

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

266 A&F Deli Grocery Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0206500

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 266 A&F Deli Grocery Corp. (266 A&F Deli Grocery or 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 March 13, 2018, 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 2017 through December 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided

by 7 CFR § 278.6(e)(1). The letter also noted that 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).

Appellant replied to the charges by fax on March 26, 2018. Appellant denied trafficking and explained the transactions were normal based on the unique circumstances of the store. Appellant also provided purchase invoices and store photographs. Appellant requested a trafficking CMP in lieu of a permanent disqualification and stated that the store owner provides SNAP training to staff.

After considering the retailer's reply and the evidence, the Retailer Operations Division issued a determination letter dated August 28, 2018. 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.

In a letter postmarked September 6, 2018, 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 clear preponderance of the evidence, that the administrative actions 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), (c) 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 CFR § 271.2 states, in part, that, "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 § 271.2 defines trafficking as: "(1) 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, inter alia, 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 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 2017 through December 2017. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were multiple transactions made from individual benefit accounts in unusually short time frames.
- There were excessively large purchase transactions made from recipient accounts.

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking.

APPELLANT’S CONTENTIONS

In its appeal request postmarked September 6, 2018, Appellant provided the following summarized contentions, in relevant part:

- Appellant disagrees with the decision.

- Appellant is a small store and it is very well stocked.
- Appellant offers a large variety of grocery items, deli, produce, bread, milk, eggs, fruits, vegetables, yogurt, and juice.
- It can be very easy to spend a large amount or all of the SNAP benefits at Appellant.
- Appellant submitted invoices previously and sent in photographs.
- Appellant also submitted signed documents related to training completed by its employees.
- Appellant will not be able to survive a disqualification.

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 266 A&F Deli Grocery as a medium grocery on June 27, 2014. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a November 17, 2017, 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:

- 266 A&F Deli Grocery is approximately 1200 square feet, with no additional food storage outside of public view.
- There were no shopping baskets or shopping carts for customer use.
- There was one cash register and one point-of-sale device.
- The available checkout area space was limited with an ice cream cooler in front.
- There were no meat/seafood specials or bundles that might sell for high prices.
- There was limited fresh fish.
- There was no fresh meat or poultry.
- There was a selection of fresh produce with limited quantities including bananas, onions, plantains, sweet potatoes, squash, apples, lemons, limes, and tomatoes.
- Dairy included milk, butter, cheese, and infant formula.
- Other staple food items included eggs, juice, cereal, rice, and a selection of canned goods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included alcohol, tobacco, and household items.

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 according to the store visit was deli meat for \$9.59 per pound and infant formula priced between \$18.99 and \$27.99. Given the available inventory as noted above, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors.

Charge Letter Attachments

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 unusually short time frames. This attachment documents 19 sets of transactions that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits. 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.

Appellant explained to the Retailer Operations Division that customers come back to it multiple times throughout the day and during the week. Sometimes a customer will make a large purchase for their home and then return later in the day for a sandwich of some cold cuts. 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. 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 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, price advantage, profusion of large packages, or significant bulk items for sale. In addition to the store's limited checkout space which is unsuitable for large transactions, 266 A&F Deli Grocery has no shopping carts and no shopping baskets for transporting food within the store. The second and subsequent transactions are too large to consist of a forgotten item or two, or a sandwich and some cold cuts.

In the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 137 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transaction amounts are not consistent with the store's inventory with no fresh meat and limited fresh produce. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

Given that the Appellant firm has a moderate inventory of staple foods and other SNAP-eligible foods, it is probable that there would be an occasional purchase where the transaction amount is high, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As such, there may well 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, especially considering the absence of shopping carts and baskets. Therefore, it is unlikely that the food items purchased in these large dollar amounts could be carried to the register without the use of baskets or carts and more likely that the amounts were contrived.

The evidence from the store visit photographs and report supports that Appellant sold infant formula. However, it would be unusual for a SNAP household to purchase infant formula with SNAP benefits, as households who participate in SNAP would also be eligible to participate in the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). Thus, it is unlikely that the sale of infant formula can explain many of the store's excessively large SNAP transactions.

The Retailer Operations Division compared Appellant to two nearby similarly stocked medium groceries. During the review period, Appellant's average SNAP transaction amount was approximately 50% greater than the other two stores. 5 U.S.C. § 552 (b)(7)(E). The Retailer Operations Division determined that Appellant meets the criteria of a small grocery instead of a medium grocery. If compared to small groceries, the differences would be even greater.

The Retailer Operations also determined that the transaction pattern of Appellant exceeded the other two authorized stores, as seen on the table. The Retailer Operations Division considered this an indicator of trafficking.

