

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

Ada Grocery Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0215530

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence that the Retailer Operations Division properly imposed a permanent disqualification of Ada Grocery Inc. 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 Ada 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.”

CASE CHRONOLOGY

In a letter dated March 27, 2019, 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 September 2018 through February 2019. 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 March 28, 2019.

In response to the charge letter, the Appellant provided handwritten letters on April 5, 2019 and May 7, 2019. The Appellant generally stated that the irregular transaction patterns were the result of customers from a nearby shelter shopping at the store. The Appellant store was accepting orders from these customers and would purchase food at places like 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and then would round prices up adding on a 20 percent markup. The Appellant did not request a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i).

After reviewing the Appellant's response and the evidence in the case record, the Retailer Operations Division issued a determination letter dated June 4, 2019. The 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.

In a letter postmarked June 7, 2019, 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).

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from September 2018 through February 2019. This involved the following transaction patterns which are trafficking indicators:

- **Charge Letter Attachment 1:** There were an unusual number of transactions ending in a same cents value. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- **Charge Letter Attachment 2:** Multiple transactions were made from individual benefit accounts in a set time frame. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- **Charge Letter Attachment 3:** Large purchase transactions were made from recipient accounts based on the observed store characteristics and recorded food stock. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in relevant part:

- The store is within yards of a family shelter and customers come and go frequently. These customers place orders with the store to purchase items in bulk. The store then charges a 20 percent markup on the items they purchase including baby formula.
- Some recipients are buying baby formula in bulk and then are shipping it to their home countries.
- The store makes purchases at various stores like 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Therefore, there is not a set price which is why a lot of prices are even and easy to count.
- Recipients bring in kids who want candy or chips and the store sells them these items which end in 25 and 50 cents which accounts for the same cent transaction amounts.
- The store is not sure if SNAP customers share their SNAP benefits because the EBT cards do not have pictures.
- If the store made any improper transactions they were not intentional.
- If the store is disqualified many customers will have to walk far distances to purchase food.

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 Ada Grocery Inc. for the SNAP on February 26, 2018 as a convenience store. The owner signed the SNAP authorization application for the store on December 18, 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 February 14, 2019 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:

- Ada Grocery Inc. is approximately 750 square feet in size. There was no storage area with food outside of customer view and no food was stored offsite.
- The store had no shopping carts and no handheld shopping baskets for customer use.
- The store had a single cash register and point-of-sale device for grocery purchases. A separate register is used for lottery sales.
- Food prices generally ended in typical retail pricing amounts of 99 cents although some items did end in even dollar amounts. The store did not round prices up or down at the checkout.
- According to store personnel, the store did not deliver or take orders for food.
- The checkout area consisted of a counter with a cash register, a lottery register and displays of candy, snack foods and lighters. There was an open space not exceeding two (2) feet by two (2) feet for stacking purchases. The very limited space for stacking food at the checkout area made it not conducive to conducting large transactions.
- Although the store did sell formula, there were no bulk foods or expensive international 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.

The SNAP eligible staple food stocked by the store consisted mainly of inexpensive canned and packaged goods. The store also sold a larger 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. Store personnel confirmed that the most expensive food items sold by the store were:

- Two (2) 96-ounce cases of Similac Pro Advanced Ready to Drink at \$60.00 each.
- More than ten (10) stocking units of 42.1 ounce of Enfamil Premium Advanced Powder at \$45.99.
- Four (4) stocking units of 36- ounce Similac Pro Advanced Powder at \$39.99 each.
- More than ten (10) stocking units of 33.2 ounce Enfamil Premium Formula at \$36.99 each.

The SNAP ineligible items sold by the firm included lottery tickets, tobacco, health and beauty aids, paper goods, cleaning products, housewares, and gift items, party goods, and souvenirs.

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.

Same Cent Transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(7)(E). When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits.

A review of the store's food inventory and prices indicates that the large dollar transactions cited in the charge letter would normally consist of multiple food products being purchased in one transaction. It is implausible that these purchases, when added together, would disproportionately result in total purchase prices ending in 00 and 50 cents. Instead when SNAP customers buy multiple food items, resulting in higher dollar amounts, the total transaction amount is more likely to result in a more random statistical spread of ending cent ranges from 00 to 99 cents.

The Appellant carried only two (2) cases of Similac Pro Advanced Ready to Drink at \$60.00 each. The charge letter does not show any transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as would be expected if customers were buying this product in bulk. In addition, the store is WIC authorized and therefore the formula sold by the store would be more likely purchased with WIC benefits than SNAP benefits.

