

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

Super Saver Liquor LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0187938

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Super Saver Liquor LLC, (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(c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant by letter dated April 28, 2016.

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 March 9, 2016, Retailer Operations Division informed ownership that Appellant was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 271 – § 278, based on EBT benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm." The Charge letter stated, in

relevant part, that “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.” The Charge letter also stated, in relevant part, “FNS may impose a civil money penalty (CMP)...in lieu of permanent disqualification of a firm for trafficking...If you request a CMP, you must meet each of the four criteria listed and provide the documentation as specified within 10 calendar days of your receipt of this letter...Your request and all documentation must be postmarked by midnight of the 10th calendar day after you receive this letter in order to be considered timely...If your request and the required documentation are not submitted on time, you will lose your right for any further consideration for a CMP.”

In a March 21, 2016, telephone conversation with Retailer Operations Division, Appellant, through representation, requested an extension of time in which to reply to the letter of charges. In a letter dated March 21, 2016, Retailer Operations Division granted Appellant, and its representation, a 10 day extension to March 31, 2016, in order to reply to the Charge letter. In a letter dated March 31, 2016, Appellant, through representation, replied to the Charge letter and generally stated that the store was in a predominately low income area where 30 percent of the households in the neighborhood did not have a vehicle, less than 20 percent had two vehicles, and therefore, a lot of the shopping had to be done within the neighborhood. Appellant also stated that it kept its prices low, equal to or less than the nearest grocery store, and tried to establish a market presence. Appellant, through representation, indicated that it had succeeded in attracting many SNAP participants to shop for multiple items at one time rather than just the single missing meal items. Appellant provided sales tax returns for September 30, 2015 and December 21, 2015. Representation stated that the tax returns show that almost 80 percent of Appellant’s sales were non-alcohol related, non-SNAP receipts were greater than other area convenience stores, and that Appellant’s prices were 25-30 percent less than other convenience stores in the area. Appellant, through representation, stated that customers would shop more than once a day since they did not have a car to get out of the neighborhood and it was hard to carry several bags at one time. Also, there were multiple users on a card and all walked to the store at different times during the day. Appellant’s representation also stated that Super Saver had large transactions due to competitive pricing. Appellant provided 69 pages with EBT receipts and corresponding cash register receipts in support of its position.

After giving consideration to the Appellant’s reply and evidence of the case, Retailer Operations Division issued a determination letter dated April 28, 2016. This letter informed Appellant that it was permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also stated that Retailer Operations Division considered Appellant’s eligibility for a trafficking 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 May 9, 2016, Appellant, through counsel, appealed the Retailer Operations Division’ determination 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) (c) 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, *inter alia*, 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 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(c) reads, in part, “*Review of Evidence*. The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1)...the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS”

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.”

SUMMARY OF THE CHARGES

The charges on review were based on an analysis of SNAP electronic benefit transfer (EBT) transactions dated during the six month period of August 2015 through January 2016. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from individual benefit accounts in usually short time frames.
2. Excessively large purchase transactions were made from recipient accounts.

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

The Appellant, through counsel, made the following summarized contentions in its response to the permanent disqualification letter issued by Retailer Operations Division, and its request for administrative review, in relevant part:

- It does not appear that the violations alleged against Super Saver arise to the level of permanent disqualification as indicated in Section 278.6(e)(1), nor do the violations appear to rise to any level of disqualification above the 6 month disqualification set forth in Section 278.6(e)(5).
- Based upon the findings against Super Saver, under SNAP regulations, we believe that the penalty against Super Saver should be limited to 6 months as Super Saver has never previously received notification of failure to comply with SNAP regulations, nor has it been previously sanctioned.
- In order to prevent such violations from happening in the future, Super Saver will review all the SNAP training materials, including the guides and videos with its ownership, management and employees to ensure that no further violations occur.

Subsequent correspondence dated July 26, 2016, Appellant, through counsel, provided two copies of the SNAP training guide for retailers with all pages initialed by “5 U.S.C. § 552 (b)(6) & (b)(7)(C)” and “5 U.S.C. § 552 (b)(6) & (b)(7)(C)”. The attached letter states “the principals of Super Saver Liquor, LLC at the time of the allegations have reviewed the SNAP training materials, including the guide and video found on the website... in addition to watch the video, they have each printed out the training guide, reviewed it and initialed each page... I have attached the initialed pages as a showing of their willingness to continue their education and compliance with the requirements of the program.”

