

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

Elegant Deli,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0237809

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance (“ROC”) to impose a permanent disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) against Elegant Deli (“Appellant”).

ISSUE

The purpose of this review is to determine whether the ROC took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a Permanent Disqualification against Appellant on May 19, 2021.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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 February 18, 2021, the ROC charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations. This charge was based on a series of SNAP transaction patterns that “establish clear and repetitive patterns of unusual, irregular, and inexplicable activity for your type of firm.” This letter of charges states: “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.” The letter also states that “. . . under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of a permanent disqualification of a firm for trafficking.”

Appellant replied to the ROC's charges in writing. The record reflects that the ROC received and considered the information provided prior to deciding. The ROC determined that Appellant's contentions did not outweigh the evidence that the store was trafficking. Based on the preponderance of evidence, the ROC concluded that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

The ROC issued a determination letter dated May 19, 2021. This letter informed Appellant that it was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6 (c) and 278.6(e)(1) for trafficking violations. The letter also states the ROC 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 ROC determined that Appellant was not eligible for the CMP because Appellant had not submitted sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

On May 25, 2021, Appellant appealed the ROC's determination and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. 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 if personnel of the firm engaged in trafficking of SNAP benefits.

7 CFR § 278.6(a) states, in part:

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 based on 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(a) states, in part:

Any firm considered for disqualification ... under paragraph (a) of this section... shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination.

The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification . . . The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter . . .

7 CFR § 278.6(c) reads, in part:

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) of this section, 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, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(e)(1)(i) reads, in part:

FNS shall . . . [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2.

Trafficking is defined in 7 CFR § 271.2, in part, as:

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

Also, at 7 CFR § 271.2, eligible food is defined as:

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(b)(2)(ii) states, in part:

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

7 CFR § 278.6(b)(2)(iii) states:

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.

SUMMARY OF CHARGES

The charges under review were based on an analysis of SNAP Electronic Benefit Transfer (EBT) transaction data during the period from May 2020 through October 2020. This analysis identified the following patterns of SNAP transaction activity that indicate trafficking:

- Multiple transactions made from the same accounts in unusually short time frames; and,
- Unusually large transactions.

The attachments enclosed with the charge letter specify the questionable and unusual SNAP transactions indicative of trafficking which were conducted at Appellant during the review period.

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- Multiple transactions during a short period of time are due to homeless patrons. Appellant is located near a homeless shelter and day-use motels that do not have refrigerators.
- Multiple transactions during a short period of time are due to different household members making purchases.
- Appellant has not had any previous issues with SNAP compliance.
- USDA should consider § 271.2(d) before deciding.
- Appellant requests a CMP. Appellant described its SNAP compliance policy and training program.
- Appellant is willing to change its POS system.
- Disqualification would pose a hardship to SNAP participants who rely on the firm.
- Appellant offers credit accounts.

In support of its contentions, Appellant provided the following documentation:

- A letter signed by the owner.
- Two letters signed by employees.
- Five letters signed by customers.
- Ten pages of credit ledgers.
- Five pages of pictures and maps of the local area.
- A letter of support from a nearby nonprofit.
- Eighteen pages of receipts and invoices (many partially or completely illegible); and,
- Twenty-nine pages store photographs (many were very dark).

These explanations may represent only a summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

Store Characteristics

In reaching a disqualification determination, the ROC considered information obtained during a March 9, 2020, store visit conducted by a USDA contractor to observe Appellant's operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report documented the following store size, description, and characteristics:

- Store size is approximately 1,020 square feet with no area of food storage outside of public view.
- Available inventory of SNAP-eligible food items showed stock composed predominantly of inexpensive items, which is typical of a convenience store.
- Only one cash register and one electronic SNAP terminal device.
- No shopping carts or hand baskets.
- No scanners or conveyor belts.
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers; and,
- No meat or seafood specials or bundles.

