

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

Super Duper,	)	
	)	
Appellant,	)	
	)	
v.	)	Case Number: C0190665
	)	
Retailer Operations Division,	)	
	)	
Respondent.	)	
_____	)	

**FINAL AGENCY DECISION**

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

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against Super Duper.

**AUTHORITY**

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may . . . file a written request for review of the administrative action with FNS.”

**CASE CHRONOLOGY**

In a letter dated June 10, 2016, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of

irregular SNAP transaction patterns that occurred during the months of November 2015 through April 2016. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated the Appellant had the right to respond to the charges within 10 days of receipt to provide explanations for the irregular SNAP transaction patterns. The letter also stated that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

The Appellant replied to the charges in a letter dated June 27, 2016. The Appellant generally stated that the irregular transaction patterns described in the charge letter were due to the store being wrongly classified as a convenience store. The Appellant also provided bank statements, purchase invoices, a CD, and proof of quarterly compliance meetings. The Appellant did not request a trafficking CMP in lieu of a permanent disqualification within the 10-day time frame mandated by 7 CFR § 278.6(b)(2).

After considering the Appellant's reply and the evidence in the case, the Retailer Operations Division issued a determination letter dated July 29, 2016. The determination letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations. The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated August 8, 2016, the Appellant requested an administrative review of the Retailer Operation Division's determination. The request for administrative review was granted.

### **STANDARD OF REVIEW**

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

### **CONTROLLING LAW AND REGULATIONS**

The controlling law in this matter is covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulation under Title 7 CFR Part

278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

7 U.S.C. § 2021(b)(3)(B) states, *inter alia*:

*... a disqualification under subsection (a) shall be ... permanent upon ... the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards ...*

7 CFR § 278.6(e)(1)(i) states:

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

7 CFR § 271.2 states, *inter alia*:

***Trafficking*** means the buying or selling of ... [SNAP] benefits for cash or consideration other than eligible food ....

7 CFR § 271.2 states, *inter alia*:

*Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption.*

7 CFR § 278.6(a) states, *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.]*

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, *inter alia*:

*(ii) Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence as specified in § 278.6(i), that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). **This information and evidence shall be submitted within 10 days**, as specified in § 278.6(b)(1).*

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

## SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from November 2015 through April 2016. This involved the following transaction patterns which are trafficking indicators:

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

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

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

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

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

## APPELLANT'S CONTENTIONS

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

- Super Duper is a small grocery store and not a convenience store. The store's stock

in 90 percent food, five (5) percent beer and alcohol and five (5) percent non-food items.

- The transactions cited by the USDA are not trafficking but are legitimate wholesale purchases by customers and local business owners.
- Generally customers shop at Super Duper more than once daily.
- Super Duper has stayed within profit ranges for an entry level small business.
- The owner was not warned of any violations prior to the issuance of the charge letter.
- The owner is a full-time college student and is unable to physically monitor transactions on a daily basis but receives weekly reports.
- The store has installed a new point-of sale system and cameras so the owner can monitor the store remotely.
- The Appellant has provided bank statements, purchase receipts, and proof of quarterly compliance meetings as well as a CD with store pictures and other miscellaneous information.
- The acceptance of SNAP benefits is essential for the store's overall success.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

## **ANALYSIS AND FINDINGS**

### Authorization History

The Food & Nutrition Service (FNS) initially authorized Super Duper for the SNAP on April 2, 2015. In its application dated December 22, 2014, the Appellant replied "no" to the question "do you sell products wholesale to other businesses such as hospitals or restaurants?" Upon authorization, the Retailer Operations Division classified the store as a convenience store based upon the information contained in its application and the results of a store visit conducted on March 27, 2015. During the review period, Super Duper was classified by FNS as a convenience store.