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 October 8, 2014. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a February 6, 2016, 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 EBT transactions at Appellant that formed patterns indicative of trafficking. The firm review summary documented the following store size, description, and characteristics:

- 1 register and 1 POS device, a small counter area, approximately 2ft x 2ft in size, partially obstructed by other smaller items available for sale.
- No adding machines but optical scanners were available at checkout.
- Two shopping baskets were available but no shopping carts.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- No hot food sold for take-out or onsite consumption.
- No deli or prepared food section.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.
- Estimated 1344 square footage with no food stored in storage area out of public view.
- Does not operate through a night window or plastic barrier with food stock behind the barrier.
- Store is not a delivery route, farmers' market or specialty food store primarily selling one food type such as meat, poultry, seafood, bread, fruit or vegetables.
- Store stocks a significant amount of non-food items such as but not limited to household products, personal hygiene products, tobacco products, alcohol products, jewelry, and clothing items.
- Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products.
- Photographs indicated that there were some dusty cans and packages and ice crystals formed on some of the frozen food items.
- Documentation indicated that Store was deficient in the dairy products category.

Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm 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 - Multiple transactions were made from individual accounts in unusually short timeframes. During the review period, this attachment documents 59 sets of 173 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 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. The following examples from the charge letter illustrate these irregular transaction patterns:

5 U.S.C. § 552 (b)(7)(E)

The store visit photographs indicated that Appellant did not offer any fresh or frozen meat, no fresh produce, and no ethnic or specialty items sold in bulk at high prices. The majority of Appellant's stock consists of canned and packaged goods with some of the canned/packaged goods containing a layer of dust which is an indication that items are not being sold or replenished. Appellant's stock did not appear sufficient to substantiate the large multiple

transaction amounts as cited in the Charge letter. The store visit report, photographs, and inventory do not indicate any compelling reason for customers to consider Appellant a first choice destination to fulfill large purchases of food, or that they would have made relatively large, multiple purchases at the store **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** there being no great variety of products, price advantage, abundance of large packages or significant bulk items, or any ethnic or specialty items. The large transaction amounts are also inconsistent with normal SNAP transaction patterns at a convenience store.

When purchasing food, people generally do not spend large sums at convenience stores. They usually stop at convenience stores to pick up quick snacks and/or a beverage, or for a few staple food items that they need, such as bread, milk, eggs, or a can or two of some food, but which are not considered worth a trip to the supermarket to get. It is rare for a convenience store to have purchases such as those cited for Super Saver Liquor LLC. In fact, the store visit report and photographs document that the Appellant firm was deficient in the dairy products category and may not have been eligible to maintain SNAP authorization on the day of the store visit.

The USDA SNAP Retailer Locator confirmed there are at least seven (7) authorized firms within a 3 mile radius of Appellant's firm. The authorized firms consist of four (4) superstores and three (3) supermarkets. Retailer Operations Division also conducted a shopping analysis of five of the households identified in the charge letter. Retailer Operations Division determined 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. This indicates that lack of access to other stores is not at issue and does not support Appellant's claim, in its response to the Charge letter, that households shopped at its store due to lack of transportation. Nevertheless, despite the access to large supermarkets and superstores, these households consistently conducted much higher transactions at the Appellant firm than at the better stocked supermarkets and superstores.

Appellant, through counsel, did not offer, with its review request, any explanation or related evidence in an attempt to clarify or justify the specific transactional behavior noted in the Attachment 1 of the Charge letter therefore, based on the analysis above and in the absence of any compelling evidence to the contrary, the irregular and unusual transaction pattern cited in the charge letter is unlikely and a strong indicator of trafficking in SNAP benefits.

Based on the analysis above, it appears that the transactions cited in the Charge letter are contrived and therefore, in the absence of plausible evidence to the contrary, are likely the result of trafficking in SNAP benefits.

Attachment 2 of the Charge Letter - Excessively large purchase transactions were made from recipient accounts. This attachment lists 520 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Based on results of the contracted store visit, the large transaction amounts are not consistent with the store's inventory and 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. The following examples from the charge letter illustrate these irregular transaction patterns:

5 U.S.C. § 552 (b)(7)(E)

Retailer Operations Division compared the Appellant's SNAP transactions with the average convenience store in Iowa. The average convenience store transaction in Iowa during the review period was \$6.70. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Of the 4,018 total transactions conducted during the review period, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The store visit photographs show that the firm is a convenience store with very limited inventory of food items with no specialty or expensive items, fresh meat or fresh produce. There are also no carts and only two hand baskets available to use in transporting the large number of food items, that these transaction amounts suggest, to the checkout area. This is unlikely and a strong indicator that trafficking may be occurring. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space and lack of shopping carts or baskets supports the Retailer Operations Division determination.

No purchase receipts or invoices were provided to substantiate the transaction amounts and to document that Appellant sold large amounts of SNAP eligible foods. Retailer Operations Division determined that the register receipts, submitted by Appellant, do not provide sufficient evidence or proof that the "no tax" description on the receipts was in fact staple foods or SNAP eligible food items. There was no way to tell whether the purchases involved food, nonfood, or both.

Appellant, through counsel, did not offer, with its review request, any explanation or related evidence in an attempt to clarify or justify the specific transactional behavior noted in the Attachment 2 of the Charge letter therefore, based on the analysis above and in the absence of any compelling evidence to the contrary, the irregular and unusual transaction pattern cited in the charge letter is unlikely and a strong indicator of trafficking in SNAP benefits. Based on this empirical data, and in the absence of sufficient evidence as to the legitimacy of such transactions, 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.

