

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

Paulino Grocery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0258056

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 Retailer Operations Division to impose a permanent disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) against Paulino Grocery (hereinafter “Appellant”).

ISSUE

The issue accepted for review is whether the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Paulino Grocery.

AUTHORITY

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

CASE CHRONOLOGY

Paulino Grocery was initially authorized to participate in SNAP on June 28, 2002. In a letter dated December 20, 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 between the months of February 2022 through July 2022 and information obtained during a visit to the store by an FNS contractor on September 6, 2022. The attachments enclosed with the charge letter specified the questionable and unusual SNAP transactions indicative of trafficking that were conducted at Appellant’s firm during the review period. The letter noted that the penalty for trafficking is permanent disqualification, as provided by 7 CFR § 278.6(e)(1). It informed Appellant of the right to respond to the charges within 10

days of receipt to explain the irregular SNAP transaction patterns and provided that Appellant may request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking within 10 days of receipt of the charge letter, under the conditions specified in 7 CFR § 278.6(i).

The record shows that Appellant did not respond to the charge letter.

After further evaluating the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated January 18, 2023. This letter informed Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but that a CMP was not appropriate because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In an email dated January 24, 2023, Appellant, through its representative, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 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.

7 U.S.C. § 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 § 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 on the basis of evidence that may include facts established through on-site investigations, **inconsistent redemption data, [or] evidence obtained through a transaction report under an electronic benefit transfer system...** [Emphasis added.]

7 CFR § 278.6(e)(1)(i) states:

FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, in part:

Trafficking means: 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 § 271.2 states, in part:

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(b)(1) 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) states, 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(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.

7 CFR § 278.6(i) states, in part:

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 CHARGES

FNS charged Paulino Grocery with trafficking based on an analysis of FNS records, which included observed store characteristics, recorded food stock, and store pricing gathered during a store visit, as well as Electronic Benefit Transfer (EBT) transaction data for February 2022 through July 2022. The attachments enclosed with the charge letter reflected the following transaction patterns, which may be indicators of trafficking:

- **Charge Letter Attachment 1:** Multiple transactions made from the accounts of individual SNAP households within a set time period.
- **Charge Letter Attachment 2:** EBT transactions that were large based on the observed store characteristics and recorded food stock.

APPELLANT'S CONTENTIONS

- Appellant denies the trafficking allegations.
- Appellant has sufficient inventory to justify its sales.
- The store visit contractor did not take a picture of the basement where Appellant stores additional merchandise.
- New Jersey is facing considerable inflation; customers can spend \$35.00 to \$50.00 on just three items. For example, milk is priced at \$5.00, a dozen eggs are priced at \$9.50, and a gallon of oil is priced at \$30.
- Appellant has always complied with SNAP regulations and requirements.
- The store's prices have never been tampered with and can be justified through sales records.
- The economy, inflation, and SNAP disqualification are negatively impacting the store.

Appellant did not submit any additional evidence in support of its contentions.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented and evidence submitted.

ANALYSIS AND FINDINGS

This review examines the relevant information regarding the Retailer Operations Division's trafficking determination. The record must contain evidence sufficient to raise a presumption that trafficking occurred. In a trafficking determination, this evidence includes SNAP transaction data, considered together with other available information, such as store visit observations, the location and characteristics of competitor firms, and household shopping patterns. Once the presumption is established, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that it did not engage in trafficking. If Appellant fails to show this, the case will be sustained.

Retailers are provided opportunities to submit evidence accompanied by explanations of the legitimacy of questionable transactions, both to the Retailer Operations Division and here on administrative review. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

Based on the evidence in this case, the SNAP transactions listed in the December 20, 2022, charge letter were indicative of trafficking. Appellant has not provided reasonable explanations supported by sufficient credible and convincing evidence to demonstrate that these transactions were more likely due to reasons other than trafficking. Accordingly, the permanent disqualification is sustained. Discussed below are elements of the Retailer Operations Division's record, Appellant's contentions, and the findings of this review.

