

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

Cleveland Deli & Grocery LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0251867

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 the permanent disqualification of Cleveland Deli & Grocery LLC (Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), 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(a), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

AUTHORITY

7 USC § 2021 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 June 15, 2022, the Retailer Operations Division charged 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 July 2021 through December 2021. 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 Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

USDA is an equal opportunity provider, employer and lender.

Appellant, through counsel, replied to the charger letter on June 27, 2022, and denied trafficking and explained that the transactions were normal based on the unique circumstances of the store. Appellant also requested a CMP. After considering the retailer's response and the evidence, the Retailer Operations Division issued a determination letter dated August 3, 2022. The determination letter informed Appellant that it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that Appellant was not eligible for a trafficking CMP because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

By an August 17, 2022, e-mail, Appellant appealed the Retailer Operations Division's determination and requested an administrative review. 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 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.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) and (e)(1) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 USC § 2021(b)(3)(B) states, in part:

... 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 § 271.2 defines trafficking, 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; . . .

7 CFR § 278.6(a) states:

FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an **electronic benefit transfer system**, . . .” (emphasis added)

7 CFR § 278.6(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).

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.

7 CFR § 278.6(i) states, inter alia:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.

SUMMARY OF THE CHARGES

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from July 2021 through December 2021. This involved the following SNAP transaction patterns which are indicative of trafficking:

- Multiple transactions were made from the accounts of individual SNAP households within a set time period.
- The store conducted EBT transactions that were large based on the observed store characteristic and recorded food stock.

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

In its August 17, 2022, administrative review request, Appellant, through counsel provided the following summarized contentions, in relevant part:

- Appellant is now adhering strict compliance to regulations and procedures found on the SNAP website, including training guides and posting retailer posters.
- Appellant will take all steps necessary for compliance.
- Appellant requests reinstatement.
- Appellant does not believe it has done anything wrong.
- SNAP authorization is crucial to its operation and will do whatever necessary to ensure compliance with the SNAP regulations.

The preceding may represent only a brief summary of the Appellant's contentions presented 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.

ANALYSIS AND FINDINGS

Store Visit

FNS authorized Cleveland Deli & Grocery LLC as a convenience store on April 16, 2020. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a December 30, 2021, store visit 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 firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Appellant is approximately 500 square feet with no storage outside of public view.
- The checkout counter was small with limited space to place items and surrounded by Plexiglas display case.
- There were no shopping baskets or shopping carts for customer use.
- There was one cash register and one point of sale (POS) device.
- There was no optical scanner.
- There was no fresh unprocessed meat, poultry, or fish.
- There were a few packages of hot dogs.
- Dairy included milk, cheese, yogurt, butter, margarine, cream cheese, and infant formula.
- There was no fresh produce.
- Other staple foods available for purchase were eggs, juice, rice, tortillas, beans, cereal, pasta, and a limited selection of canned goods.
- Much of the remaining stock consisted of accessory foods such as candy and carbonated and uncarbonated drinks.
- There was a hot and prepared food menu and kitchen prep area.

- Ineligible items included lottery, tobacco, paper goods, cleaning products, paper goods, and health and beauty aids.

The SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. The highest priced items noted included Nescafe - \$7.99 and \$5.99; and Crema Guatemalteca- \$5.29. There were only three items priced greater than \$5.00. Given the available inventory, there was very little sign that the firm would be likely to have SNAP redemption patterns that differed significantly from those of similar-sized competitors, especially competitors that sell similar or identical food items.

Charge Letter Attachment

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.

Charge Letter Attachment 1. Multiple transactions were made from individual benefit accounts in a set timeframe. This attachment documents 42 sets of transactions conducted by 13 households that total \$5,731.40 in SNAP benefits that meet the parameters of this scan. On September 8, 2021, one household conducted two SNAP transactions at Appellant totaling an even \$198.00 (transactions #5-#6). Similarly, on September 30, 2021, another household conducted three SNAP transactions at Appellant that total an even \$170.00 (transactions #26- #28). On November 4 and November 5, 2021, a different household conducted two SNAP transactions totaling \$175.00 (transactions #66- #67). Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

The SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of Appellant's stock and facilities and are therefore indicative of trafficking. The photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Appellant multiple times during a short period or purchase such a large volume of items, there being no great variety of products, or price advantage. Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The second and third transactions in each set are too large to consist of forgotten items.

Appellant has not offered sufficient evidence to show that the transactions listed in Attachment 1 were legitimate purchases of eligible food.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 287 transactions as large as \$170.00, and that total \$16,823.15. The substantial number of high-dollar transactions in a six-month period call into question the legitimacy of these transactions.

Appellant explained that the transactions are reasonable considering the cost to feed a family of five for one week. Appellant explains that families will shop for a week at a time. The store visit supported that Appellant was a small grocery with no fresh meat, poultry, or fish or fresh produce. The checkout area was a small counter space upon which it would be difficult to place many items for purchase. There were no shopping baskets or shopping carts to handle large purchases of food items. There were only three items priced greater than \$5.00. Thus, Appellant's layout, business structure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores.