5 U.S.C. § 552 (b)(7)(E)

Appellant provided 38 store photos and 126 pages of invoices in support of its contention that the store carries a large amount of groceries, deli products and produce. Appellant explains that it would be easy for a household to expend their benefits at the store. However, a government report on SNAP benefit redemption patterns¹ reveals that households most often redeem their benefits at supermarkets and supercenters with only four percent of all households never shopping in a supermarket. A medium grocery might have larger than average SNAP transactions if no larger stores are available. However, the Retailer Operations Division determined that there are 47 SNAP authorized stores within a one-mile radius of Appellant, including 17 other medium groceries, four groceries, 16 supermarkets, and ten super stores. Therefore, it would be highly unlikely that SNAP recipients would regularly purchase large amounts of merchandise at Appellant when larger, better stocked stores are readily available and in the vicinity of the Appellant firm.

¹ Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program, Mathematica Policy Research, by Laura Castner and Juliette Henke, for the U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, February 2011.

Lastly, the Retailer Operations Division examined four households identified in the charge letter to analyze their shopping patterns at 266 A&F Deli Grocery. compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at supermarkets and super stores. However, despite this access to better stocked stores, each of the four households conducted excessively large transactions at 266 A&F Deli Grocery **5 U.S.C. § 552 (b)(7)(E)** of shopping at a supermarket or super store. It is unlikely that these households would conduct large transactions at Appellant when these households had just visited or planned to visit larger stores with a better selection of staple foods including fresh meat and produce and likely better prices.

In summary, 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. In addition to the irregularity of such high dollar transactions in comparison to similar stores, the limited availability of counter space for checking out and the lack of shopping carts and baskets support the Retailer Operations Division determination. It is not plausible that the store's customers are carrying large amounts of food around the store without the benefit of shopping carts and only a limited amount of shopping baskets. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping.

Based on a preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 2 are more likely than not the result of trafficking in SNAP benefits.

Invoices

Appellant submitted 126 pages of invoices to document its inventory to support the high SNAP redemption amounts. The Retailer Operations Division analyzed the invoices. Some invoices were excluded because they contained several errors indicating that they may not have been legitimate. The Retailer Operations Division determined that 20% of sales were likely attributable cash or credit transactions. Given these estimates and the acceptable invoices, the Retailer Operations Division determined that Appellant did have sufficient food purchases to justify its total monthly SNAP redemptions.

However, even if the invoices and store photos did show that the store purchased sufficient food inventory to account for the firm's SNAP redemption volume, sufficient inventory alone does not explain the suspicious patterns of SNAP transactions such as rapid and consecutive transactions by individuals during the same store visit or in a single day. Even the large dollar transactions would remain questionable if there were sufficient food inventory to support such transactions when consideration is made of there being no shopping carts or baskets and very little counter space to place food for purchase at the checkout counter.

Rule Abiding Business

Appellant contends that it has always been a rule abiding business and Appellant has always observed the rules and regulations of the SNAP program and under no circumstances would it violate them. A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

Economic Hardship

Appellant states that the business will not survive if it is disqualified. It is recognized that economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty.

To 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 economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, 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

Appellant timely requested consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i). However, the Retailer Operations Division correctly determined that there is insufficient evidence to demonstrate that the firm had established and implemented an **effective** SNAP compliance policy and program prior to the violations. The Appellant submitted documentation that four employees were trained on May 10, 2017, and November 9, 2017. The criteria for a trafficking CMP in lieu of disqualification is defined under 7 CFR § 278.6(i) which reads, in part:

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 by the firm [

Regarding compliance policy standards, 7 CFR 278.6(i)(1) further states, in part:

As specified in Criterion 1 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with this part 278 of current [SNAP] regulations As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation. In addition, in evaluating the effectiveness of the firm's policy and program to ensure FSP compliance and to prevent FSP violations, FNS may consider the following:

- (1) Documentation reflecting the development and/or operation of a policy to terminate the employment of any firm employee found violating FSP regulations;
- (2) Documentation of the development and/or continued operation of firm policy and procedures resulting in appropriate corrective action following complaints of FSP violations or irregularities committed by firm personnel;
- (3) Documentation of the development and/or continued operation of procedures for internal review of firm employees' compliance with FSP regulations

Although Appellant provided some minimal evidence that it provided SNAP training to a some store employees prior to the violations, the evidence provided did not rise to the level of substantial evidence necessary to establish its eligibility for a trafficking CMP. For example, Appellant did not provide any evidence of its written compliance policy as described at 7 CFR 278.6(i)(1). Appellant also did not establish the effectiveness of its training program as described at 7 CFR 278.6(i)(2). In conclusion, the Retailer Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

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 of 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 also determined 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. Under review, the denial of a trafficking CMP was deemed correct and proper.

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

March 14, 2019