

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

Verax Company LLC d/b/a Top Grocery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0195552

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 a **Permanent Disqualification** from participation as an authorized retailer in the Supplemental Nutrition Assistance Program¹ was properly imposed against Verax Company LLC d/b/a Top Grocery (hereinafter “Top Grocery” and/or “Appellant”) and its owner of record, by the Retailer Operations Division of the FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a Permanent Disqualification against Top Grocery in a letter dated December 27, 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.

¹ Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

CASE CHRONOLOGY

In a letter dated December 7, 2016, the Retailer Operations Division informed Appellant that it was in violation of the terms and conditions of the SNAP regulations, 7 CFR §§ 270-282, based on Electronic Benefit Transaction (EBT) SNAP benefit transactions considered to “establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm.”

The Retailer Operations Division record and letter of determination indicates Appellant provided both telephonic and written responses to the letter of charges, through counsel. Following documented review of the responses Retailer Operations Division advised Appellant of a final determination of permanent disqualification from participation in the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1) for trafficking violations, in a letter dated December 27, 2016, documented to have been delivered to Appellant on December 28, 2016.

The determination letter also stated that the Retailer Operations Division considered Appellant’s eligibility for a trafficking civil money penalty (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 the trafficking CMP because the Appellant did not submit evidence to demonstrate the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated January 9, 2017, received in the offices of the Administrative Review Branch on January 12, 2017, Appellant, through counsel, submitted an appeal of the Retailer Operations Division’s assessment, requesting an administrative review of the action. The appeal 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 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 law in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)², 7 U.S.C. § 2021 and promulgated through regulation under Title 7 of the Code of Federal Regulations (CFR),³ part 278. In particular 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.

² Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246.

³ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

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, inter alia:

“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 & 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) states, inter alia:

“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...”

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).” [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 as defined in §271.2 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.” [Emphasis added]

SUMMARY OF THE CHARGES

The Retailer Operations Division materials and the charge letter dated December 7, 2016, reveal that charges were based on an analysis of EBT SNAP benefit transaction data during the six (6) month period of May 2016 through October 2016 and involved two (2) patterns of EBT transaction characteristics indicative of trafficking as follow:

- Attachment #1 lists multiple SNAP EBT transactions made from individual benefit accounts in unusually short timeframes.
- Attachment #2 lists excessively large purchase transactions made from the accounts of SNAP recipients.

APPELLANT’S CONTENTIONS

Appellant’s request for review letter of January 9, 2017 provides a copy of the December 19, 2016 written response provided for consideration by the Retailer Operations Division, reasserting the contentions contained therein and indicating that further materials will be forwarded at a later date. The restated contentions include:

- A denial of all instances of trafficking as alleged.
- Declaring that Appellant’s location, directly across from a 630 unit low income housing complex, positions it to serve a predominantly economically challenged neighborhood that depends on its SNAP redemptions.
- Noting that a lack of a large grocery store for some 30 plus blocks positions Appellant to serve customers who are not cost sensitive as convenience of location and availability of products outweighs price considerations.
- An analysis of Appellant’s monthly revenue and expenditures used to compare the average gross profit margin achieved in the focus period to that outside of the focus period, identifying the overall profit margin as “approximately 48.5 percent;” unchanged between periods.

- Explaining that certain transactions identified as suspicious in the letter of charges are related to preorder sales prepared upon customer request to support Cambodian Cultural Center events held seasonally between May and September.
- Explaining that transactions identified in Attachment #1 represent purchases split at the request of the customer.
- Citing that permanent disqualification of Appellant will cause hardship to area customers.

In a letter dated February 10, 2017 Appellant, through counsel provided over 100 signatures of customers who it states “are reluctant to give their EBT card number or addresses” but signed a declaration that “Not being able to use our EBT card at Top Grocery has created a hardship in buying our groceries”.

