

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

671 Kelly Deli Grocery Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0210657

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a permanent disqualification of 671 Kelly Deli Grocery Inc. (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not 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 671 Kelly Deli Grocery Inc.

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.”

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified based on an analysis of EBT transaction data from December 2017 through May 2018. This involved the following transaction patterns which are common trafficking indicators:

- There were multiple transactions made from the accounts of individual SNAP households within a set time period.
- Excessively large purchase transactions were made from recipient accounts.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized 671 Kelly Deli Grocery Inc. for SNAP participation as a convenience store on June 10, 2014. In a letter dated September 6, 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 between the months of December 2017 and May 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

Between September 12, 2018, and December 18, 2018, the Appellant, through its accountant, responded to the charges, claiming that the allegations of trafficking were untrue. The Appellant claimed that all items purchased by SNAP recipients were approved under SNAP regulations and guidelines. Similarly, it claimed that inventory purchased by the firm was also approved under SNAP regulations. It further stated that the firm had reviewed all of its stock, both on the store's shelves and in storage, and contended that the firm maintained required levels of inventory. After a review of all of its data, the Appellant could not see any signs of trafficking or misuse. Finally, the Appellant pointed to a 2016 undercover investigation at the store in which no program violations occurred as proof that the firm was in compliance with program regulations.

In support of its responses, the Appellant submitted a large amount of evidence, including roughly 150 pages of inventory invoices and receipts; approximately 70 pages of bank statements; tax return documentation from the year 2017; 182 itemized cash register receipts corresponding to many of the transactions listed in the charge letter; a 2017 "Deposit Analysis" showing that approximately 41 percent of the firm's sales were EBT sales; and a two-page document entitled "Item Summary," which appears to list quantities of specific items sold, but does not specify a time period.

It should be noted that in a letter dated October 3, 2018, the Appellant, through counsel, submitted a request for case file information in a request made under the Freedom of Information Act (FOIA). The agency completed its response to this request on October 25, 2018. The FOIA response was delivered to Appellant's counsel on October 30, 2018.

After considering the Appellant's response to the charges and further evaluating the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated February 5, 2019. This letter informed the 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 the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the regulations, but determined that a CMP was not appropriate in this case 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 SNAP violations.

In a letter postmarked February 11, 2019, the Appellant, through its accountant, 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....

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...

APPELLANT'S CONTENTIONS

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

- Appellant disagrees with the disqualification action taken by the Retailer Operations Division. It has gathered factual evidence to prove that the findings are untrue.
- Appellant has gone through all of its cash register receipts and does not see any signs of trafficking. The purchased items are approved under SNAP regulations and guidelines.
- Appellant has gone through its vendor invoices and does not see any signs of trafficking. The items purchased by the firm are approved under EBT regulations and guidelines.
- Appellant has gone through all of its current and past inventory and has determined that the firm maintained the required levels of SNAP food stock. The Appellant does not see any signs of trafficking.
- Appellant has reviewed a prior undercover investigation report and has found that the firm committed no violations.

In support of its contentions, the Appellant submitted a 10-page document entitled, “EBT SNAP Training & Manual.” The cover pages of the manual states that it is for the “owner and all cashiers.”

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions and evidence presented, including any not specifically summarized or explicitly referenced in this document.

ANALYSIS AND FINDINGS

The primary issue for consideration in a case based on suspicious SNAP redemption data is whether or not the Retailer Operations Division adequately established that the Appellant firm engaged in the violation of trafficking. In other words, did the Retailer Operations Division, through a preponderance of the evidence, establish that it is more likely true than not true that the irregular and unusual transactions cited in the charge letter were the result of trafficking?

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm’s EBT transactions, but also information obtained during a July 9, 2018, store visit which was conducted by an FNS contractor to observe the nature and scope of the firm’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 and photographs documented the following store size, description, and characteristics:

- 671 Kelly Deli Grocery Inc. is a small convenience store/corner market, approximately 600 square feet in size, operating in the Bronx, New York.
- At the time of the contractor’s visit, the firm did not have any shopping carts or handheld shopping baskets, which is typical for stores of this size. Customers shopping in such stores generally purchase only as much food as they can carry in their arms.
- The store visit photographs show one cash register for food purchases and one EBT point-of-sale device.

