

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

**My Convenience Grocery,
Appellant,**

V.

**Retailer Operations Division,
Respondent.**

Case Number: C0237119

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that My Convenience Grocery, (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 2, 2021.

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

By charge letter dated December 16, 2020, Retailer Operations Division informed ownership that Appellant was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 271 – § 278, based on EBT benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm." The charge letter stated, in relevant part, that “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.”

In email correspondence dated December 22, 2020, Appellant, through counsel, requested an extension of time in which to respond to the charge letter. In correspondence dated December 23, 2020, Retailer Operations division informed counsel that the time to respond to the charge

letter has been extended to January 28, 2021. Appellant, through counsel, was also informed that the time to request a civil money penalty in lieu of permanent disqualification and to provide the documentation to support such a request has not been extended. In email correspondence dated January 28, 2021, Appellant, through counsel, responded to the charge letter and generally stated that Appellant are not permitted FOIA requests and the abatement of this matter therewith and this is a violation of the regulations. Counsel provided, as attachments, a copy of the 2016 U.S. Grocery Shopping Trends reports, a copy of the 2016 Know Your Core, Protect Your Core cover story by Angela Hanson, a copy of the November 2016, USDA Report entitled “Foods Typically Purchased by Supplemental Nutrition Assistance Program (SNAP) Households, a copy of the 2018 Massachusetts Profile of SNAP Households, a copy of the 2017 Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program Final Report.

Retailer Operations Division gave consideration to the Appellant’s reply, through counsel, and evidence of the case, and issued a determination letter dated March 2, 2021. This letter informed Appellant that it was permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also stated that Retailer Operations Division considered Appellant’s eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. 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 15, 2021, Appellant, through counsel, 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 2008, 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 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 ...”

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 CHARGES

The charges on review were based on an analysis of SNAP electronic benefit transfer (EBT) transactions dated during the six-month period of March 2020 through August 2020. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from the accounts of individual SNAP households within a set time period.
2. Your store conducted EBT transactions that are large based on the observed store characteristics and recorded food stock.

The first 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, through counsel, 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. This business has never had a compliance problem with SNAP in the past and has not committed any violations in connection with the transactions set out in the Charge letter.
2. Most visits, to a store the size of Appellant’s, are made while the customer is on his/her way to work or school or while running errands at night.
3. The store stocks the majority of a SNAP household’s preferred needs and has sufficient variety and quantity to meet the needs of several households all at once without having to replenish inventory.

4. It is likely that the presence of Confirmation Bias exists as it does in many cases handled by FNS.
5. Deprivation of FOIA is a violation of the Regulations.
6. Attachment 1: All of these transactions are the result of the store's business practices, inventory, customer co-shopping, purchasing preferences and the habits of the SNAP clientele.
7. Attachment 2: Various Case laws were quoted and Appellant, through counsel, stated that where a store can demonstrate the presence of one or more of the factors presented in those case laws quoted, that no further action should be taken.
8. The highest transaction amount is a result of formula and an assortment of other SNAP eligible foods.
9. In the event the Department determines that trafficking did occur at the store, Appellants would request that a civil money penalty be issued against them in lieu of a permanent disqualification.

In support of its position during the review process, Appellant, through counsel, provided a copy of the 2016 U.S. Grocery Shopping Trends reports, a copy of the 2016 Know Your Core, Protect Your Core cover story by Angela Hanson, a copy of the November 2016, USDA Report entitled "Foods Typically Purchased by Supplemental Nutrition Assistance Program (SNAP) Households, a copy of the 2018 Massachusetts Profile of SNAP Households, a copy of the 2017 Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program Final Report.

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 file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during an August 18, 2020, 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:

- One cash register and one POS device with a small counter area partially obstructed by other smaller items available for sale.
- Estimated to be approximately 2200 square feet.
- No shopping baskets or carts available for customers.
- No adding machines or optical scanners were available at checkout. No specialty registers present.
- Store does not operate through a night window but there is a barrier around the register area with food stock behind the barrier.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.