The February 10, 2017 letter also references that no previous SNAP Violations have been identified at Appellant; and, that a sales agreement including a provision for the return of the store to the original owners will occur if a permanent disqualification from SNAP occurs. The referenced sales agreement is not attached.

The preceding represents only a brief summary of Appellant’s contentions in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

On review, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed.

With regards to Appellant’s contentions in explanation of questionable transactions, the issue in review is whether there is sufficient evidence, through a preponderance of that evidence, that it is more likely true than not true that the questionable transactions were the result of trafficking.

Appellant Operations:

The record reveals that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a store visit conducted by FNS contracted personnel on November 5, 2016. The record indicates the November 5, 2016 visit was authorized by a self- identified “worker”. Materials reflecting observations made during the store visit describes the nature and scope of the Appellant’s operation, as well as the stock and facilities.

Appellant is reported to be open seven (7) days per week from 8AM until 11PM; located in an urban, residential area, in a strip shopping mall arrangement, with a retail footprint of approximately 1900 square feet. The store visit materials indicate that out of public view storage was declared by Appellant (sized at approximately 650 square feet), and identified as stocked

with drinks/soda only. The administrative record classifies Top Grocery as a convenience store, in accordance with FNS definitions, operating with one (1) cash register that is equipped with scanning technology⁴; and, one (1) point-of-sale (POS) terminal.

The Retailer Operations Division documents that Appellant operation presents like a typical convenience store, noting that the food stock is minimal; there are no fresh meats beyond commercially packaged deli meats; and limited fresh produce beyond one (1) bag of apples, a few bananas and oranges, and some 100 percent fruit juices identified in the official store photographs. The stock viewed one (1) shelf unit stocked on two (2) sides with staple foods such as cereal; a few bags of rice, flour, and sugar; some spices, a few jars of jellies and jams; and a minimum quantity of condiment (i.e. Ketchup, mustard). There are several snack and candy item displays; and, drink items are found both stacked on floor space and in refrigerated units although the quantities are limited. There are no pallet size displays identified. There are milk, bread, eggs, and single serve ice cream seen in the store visit photographs. One (1) freezer unit displays frozen foods such as hot pockets, burritos and Chimichangas, open for individual sale; together with single serve TV dinners and ready to heat pizza and breakfast sandwiches.

The store visit materials document that there are less than 10 hand-held shopping baskets and no shopping carts available to support the delivery of purchases to the limited counter/checkout area for the completion of merchandise price totaling and payment. There is no separate identifiable area for the placement of goods staged to package.

Non-SNAP products and services offered at Appellant include alcohol (beer and wine), tobacco products, health and beauty aids, paper goods and cleaning products, clothes, hats, caps, and sunglasses. No evidence of the availability of specialty ethnic or cultural foods is identified.

Certified photographs from the November 5, 2016 contracted store visit are presented below:



Photo #16 - Storefront



Photo #31 - Storefront and Strip Mall Arrangement

Note in Photo #16 that the Advertised Store Name is “The Smoke Mart”.

⁴ On review Appellant explains that at initial purchase the cash register in use included an inoperative register receipt tape; and, that the register has been replaced to support more robust record keeping. The cash register replacement date was not provided.



Photo #22 – Counter and Checkout Area



Photo #26 – General Store Overview



Photo #11 – Staple Food Stocking Area



Photo #7 – Staple Food Stock



Photo #25 – Misc Clothes/Caps & Stockroom



Photo #24 – Frozen Food



Photo #32 – Frozen Food & Ice

The inventory at the time of the November 5, 2016 store visit is shown to include inventory in the four (4) staple food groups including:

- Five (5) varieties of dairy products including with one (1) unit of sour cream/yogurt; between six (6) and 20 units of butter/margarine and cheese; and more than 20 units of ice cream and milk.
- Thirteen (13) varieties of fruits and vegetables with one (1) bag of apples; a partial bag of oranges; five (5) bananas; and 100 percent fruit/vegetable juices. Four (4) varieties represent less than six (6) cans each of fruits/vegetables.
- Eight (8) varieties of breads and cereals with more than 20 units of loaf bread; cakes/muffins/ pasta; and snacks; two (2) units of corn meal/baking mixes; and less than 20 units of breakfast cereals; rice; and flour.
- Nine (9) varieties of meat/poultry/fish staple foods with less than six (6) units of frozen foods with beef, pork, and fish as the first ingredient; between six (6) and 20 units of eggs

and frozen dinner with poultry as the first ingredient; and more than 20 units of canned meats, deli lunch meats, and jerky.