Store Characteristics

In reaching a disqualification determination, the Retailer Operations Division considered

information obtained during the September 6, 2022, 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 store size, description, and characteristics. The report also described the store's checkout counter space area and noted the effect of any limitations of the available surface area on placing large purchases or processing 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.

SNAP Transaction Analysis

While SNAP households are not limited in the number of times they may use their SNAP benefit card or how much eligible food they may purchase in SNAP transactions, government analyses have found that stores likely trafficking SNAP benefits have particular transaction patterns or characteristics that are inconsistent with the transaction patterns and characteristics of similarly situated stores. The charge letter attachments specify the unusual transactions and transaction patterns found at Appellant's store, which are considered together with other available information, such as store visit observations, the location and characteristics of competitor firms, and household shopping patterns, to determine if the anomalies can be explained based on circumstances specific to the store.

Charge Letter Attachment 1: Multiple transactions were made from the accounts of individual SNAP households within a set time period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Abnormally repetitive transactions over short periods of time at rates substantially greater than expected can be an indication that trafficking violations are occurring.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Although it is not uncommon for customers to have multiple transactions in a day or two, it is uncommon that, at a convenience store, such multiple transactions total large dollar amounts. 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 to purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale.

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, likely 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.

Without compelling evidence from Appellant to show that the transactions in Attachment 1 were legitimate, this review finds that trafficking was a likely cause of the unusual patterns.

Charge Letter Attachment 2: EBT transactions that are large based on the observed store characteristics and recorded food stock. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant contends it has sufficient inventory to justify its sales. Further, Appellant argued that the store's prices have never been tampered with and can be justified through sales records. Appellant did not provide any inventory, purchase, or sales records to support these contentions. Given Appellant's available inventory of staple foods and other SNAP-eligible items, including snacks and drinks, it is possible that there would be an occasional purchase where the transaction amount is high, perhaps exceeding \$40.00 or even \$50.00. As such, there may be some legitimate SNAP transactions among the transactions listed in Attachment 2. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from nearby, similar-sized competitors. The substantial number of high-dollar transactions in a six-month period calls into question the legitimacy of these transactions.

Appellant also stated that it has a basement storage area with additional merchandise that was not photographed by the contractor during the store visit. While this may be true, Appellant has provided no evidence to support this contention. The contractor report, completed in collaboration with the manager of the store during the September 6, 2022, store visit, stated Appellant did not have a storage room, did not have storage areas out of the view of the public, or store food at other locations. Unsubstantiated contentions do not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant argued that New Jersey is facing considerable inflation; customers can spend \$35.00 to \$50.00 on just three items. For example, milk is priced at \$5.00, a dozen eggs are priced at \$9.50, and a gallon of oil is priced at \$30. At the time of the store visit, the store's six highest-priced items were priced between \$6.49 and \$9.99. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering how many food items it would typically take to add up to \$75.00 or more and that Appellant has no shopping carts or baskets, and its checkout area sits behind a glass or Plexiglass barrier and transactions are conducted through a small opening, this review finds it difficult to believe that every large transaction in Attachment 2 was a legitimate purchase of eligible food.

The evidence under review shows that SNAP households shopping at Appellant are also shopping at many full-line large grocery stores, supermarkets, and superstores that offer a greater quantity and variety of SNAP eligible food items and likely better prices. These high dollar-value transactions remain questionable when considering the proximity of other stores that would be better shopping options for consumers. Based on their shopping patterns, transportation does not appear to be an issue for these households. Yet, they continue to shop and spend suspicious high dollar amounts at Appellant, where the eligible food stock is limited, often on the same day, or within 24-72 hours of purchases at larger food stores.

In this case, Appellant has not offered any compelling evidence, such as itemized cash register receipts, to help explain what occurred between the customer and store personnel at the point of sale. Accordingly, it is the finding of this review that trafficking was a likely cause of the transaction patterns found in Attachment 2.