- No unusual pricing structure such as ending most products with 00 cents and does not round transaction totals.
- Food is not stored in an area outside of public view.
- No storage freezers or coolers and no food stored off site.
- Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods, or vegetables.
- Store does not take telephone or online orders and does not offer delivery
- Highest priced eligible food items were Mazola Oil (\$24.00), Riceland Rice (\$23.00), BMR Classic Shrimp (\$20.00) and Tasters Choice Coffee (\$12.50). All prices were received verbally from the retail staff.
- Store stocks a significant amount of non-food items such as but not limited to paper products, household products, tobacco products, health and beauty aids, and cleaning products.
- Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry, and fish products. Limited fresh fruits and produce, No fresh meat or poultry. Most meats are canned, packaged, or frozen. Some bulk bags of rice and bottles of cooking oil.
- No kitchen/prepared food area
- No Hot foods sold for onsite consumption.
- No deli or prepared food section. Stock is not used in preparation of food.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.
- Some empty coolers and empty shelving in coolers.
- Some shelf items contained a layer of dust.

The second 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 Appellant's store 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 – Multiple transactions were made from the accounts of individual SNAP households within a set time-period.

During the review period there were 24 sets of 49 SNAP transactions that met the parameters of this attachment. Multiple transactions conducted by the same household account within a set time period is a method which violating stores use to avoid the detection of single high dollar transactions that cannot be supported by the retailer's inventory and structure.

Appellant, through counsel, contends that all of these transactions are the result of the store's business practices, inventory, customer co-shopping, purchasing preferences and the habits of the SNAP clientele. With regard to these contentions, the record reflects that many of Appellant's statements, through counsel, in regard to the causation of the SNAP transactions cited in the charge letter, were not corroborated with evidence to the same that specifically speak to Appellant's transaction patterns during the review period.

Appellant, through counsel, contends that that there were shopping carts in the store during the review period and groceries are often carried in the store's shopping carts, however the store visit documentation and photographs show that the store did not provide any hand baskets or shopping carts for customer use. Appellant, through counsel, also indicated that the store allows participants to gather items, bring them to the register and then return to gather more items thereby tabulating transactions on a rolling basis. Other than the statement itself, there is no evidence that this is a store practice and cannot be accepted as a valid explanation for the unusual, irregular, and inexplicable SNAP transactions as cited in the charge letter.

Additionally, Appellant, through counsel, contends that many of the local SNAP household members are unemployed, either by virtue of their disability designation or as a matter of happenstance and to satiate their boredom, these participants will regularly shop at store to find something to do. They will shop regularly on the same day, or they will binge shop and make large purchases because they have the benefits to do so. There was no evidence provided to substantiate this statement and therefore cannot be accepted as a valid explanation for the unusual, irregular, and inexplicable SNAP transactions as cited in the charge letter.

Appellant, through counsel, did not provide any additional documentation to support its various claims to justify the SNAP transactions cited in this Attachment. Based on the analysis above and Appellant's failure to adequately show that all of the transaction sets were as a result of legitimate SNAP purchases, a conclusion can be drawn, through a preponderance of evidence that the "unusual, irregular, and inexplicable" transaction patterns cited in Attachment 1 evidence trafficking as the most likely explanation.

Attachment 2 of the Charge letter - Your store conducted EBT transactions that are large based on the observed store characteristics and recorded food stock.

During the review period, there were 235 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 of low-priced foods. The firm only has a few bulk bags of rice and a couple of other higher priced items but does not offer any ethnic or specialty foods that sell for a high price. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions. These transactions range from \$50.00 to \$246.82.