Charge Letter Attachment Analysis:

The data reflected in the letter of charges dated December 7, 2016 is the result of information gained primarily from the Anti-Fraud Locator using Electronic Benefits Transfer (EBT) Retailer Transactions (ALERT) system which is a fraud detection, decision support system designed to monitor and track electronically conducted retail transactions completed by SNAP recipients in authorized meal program and food retailer locations.

The ALERT System facilitates management of the program by providing transaction-level information to Federal personnel charged with the responsibility of SNAP retailer management and compliance. The system uses pre-defined criteria or patterns for potential fraud detection. Pre-formatted reports provide information on those stores and transactions meeting the criteria. ALERT supports both online analysis and online queries and reports for use by FNS.

The system does not make the final determination instead it is used by Retailer Operations Division to develop information and evidence for consideration in support of their development of an ultimate decision.

Attachment #1: Represents **multiple SNAP EBT transactions made from individual benefit accounts in unusually short timeframes** and includes 129 transactions, grouped in 51 sets, where 29 households redeemed SNAP benefits between two (2) and four (4) times **7 U.S.C. 2018 (b)(7)(e). 7 U.S.C. 2018 (b)(7)(e).**

Appellant provides two (2) basic explanations for the transactions identified in charge letter attachment #1 indicating that:

- 1) Customers request their orders be split into more than one (1) transaction; and,
- 2) Customers preorder food products which are gathered by store personnel and checked out quickly upon the customer arrival for pick-up. When picking up preorders customers are said to pick up additional products resulting in multiple transactions on individual cards.

Appellant indicates that splitting transactions at customer request is not a SNAP violation. Appellant is correct, however, the Retailer Operations Division does not question the splitting of orders but rather the consistent pattern of the split transactions totaling amounts that are unreasonable, and represent patterns of repeating similar totals, when considering the stock and facilities at Appellant.

Appellant also explains that customers call ahead and place orders for events being held at a Cambodian Cultural Center, that is in close proximity to Appellant, during the months of May through September; referencing specifically transactions numbers 1-28, 41-43, 112-114, and 121- 123 as examples of the explanation having occurred between May and September 2016.

Examples of cost for cases of energy drinks @ \$49.99 per case; soda by the case @ \$10.99; boxes of candy @ \$39.99 and \$50.00; bags of ice in quantities of up to 30; cases of water @ \$25.00; and bags of beef jerky @ \$19.99 each are provided. Although specific transactions and household numbers are referenced, Appellant offered no evidence supporting the information as presented. On review it is noted that the prices listed by Appellant are extraordinarily high.

It is notable that no call order practice was declared prior to the explanations provided following the letter of charges; and, it would be unlikely that a convenience store would stock products that would be useful to individual households in BBQ or picnic events beyond perhaps ice, drinks and paper goods. On review it is noted that inventory identified at the official store visit on November 9, 2016 did not include any significant volume of ice, drinks in multiple case quantities, and only minimal staple foods.

Retailer Operations Division documents that multiple transactions 7 U.S.C. 2018 (b)(7)(e) is a recognized method of avoiding single high dollar transactions that cannot be supported with a firm's inventory and operational facilities. Retailer Operations Division further cites that no compelling reason could be identified for Appellant to serve as a first choice destination for grocery purchases; that back to back transactions in almost identical amounts add to the level of suspicion of the transactions; and, the checkout setup does not support the transaction amounts in the times as listed.