Appellant submitted photos to show its food stock that was alleged to have not been captured at the time of the store. The photos do show a larger selection of produce items than what was seen on the day of the store visit since there was no produce on that days. However, for the most part the photos show snack items, beverages, tortillas, cereal, and eggs. The evidence submitted does not show that households would rely on Appellant as its primary grocer.

The Retailer Operations Division compared Appellant to two nearby similarly stocked convenience stores. Appellant's average SNAP transaction amount was 72% and 85% greater than the other two stores. Appellant's total SNAP redemption dollar value was 219% and 229% greater than the other two stores during the review period. The Retailer Operations Division also determined that Appellant conducted more larger dollar SNAP transactions in each dollar range between \$50.00 and \$119.99 than the comparison stores. The comparison stores conducted no SNAP transactions in the \$80.00-\$89.99, \$100.00-\$109.99, and \$110.00 - \$119.99 dollar ranges, whereas Appellant conducted 11, 7, and 7 transactions in each of those ranges. The data from these nearby stores also show that the transaction patterns at the Appellant firm were unusual. Moreover, if these flagged sets of transactions could be explained by household shopping patterns for this local area, then similar shopping patterns would be seen at the other two local comparable stores. However, this was not the case.

| Store | Attachment 1 Pattern | Attachment 2 Pattern |
|-----------|-------------------------|-------------------------|
| Appellant | 42 | 287 |
| Store #1 | 0 | 26 |
| Store #2 | 3 | 20 |

Counsel explained it its reply to the charge letter that many people in the neighborhood do no drive and walk to Appellant to do their shopping. It is true that sometimes a firm may have higher than average SNAP transaction amounts due to the lack of access to other SNAP authorized stores. However, the Retailer Operations Division determined that 35 other convenience stores within a one-mile radius of Appellant as well as two supermarkets.

The Retailer Operations Division reviewed the transaction history of five households that conducted some of the questionable flagged transactions. Each of the five households conducted a flagged transaction at Appellant within one day of visiting a supermarket, super store, or large grocery store. For example, on July 4 and July 5, 2021, Household #1 transacted \$38.24 at a superstore and then transacted \$140.40 at Appellant via three separate transactions. Similarly, on August 20, 2021, Household #2 transacted \$138.00 at Appellant and the following day o shopped at a superstore spending \$74.86. On August 22, 2021, the household conducted another large transaction at Appellant for \$159.50. Lastly, on December 5, 2021, Household #3 transacted

\$128.55 at a supermarket and then transacted and even \$116.00 at Appellant. It is questionable as to why households would conduct large transactions at Appellant, when these households had just visited or planned to visit larger stores with a better selection of fresh meat and produce and likely better prices.

Evidence

The documentation and evidence provided by the Retailer Operations Division was thoroughly examined. From all indications, the Retailer Operations Division obtained the EBT data (provided by ALERT), found it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough investigation before concluding that trafficking was likely occurring. Appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed and that the transactions detailed in the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. Appellant offered insufficient evidence to prove that the transactions listed in the charge letter were legitimate purchases of eligible food. In the absence of compelling information or documentation weighed in comparison to the evidence provided by the Retailer Operations Division, the evidence weighs in favor of the Retailer Operations Division's determination that SNAP-benefit trafficking substantially produced the transaction activity at issue in the present case.

Corrective Action

Appellant explains it has implemented corrective action by now adhering strict compliance to regulations and procedures found on the SNAP website, including training guides and posting retailer posters. 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. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not within the authority of this review to consider what subsequent remedial actions may have been taken or will be taken in the future so that a store may begin to comply with program requirements. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment based on corrective actions implemented subsequent to investigative findings of program violations. Therefore, Appellant's contention that it took corrective action to prevent future violations does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant Hardship

Counsel also contends that a permanent disqualification is a hardship to the business. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment based on possible economic hardship to the firm resulting from imposition of such penalty. To excuse ownership from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to a firm's economic hardship 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, Appellant's contention that the firm will 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 imposition.

CIVIL MONEY PENALTY

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR § 278.6(i). Appellant was informed that it would need to provide both the request and supporting evidence within ten calendar days of receiving the charge letter, and that no extension of time could be granted for making the request or for providing the required evidence. The criteria for a trafficking civil money penalty in lieu of disqualification is established under 7 CFR § 278.6(i) which reads, inter alia:

“In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, 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 § 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 an effective personnel training program as specified in § 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 only 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 ...”

With its reply to the charges, Appellant requested a CMP. In support of Appellant's contention that it is eligible for a CMP, counsel reported that Appellant had developed an effective compliance policy; the compliance policy was in place at the time of the alleged violations; Appellant trained its employees; and the owner did not benefit from any alleged trafficking. Appellant did not submit any documentation in support of its request.

The Retailer Operations Division determine that these statements from 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.” 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. The determination by the Retailer Operations Division to deny Appellant a CMP is sustained.

CONCLUSION

The Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations 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 occur as charged by the Retailer Operations Division. The determination to impose a permanent disqualification against Appellant is sustained. The Retailer Operations Division's determination that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations is also sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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 the Appellant's owner resides or is 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, 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

April 4, 2023