

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

Walia Convenience Store,

Appellant,

v.

Case Number: C0204388

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Walia Convenience Store, (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 March 14, 2018.

AUTHORITY

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

CASE CHRONOLOGY

In a letter dated January 11, 2018, Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of October 2017 through December 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 the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

In a facsimile dated January 23, 2018, Appellant replied to the charge letter and provided five pages of batch receipts which were illegible. Retailer Operations Division contacted Appellant, via telephone, on February 16, 2018, and informed Appellant that the documents provided were not legible. During the conversation, Retailer Operations Division inquired if Appellant understood the information that was being explained and what information was being requested. Retailer Operations also offered Appellant the opportunity to have someone speak on her behalf so that she would fully understand what was being requested. The Appellant agreed but failed to have anyone speak on her behalf or provide correspondence explaining the SNAP transactions in the charge letter. In a facsimile dated February 20, 2018, Appellant provided copies of EBT receipts and in correspondence received March 9, 2018, postmarked February 20, 2018; Appellant provided duplicates of the EBT receipts and register batch receipts that were previously provided.

After giving consideration to the Appellant's reply and evidence of the case, Retailer Operations Division issued a determination letter dated March 14, 2018. This letter informed ownership that they were permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also states that Retailer Operations considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, Retailer Operations Division determined that Appellant was not eligible for the CMP because it failed to submit sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated March 20, 2018, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

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

CONTROLLING LAW

The controlling statute in this matter is contained in the Food & Nutrition Act of 1977, 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 1977, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site

investigations, inconsistent redemption data, evidence obtained through a transaction report under an *electronic benefit transfer system...*” (*Emphasis added*)

7 CFR § 278.6(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 three month period of October 2017 through December 2017. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. An unusual number of transactions ended in a same cents value.
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 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:

1. The store owners provided their response to the charges by turning over receipts and writing on the charging documents what food items were contained in the transactions.
2. The biggest issue at the investigation stage was lack of adequate communication. The owners are originally from Ethiopia and English is their second language. Though they speak English well, I believe this caused confusion on both sides for what evidence was needed from Walia.
3. Please find attached, supplemental information to show that Walia did not engage in trafficking. This information includes pictures, receipts and a sworn affidavit.
4. A large portion of Walia customers are SNAP participants and disqualification from the program has been very difficult.

5. If Walia needs to update their system, change to itemized receipts, etc., they are more than willing to accommodate whatever changes the Department would see fit to restore their participation in SNAP.

In subsequent correspondence dated April 21, 2018, Appellant, through counsel, provided the following:

A signed and notarized affidavit from **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** explaining the sales equipment, purchase process by EBT customers and explanations on some of the transactions.

- Exhibit A and B: Pictures of the cash register and EBT terminal.
- Exhibit C: A page containing four (4) pictures of Z-Tape batch receipts from December 2017.
- Exhibit D: Three pages containing 12 EBT receipts.
- Exhibit E: One page containing three color photographs of store stock.
- Exhibit F: Copies of the charge letter Attachments with food items listed next to each charge amount.
- Exhibit G: One page containing photos of two EBT receipts and three Z-Tape batch receipts.
- Exhibit H: A photo of Z-Tape batch receipts showing dates for April 2018

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 initially authorized the business as a convenience store on July 25, 2012. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during the September 28, 2017, 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. One cash register and one POS device with a small counter area partially obstructed by other smaller items available for sale.
2. Estimated to be approximately 420 square feet.
3. No shopping baskets or carts available for customers.
4. No adding machines or optical scanners were available at checkout. No specialty registers present.
5. Store does not operate through a night window or plastic barrier with food stock behind the barrier.
6. No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
7. No unusual pricing structure such as ending most products with 00 cents and does not round transaction totals.

8. Food stored outside of public view in a space that is approximately 200 square feet.
9. No storage freezers or coolers and no food stored off site.
10. Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
11. Store does not take telephone or online orders and does not offer delivery
12. Highest priced eligible food items were Flour (\$45.00), Rice (\$25.00), and Honey (\$18.99).
13. Store stocks a significant amount of non-food items such as but not limited to housewares, tobacco products, alcohol products, health and beauty aids and automotive products.
14. Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and no products in the meat, poultry and fish category. No fresh fruits or produce, no fresh meat or poultry. Most meats are canned, packaged or frozen.
15. A kitchen/prepared food area with foods sold for onsite consumption.
16. No hot food sold but a microwave is available for heating. The report suggests that the microwave is for employee use and there are several hot plates that are used for roasting grains and spices which are prepackaged and sold at room temperature. Some seating is available.
17. No deli or prepared food section. Stock is not used in preparation of food.
18. No meat or seafood specials or bundles or fruit/vegetable boxes sold.
19. The store visit suggests that Appellant may have been ineligible to maintain its SNAP authorization as it was deficient in the dairy products and the meats, poultry, fish products categories.

The issue for consideration is whether Retailer Operations Division has presented a convincing case that Appellant likely trafficked in SNAP benefits. Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at 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 – An unusual number of transactions ending in a same cents value

There were 43 SNAP transactions that met the parameters of this attachment. When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits.