Retailer Operations Division identified that five (5) households were responsible for the seven (7) sets of transactions 7 U.S.C. 2018 (b)(7)(e) with two (2) of those households conducting two (2) transactions each on two (2) separate days. Transactions numbers 1 through 4 were completed by one (1) household on two (2) separate dates in August 7 U.S.C. 2018 (b)(7)(e). Similarly transactions number 5 and 6 and 77 and 8 were conducted by the same household on July 4 and July 5 7 U.S.C. 2018 (b)(7)(e). Of the 29 households identified with multiple transactions in the six (6) month period there were four (4) households repeating the pattern four (4) times each; and nine (9) households repeated the pattern twice. Retailer Operations Division documents that it is suspicious for households to spend such high cumulative dollar amounts at a convenience store that sells basically inexpensive snack and drink items as its main commodity.

Attachment #2: Represents **excessively large purchase transactions made from the accounts of SNAP recipients** with 275 transactions 7 U.S.C. 2018 (b)(7)(e) conducted by 85 households at Top Grocery in the focus period. The transactions represent 7 U.S.C. 2018 (b)(7)(e) more than 55 percent of Appellant's total SNAP redemptions recorded in the focus period.

Appellant, through counsel, offered no specific explanation for the transactions listed in Attachment #2.

The Retailer Operations Division noted that these transactions represent amounts that are between four (4) and 20 times the average transaction of \$7.29 recorded in Pierce County Washington in the focus period.

Additionally Retailer Operations Division notes that the operational structure of Appellant, with no shopping carts; a limited checkout area; and inventory assessment indicating the predominate

availability of inexpensive items such as canned/package foods together with snacks, candy and drinks, does not support the legitimacy of the transactions as identified.

Comparison/Competitor Store Information:

Appellant indicates that it serves as a primary food store for low income area residents, principally those residing in the 630 housing unit located directly across the street; and that its location, and the lack of transportation available to area residents, position it to sell a substantial variety of staple foods 7 U.S.C. 2018 (b)(7)(e). Appellant provided a Google Map identifying that the nearest “large grocery store” to the previously identified housing unit is “some 30 blocks” away.

Contrary to Appellant’s information regarding proximity of “large grocery” stores to the cited housing unit Retailer Operations Division documents that there are 12 SNAP equivalent type or larger authorized stores within a one (1) mile radius of Appellant firm; including a supermarket located within the same city block. Retailer Operations Division documents that the larger stores offer larger selection of food items at cheaper prices than what is offered at Appellant; and, that there is no obvious legitimate reason why SNAP recipients would be accessing Appellant to conduct transactions such as those listed in the attachments to the letter of charges.

Although on review Appellant, through counsel, indicates that it adjusts its inventory to include ethnic products, in order to cater to the needs of the area population, no clearly identifiable ethnic products were specified by Appellant or identified in the store visit photographs.

On review of the SNAP Retailer Locator inquiry (<https://www.fns.usda.gov/snap/retailerlocator>) 13 currently authorized SNAP retailers were identified within a one (1) mile radius of Appellant.

Retailer Operations Division documents completing a comparison of two (2) convenience stores located in close proximity to Appellant; and, the average convenience store in Pierce County. The results are shown in the table below:

7 U.S.C. 2018 (b)(7)(e)

As seen in the table above Appellant had the highest average transaction amount while completing less overall transactions and redeeming more SNAP benefits than the average convenience store in Pierce County Washington.

Household Analysis:

Retailer Operations Division documents the analysis of three (3) randomly selected households identified as having conducted suspicious SNAP transactions at Appellant firm to the shopping patterns of those same households at alternative SNAP retailers during the focus period. These households were found to be shopping at a larger, better stocked alternative SNAP authorized firms sometimes the same day or the day following completing suspicious transactions at Appellant.