- It appears that the firm does not use optical scanners to process transactions.
- The checkout area consists of a small countertop where items can be placed for purchase. The constricted checkout area is not suitable for conducting large or rapid transactions as there is little space on the counter to place more than a few items at a time and little room for customers to maneuver with large amounts of groceries.
- The firm's staple food inventory is sufficient for program eligibility. The overall breadth of staple foods is marginal, and is typical of a convenience store.
- SNAP-eligible, non-staple accessory food items available at the store include carbonated and uncarbonated drinks, snacks, candy, and condiments. The store also sells ineligible, nonfood items, including cleaning supplies, personal care items, and other miscellaneous household merchandise.
- The store has a large kitchen/deli area, where hot and cold made-to-order sandwiches and salads are available for purchase. The store also sells hot breakfast plates, such as French toast, omelettes, and pancakes, and dinner sides such as French fries, onion rings, and chicken wings. The store also sells deli meats and cheeses by the pound.
- There is no indication from the store visit report that the firm has a special pricing structure. Most prices end in 9, such as \$0.99, \$1.99, etc.
- According to the contractor's report, the most expensive SNAP-eligible food items are a 12.5-ounce can of Enfamil infant formula for \$18.99; deli meat for \$8.99 or \$9.99 per pound; deli cheese for \$6.99 per pound; and a cold sandwich for \$6.75. It should be noted that SNAP households do not frequently purchase expensive infant formula with their SNAP benefits. Most SNAP households that have children under the age of 5 are eligible for participation in the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), and infant formula is part of the WIC food package.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a convenience store, where households normally purchase a limited number of items to complement their overall dietary needs. There was no indication that SNAP households would be inclined to regularly visit 671 Kelly Deli Grocery Inc. to purchase large quantities of groceries, especially considering the limited staple food inventory, the absence of shopping carts and baskets, and the availability of larger SNAP-authorized stores nearby, including one large grocery store and two supermarkets less than a quarter of a mile away – all of which are also authorized to accept WIC benefits. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of nearby, similar-sized competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: Multiple transactions were made from the accounts of individual SNAP households within a set time period. This attachment lists 22 sets of transactions (53 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E).

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), an extraordinary amount for a convenience store like 671 Kelly Deli Grocery Inc. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Such patterns and transaction totals at a marginally-stocked convenience store are highly irregular and are often an indication of trafficking. As such, these transactions warrant further explanation.

The Appellant has not offered any specific arguments related to the transactions listed in Attachment 1 except to claim that it has reviewed its evidence and has not found any signs that the store was engaged in trafficking. The Appellant has also provided a large amount of documentation, which will be discussed later in this document.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 151 SNAP transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with other convenience stores in the state of New York. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a convenience store in New York was \$8.87. In the Bronx, the average was slightly higher at \$8.94 per transaction, but the average transaction in Attachment 2 is more than seven times larger than the average purchase amount for this store type.

Given that the Appellant firm has a small inventory of staple foods and other SNAP-eligible items, such as snacks and drinks, it is possible 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 be some legitimate SNAP transactions sprinkled 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 constricted checkout area, the absence of shopping carts and baskets, and the availability of much larger stores in the area. The substantial number of high-dollar transactions in a six-month period calls into question the legitimacy of these transactions. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Considering how many low-priced food items it would typically take to add up **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, and considering the store's characteristics, this review finds it unlikely that SNAP households would legitimately choose to spend large portions of their benefit allotments at a store such as 671 Kelly Deli Grocery Inc.

Included in Attachment 2 are several unusually repetitive transaction totals. For example, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Transactions ending in .99, .89, .86, and .69 are among the most common found in this attachment. Of course, with more transactions that occur at a given store, the greater the likelihood that a transaction total will be duplicated. But these stand out as particularly unusual given their frequency and large size. That a number of randomly-selected items would so frequently result in these transaction totals is highly irregular. The repetitiveness of such transaction amounts gives an impression of a cashier attempting to mask trafficking by avoiding suspicious-looking even-dollar amounts.

As with Attachment 1, the Appellant has not provided any arguments directly related to the transactions listed in Attachment 2 except to claim that it has reviewed its evidence and has not found any signs that the store was engaged in trafficking.

It is the finding of this review that the attachments furnished with the charge letter adequately identify the irregular patterns of SNAP transactions which indicate that trafficking was likely taking place. The transactions listed in the charge letter are highly unusual and substantially

different from comparable stores in the area. Based on these and other factors, such as the store's physical characteristics and inventory, the case of trafficking is convincing.

Appellant's Evidence

In its response to the charge letter, the Appellant provided a large amount of evidence, including inventory invoices and receipts; bank statements; tax returns; itemized cash register receipts; and spreadsheets that provide a summary of sales. The most relevant evidence is addressed below:

Inventory Invoices / Bank Statements

The Appellant submitted approximately 150 pages of inventory invoices, most of which are from the review period. According to the Retailer Operations Division's analysis of this evidence, the firm purchased 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP-eligible food during the six-month review period. Assuming a 50 percent markup and assuming that all food items purchased by the firm were sold during that same period, total food sales should have been approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C). According to agency records, SNAP redemptions during the review period totaled 5 U.S.C. § 552 (b)(6) & (b)(7)(C), or 90.1 percent of the possible food sales. This percentage is extraordinarily high and contradicts the Appellant's "Deposit Analysis" document, which claims that EBT transactions constituted 41 percent of the firm's sales.

