A record of participation in SNAP with no previously documented instance of violations or assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges or for mitigating the impact of those charges.

The owner and the firm were charged with trafficking based on a computer analysis of the store's transactions for the months of September 2017 through February 2018. The charges do not derive from the use of a confidential informant or independent investigator who visited the store and made illegal purchases to support findings of trafficking, but by a computer program used by SNAP Administrators. While traditional undercover operations are still in use by USDA, for many years federal regulations have also authorized the use of evidence consisting of EBT

transaction data in investigations of SNAP retail stores to determine if trafficking is occurring and U.S. District Courts have long upheld the validity of EBT transaction data.

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.” SNAP regulations at 7 CFR § 271.2, define trafficking as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food”. SNAP regulations at 7 CFR § 278.6(a) clearly state that “FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system”. In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant firm during the review period. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the review period. All of the transactions were then reviewed and analyzed by the Retailer Operations Division staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photos from the FNS store visit, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant firm during the review period. This analysis included a review of the firm to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

Based on this empirical data, and in the absence of sufficient evidence for the legitimacy of 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 charge letter evidence trafficking as the most likely explanation for the questionable transactions listed in the charge letter Attachments. It is herein determined that Appellant did not provide a preponderance of evidence demonstrating that the transactions contained in the charge letter were more likely due to eligible food sales than not. Under review, the evidence more substantially supports a conclusion that the transaction activity in the charge letter Attachments is due primarily to trafficking in SNAP benefits.

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is

conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon the first occasion of a disqualification based on trafficking by a retail food store.” In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option under existing regulations.

CIVIL MONEY PENALTY

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

Based on the above discussion and the evidence under review, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Accordingly, the Retailer Operations Division’s decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

The Retailer Operations Division presented a case that Appellant has likely trafficked in SNAP benefits. Their 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 consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in three Attachments of EBT transaction data, the inadequacy of the store’s staple food stock as observed during the store visit to support large transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type and larger stores in the county and state.

The retailer has not provided sufficient evidence to rebut the case that Appellant most likely trafficked 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, in fact, occur as charged. Based on the

discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a trafficking CMP according to Section 278.6(i) of the SNAP regulations.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

ROBERT T. DEEGAN
Administrative Review Officer

November 15, 2018