In this case, ownership did not provide sufficient evidence to legitimize Appellant's transaction data as outlined in the Attachments. Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence that the store was trafficking and concluded, through a preponderance of evidence, that trafficking is the most probable explanation for the questionable transactions listed in the Charge letter attachments. 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 the *prima facie* 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, might 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.

Level of Disqualification

Appellant, through counsel, contends that the alleged violations do not rise to the level of permanent disqualification as indicated in Section 278.6(e)(1) and should be limited to six months as set forth in Section 278.6(e)(5). Regarding this contention, 7 CFR § 278.6(e)(1)(i), states in relevant part: “FNS shall take action... against any firm determined to have violated the Act or regulations. For the purposes of assigning a period of disqualification, a warning letter shall not be considered to be a sanction. A civil money penalty and a disqualification shall be considered sanctions for such purposes. The FNS... shall (1) Disqualify a firm permanently if: (i) Personnel of the firm have trafficked as defined in §271.2...” Section 278.6(e)(5) relates to disqualification for violations, such as but not limited to, the sale of common nonfood items and does not apply in this case. Therefore, Appellant’s contention does not provide a valid basis for dismissal of the charges or for mitigating the impact of those charges.

As noted, CFR § 278.6(a), which establishes the authority upon which FNS may disqualify any authorized retail food store, reads, in 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.” Therefore, that the Retailer Operations Division used computer printouts of transaction data and other reports, in addition to store visit observations and an analysis of household shopping behavior, in rendering a finding that violations indicative of trafficking are occurring, is as valid a means of establishing facts as direct evidence obtained through an on-site investigation and the eye witnessing of trafficking.

No Previous Sanctions

Appellant, through counsel, contends that the penalty should be limited to six months as Super Saver has never previously received notification of failure to comply with SNAP regulations, nor has it been previously sanctioned. With regards to this contention, the regulatory citation at 7 CFR § 278.6(d)(2),(3) which states, in part: “The FNS ...office making a disqualification or penalty determination ... shall consider:... (2) any prior action by FNS to warn the firm about the possibility that violations are occurring, and (3) any other evidence that shows the firm’s intent to violate the regulations...” requires FNS to consider any prior warnings and evidence of a firm’s intent to violate when determining a sanction. It does not require FNS to give such warnings prior to assessing a sanction.

FNS did not consider prior actions to warn Appellant about the possibility that violations were occurring because there were no prior warnings. The evidence considered by Retailer Operations Division included the computer data of questionable SNAP transactions in two identified patterns indicative of trafficking, and information obtained during the aforementioned store visit and accompanying report and photos taken by a FNS contractor. It is important to note that a record of participation in 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 the present serious charge of trafficking. There is no provision in the Act, regulations, or agency policy that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers, and/or employees.

Retailer Operations Division has presented a *prima facie* case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns in two attachments of EBT transaction data, the inadequacy of the firm's eligible food stock as observed and recorded during the onsite visit to support such large transactions, the lack of evidence of invoices of foods in inventory to cover SNAP redemption totals for the review months, the lack of explanation 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 Charge letter. Therefore, based on this empirical data, and in the absence of 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. 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 purpose of the administrative review process is to ensure that firms aggrieved by Retailer Operations Division' adverse actions have the opportunity to have their position fairly considered by an impartial review authority prior to that adverse action becoming final. Appellant has been duly given, and has taken the opportunity to present to USDA through the administrative review process whatever evidence and information it deems pertinent in support of its position that Retailer Operations Division adverse action should be reversed. Therefore, any evidence and information that Appellant presented to Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to Appellant's right to a fair and thorough review.

Ownership has not provided sufficient evidence to rebut the *prima facie* 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, through counsel, contends that in order to prevent such violations in the future, Super Saver will review all SNAP training materials including the guides and videos with its ownership, management, and employees to ensure that no further violations occur. With regards to this contention, Appellant was notified in the charge letter dated March 9, 2016, that it had 10

calendar days upon receipt of the charge letter to provide required documentation in order to be considered for the trafficking CMP.

Appellant failed to provide Retailer Operations Division with the required documentation to be considered for a trafficking CMP in lieu of disqualification. Initiating training and initialing the SNAP training guide for retailers, after being charged for SNAP violations, is insufficient and therefore, Retailer Operations Division correctly determined that Appellant was not eligible for a trafficking CMP as set forth in the SNAP regulations.

CONCLUSION

Retailer Operations Division' analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Super Saver Liquor LLC from participation in the SNAP. 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 herein, the determination to impose a permanent disqualification against Super Saver Liquor LLC is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 USC § 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your rights 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.

Monique Brooks
Administrative Review Officer

September 20, 2016
DATE