The record reflects that 46 percent of the Appellant's overall SNAP transactions ended in 00 cents and the store visit documentation indicates that Appellant does not have a special pricing structure that would account for such a high percentage of transactions ending in 00 cents. When there are a disproportionate amount of transactions ending in same cent value it appears the transactions are contrived and absent any compelling rationale to the contrary it is a strong indicator of trafficking. Especially when item prices end with a standard *9 it is implausible that several of these relatively inexpensive items purchased together would routinely total to a purchase amount ending in 00 cents. The store visit report indicates that Appellant does not have

any special pricing structure whereby transaction amounts would consistently end in a value of 00 cents.

Though some of the transactions in this Attachment may have been legitimate SNAP purchases, Appellant failed to adequately explain the transaction pattern given the argument presented herein. Additionally, the illegible list of food items written next to each transaction, as provided by the Appellant, is not corroborated with register receipts as evidence that those food items were actually purchased. Furthermore it is implausible that Appellant would remember exactly which items were purchased in conjunction with each SNAP transaction, as cited in the charge letter, without the assistance of a detailed register receipt.

In conclusion, it is therefore more likely true than not true that the irregular transactions cited in the charge letter Attachment 1 are due to trafficking in SNAP benefits.

Attachment 2 of the Charge Letter - Excessively large purchase transactions were made from recipient accounts.

There were 66 SNAP transactions that met the parameters of this attachment. Based on the results of the contracted store visit, the large transaction amounts are not consistent with the store's inventory and low priced foods. The firm does offer some foods in bulk and offers ethnic or specialty foods that sell for a high price. However, based on the stores available stock which consists mainly of large bags of flour, large bags of rice, large bottles of honey, lentils, some canned goods, snacks and accessory foods; the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

The store visit report indicates that Appellant may not have been eligible to maintain its SNAP authorization at the time of the visit as it was deficient in two of the four staple food categories carrying only one item in the dairy products category and no staple foods in the meats, poultry, fish category.

Appellant, through counsel, contends that it provided supplemental information to show that it did not engage in trafficking which includes pictures, receipts and a sworn affidavit. With regard to this contention, the documentation provided does not adequately explain or provide sufficient evidence to clarify the unusual, irregular and inexplicable transaction activity cited in the charge letter. The EBT receipts and batch Z-Tape register receipts, which were dated during the review period, were mostly illegible and did not provide enough information to satisfactorily determine that the transactions were legitimate SNAP purchases.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Additionally, it is important to note that the store visit report and photographs document that the Appellant firm was deficient in dairy products and the meat/poultry/fish category and tends to indicate that the firm may not have been eligible to maintain SNAP authorization on the day of the store visit.

Retailer Operations also conducted an analysis of the shopping habits of four of the households identified in the charge letter. This analysis concluded that these households also shopped at other area grocery stores including full-line supermarkets and superstores that offer a much

larger quantity and variety of eligible food items for likely better prices either on the same day or within days of visiting Appellant's firm. This again indicates that lack of access to other stores is not at issue. However, despite this access to large supermarkets and superstores, these households consistently conducted much higher transactions at the Appellant firm than at better stocked supermarkets/superstores in and around the Minnehaha County area of South Dakota. This is another strong trafficking indicator.

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.

Appellant, through counsel, contends that a large portion of Walia customers are SNAP participants and disqualification from the program has been very difficult. If Walia needs to update their system, change to itemized receipts, etc., they are more than willing to accommodate whatever changes the Department would see fit. With regard to these contentions, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. Furthermore, giving special consideration to economic hardship of the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, ownership's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed. Moreover, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. As such, this review is limited to consideration of the relevant facts and circumstances at the time this decision was made. It is not within the scope of this review to consider actions Appellant may have taken or plans to take subsequent to this decision to begin to comply with program requirements. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent the administrative action. Therefore, Appellant's contentions do not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

The transaction data and overall firm record convincingly demonstrate repetitive patterns of unusual, irregular, and inexplicable SNAP activity for this type of firm indicative of trafficking.

Once Retailer Operations Division established a convincing case against Appellant, ownership bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. If this is not demonstrated, the case is to be sustained.

As noted, 7 CFR § 278.6(a) states that FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 1977, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Retailer Operations Division has presented a convincing 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 letter of charges. Therefore, based on this empirical data, and in the absence of evidence for the legitimacy for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the unusual, irregular, and inexplicable transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation. While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence in the record.

The purpose of the administrative review process is to ensure that firms aggrieved by Retailer Operations Division's 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's 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.

CIVIL MONEY PENALTY

Appellant was notified in the charge letter dated January 11, 2018, 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. Therefore, Retailer Operations Division correctly determined that Appellant was not eligible for a trafficking CMP as set forth in the SNAP regulations.

CONCLUSION

Ownership has not provided sufficient evidence to rebut the 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.

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Walia Convenience Store 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 Walia Convenience Store is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 1977, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

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

Monique Brooks
Administrative Review Officer

June 28, 2018