In addition, the store's checkout counter space area was cluttered and small allowing very little surface area to place large purchases and making it impractical to process more than one customer at a time.

There was no indication that SNAP households were inclined to visit the store regularly to purchase large quantities of grocery items. The available food was primarily of a low-dollar value and there was no hint that the firm sold items in bulk. Given the available inventory, there was no sign that Appellant would be likely to have SNAP redemption patterns that differed significantly from those of similarly sized competitors.

Repeat Transactions by the Same Household

Attachment 1 to the charge letter documents the same household conducting back-to-back transactions in unusually short time frames. Violating stores may conduct multiple transactions from the same household account within a 48-hour period to avoid the detection of single, high-dollar trafficking transactions. There are 213 repeat transactions totaling \$10,497.82 included in this document.

The record reflects that customer conducting rapid, repetitive, and large transactions at Appellant frequently spent SNAP benefits at better stocked and more competitively priced grocery stores, sometimes on or about the same day they shopped at Appellant.

The Case Analysis Document identifies much larger stores with more reasonable prices located within one mile of Appellant. There is no basis for unusually high customer attraction to Appellant, there being no great price advantage, profusion of ethnic goods, or special or custom services rendered. Oddly, some SNAP households spent considerably less at the larger stores than at Appellant.

Appellant contends multiple transactions during a short period of time is due to homeless patrons making repeat purchases, SNAP participants without access to refrigerators, and different household members making purchases. While there are legitimate reasons why a SNAP recipient might return to a convenience store in a short period of time, the examples in Attachment 1 indicate a series of purchases that total to large amounts. SNAP benefits are intended to supplement the food budget for households whose net income is near or below the Federal Poverty Level. It is difficult to believe customers who must rely on SNAP benefits to make ends meet prefer to pay higher prices and spend considerable amounts of their benefits at a convenience store. Spending sizable portions of one's SNAP benefit allotment in a convenience store - when there are larger stores at which one also shops that carry more variety of foods at a lower cost - is unreasonable customer behavior. Moreover, households listed in this attachment conducted this strange shopping pattern of making substantial purchases at Appellant multiple times during the review period. Given the common practice of violating retailers breaking up large, suspicious transactions into multiple, smaller transactions to avoid detection, a firm's explanation and evidence for why these transactions are occurring in a 24-hour period in a convenience store should be both rational and compelling. Appellant's explanation is neither.

Large Transactions

The food stock and facilities of Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at convenience stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. It is rare for a convenience store such as Appellant's to have purchases like those included in Attachment 2 to the charge letter. This attachment cites 631 EBT transactions during the six-month period of investigation of \$34.25 or more totaling \$32,602.46.

Additionally, the Case Analysis Document contains a comparison of Appellant's redemption activity during the analysis period to two SNAP-authorized convenience stores located nearby. Appellant's SNAP redemptions during the analysis period were 8 to 9 times that of the nearby comparable firms.

Based on the store layout, infrastructure, and available inventory, it is not credible that the Appellant would so frequently conduct large transactions closely resembling those typically found at a supermarket or superstore. It is not plausible that the firm's customers would regularly carry very large amounts of merchandise around the store without the benefit of shopping carts or shopping baskets, especially since larger, better-stocked stores are readily available and in the vicinity of the Appellant firm. Appellant is not set up to process high-dollar transactions, as indicated by its lack of equipment to facilitate large transactions and limited counter space. There

are no legitimate bases for SNAP customers' unusual attraction to the firm such as a superior selection of staple foods, price advantages, package specials, bulk or promotional items, an extensive variety of otherwise unavailable ethnic food items, or special services rendered. Appellant failed to provide convincing evidence to establish the legitimacy of these excessively large transactions, such as itemized cash register receipts. Based on all these factors discussed in this section, the large volume of transactions for high-dollar amounts is unlikely to indicate a pattern of legitimate food purchases.