Financial Information:

On request Appellant provided the Retailer Operations Division with data relative to its reported monthly taxable revenue together with invoices/receipts verifying expenditures for goods purchased during the focus period. 7 U.S.C. 2018 (b)(7)(e).

The record also includes documentation of an analysis completed by Retailer Operations Division of the markup percentages for 50 food items, as provided by Appellant including products such as eggs, milk, candy, and soda. 7 U.S.C. 2018 (b)(7)(e).

Retailer Operations Division documents that Appellant provided invoices and receipts from local vendors including Costco, Winco, Walmart and Dollar Tree; noting that on review it was identified that many of the customers listed in the charge letter attachments also had documented purchases at those same vendors. Retailer Operations division concluded that there is no reasonable explanation why a household would pay a markup price on food items that they had access to at the lower prices.

The table below represents a comparison of SNAP redemptions in the focus period to available eligible inventory with a 53 percent markup compared to Appellant reported total grocery sales.

7 U.S.C. 2018 (b)(7)(e).

7 U.S.C. 2018 (b)(7)(e)

Denial of Allegations:

Appellant, through counsel, denies the allegations of trafficking contending that the charge letter attachments provide only statistical information, without investigative proof that trafficking has occurred. Assertions that Appellant has not violated program rules, without supporting evidence and rationale, does not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

Moreover, as previously indicated the data presented in the charge letter attachments result from analysis of SNAP transactions that meet parameters as defined in the Agency's fraud detection decision support system designed to monitor and track electronically conducted retail transactions. Retailer Operations Division has evidenced suspicious transaction patterns that are not effectively refuted in the instant case.

SNAP regulations at 7 CFR § 278.6(a) provide for the imposition of penalties based on findings of violations on the basis of evidence that may include "evidence obtained through a transaction report under an electronic benefit transfer system...."

Customer Declaration of Hardship:

Appended to the February 10, 2017 letter provided on appeal are seven (7) pages including over 100 signatures of customers who signed a typed statement attesting that "Not being able to use our EBT card at Top Grocery has created a hardship in buying our groceries."

Part 278.6(f)(1) of the SNAP regulations provides for civil money penalty assessments in cases where disqualification would cause “hardship” to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs.

However, this regulation also sets forth the following specific exception to assessments thereunder: “A civil money penalty for hardship to Food Stamp households may not be imposed in lieu of a permanent disqualification.” Therefore, this civil money penalty provision is not applicable in the present case.

CIVIL MONEY PENALTY

As previously indicated the December 27, 2016 determination letter advised Appellant of the ineligibility for consideration for a trafficking civil money penalty (CMP) according to the terms of Section § 278.6(i) of the SNAP regulations. The letter of charges dated December 7, 2016 advised Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The December 27, 2016 determination letter indicates that no information was provided by Appellant for consideration and a review of the administrative record finds no evidence of materials or information timely provided.

Therefore, on review the Retailer Operations Divisions’ determination that Appellant firm is ineligible for the imposition of civil money penalties in lieu of disqualification is affirmed.

CONCLUSION

The data from Attachments 1 and 2 of the charge letter provide sufficient evidence that the questionable transactions during the review period had characteristics that were consistent with trafficking in SNAP benefits. Government analyses of stores caught in trafficking violations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges.

The Retailer Operations Division analysis of Appellant’s EBT transaction records, upon which charges of violations are based, together with observations made during the contracted store visits provide substantial evidence that questionable transactions during the focus period have characteristics that are not consistent with legitimate sales of eligible food to SNAP customers at a store of the nature and scope as described in the preceding materials. Rather, the characteristics are indicative of illegal trafficking in program benefits.

Therefore, based on the available empirical data, and in the absence of any reasonable or evidence supported explanations for the anomalous transaction patterns, a conclusion can be drawn, through a preponderance of evidence that the majority of the “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation.

Based on the discussion above, the decision to impose a permanent disqualification from participation in the SNAP against Top Grocery is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR §279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

NANCY BACA-STEPAN
Administrative Review Officer

April 25, 2017