

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

545 Linden Deli Grocery Corp,

Appellant,

v.

Case Number: C0208446

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of 545 Linden Deli Grocery Corp. as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against 545 Linden Deli Grocery Corp..

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

In a letter dated May 30, 2018, the Retailer Operations Division charged the 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 January 2018 through March 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated the Appellant had the right to respond to the charges within 10 days of receipt to provide explanations for the irregular SNAP transaction patterns.

The letter also stated that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i). The charge letter was delivered to the Appellant by UPS on May 31, 2018.

The Appellant, through counsel, responded to the charge letter in a series of telephone calls and written responses from June 11, 2018 to July 12, 2018. The Appellant initially made several requests for additional time to address the charge letter. The Retailer Operations Division granted these requests for additional time, but noted that it could not grant an extension of time to request and provide supporting evidence, for a trafficking CMP under 7 CFR § 278.6(i).

In a letter received on July 12, 2018, the Appellant generally denied trafficking in SNAP benefits and stated that the charge letter did not establish any proof of violations. The Appellant stated that the transactions were not unusual and that people receiving SNAP benefits frequently use a local grocery store in lieu of a supermarket to make some or all of their purchases. The Appellant stated many people will make frequent trips to the store to carry items home or forget items and make an additional purchase. The Appellant also provided statements from the store owner and two (2) store employees which among other contentions generally denied knowledge of any trafficking in the store.

After considering the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated July 25, 2018. The determination letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and 7 CFR § 278.6(e)(1). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of 7 CFR § 278.6(i). The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP because the 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. The determination letter was delivered to the Appellant's counsel on July 27, 2018.

In a letter postmarked August 6, 2018, the Appellant requested an administrative review of the Retailer Operation Division's determination. The request for administrative review was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action 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 AND REGULATIONS

The controlling law in this matter is covered in the Food & 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 § 271.2 states that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

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 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 § 271.2 defines eligible food, in part, as:

Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption

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, **evidence obtained through a transaction report under an electronic benefit transfer system...**

[Emphasis added.]

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.

7 CFR § 278.6(b)(2) states, in part:

- (ii) 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 as specified in § 278.6(i), 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).** [Emphasis added.]
- (iii) **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. [Emphasis added.]

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from January 2018 through March 2018. This involved the following transaction patterns which are trafficking indicators:

- **Charge Letter Attachment 1:** Multiple transactions were made from individual benefit accounts in a set time period. This attachment lists 16 sets of 38 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits. **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**
- **Charge Letter Attachment 2:** Excessively large purchase transactions were made from recipient accounts. This attachment lists 101 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C).** **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- The decision of the Retailer Operations Division was unwarranted, unjustified, arbitrary and capricious in that it did not cite any prohibited conduct.
- There was no evidence of any violation other than occasional multiple transactions by the same household within a short time frame which is not prohibited conduct under the regulations.
- The Appellant store did not engage in any prohibited conduct by applicable laws and regulations defining trafficking and cannot be found to have violated any training materials.

- The Retailer Operations Division did not provide any proof to support its decision, including, but not limited to: proof that the purchases were not for authorized items; that the purchases were repayments on credit accounts; that the transactions described in the charge letter were for the exchange of cash or other prohibited items.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Authorization History

FNS authorized 545 Linden Deli Grocery Corp. for the SNAP on June 9, 2017. During the review period of January 2018 through March 2018, the Retailer Operations Division classified the store as a convenience store.

The owner signed the SNAP application for the store on February 23, 2017 and acknowledged that the owner was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time." The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible items.

Store Visit Report

The case record documents that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a March 29, 2018 store visit conducted by an FNS contractor to observe the nature and scope of the store's operation, stock and facilities. This information was then used to ascertain if there were justifiable explanations for the store's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- 545 Linden Deli Grocery Corp. is approximately 500 square feet in size and operates out of a building in an urban area.
- The store had no shopping carts and no handheld shopping baskets for customer use.
- The store had one (1) cash register and one (1) point-of-sale device for grocery purchases.
- The store did not have any optical scanners and there was no conveyor belt at the checkout area.

