

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

Stop by Grocery Store,

Appellant,

v.

Case Number: C0201126

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the permanent disqualification of Stop by Grocery Store (Stop by Grocery Store or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), 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), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

AUTHORITY

7 USC § 2021 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 July 19, 2017, the Retailer Operations Division charged 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 April 2017 through June 2017. 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 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 replied to the charges on July 26, 2017, and denied trafficking. Appellant provided invoices for its eligible food stock and receipts for each of the transactions.

After considering the evidence and the retailer's reply, the Retailer Operations Division issued a determination letter dated May 15, 2018. The determination letter informed Appellant that 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 Appellant was not eligible for a trafficking CMP because 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 May 22, 2018, Appellant appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions 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.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) and (e)(1) 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 USC § 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 § 271.2 states that the definition of "coupon" includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

7 CFR § 271.2 states, in part, that, 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 § 271.2 defines trafficking, in part, as:

The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone; . . .

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**, . . .” (emphasis added)

7 CFR § 278.6(b)(2)(ii) states, inter alia:

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(e)(1) reads, in part:

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

7 CFR § 278.6(i) states, inter alia:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.

7 CFR § 278.6(b)(2) states, in part:

(ii) Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence as specified in § 278.6(i), that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria

included in § 278.6(i). **This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).** [Emphasis added.]

(iii) **If a firm fails to request consideration for a civil money penalty** in lieu of a permanent disqualification for trafficking **and submit documentation and evidence** of its eligibility **within the 10 days** specified in § 278.6(b)(1), **the firm shall not be eligible** for such a penalty. [Emphasis added.]

SUMMARY OF THE CHARGES

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from April 2017 through June 2018. This involved one SNAP transaction pattern, excessively large purchase transactions made from recipient accounts, which is indicative of trafficking. 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.

APPELLANT'S CONTENTIONS

In its May 22, 2018, administrative review request, Appellant provided the following summarized contentions, in relevant part:

- Every transaction was addressed in its previous reply.
- The electronic report was not indicative of intent to defraud.
- Appellant has no prior violations.
- Appellant is requesting a review because there was no headway made when it submitted its 500 page packet.

The preceding may represent only a brief summary of the Appellant's contentions presented 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.

ANALYSIS AND FINDINGS

Store Visit

FNS authorized Stop by Grocery Store as a convenience store on March 9, 2017. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a June 10, 2017, 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 irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Stop by Grocery Store is approximately 700 square feet, with no additional food storage outside of public view.

- Checkout occurs through a small turnstile window through a Plexiglas wall with limited counter space.
- There were no shopping baskets or shopping carts for customer use.
- There was one point-of-sale device.
- There was no fresh unprocessed meat, poultry, or fish.
- There were some packages of deli meat, hot dogs, bacon, canned meat, canned fish, and beef jerky.
- There was no fresh produce.
- Dairy included milk, cheese, and butter.
- Other staple foods available for purchase were eggs, juice, rice, bread, beans, cereal, pasta, and canned goods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included health and beauty products, cleaning products, and tobacco products.

There were no items provided during the store visit that were priced greater than \$5.00. The SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. Given the available inventory, there was very little sign that the firm would be likely to have SNAP redemption patterns that differed significantly from those of similar-sized competitors, especially competitors that sell similar or identical food items.

Charge Letter Attachment

The attachment furnished with the charge letter represents the questionable and unusual pattern of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period.

Charge Letter Attachment: Excessively large purchase transactions were made from recipient accounts. This attachment lists 387 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C).** **5 U.S.C. § 552 (b)(7)(E).** Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

As indicated previously, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar-sized competitors. These large transaction amounts are also not consistent with the store's inventory. There was no fresh unprocessed meat, poultry, or fish and there was no fresh produce. In fact, there were no items noted in the store visit report of any food items priced more \$5.00. Most of the food products in the store consisted of accessory food items such as snack foods, candy, and soda and inexpensive staple foods such as canned and packaged goods. It is unlikely that these large dollar transactions were for eligible food items given that checkout occurred through a small night window which makes processing large dollar transactions difficult. In addition, there were no shopping baskets for customers to carry around multiple low dollar value foods.

When a supermarket or super store is available, it is unlikely that a SNAP recipient would conduct excessively large SNAP transactions at a convenience store with a limited selection of staple foods like Appellant. The Retailer Operations Division determined that there are 37 authorized stores within a one mile radius of Appellant, including 19 other convenience stores, six combinations stores, six small groceries, four medium groceries, and two supermarkets. Thus, households who shop at Appellant have access to and do shop at large grocery stores, supermarkets and super stores, among all other types of authorized stores.

The Retailer Operations Division compared Appellant to two nearby larger stores located .01 and .02 miles from Appellant. Appellant's average SNAP transaction amount was close to three times the other stores' average SNAP transaction amount. The Retailer Operations Division determined that the transaction pattern noted at Appellant, described in the charge letter attachment, exceeded the two nearby convenience stores, as seen on the table. The data from these nearby stores provided adequate evidence to demonstrate that the transaction pattern at the Appellant firm was unusual and indicative of possible trafficking violations.

5 U.S.C. § 552 (b)(7)(E)

The Retailer Operations Division examined three households identified in the charge letter to analyze their shopping patterns at Stop by Grocery Store compared to their shopping patterns at other SNAP authorized stores. Despite their access to better stocked stores, each of the three households conducted excessively large transactions at Stop by Grocery Store

5 U.S.C. § 552 (b)(7)(E) of shopping at a supermarket or super store. It is questionable as to why households would conduct large transactions at Appellant, when these households had just visited or planned to visit larger stores with a better selection of fresh meat and produce and likely better prices.