The Appellant has offered no evidence that successfully rebuts the charges made by the Retailer Operations Division. When there are a disproportional amount of transactions that end in a same cents value such as 00 and 50 cents, it appears that these transaction amounts are contrived and therefore, in the absence of any compelling rationale to the contrary, are an indicator that the firm is trafficking in SNAP benefits. A preponderance of the evidence indicates that the irregular transactions cited in Charge Letter Attachment 1 are more likely than not a result of the store trafficking in SNAP benefits.

Multiple Transactions by the Same Household within a Set Time Period

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.

5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(7)(E).

The Appellant states that people from an adjacent family shelter come to the store multiple times a day for food due to rodent infestation at the shelter. Even if families in the area make frequent trips to the store, it is unlikely they would consistently make large dollar purchases typical of a superstore and atypical of a convenience store. It is even more unlikely considering that the store does not have shopping carts and shopping baskets. The Retailer Operations Division also determined that it was likely that the shelter residents would not be able to store large purchases, perishable foods or have the ability to prepare them at this particular shelter location.

It is also noteworthy that the other SNAP authorized stores in the area, including other nearby convenience stores, grocery stores, a supermarket and a superstore, do not exhibit these same irregular transaction patterns. If neighborhood shopping habits were contributing to the irregular transactions identified in the charge letter, one would expect these same patterns to occur at nearby competitor stores.

In conclusion, 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 set time frame. In addition, the store's small checkout area and limited counter space makes it unsuitable for conducting large transactions. During the store visit, Ada Grocery Inc. had no shopping carts or shopping baskets for transporting food within the store which would be required for the larger 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.

5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(7)(E)

The Appellant states that the store is within yards of a family shelter and customers come and go frequently. These customers place orders with the store to purchase items in bulk. The store then charges a 20 percent markup on the items they purchase including baby formula. In addition, the Appellant alleges some recipients are buying baby formula in bulk and then are shipping it to their home country. However, the Appellant did not provide any evidence to support its contentions. During the store visit, store personnel stated that the store did not take orders.

There are also no purchase invoices or receipts to support that the store is purchasing items in bulk for resale.

There is no indication from the store visit report and photographs that the store sells food in bulk. Although the store does carry some expensive formula products, Ada Grocery Inc. is WIC authorized and SNAP customers with infants are more likely to purchase formula with their WIC benefits.

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 142 SNAP authorized stores located within a one-mile radius of Ada Grocery Inc. These include 15 supermarkets and 12 superstores. Two (2) superstores were located 0.14 and 0.15 miles away from Ada Grocery Inc. 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.

The case record also documents that the Retailer Operations Division conducted a detailed analysis of four (4) households identified in the charge letter to analyze their shopping patterns at Ada Grocery Inc. compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at supermarkets and/or superstores. However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at Ada Grocery Inc. often on the same day or within a day or two of shopping at a supermarket or a superstore. 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 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 3 are more likely than not the result of trafficking in SNAP benefits.

Hardship to the SNAP Community

The Appellant states that a permanent disqualification would be a hardship to the local community as families with children will have to walk far distances to purchase their food items. Regarding this contention, there is no provision in SNAP law or regulations that would negate,

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

waive or reduce a permanent disqualification for trafficking due to a purported hardship to SNAP customers.

Where there is a hardship to SNAP households due to a lack of authorized stores in the area, FNS may impose a hardship CMP on a firm in lieu of a **less than** permanent disqualification. However, the regulations at 7 CFR § 278.6(f)(1) clearly state that “a civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a **permanent** disqualification.” [Emphasis added.] Because the Retailer Operations Division has taken action to permanently disqualify the Appellant firm, a hardship CMP in lieu of disqualification cannot be granted.

It should also be noted that there are 142 SNAP authorized stores located within a one-mile radius of the Appellant store including two (2) superstores located 0.14 and 0.15 miles away from Ada Grocery Inc. Therefore, it is unlikely that the local SNAP community will suffer a hardship as opposed to a mere inconvenience due to the permanent disqualification of Ada Grocery Inc.

CIVIL MONEY PENALTY

The Appellant did not 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. SNAP regulations at 7 CFR § 278.6(b)(2)(iii) states 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** specified in § 278.6(b)(1), the firm **shall not be eligible** for such a penalty.” [Emphasis added.]

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.

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 Ada Grocery Inc., 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

August 13, 2019