

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

Colonial Deli & Grocery,

Appellant,

v.

Case Number: C0212287

Retailer Operations Division,

Respondent.

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 Colonial Deli & Grocery (Colonial 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 October 5, 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 March 2018 through August 2018. 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 October 16, 2018. Appellant denied trafficking and explained the transactions were normal based on the unique circumstances of the store. After considering the retailer's reply and the evidence, the Retailer Operations Division issued a determination letter dated November 8, 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.

By letter postmarked November 16, 2018, ownership appealed the Retailer Operations Division's determination and requested an administrative review.

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 USC § 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 § 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, 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 § 278.6(a) states:

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(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.

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 THE CHARGES

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from March 2018 through August 2018. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were an unusual number of transactions ending in a same cents value.
- 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 November 16, 2018, administrative review request, and subsequent information submitted December 10, 2018, Appellant provided the following summarized contentions:

- Appellant operates a “Keep the Change” program and rounds its transactions down.
- Many customers shop at the store for delivery because they are disabled and unable to walk.
- These customers purchase large quantities every month on a consistent basis.
- The store has been in the community for more than 20 years and was run by the current owner’s father.
- Ownership has ensured that all employees followed the guidelines of the EBT rule and regulations.
- From the beginning of the calendar year, Appellant purchased 5 U.S.C. § 552 (b)(6) & (b)(7)(C) from Frito Lay and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) from Wise Chips. This is evidence of the amount of foot traffic in the store.
- Some customers visit the store multiple times throughout the day and make multiple purchases.
- Appellant is submitting evidence to show that it manages a large inventory.
- Appellant’s deli meat is one of the bestselling items in the store including its hoagies.
- Appellant sells 5 U.S.C. § 552 (b)(6) & (b)(7)(C) plus per month of hoagies with the average price of \$7.99.
- A shopper can walk to the store and purchase three hoagies, oil, rice, shakes, and other items and the bill can easily total 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant submitted the following documents in support of its contentions:

- Four customer letters with the last 4 digits of the EBT card;
- “Keep the Change!” poster;
- Screen shots of the computer system that operates the round down program;
- Eight photographs of store interior;

- Forty-six paid checks to Frito Lay since the beginning of calendar year 2018;
- Twenty paid checks to Pepsi Company;
- Thirty-nine pages of invoices from General Trading Wholesale Food Distributors with 18 copies of paid checks to this company;
- 88 Sahill Inc. invoices; and
- Colonial Deli Menu.

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 Colonial Deli & Grocery as a convenience store on May 18, 2010. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an August 16, 2018, 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:

- Colonial Deli & Grocery is approximately 400 square feet.
- The checkout space is small and limited and occurs through a small window area surrounded by Plexiglas with an ice cream cooler in front.
- There were no shopping baskets and no shopping carts for customer use. There was one shopping basket in the storage room that was used for stocking and kept in the storage room.
- There was one cash register and one point-of-sale device.
- There was no fresh meat, poultry, or fish
- There were no bulk packages or any advertised specials.
- There was limited fresh produce including onions, potatoes, five mangoes, and a box of bananas. In the deli case there were heads of lettuce, tomatoes, green peppers, and lemons.
- There was a deli area that sold hot and prepared food as well as deli meat and cheese.
- There were packages of hot dogs and bacon in the deli case.
- Dairy included milk, cheese, and butter.
- Other staple foods available for purchase were eggs, juice, rice, bread, beans, cereal, pasta, and a limited 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 tobacco, lottery, health and beauty products, cleaning products, and paper products.

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 noted were the deli meat and cheese prices for \$6.99 and \$5.99 per pound. 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. There were an unusual number of transactions ending in a same cents value. During the review period, there were 644 transactions ending in a same cents value that meet the parameters of this attachment. When such patterns are unsupported by special pricing structures, they are a strong indicator of trafficking in SNAP benefits.

