

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

**SPA Food Liquor & Gas,**

**Appellant,**

**v.**

**Case Number: C0209402**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the USDA that the record indicates that SPA Food Liquor & Gas (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 SPA Food Liquor & Gas by letter dated August 23, 2018.

**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 June 26, 2018, 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 November 2017 through April 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 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

In correspondence dated August 3, 2018, Appellant replied to the charge letter and generally stated that the problems, which are highlighted by Attachments 1, 2 and 3, largely can be attributed to ownerships unfamiliarity with the system by which SNAP transactions are reported. Ownership had no previous experience with the SNAP program. Likewise, none of his employees had experience with the SNAP program. Ownership did not take any classes on SNAP sales before purchasing his business. In order to effect compliance with SNAP, ownership has now engaged the previous owner of the store to come and help him understand the system better so that he can have more control of it. It is significant that the Department find no fault with ownership in terms of the items sold under the SNAP program. Certain customers had been purchasing larger amounts of items such as Red Bull, Rock Star, Pepsi and Coke-Cola. Those customers negotiated with ownership in order to get a cheaper lot price. The rounding of prices by ownership in order to move the product accounts for most if not all the transactions which the Department isolated as ending in 0 cents. Ownership has taken encouraging steps to bring his store into compliance with SNAP procedures. Ownership welcomes the opportunity to be instructed by the Department in order to avoid any future problems with SNAP

After giving consideration to the Appellant's reply and evidence of the case, Retailer Operations Division issued a determination letter dated August 23, 2018. 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 September 4, 2018, Appellant 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 November 2017 through April 2018. This involved the following transaction patterns, which are trafficking indicators:

1. An unusual number of transactions ended in a same cents value.
2. Multiple transactions were made from the accounts of individual SNAP households within a set time-period.
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, in relevant part:

1. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) had no previous experience with the SNAP program. Upon receiving the initial letter of charges from SNAP, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) has taken steps that he hopes will ensure effective compliance with SNAP procedures.
2. Two out of three employees including 5 U.S.C. § 552 (b)(6) & (b)(7)(C) himself have reviewed the official SNAP Training Guide and Video. The third employee is scheduled to do so upon her return to work.
3. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) continues to seek assistance from the previous owner of the store to help him better understand the system and its functions.
4. The Department did not originally find fault with 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in terms of the items sold under the SNAP program.
5. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) has taken encouraging steps to bring his store into compliance with SNAP procedures. He welcomes the opportunity to be instructed by the Department and/or to participate in any Department offered classes to avoid any future problems.

Appellant did not provide any additional information or evidence in support of its position. 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 convenience store on January 7, 2016. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a May 21, 2018, store visit to the business conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- One cash register and one POS device. The checkout counter is approximately 2 ft. X 5 ft. and cluttered with merchandise and displays making large transactions difficult.
- Estimated to be approximately 1147 square feet.
- No shopping baskets and one shopping cart available for customer use.
- An optical scanner available at checkout but no conveyor belts for speedy 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 stored in an area outside of public view
- Store has storage freezers or coolers but not food stored off site.

- Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
- Store does not take telephone or online orders and does not offer delivery
- Highest priced eligible food items were Jerky (\$9.99 & \$12.99), Beef Stick (\$12.99), and Red Bull 4 pack (\$7.99).
- Store stocks a significant amount of non-food items such as but not limited to paper products, household products, tobacco products, automotive products, health and beauty aids, alcohol products, lottery tickets, pet food, hats and cleaning products.
- Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products. Does not carry fresh meat, meat plans, deli products, fresh produce, baby food, baby formula, and ethnic or specialty foods. Appellant does not accept WIC.
- No kitchen/prepared food area and no hot foods sold for onsite consumption.
- Food is sold for on-site consumption with a microwave available for heating.
- A deli or prepared food section. Stock is not used in preparation of food.
- No meat or seafood specials, bundles, or fruit/vegetable boxes sold.
- The store has a locked room where liquor is stored. The expired food returns are on the counter next to the microwave. The store has a small storage freezer, which contains some food for the store and some personal food for the owner.
- The store visit documentation appears to suggest that Appellant may not have been minimally eligible to hold a SNAP authorization on the day of the visit.

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 – Unusual number of transactions ending in a same cents value.**

There are 122 SNAP transactions meeting the parameters of this attachment. When such repetitive patterns are unsupported by special pricing structures, they are a strong indicator of trafficking in SNAP benefits.

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 cents. When there are disproportionate amounts 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 cents. In addition, a store that is rounding prices up or down or an even value would not have any transactions ending in odd values.