Competitor Stores:

The Retailer Operations Division reviewed the number of SNAP authorized retailers within a one-mile radius of Appellant to determine if households living near Appellant had access to other shopping options during the review period. Mapping showed three supermarkets, six superstores, two large grocery stores, 14 medium grocery stores, 32 small grocery stores, and 34 other convenience stores within the one-mile radius. This review demonstrates that households shopping at Appellant were nearby a larger store that may have lower prices and better inventory, making it less likely that SNAP recipients would expend their SNAP benefits in large amounts at Appellant's convenience store, and that they would do so recurrently.

Household Analysis:

In addition to determining if households had access to other shopping options, the Retailer Operations Division conducted a household analysis to determine if households conducting suspicious transactions at Appellant actually utilized larger stores during the review period. As noted above, larger stores usually have lower prices and better inventory.

The analysis included examples of five households with unusual shopping patterns at Appellant that also regularly shopped at larger stores. These examples included a household that shopped at seven different supermarkets or superstores and one large grocery store, conducting 23 transactions at these larger store types during the review period. These larger stores were located between 0.17 and 6.21 miles away from Appellant, indicating the household had regular access to transportation and larger store types. Another household shopped at 11 different supermarkets, superstores, and large grocery stores 30 times during the review period, all of which were between 0.17 and 11.27 miles from Appellant. Each household examined had access to and shopped at larger stores, including superstores, supermarkets, or large grocery stores.

Agency records show that 80% of the households in the charge letter conducted a transaction at a large grocery store, supermarket, or superstore within one day of a charge letter transaction at Appellant. However, despite this access to larger, better stocked stores, these sampled households conducted multiple transactions in set time frames and transactions that were large based on the observed store characteristics and recorded food at Paulino Grocery.

Comparison with Similarly Situated Convenience Stores:

The Retailer Operations Division compared Appellant's redemption data to the redemption data for other convenience stores in Passaic County using ten-dollar increments from \$50.00-\$59.99 through \$180.00-\$189.99. Appellant's transaction count and dollar volume were higher than the average Passaic County convenience store in all dollar ranges. For example, in the \$50.00 to \$59.99 range, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is unusual for a convenience store to

recurrently conduct higher dollar transactions so frequently as compared to other similarly situated stores.

Given Appellant's inventory, characteristics, and location this review could find no reason why Appellant's SNAP redemption patterns differed from its competitors.

Compliance History/Negative Impact

Appellant contends it has always complied with SNAP regulations and requirements. Appellant also stated that disqualification from the SNAP would negatively impact the store.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, statute at 7 U.S.C. § 2021(b)(3)(B) and SNAP regulations, at 7 CFR § 278.6(e), require that when trafficking occurs, permanent disqualification is the necessary penalty, even on the first occasion, regardless of a firm's prior compliance with program rules. This review finds that the sanction imposed by the Retailer Operations Division in this case fully conforms to SNAP regulations and is consistent with sanctions imposed upon other retail stores that have committed similar violations. Further, this review has no authority to reduce a period of disqualification in a case in which trafficking violations were found to have occurred.

Civil Money Penalty

As noted earlier, the Retailer Operations Division determined that Appellant firm was not eligible for a CMP in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a CMP to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate supporting documentation within 10 days of receipt of the charge letter. The case record shows that Appellant did not request a trafficking CMP or provide any evidence of a compliance policy or training program within the required 10-day period.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

An analysis of Appellant's EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify Paulino Grocery from SNAP participation. This data provided sufficient evidence for this review to conclude that the questionable transactions and patterns listed in the charge letter were more likely than not the

result of trafficking violations committed by Appellant. Likewise, Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

Based on a review of all available information in this case, the decision to impose a permanent disqualification against Appellant, Paulino Grocery, under the ownership of Jose Paulino, is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

AMIE CHURCHILL
Administrative Review Officer

March 17, 2023