Appellant, through counsel, gave a list of the most expensive items in the store however some items listed on Appellant's list do not match the items as listed during the contracted store visit and may have been added for the purpose of justifying the SNAP transactions as listed in the charge letter. The contractor store visit and case analysis both indicate that Appellant is a sufficiently stocked small grocery store offering staple foods. However, no invoices or other evidence was presented to show customers are buying these higher priced items at a rate that would account for outperforming the comparable or larger stores that are within a 1-mile distance from the Appellant's store. The record reflects that many of Appellant's statements, through counsel, in regard to the causation of the SNAP transactions cited in the charge letter, were not corroborated with evidence to the same that specifically speak to Appellant's transaction patterns during the review period.

Retailer Operations also conducted an analysis of the shopping habits on a number of 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 Essex County area of Massachusetts. This is another strong trafficking indicator.

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 the 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 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 inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

The statements made by counsel as taken from the various reports supplied during this review, though they may be the result of studies conducted on households receiving and using SNAP benefits in general, these statements do not directly or specifically explain the transactions in Appellant's store as cited in the charge letter given the specific characteristics of Appellant's firm and the review period in question. Additionally, the 2016 Grocery Shopping Trends Report states that the methodology used in the quantitative research included a 25-minute survey fielded online to 2,061 U.S. Shoppers age 18 and older, that the sample was split to cover a wider range of topics and does not indicate that the study was for the shopping trends of SNAP recipients specifically.

With regard to co-shopping being conducted at Appellant's store, Counsel offered no evidence to support its contention that these were legitimate transactions. Such evidence could include cash register receipts or other documentation to prove that the transactions cited in attachment 1 were legitimate purchases of eligible food. As such, family members using the same EBT card stated in the reply, while possible, was not supported by the evidence submitted nor by the Appellant's stock or store characteristics. Counsel's citation of SNAP reports does not specifically address Appellant and the shopping pattern exhibited as cited in the charge letter. General data does not provide an adequate reflection of the Appellant store as it is not data taken from the Appellant's transaction history. Moreover, if co-shopping truly impacted the Appellant, concluded by counsel, it would stand to reason that co-shopping would affect other nearby firms as well. This would manifest itself in comparable firms having similar transaction patterns. According to the

record, this is not the case.

When a household is certified for participation in the SNAP, if there are multiple families living in one household and every member of the household purchases, prepares, and eats food together, the benefits issued are for the entire household. However, if there are multiple individuals living under one roof, and they purchase, store, prepare, and eat separately, their benefits are issued as separate households, each with its own EBT card. Therefore, the different shopping priorities and needs of multiple generations residing under one roof are not necessarily portioned out via one single SNAP benefits account. The attorney's argument of "co-shopping" does not adequately explain the transactions as cited in the charge letter.

Furthermore, the Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program Final Report for 2017 states that transactions at supermarkets/superstores accounted for over half of transactions and 82 percent of benefits redeemed. Although the information in these various reports is the result of studies conducted and show valid information to the same, the studies were not conducted on Appellant's store in particular and do not specifically address the transactions cited in the charge letter without tangible evidence to the same.

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 food in inventory to cover Appellant's reasoning for the SNAP transaction totals for the review months, the lack of adequate 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 small grocery stores in the State.

Generally, stores caught in trafficking violations consistently display particular characteristic transaction patterns including those cited in the charge letter and, in the absence of evidence for the legitimacy of such transaction patterns, based on information submitted by the Appellant and a comparison of the store's characteristics and available stock to the transaction patterns cited in the charge letter, a conclusion can be drawn through a preponderance of evidence that the unusual, irregular, and inexplicable transactions and patterns 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' 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 deemed pertinent in support of its position that Retailer Operations Division' 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.

Ownership has not provided sufficient evidence to rebut the convincing 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.

CIVIL MONEY PENALTY

The Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i) even though it was informed of the right to do so in the charge letter dated December 16, 2020. Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program prior to the violations. Therefore, the Retailer Operations Division' decision, not to impose a trafficking CMP in lieu of disqualification, is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

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

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, 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

October 26, 2021