- There were no large bulk foods, expensive international or specialty foods that might sell for a high price. There were no fresh meat/poultry/seafood bundles or large boxes of fresh fruit and vegetables for sale. The store had no signs advertising bulk purchase deals.
- There was no storage area where food was kept outside of public view. Store personnel confirmed that no food was stored offsite.
- The checkout area consisted of a small counter of approximately 2 feet by 2 feet for stacking purchases. The area around this counter space was crowded with products for purchase including snack foods such as pastries and potato chips, Red Bull, and stacked boxes labeled Dunkin Donuts coffee. To the right of the checkout area was a large reach-in cooler containing ice cream. The very limited space for stacking food at the checkout area made it not conducive to conducting large transactions.

The SNAP eligible staple food stocked by the store consisted mainly of a limited to moderate selection of inexpensive canned and packaged goods. There was no fresh meat, fresh seafood or fresh poultry although the store had a deli section selling various deli meats and cheeses. The store visit pictures showed only a limited selection of fresh produce in boxes on the floor. The store also sold a large amount of inexpensive accessory food items such as snack foods, ice cream, candy, potato chips, coffee, tea, carbonated and non-carbonated drinks, condiments, and spices.

The store had a small kitchen/food preparation area selling SNAP ineligible hot, heated and cold prepared food not intended for home preparation and consumption. It appeared that some of the deli products were also used for prepared food. In addition to prepared foods, the stocked ineligible items included alcohol, health and beauty products, paper goods, and cleaning products.

Store personnel confirmed that the most expensive items sold by the store were a 25 pound bag of rice at \$14.99, a gallon of oil at \$9.99, and a pound of deli meat at either \$9.99 or \$8.99. However, the store carried less than ten (10) stocking units of bags of rice and cooking oil. The store had some cans of infant formula in a display case, but store personnel didn't mention the price for these to the store visit contractor. However, any SNAP recipients in households containing infants would also likely be WIC participants. As the Appellant store was not authorized for WIC, it is more likely that WIC participants would purchase infant formula at another store that is WIC authorized.

Given the available inventory and store layout as noted above, there is no indication from the store visit report that the store would be likely to have SNAP transaction patterns significantly different from similar-sized competitors offering similar food items.

Legality of Case based on EBT Transactions

The Appellant, through counsel, contests the legality of the determination by the Retailer Operations Division because the alleged violations are based solely on irregular transaction patterns. With regard to this contention, it should be noted that FNS employs a computerized

fraud detection tool to identify EBT transactions that form patterns having characteristics indicative of trafficking. However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still analyze the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether questionable transactions were, more likely than not, the result of trafficking.

The legality of this method is supported by 7 CFR §278.6(a) which states, *inter alia*, “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.]

Multiple Transactions by the Same Household within a Set Time Period

The Appellant states that there is no regulation against multiple purchases within a short time frame. It is true that SNAP households have no limit on the number of times they may use their SNAP cards or how much eligible food they may purchase. However, 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 a convenience store’s stock and facilities and are thus indicative of trafficking.

Violating stores often conduct multiple split transactions from the same household account as a method to avoid the detection of single high dollar transactions that cannot be supported by the retailer’s food inventory and infrastructure. Charge Letter Attachment 1 lists 16 sets of 38 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E)**. In fact, this average SNAP transaction is larger than the average SNAP transaction at a New York supermarket or superstore during the review period. It is not credible that a convenience store with a limited selection of inexpensive staple foods would have suspicious SNAP transactions greater than a supermarket and a superstore. It is even less likely that these excessively large transactions would be conducted multiple times by the same household during a set time period.

The Appellant states that shoppers may forget to purchase an item and make another transaction. It is true that sometimes a customer will forget an item or two and come back later to make an additional small dollar purchase. However, the transactions cited in the charge largely consisted of second or subsequent transactions which exceeded the average transaction of a New York convenience store during the review period.

The Appellant states that nearby customers lacking transportation may walk to the store and split their trips up in order not to carry a lot of items back. However, the Appellant does not explain how these customers, lacking transportation, would be able to return home carrying a large amount of groceries atypical of a convenience store purchase. Every transaction set contained at least one transaction greater **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and these would normally consist

of multiple items that would not be easy to carry back in a single trip. One particularly egregious set is shown in transactions 36-37-38. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The Appellant did not offer any credible explanation for this or any other transaction patterns cited in Charge Letter Attachment 1.