In summary, Appellant's layout, business structure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. 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 to legitimize 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.

Cash Register Receipts

With its reply to the Retailer Operations Division, Appellant submitted 387 cash register receipts for each of the listed charge letter transactions. The Retailer Operations Division reviewed the cash register receipts and questioned their credibility. The receipts provided were all itemized as if they were scanned at the register. These items would need to be passed through a window in order to be scanned if such a scanner existed. In order to verify the transaction receipts, an undercover investigator was sent to the store to purchase items that were frequently listed on the receipts. The investigator was only able to purchase one of the items on the list during two

separate visits. The majority of items were not available for purchase. The Investigator was also not provided with an itemized receipt during either of its transactions and there was no optical scanner observed.

In addition, the Retailer Operations Division noticed that in 90% of the submitted receipts there was one non-specific item very often as the first line item on the receipt.

5 U.S.C. § 552 (b)(7)(E). The Retailer Operations Division determined that it is unlikely that the retailer was selling items at these prices and it was more likely that these items were included to ensure the receipt total would match the transaction total of the listed questionable transactions.

Given the reasons listed, it appears that the data in the charge letter attachment was used to create the receipts that were submitted and therefore the receipts are not considered credible evidence.

Invoice Analysis

Appellant provided purchase invoices from the review period in order to show that the store had sufficient food inventory to justify its SNAP redemptions. The case record documents that the Retailer Operations Division thoroughly reviewed these purchase invoices to determine if they could support the store's actual SNAP redemptions during the review period. The Retailer Operations Division applied a 40 percent markup to all food and beverage items to arrive at an estimated retail sales amount during the applicable months of the review period. The estimated retail sales amount was then compared to Appellant's SNAP redemptions for the corresponding months of the review period. Using the purchase invoices supplied by the Appellant, there is an unexplained inventory shortfall **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. This shortfall of food inventory to redemption amounts provides further support to the determination made by the Retailer Operations Division that Appellant was trafficking in SNAP benefits during the review period.

Decrease in Unusual Redemptions

After the June 10, 2017, store visit, Appellant's unusual transactions decreased dramatically. Appellant's total SNAP redemptions dollar volume decreased by 55% in June compared to its total SNAP redemption dollar volume in May 2017. In addition, there were 202 unusually large transactions conducted in May and there were only 15 of these types of transactions in July.

The Retail Operations Division determined that Appellant received the charge letter on July 20, 2017, Appellant's SNAP redemptions continued to decline even more. During the review period, Appellant conducted 387 unusually large transactions. However, in the nine months following receipt of the charge letter, Appellant conducted only 11 transactions that met the parameters of this scan.

If the high dollar transactions in the charge letter were legitimate food purchases, then there should not be a drastic decrease in its SNAP redemptions or the transaction pattern following receipt of the charge letter. As such, unexplained and drastic declines in SNAP redemptions as a result of receiving compliance related correspondence are often indicative of trafficking.

Evidence

Appellant contends that the electronic report was not indicative of fraud. The ALERT system is a computerized fraud detection tool to identify SNAP transactions that form patterns having characteristics indicative of trafficking. However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still conduct an extensive analysis of the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether the questionable transactions were, more likely than not, the result of trafficking. Lastly, Appellant is always given a chance to explain the specific transaction patterns before the determination letter is issued and during the administrative review.

The legality of this method is supported by 7 CFR §278.6(a) which states, inter alia, “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.]

The documentation and evidence provided by the Retailer Operations Division was thoroughly examined. From all indications, the Retailer Operations Division obtained the EBT data (provided by ALERT), found it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough investigation before concluding that trafficking was likely occurring. Appellant’s implication that the Retailer Operations Division simply charged a store with trafficking violations simply because it was listed on some computerized reports is unfounded.

Appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed and that the transactions detailed in the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. Appellant offered no credible evidence to prove that the transactions listed in the charge letter were legitimate purchases of eligible food. In the absence of compelling information or documentation weighed in comparison to the evidence provided by the Retailer Operations Division, the evidence weighs in favor of the Retailer Operations Division’s determination that SNAP-benefit trafficking substantially produced the transaction activity at issue in the present case.

Intent

Appellant explains that there was no intent to defraud the SNAP. SNAP regulations do not require evidence of intent in order to disqualify a retail store for trafficking. Therefore, whether or Appellant or its employees intended to violate SNAP regulations by exchanging cash for SNAP benefits is irrelevant.

No Previous Violations

Appellant contends that it has not had any previous SNAP violations. A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of them violations upon which they are based. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

CIVIL MONEY PENALTY

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR § 278.6(i). Appellant was informed that it would need to provide both the request and supporting evidence within ten calendar days of receiving the charge letter and that no extension of time could be granted for making the request or for providing the required evidence. Appellant did not 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, Appellant would likely not have been eligible a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy to prevent SNAP 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 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 that are consistent with trafficking violations 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 occur as charged by the Retailer Operations Division. The determination to impose a permanent disqualification against Appellant is sustained.

The Retailer Operations Division also determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations. Under review, the denial of a trafficking CMP was deemed correct and proper.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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 the Appellant's owner resides or is 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, 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

September 24, 2018