Credit Accounts

Appellant maintains that one of the reasons for the large transactions is that credit is extended to loyal customers, and their tabs are paid in full when they receive their SNAP benefits. In support of this assertion, Appellant provided credit ledger pages that Appellant contends support the use of credit accounts at Appellant. Many of the credit entries listed were unpersuasive for a variety of reasons: they did not include the full name or other information that would allow identification of the customer; they fell outside of the review period; they did not include a list of items purchased or included items that are not eligible for purchase with SNAP benefits; and they lacked dates of purchases and/or payoff amounts and dates. Also, credit ledgers were provided for only three customers, which represented a very small portion of Appellant's transactions. The analysis of these credit ledgers does not support Appellant's contention.

No Applicable Mitigating Factors

This review is limited to considering the circumstances at the time the Office of Retailer Operations and Compliance's decision was made. It is not within this review's scope to consider actions that Appellant may have taken after this decision to begin to comply with program requirements. There is no provision in SNAP regulations for reducing an administrative penalty based on corrective actions implemented after investigative findings of program violations. Therefore, Appellant's contention that the owner will improve its POS system does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant asserts that this is the first time there has been an issue related to SNAP and that it did not receive prior warnings. A record of program participation with no documented previous violations, however, does not constitute valid grounds for mitigating the impact of the present serious determination of trafficking.

Appellant stated that FNS should consider the factors listed in § 271.2(d) before imposing a sanction. Appellant's citation is incorrect, as Appellant then summarizes 7 CFR § 278.6(d): the nature and scope of the violations; whether the firm was warned violations were occurring; and any evidence of intent to violate the regulations. This argument is based on an incorrect understanding of the regulations. The severity of the penalties, set forth in the subsequent paragraph 7 CFR § 278.6(e), are based on the factors listed in 7 CFR § 278.6(d). For example, permitting the sale of cigarettes with SNAP benefits results in a three-year disqualification, but this becomes five years if the firm had been previously warned. Other sanctions consider intent, such as whether false information on an application was "knowingly submitted" or whether the sale of nonfood items was "the firm's practice" (which carries a three-year disqualification)

rather than “due to carelessness or poor supervision” (which results in a six-month disqualification). However, in this case, the ROC determined the firm engaged in trafficking.

Neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be extremely serious, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store.” In keeping with this legislative mandate, § 278.6(e)(1)(i) of the SNAP regulations states that FNS must disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved.

Invoices

Appellant submitted approximately 18 pages of invoices to establish that the store purchased enough inventory to support the total of its SNAP sales. However, the invoices are insufficient to demonstrate this. Many of the invoices provided did not include Appellant’s name or the supplier’s name, were outside of the review period, did not include a list of items purchased or included items that are not eligible for purchase with SNAP benefits. The SNAP-eligible inventory included in the invoices from May and June 2020 totaled approximately \$4,732. Assuming the typical mark up for SNAP-eligible items by a convenience store of 71%¹, this amount of inventory would support \$8,091 in SNAP transaction activity. However, the total of SNAP transactions during the review period was much higher than this. This also does not account for any non-SNAP purchases of food items at Appellant. In sum, the invoices do not explain the questionable transactions at Appellant.

Customer Statements

Regarding customer statements provided by Appellant that purport to establish that questionable transactions were legitimate, and no trafficking occurred, the truth of such statements cannot be verified. Customers engaging in trafficking transactions would be unlikely to admit to this behavior. On the contrary, customer statements would be expected to attest to the legitimacy of questionable transactions regardless of whether they were, in fact, legitimate.

No Undue Hardship to SNAP Participants

Appellant asserts that disqualification would be a hardship to SNAP households who rely on the store. Some degree of inconvenience to SNAP benefit users is inherent in the disqualification from SNAP of any participating food store, since the normal shopping pattern of such SNAP participants may be changed due to the disqualification. Section 278.6(f)(1) of SNAP regulations provides for Civil Money Penalty (CMP) assessments in lieu of disqualification in cases where

¹ *National Association of Convenience Stores (NACS) State of the Industry Annual Report 2017*

disqualification would cause “hardship” to SNAP households because of the unavailability of a comparable participating retail food store in the area to meet their needs. However, this regulation also sets forth the following specific exception: “A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.” Because the matter at hand involves a permanent disqualification, this CMP provision is not applicable.

