

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

El Bodegon Deli Grocery Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0205048

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 El Bodegon Deli Grocery Corp. (El Bodegon 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 January 3, 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 June 2017 through November 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant replied to the charges by letter dated January 15, 2018, and requested documents under the Freedom of Information Act (FOIA). FNS responded to the FOIA request on June 7, 2018. The Retailer Operations Division sent the retailer a letter to the retailer on September 12, 2018, requesting that it provide its final response to the charges within ten days. Appellant replied to the charges by letter dated September 26, 2019. 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 May 30, 2019. 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 dated June 7, 2019, 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 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 June 2017 through November 2017. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were multiple transactions made from individual benefit accounts within a short time period.
- There were excessively large 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 June 7, 2019, administrative review request, Appellant provided the following summarized contentions:

- Appellant offers a large variety of grocery food items, deli, produce, and other food products such as bread, eggs, cold cuts, milk, fruit, vegetables, yogurts, juice, etc.
- It can be very easy for a SNAP participant to expend a large amount of benefits at Appellant.
- Appellant previously sent the receipts of purchases for merchandise available and it also sent in the photographs show the different products it sells.
- Appellant sent in signed documentation of the training to its workers.
- Appellant's EBT transactions increased due to several of the business in the area having lost their authorization.
- Appellant has always been a rule abiding business and has observed the rules and regulations.
- Appellant requests a CMP.

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 El Bodegon Deli Grocery as a convenience store on May 31, 2012. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a March 8, 2017, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- El Bodegon Deli Grocery is approximately 1,000 square feet.
- There were no shopping baskets or shopping carts for customer use.
- There was one cash register.
- The checkout area was limited and surround by Plexiglas display case.
- There was no fresh unprocessed meat or poultry.
- There were some bags of Pollock Fillets.
- There were no bulk packages or advertised specials for large packages.
- There was some fresh produce including bananas, onions, limes, apples, green peppers, potatoes, tomatoes, and four heads of lettuce.
- There was a deli case with meat and cheese sold by the pound and prepared food items and a sandwich menu.
- Dairy included milk, cream cheese, yogurt, butter, cheese, and infant formula.
- Other staple foods available for purchase were eggs, juice, bread, tortillas, cereal, rice, beans, pasta, and a selection of canned goods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included alcohol, tobacco, 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. There was a deli section that sold meats priced between \$5.99 and \$7.99 per pound and prepared sandwiches between \$2.00 and \$5.00. Given the available inventory as noted above, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors.

Charge Letter Attachments

Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

Charge Letter Attachment 1. Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment documents 25 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.

5 U.S.C. § 552 (b)(6) & (b)(7)(C) Appellant has no fresh meat or poultry and no shopping carts or baskets. These transactions are unusual given Appellant's inventory and infrastructure.

Appellant explains that household members shop together and then split their transactions so they can track what they purchase. Appellant also explained that customers see other items that they like after they check out and see new items delivered. However, each of the transaction sets occurred 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and therefore did not occur on the same shopping trip. Therefore, these scenarios do not adequately explain these transaction sets.

Appellant has not offered any evidence to show that the transactions listed in Charge Letter Attachment #1 were legitimate purchases of eligible food.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 382 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 meat, limited fresh produce, and limited counter space. The frequency of high-dollar purchases in a six-month period calls into question the legitimacy of these transactions.

Appellant's average SNAP transaction amount was 11% greater than the average SNAP transaction amount for convenience stores in Bronx County during the review period. However, Appellant conducted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) more SNAP transactions than the average for convenience stores during the review period. Moreover, Appellant's total SNAP dollar volume was 5 U.S.C. § 552 (b)(6) & (b)(7)(C) greater than the average for convenience stores during the review period. The Retailer Operations Division could not find anything unique about Appellant that could explain this and considered it a likely indicator of trafficking.

The Retailer Operations Division also determined that Appellant conducted more transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) than the average for convenience stores in the county during the review period. For example, Appellant conducted 184 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Similarly, Appellant conducted 68 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). T5 U.S.C. § 552 (b)(6) & (b)(7)(C). The store does not stock fresh meats 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, infrastructure, and proximity to larger, better stocked stores, including a supermarket located .10 miles from Appellant.

With its reply to the charge letter, Appellant submitted invoices to the Retailer Operations Division to support its eligible food stock. The Retailer Operations Division analyzed the

receipts and invoices. Appellant is also WIC vendor. The Retailer Operations determined that with a 40% markup, the retailer did not purchase sufficient quantity of food during the review period to justify its SNAP and WIC redemptions as well as an estimated 20% of cash and credit customers. However, even if there was 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 at Appellant and spend substantial amounts of their SNAP benefits.

Appellant explained that its EBT transactions increased due to several of the businesses in the area having lost their authorization. The Retailer Operations Division determined that within a one-mile-radius of Appellant there are 344 authorized stores including 122 other convenience stores, 125 small groceries, 27 medium groceries, five large groceries, 22 supermarkets, and nine super stores. Furthermore, business can increase due to nearby stores closing, however, it would not explain the unusual transactions patterns that are listed in the Charge Letter attachments.

The Retailer Operations Division examined three households identified in the charge letter to analyze their shopping patterns at Appellant compared to their shopping patterns at other SNAP authorized stores. Each of these households shopped at larger stores during the review period. However, despite this access to better stocked stores, each of the other households conducted excessively large transactions at Appellant 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 Appellant does not support these transactions.

Economic Hardship

Appellant replied to the Retailer Operations Division that it will never survive a disqualification. It is recognized that economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To excuse ownership from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that the firm will incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposition.

Rule Abiding Business

Appellant states that it has always been a rule abiding business. However, the record shows that Appellant was charged with previous violations and received a civil money penalty in 2013 due to the exchange of SNAP benefits for nonfood items. Regardless, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

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 insufficient 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.

Summary

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. Therefore, 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.

CIVIL MONEY PENALTY

Appellant requested consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i). However, the Retailer Operations Division correctly determined that there is insufficient evidence to demonstrate that the firm had established and implemented an **effective** SNAP compliance policy and program prior to the violations. The Appellant submitted documentation that employees were trained on April 1, 2017, and October 1, 2017. The criteria for a trafficking CMP in lieu of disqualification is defined under 7 CFR § 278.6(i) which reads, in part:

In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by **substantial** evidence its fulfillment of each of the following criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in §278.6(i)(1); and

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in §278.6(i)(2); and

Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm
.... [

The Retailer Operations Division determined that the information submitted was not credible due to formatting errors. Although Appellant provided some minimal evidence that it provided SNAP training to store employees prior to the violations, the evidence provided did not rise to the level of substantial evidence necessary to establish its eligibility for a trafficking CMP. In conclusion, the Retailer Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

The Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided

substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did occur as charged by the Retailer Operations Division. The determination to impose a permanent disqualification against Appellant is sustained.

The Retailer Operations Division also determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations. Under review, the denial of a trafficking CMP was deemed correct and proper.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. If a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant's owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

MARY KATE KARAGIORGOS
Administrative Review Officer

October 22, 2019