The Appellant submitted signed form statements from the store owner and two (2) employees denying that the transactions cited in Charge Letter Attachment 1 were trafficking transactions. However, these statements did not provide any further explanation for the irregular transaction patterns cited in Charge Letter Attachment 1. It should be noted that the statements did indicate that a single customer was making pre-payments on milk and then picking up milk on separate trips to the store to ensure freshness until the amount paid was reached. This practice, if it truly occurred, is a violation of 7 CFR § 278.2(e) which states “**Accepting coupons before delivery.** Food retailers may not accept coupons before delivering the food, retain custody of any unspent coupons, or in any way prevent an eligible household from using coupons in making purchases from other authorized firms”

In summary, the store visit pictures show that is unlikely that SNAP customers would shop at the store and purchase such a large volume of items multiple times during a short time frame. In addition, the store’s small checkout area and limited counter space makes it unsuitable for conducting large transactions. The store also had no shopping carts or shopping baskets for transporting food within the store which would be required for the large dollar transactions. Based on the analysis above, and 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.

Excessively Large Transactions

SNAP households have no limit on the amount of eligible food they may purchase (subject to the remaining balance on the card). However, the SNAP transactions noted in the charge letter are questionable not because they exceed any regulatory limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of a convenience store’s stock and facilities and are thus indicative of trafficking.

Charge Letter Attachment 2 cites 101 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(7)(E)**.

Sometimes a store may have higher than normal SNAP transactions due to the lack of access to other SNAP authorized stores in the area. However, the Retailer Operations Division determined that during the review period there were 19 SNAP authorized stores located within a quarter-mile radius of 545 Linden Deli Grocery Corp. These SNAP authorized stores consisted of eight (8) other convenience stores, eight (8) small grocery stores, two (2) medium grocery stores and a supermarket. The supermarket was located 0.15 miles away. When expanded to a half-mile radius there are four (4) supermarkets and two (2) superstores that are SNAP authorized.

The Appellant states that SNAP recipients frequently use a local grocery store in lieu of a supermarket to make some or all of their purchase. However, a government report¹ on SNAP benefit redemption patterns revealed that households most often redeemed their benefits at supermarkets and superstores with only four (4) percent of all households never shopping in a supermarket or superstore. Thus, when a supermarket or superstore is available, it is highly unlikely that a SNAP recipient would conduct excessively large SNAP transactions at a convenience store with a more limited selection of staple foods.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The case record also documents that the Retailer Operations Division conducted a detailed analysis of three (3) households identified in the charge letter to analyze their shopping patterns at 545 Linden Deli Grocery Corp. compared to their shopping patterns at other SNAP authorized stores. All of these households had access to supermarkets and/or superstores. However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at 545 Linden Deli Grocery Corp. on the same day or within a day of shopping at these larger stores. It is highly unlikely that a convenience store with limited staple foods would have legitimate SNAP transactions comparable or larger than these SNAP authorized supermarkets and superstores.

In summary, the store's layout, infrastructure, 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 statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts and shopping baskets support the Retailer Operations Division determination. 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.

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. The SNAP regulation at 7 CFR § 278.6(b)(2)(ii) mandates that a request for a trafficking CMP along with supporting documentation shall be submitted within ten (10) days of receipt of the charge letter.

The SNAP regulation at 7 CFR § 278.6(b)(2)(iii) also states, in part, that “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 ... the firm **shall not be eligible** for such a penalty.” [Emphasis added.]

¹ “Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program,” report prepared by Mathematica Policy Research for the Food and Nutrition Service, February 2011.

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'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 the Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify the retailer. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges.

In the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation. 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 in fact occur as determined by the Retailer Operations Division. Based on the discussion above, the decision to impose a permanent disqualification against 545 Linden Deli Grocery Corp., Appellant, is sustained.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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, FNS is 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.

RONALD C. GWINN
Administrative Review Officer

October 24, 2018