### Store Conditions during the Review Period

The case file documents that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a March 25, 2016 store visit conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock and facilities. This information was then used to ascertain if there were justifiable explanations for the store's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Super Duper is approximately 450 square feet in size and operates out of a freestanding building in an urban commercial area.
- The signage on the outside of the store said Tobacco Discount.
- The store had no handheld shopping baskets and no shopping carts for customer use.
- The store did not have an optical scanner for the rapid processing of transactions.
- There were two (2) cash registers and one (1) point-of-sale device.
- There was no evidence of a wholesale business such as posted wholesale prices or separate entrances for wholesale customers.
- There was no food stored outside of public view in a storage area.
- There were no large bulk foods, or other specialty foods such as infant formula that might sell for a high price. There were no fresh meat/seafood bundles or fresh fruit/vegetable boxes for sale.
- One of the coolers was broken.
- The checkout area consisted of a small countertop (no more than 2 x 2 feet) which was crowded with product on either side. The small checkout area was not conducive to conducting large transactions.

The store was deficient in the dairy category and likely did not meet SNAP eligibility requirements at the time of the store visit. The inventory of food items at the time of the store visit was typical of a convenience store with limited staple foods. 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. Accessory food items included, but were not limited to: coffee, tea, carbonated and non-carbonated drinks, condiments, and spices. The stocked ineligible items included tobacco, alcohol, DVDs, paper goods, sunglasses, incense, and clothing.

Given the available inventory as noted above, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors.

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

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

The Appellant states that customers shop at the store more than once daily without further explanation. 7 USC 2018 (b)(7)(e). In addition, the store did not have any handheld shopping baskets or shopping carts for transporting large amounts of food within the store. Based on the analysis above, and in the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

## Excessively Large Transactions

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

The store visit pictures show that the store layout is not conducive to these excessively large transactions. There were no shopping carts or handheld shopping baskets for transporting food around the store and the checkout counter space is very small. In addition, the store's stock is mainly inexpensive snack foods, canned/packaged foods and accessory food items. The store visit report and pictures do not show that the firm offered any food for sale in bulk, international items, fresh meat/seafood bundles, or boxes of fresh produce that would justify high dollar transactions atypical of a convenience store. The Retailer Operations Division properly considered these factors in making its determination that the transaction patterns cited in the charge letter are more likely than not due to trafficking.

The Appellant claims that Super Duper is a small grocery store that sells wholesale to other businesses and customers and is not a convenience store. Regarding this contention, the Appellant's SNAP application and the store visit reports clearly shows that it was correctly classified by FNS as a convenience store. Even if the store was a small grocery store, its SNAP transactions would still be excessively large for that store type. Likewise, there is no evidence in the casefile that the store sells wholesale. The Appellant's original SNAP application also stated that it did not sell food wholesale. The store visit photographs show no evidence of food offered for sale in bulk (with the possible exception of alcohol which is not a SNAP eligible food item) and no signage advertising wholesale prices. Even if some wholesale sales were made to local businesses or customers, it would not explain the irregular SNAP transactions as local businesses do not make SNAP transactions; only individual households that purchase and prepare meals together may be authorized as a SNAP recipient.

Sometimes a firm may have higher than normal SNAP transactions amounts due to a recipient's lack of access to other SNAP authorized stores. However, agency mapping systems show that there are 15 SNAP authorized firms located within a one-half mile radius of Super Duper. These SNAP authorized stores include two (2) supermarkets located 0.76 miles from the Appellant store. These larger stores offer a greater variety and amount of staple food at likely comparable or better prices. The Retailer Operations Division also examined the transactions at two competitor convenience stores nearby and found that these stores did not have large dollar transactions like Super Duper during the review period. Therefore, a lack of SNAP authorized stores does not explain the abnormally high transactions at the Appellant firm.

The Retailer Operations Division also conducted a shopping analysis of some of the households that were identified in the charge letter. The Retailer Operations Division compared the

shopping patterns of five (5) households at the Appellant store to their shopping patterns at other SNAP authorized stores. All of these households shopped at large grocery stores, supermarkets and superstores during the review period. This again indicates that lack of access is not an issue for these households. However, despite this access to larger and better stocked stores, these households conducted large transactions at the Appellant firm that were either comparable to, or larger than, the transactions conducted at the supermarkets and superstores. 7 USC 2018 (b)(7)(e). There is no credible explanation why these households would spend such a large amount of their benefits at the Appellant store when they had access to these much larger and better stocked stores.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space, and the lack of shopping carts and shopping baskets support the Retailer Operations Division determination. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping, all without the benefit of shopping carts or hand baskets.