While inventory records can be useful in demonstrating that a firm had sufficient stock to account for the SNAP transactions during a review period, inventory records alone do not give a complete picture of the activities taking place at a store and they offer virtually no insight into what transpired at the cash register. Similarly, the firm's bank statements provide no record of what took place during each transaction. Accordingly, it is the finding of this review that the Appellant's inventory invoices and bank statements do not provide a valid basis for reversing the disqualification decision or for mitigating the penalty imposed.

Itemized Cash Register Receipts

In terms of demonstrating what occurred during specific transactions, itemized cash register receipts are among the most valuable pieces of evidence a firm can retain. In this case, the Appellant submitted 182 cash register receipts that allegedly show individual items that were purchased during each transaction. Unfortunately, the receipt evidence is not credible and strongly suggests that the Appellant fabricated the evidence in a misguided effort to disprove the allegations against the firm. There are three key reasons for this conclusion:

- 1) Several of the transactions in Attachment 1 were also found in Attachment 2, but the Appellant submitted conflicting receipts. For instance, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This transaction is found in Attachment 1 as part of a set of transactions that occurred in an unusually short period of time. Due to its large size, this same transaction is also listed in Attachment 2. However, the Appellant provided two separate receipts showing the purchase of different products.

On one receipt, which the Appellant claims to correspond to line 7 of Attachment 1, the customer supposedly purchased three cans of infant formula (\$25.79 each) as well as packages of bacon, chicken, and hot dogs. On the other receipt, which supposedly corresponds to line 59 of Attachment 2, the customer apparently purchased three deli sandwiches and three cans of infant formula (\$26.07 each). The receipts list the same date, time, and total amount.

Although listed in both attachments, this 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transaction is, in reality, just one transaction. Contradictory receipts were similarly provided for at least 10 other transactions. It appears that in its haste to manufacture compelling evidence, the Appellant failed to recognize that a number of transactions were duplicated in the two attachments.

- 2) Of the 182 cash register receipts submitted by the Appellant, 78 receipts, or 42 percent, included purchases of infant formula, ranging in price from \$24.99 to \$26.07. Some of the larger transactions from Attachment 2 included as many as five or six cans of formula in a single purchase. This is simply not believable. A review of the Appellant's inventory records shows a total of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) spent by the firm to stock the store with infant formula. And yet, customers supposedly purchased almost 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of formula during the same period. Additionally, the contractor's store visit report shows fewer than 10 containers of formula in stock on the day of the inspection. This evidence strongly suggests that the Appellant's receipts are fictitious, as its sales of infant formula, as listed on the receipts, far exceed its inventory of that product.

Additionally, as noted earlier, SNAP households containing infants do not frequently purchase formula with SNAP benefits because such households are almost always eligible for participation in the WIC Program as well. Because infant formula is part of the WIC food package, such food items are normally purchased with WIC vouchers.

- 3) The items listed on the cash register receipts do not reflect how customers – SNAP or otherwise – actually shop. Of the 182 receipts provided, not a single one lists the purchase of candy, chips, bottled water or juice, or other accessory foods that are so prevalent in convenience stores. One receipt did show the purchase of soda, but this review could not find any other similar purchases. Research has shown that just like non-SNAP households, SNAP customers regularly purchase snack foods, particularly when spending their benefits at convenience stores. That the Appellant's receipts do not reflect normal shopping behavior strongly suggests that they were generated in an ill-advised and fraudulent effort to persuade FNS that the transactions in the charge letter were legitimate.

Based on the analysis above, this review finds that the evidence provided by the Appellant undermines rather than strengthens its contentions and fails to persuade this review that trafficking was not occurring.

No Prior Violations

The Appellant contends that as a result of its FOIA request it reviewed a prior undercover investigation report concerning the firm and found that it had committed no violations. Unfortunately, this contention has no relevance in this matter. 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. In this case, the sanction imposed by the Retailer Operations Division fully conforms to SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations.

Civil Money Penalty

As noted earlier, the Retailer Operations Division determined that the Appellant firm was not eligible for a civil money penalty 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 training program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a civil money penalty 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 documentation within designated timeframes. The case record shows that the Appellant did not request a trafficking civil money penalty when it replied to the charge letter. While the Appellant did provide a copy of its training manual as part of its request for administrative review, this evidence cannot be considered as it was not submitted within 10 days of receipt of the charge letter as required by 7 CFR § 278.6(b)(2)(ii) and (iii). Therefore, a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

An analysis of the Appellant's EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify 671 Kelly Deli Grocery Inc. 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 the Appellant. Likewise, the 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 and evidence in this case, the decision to impose a permanent disqualification against the Appellant, 671 Kelly Deli Grocery Inc., under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), 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.

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.

JON YORGASON
Administrative Review Officer

June 17, 2019