Summary

The ROC determined that Appellant likely trafficked in SNAP benefits. The charges of violations were based on the ROC’s assessment that substantial evidence exists that the questionable transactions occurring during the review period displayed patterns inconsistent with legitimate sales of eligible food to SNAP participants. The evidence the ROC considered in support of its determination included:

- The irregular SNAP transaction data of Appellant as compared to similar stores.
- Observations made during a store visit by a USDA contractor, including the inadequacy of the firm’s staple food stock to support such large transactions.
- The availability and characteristics of other SNAP-authorized stores located close to Appellant; and,
- Shopping behaviors of Appellant’s customers.

The transaction data and overall firm record demonstrate the patterns of unusual, irregular, and inexplicable SNAP activity for this firm is likely the result of trafficking.

Upon review, Appellant failed to prove by a preponderance of the evidence that the administrative action should be reversed. Appellant provided inadequate explanations for the suspicious transactions and insufficient evidence to legitimize its transaction data. It has not convincingly rebutted the ROC’s determination that Appellant most likely trafficked in SNAP benefits. The SNAP regulations are specific regarding the action that must be taken if personnel of the firm have trafficked, which is that FNS must disqualify the firm permanently.

CIVIL MONEY PENALTY

Appellant requested a civil money penalty (CMP) contending that it had established and implemented an effective compliance policy and program to prevent SNAP violations. According to 7 CFR § 278.6(i) of the SNAP regulations, FNS may impose a CMP in lieu of permanent disqualification for trafficking.

7 CFR § 278.6(i) sets forth the eligibility requirements for a CMP:

The firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:

Criterion 1: The firm shall have developed an effective compliance policy as specified in Section 278.6(i)(1); and,

Criterion 2: The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and,

Criterion 3: The firm had developed and instituted effective personnel training program as specified in Section 278.6(i)(2); and,

Criterion 4: Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations; or it is the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm . .

..

In support of Appellant's contention that it is eligible for a CMP, it provided a letter signed by the owner and two letters signed by employees. In this regard, the various documentation provided by Appellant is not "substantial evidence" that fulfills each of the four criteria of 7 CFR § 278.6(i), demonstrating "that the firm had established and implemented an effective compliance policy and program to prevent violations." Appellant did not submit any signed employee agreements. None of these documents have dates of when this training allegedly occurred. There is no contemporaneous documentation of employees received training prior to the trafficking. The documentation provided could have simply been created after the firm being charged.

The standards of eligibility for a trafficking CMP are high. They require substantial proof that a compliance policy and program was established and implemented prior to the occurrence of violations. These standards exist to thwart attempts to falsely present compliance policies and programs that were not actually implemented prior to violations. As Appellant did not provide the required supporting documentation, the ROC did not assess a CMP. According to the requirements stated in 7 CFR § 278.6(b)(1), § 278.6(b)(2) (ii and iii), and § 278.6(i), Appellant is not eligible for a CMP in lieu of a permanent disqualification from participation as an authorized retailer in SNAP. The determination by the Office of Retailer Operations and Compliance to deny Appellant a civil money penalty is sustained.

CONCLUSION

The record has yielded no indication of error in the finding by the Office of Retailer Operations and Compliance that Appellant trafficked in SNAP benefits. A review of the evidence supports that it is more likely true than not true that program violations occurred as charged. Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against Elegant Deli from participating as an authorized retailer in SNAP 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 Appellant desires a judicial review, 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.

RICH PROULX
ADMINISTRATIVE REVIEW OFFICER

August 2, 2021