#### Purchase Invoices

The 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, omitting only those invoices that were outside the review period. The Retailer Operations Division then analyzed the purchase invoices to determine if they could support the store's actual SNAP redemptions during the review period.

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

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

7 USC 2018 (b)(7)(e). This does not take into account that the shortfall would likely be greater as the Appellant store likely had cash and credit card sales of food. The invoices also indicate that the Appellant's claim that 90 percent of its sales are in food is incorrect. In conclusion, the case record documents that the Retailer Operations analyzed the firm's purchase invoices in comparison with the firm's total SNAP redemptions during the same time period and properly concluded the firm had an insufficient food inventory to justify its actual SNAP redemption amounts.

#### Profitability of the Store



The Appellant provided bank account information to support its contention that the store has stayed within the profitable ranges of an entry level small business. The Appellant also indicates that the business is making only a minimal profit. However, the business plan or financial solvency of the company is not in question. Whether or not a store is profitable does not explain the irregular SNAP transactions cited in the letter. As a result, the Retailer Operations Division properly determined that this evidence has no probative value in this case.

#### Owner Not Involved in Violations

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

Lastly, Laquisha Bond signed the FNS application to become a SNAP authorized retailer on December 22, 2014, which included a certification and confirmation that the owner(s) would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” These violations included the exchange of SNAP benefits for cash, otherwise known as trafficking.

#### Hardship to the Store

The Appellant states that the acceptance of SNAP benefits is essential for the store’s overall success. With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in the SNAP. **7 USC 2018 (b)(7)(e)**. To allow store ownership to be excused from assessed administrative penalties based on a purported economic hardship would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

#### No Prior Warning

The Appellant states that the owner was not warned of any violations prior to the issuance of the charge letter. Regarding this contention, the SNAP regulations do not require the

Retailer Operations Division to give prior warnings before issuing a charge letter for trafficking. SNAP regulations at 7 CFR §278.6(e)(7) states that FNS will “send the firm a warning letter if violations are too limited to warrant a disqualification.” Trafficking transactions are not considered to be “violations that are too limited to warrant a disqualification.” Trafficking in SNAP benefits is an extremely serious violation and both 7 U.S.C. § 2021(b)(3)(B) and 7 CFR § 278.6(e)(1)(i) state that a first time violation warrants a permanent disqualification. Therefore, the Appellant’s contention does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

### Corrective Actions

The Appellant states that the store has installed a new point-of sale system and cameras so the owner can monitor the store remotely. Regarding this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is limited to what circumstances existed at the time that was the basis of the Retailer Operations Division’s action. It is not the authority of this review to consider what subsequent remedial actions may be planned so that a store may begin to comply with program requirements.

7 USC 2018 (b)(7)(e). Therefore, Appellant’s contention that corrective action has taken place or that further remedial actions are planned does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### Summary

Based on the above analysis, the Retailer Operations Division presented a *prima facie* case that Super Duper trafficked in SNAP benefits which the Appellant failed to adequately rebut. The attachments furnished with the charge letter identify the irregular patterns of SNAP transactions which indicate that the Appellant store was trafficking during the review period. As there is more than one pattern of irregular transactions, the case of trafficking is convincing.

## **CIVIL MONEY PENALTY**

The Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i) even though it was informed of the right to do so in the charge letter. Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program prior to the violations.

Therefore, the Retailer Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

## **CONCLUSION**

The Retailer Operations Division's analysis of the Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify the retailer. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges.

In the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did in fact occur as determined by the Retailer Operations Division. Based on the discussion above, the decision to impose a permanent disqualification against Super Duper, Appellant, is sustained.

## **RIGHTS AND REMEDIES**

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act (FOIA), it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

RONALD C. GWINN  
ADMINISTRATIVE REVIEW OFFICER

October 12, 2016

DATE