The store visit report that was completed with the cooperation of the store manager indicated that typically prices ended in 9 cents. It is possible that some of the smaller transactions are the result of purchasing some same cent items and this could explain some of the lower dollar same cent transactions. However, the larger transactions cited in the charge letter would most likely consist of the purchase of several relatively inexpensive items and it is unlikely that these purchases would routinely total to an amount ending in same cents. Consequently, when many transactions end in a same cents amount, it appears that these transaction amounts are contrived and in the absence of compelling evidence to the contrary, are suggestive of trafficking.

Appellant's contends that it rounds down its transactions with a "Keep the Change!" program. Appellant submitted a photograph of the sign posted in the checkout area above the hoagie menu. However, the evidence from the store visit, including photographs and report, show no evidence of this promotion. The poster was not hung in that location or visible in any of the photographs on the day of the store visit. In addition, the store employee did not indicate that there were any rounding down policies in place or other specials or promotions. The photograph submitted by the store owner was more likely than not created for the purpose of responding to the charges.

Appellant failed to provide a credible explanation for the same cent transactions listed on Charge Letter Attachment #1.

Charge Letter Attachment 2. Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment documents 22 sets of transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits that meet the parameters of this scan. 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.

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. Appellant is not set up to provide for all of one's food needs and lacks an abundant depth and breadth of staple foods. The second and third transactions in each set are too large to consist of forgotten items.

The Retailer Operations Division compared Appellant to six nearby convenience stores. Appellant conducted 22 transaction sets that met the parameters of this scan, whereas the other six stores collectively conducted three similar transactions sets. Appellant's explanation does not address why this transaction pattern occurs much more frequently at Appellant than at other nearby similarly stocked stores.

Appellant submitted numerous invoices from two potato chip companies as well as a soda company to show how much inventory it purchases. However, the sale of chips and soda do little to explain multiple large dollar transactions by the same household. These households would need to be purchasing a significant quantity of chips and soda to equal the amounts of the transactions amounts listed. Similarly, it is unlikely that many customers are making multiple visits purchasing large volume of hoagies. Appellant does not have shopping baskets or carts to carry these large amounts of snack food items.

Appellant has not offered any evidence to show that the transactions listed in Charge Letter Attachment #2 were legitimate purchases of eligible food.

Charge Letter Attachment 3: Excessively large purchase transactions were made from recipient accounts. This attachment lists 110 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These large transaction amounts are questionable because they are not consistent with the store's inventory with no fresh unprocessed meat and limited fresh produce. The SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, and snack foods. The frequency of high-dollar purchases in a six-month period calls into question the legitimacy of these transactions.

The Retailer Operations Division compared Appellant to other convenience stores in Mercer County New Jersey during the review period. Appellant's average SNAP transaction amount and total SNAP redemptions during the review period were two times that average for convenience stores in the County. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** The store does not stock fresh meats, sell bulk foods, or offer specials which might account for these transactions. As such, the Retailer Operations Division considered this an indicator of trafficking considering Appellant's eligible food stock and infrastructure.

The Retailer Operations Division compared Appellant to six nearby convenience stores. Appellant

conducted 110 transaction sets that met the parameters of this scan, whereas the other six stores collectively conducted 79 similar transactions sets. Specifically, the other stores conducted 3, 12, 11, 6, 24, and 23 transactions that met that parameters of this scan. Appellant did not provide an evidence that might explain why its convenience store would have such a large amount of large dollar transactions in comparison to other similarly stocked stores.