In its response to the charge letter, Appellant, through counsel, contends that certain customers had been purchasing larger amounts of items such as Red Bull, Rock Star, Pepsi and Coke-Cola. Those customers negotiated with ownership in order to get a cheaper lot price. The rounding of prices by ownership in order to move the product accounts for most if not all the transactions which the Department isolated as ending in 0 cents. With regard to this contention, the store visit, which was conducted on May 21, 2018, does not indicate the sale of bulk items. In fact, the most expensive items on the list are beef jerky and beef stick, both at \$12.99 each followed by regular jerky for \$9.99, and then Red Bull at \$7.99 for a 4 pack. The record reflects that this list was compiled with the help of store personnel, so it would make sense that if these items were sold in bulk, the cashier would know and would have informed that contractor.

Additionally the store visit showed only a few cases of these items stocked on the floor and the back room appeared only to carry cases of alcohol. The store does not appear to carry enough of these items to justify the transactions in the charge letter, and the Appellant did not supply invoices to demonstrate that it sold large quantities of these items. In conclusion, it is therefore more likely true than not true that the irregular transactions cited in the charge letter Attachment 1 are due to trafficking in SNAP benefits

**Attachment 2 of the Charge letter - Multiple transactions were made from the accounts of individual SNAP households within a set time-period.**

There are 43 sets of 117 SNAP transactions meeting the parameters of this attachment. Multiple transactions conducted by the same household account 5 U.S.C. § 552 (b)(6) & (b)(7)(C) 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.

As an example, a particular household has no transactions at Appellant's store in December, January or February and shops mostly at superstores and supermarkets. It is implausible that on 3/5/18, this same household would conduct two SNAP transactions at Appellant 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) later make a SNAP purchase, at a superstore, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is also implausible that on 4/6/18, this household would make a SNAP purchase at a superstore 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) later conduct a SNAP transaction at Appellant 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or return to Appellant, the next day, and conduct two more SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C), when it would have been more logical to make such large purchases at the larger superstores which offered a much larger quantity and variety of eligible food items for likely better prices.

Retailer Operations also conducted an analysis of the shopping habits of three of the households identified in the charge letter. This analysis concluded that these households also shopped at other area grocery stores including 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 Stanislaus County area of California. This is

another strong trafficking indicator.

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 are 183 SNAP transactions meeting 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. It was also noted that the owner is no longer stocking or selling Red Bull in his store. This seems questionable, as there is no reason that if the transactions were all legitimate and the owner was selling large amounts of these items that they would remove them from the store.

The record reflects that when Appellant's store is compared to its almost identically stocked competitors, SPA Food Liquor and Gas has 122 questionable transactions while the competitors had very few combined or none. During the review period, Appellant's average transaction amount was more than two times higher than the average convenience store in California, and although Appellant's total number of transactions, during the review period, were 493 less than the average for this store type, its SNAP redemptions were more than 28 percent higher than that of other convenience stores in the State.

Appellant, through counsel contends that it had no previous experience with the SNAP program and upon receiving the charge letter ownership has taken steps that will ensure effective compliance with SNAP. Additionally, Appellant, through counsel, contends that ownership continues to seek assistance from the previous owner of the store to help him better understand the system and its functions. With regard to these contentions, it is important to note that Appellant was SNAP authorized on January 7, 2016. Appellant received the same Authorization Kit that is sent to all retail food stores when they are newly authorized in the SNAP, including various information booklets, signs and posters indicating the Do's and Don'ts, rules of the SNAP available in several languages, a copy of the SNAP regulations, and a training video. Therefore, Appellant's contentions cannot be accepted as valid basis for dismissing the charges or for mitigating, the penalty imposed.

Appellant, through counsel, contends that the Department did not originally find fault with ownership in terms of the items sold under the SNAP program. Appellant, through counsel, also contends that ownership has taken encouraging steps to bring his store into compliance with SNAP procedures. With regard to these contentions, Appellant's referencing of a previous compliance investigation, acts as verification that Appellant clearly understands SNAP and the rule and regulations regarding retailer participation in the program. Additionally, for the purposes of this review, a record of no previously documented instances of violations or misconduct regarding participation in the SNAP does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges. Moreover, it is

important to note that any remedial actions taken subsequent to program violations also do not provide a valid basis for dismissing the charges or for mitigating the impact of the penalty imposed.

Based on the above analysis, the Retailer Operations presented a convincing case that the SPA Food Liquor & Gas 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 may be 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 convenience stores in the State.

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Therefore, based on this empirical data, and in the absence of evidence for the legitimacy 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. 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 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 June 26, 2018. 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' 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's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify SPA Food Liquor & Gas. 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 SPA Food Liquor & Gas 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

March 18, 2019