The Retailer Operations Division determined that within a one-mile radius of Appellant there were ten combinations stores, 12 other small groceries, three medium groceries, one large grocery, and three supermarkets. Thus, households who shop at Appellant have access to large grocery stores, supermarkets and super stores, among all other types of authorized stores. The Retailer Operations Division examined three households identified in the charge letter to analyze their shopping patterns at Colonial Deli & Grocery compared to their shopping patterns at other SNAP authorized stores. However, despite this access to better stocked stores, the other households conducted excessively large transactions at Colonial Deli & Grocery within a short time of shopping at a supermarket or super store. It is questionable as to why households would conduct large transactions at Appellant, when these households had just visited or planned to visit larger stores with a better selection of fresh meat and produce and likely better prices. The inventory and layout at Colonial Deli & Grocery Corp does not support these transactions. There is no compelling reason for customers to consider Colonial Deli & Grocery, as a first choice destination to fulfill large purchases of food.

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. 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. Therefore, based on this empirical data, and in the absence of evidence to legitimize 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.

Invoices

Appellant submitted invoices of its eligible food products purchased. In its original reply to the charges, Counsel informed the Retailer Operations Division that Appellant's profit margin is 22% to 25%. Using this markup and considering cash and card sales, the invoices do not support Appellant's SNAP redemptions. However, even if the receipts and invoices 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 individual during the same store visit or in a single day. The large dollar transactions remain questionable even when there is sufficient food inventory to support such transactions when consideration is made of there being only a limited variety of stock in the store, no fresh meat and limited fresh produce, a greater variety of foods at lower prices at other stores, including supermarkets at which many customers also shop, no shopping baskets or carts, and very little counter space to place food for purchase at the checkout counter. Even with sufficient food stock at Appellant to mathematically support high dollar transactions,

there does not appear to be anything that would reasonably attract SNAP households to shop there, a convenience store, and spend substantial amounts of their SNAP benefits. It is important to note that the majority of invoices submitted were for chips and soda.

Customer Statements

Appellant submitted four customer statements describing that it would be a hardship to them if Appellant is permanently disqualified. These households indicate that they shop frequently at Appellant. The transaction history of each of these households was reviewed. Each of these households had opportunities to shop at other retailers during the review period. Two of the four households shopped at several different stores during the review period in addition to Appellant including supermarkets and super stores. Many times these households' transactions at Appellant were larger than the transactions conducted at these larger stores. The other two households did primarily shop at Appellant during the review period. However, each of these two households did shop at a supermarket during at least one month of the review period. Again, the transactions conducted at Appellant were larger than the transactions conducted at the larger better stocked stores. These customer statements are not sufficient evidence that the questionable transactions were for eligible food items only.

As indicates previously, the Retailer Operations Division determined that within a one-mile radius of Appellant there were 44 other authorized retailers. Moreover, where there is a hardship to SNAP households, FNS may impose a hardship CMP on a firm in lieu of a disqualification where there is a lack of authorized stores in the area. However, 7 CFR § 278.6(f)(1) clearly states that "a civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a permanent disqualification." Because the Retailer Operations Division has taken action to permanently disqualify Appellant's firm, a hardship CMP in lieu of disqualification cannot be granted.

Evidence

The transactions reports are derived from the ALERT system, a computerized fraud detection tool to identify SNAP 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 conduct an extensive analysis of 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 the 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.]

The documentation and evidence provided by the Retailer Operations Division was thoroughly examined. From all indications, the Retailer Operations Division obtained the EBT data (provided by ALERT), found it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough investigation before concluding that trafficking was likely occurring. Appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed and that the transactions detailed in the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. Appellant offered no relevant evidence to prove that the transactions listed in the charge letter were legitimate purchases of eligible food. In the absence of compelling information or documentation weighed in comparison to the evidence provided by the Retailer Operations Division, the evidence weighs in favor of the Retailer Operations Division's determination that SNAP-benefit trafficking substantially produced the transaction activity at issue in the present case.

CIVIL MONEY PENALTY

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR § 278.6(i). Appellant was informed that it would need to provide both the request and supporting evidence within ten calendar days of receiving the charge letter and that no extension of time could be granted for making the request or for providing the required evidence. 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.

Even if a timely request had been submitted, 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 compliance policy to prevent SNAP 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 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

May 14, 2019