

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

Elmore Grocery & Package Store,

Appellant,

v.

Case Number: C0209001

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 a permanent disqualification of Elmore Grocery & Package Store (hereinafter “Elmore Grocery” or “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 Elmore Grocery.

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 November 2017 through April 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 Elmore Grocery for SNAP participation as a convenience store on January 25, 2012. In a letter dated July 11, 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 November 2017 and April 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).

In a letter sent on July 18, 2018, the Appellant responded to the trafficking charges by explaining that Elmore Grocery is located in a very rural area of Alabama. According to the Appellant, many customers do not have transportation, but live close enough to walk or ride a bike to the store. Because most customers do not readily have transportation to the nearest Walmart, which is 12 miles away, they buy all their groceries, including meat, at Elmore Grocery. Since they are walking, they will sometimes return to the store the same day to purchase other goods since they cannot carry everything at once. Occasionally, customers are able to find a ride to the store and do purchase everything at once. Finally, the Appellant claimed that most of its customers have shopped at the store for years and trust its meat items to be fresh and its prices manageable.

In a phone call on July 30, 2018, the Retailer Operations Division spoke with the Appellant owner and requested inventory invoices and receipts to confirm the firm's food inventory, but no documentation was submitted.

After reviewing the Appellant's response and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated August 7, 2018. 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 August 9, 2018, the Appellant 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 made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant contends that the determination letter from the Retailer Operations Division states that the Appellant's response was late. Appellant took the matter very seriously and sent the letter right way by priority mail.
- Appellant would like the case reviewed as its customers depend on the store very much to care for their needs.

In support of its contentions, the Appellant provided a copy of the priority mail receipt from the United States Postal Service. The receipt shows that a letter was sent to the Retailer Operations Division on July 18, 2018, with an expected delivery date of July 20, 2018.

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 herein.

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 February 7, 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:

- Elmore Grocery is a convenience store, approximately 3,000 square feet in size, operating in the rural town of Elmore, Elmore County, Alabama.
- At the time of the contractor's visit, the firm did not have any handheld shopping baskets for customer use, but did have a small number of shopping carts, some of which appeared to be used by the firm to transport merchandise from storage units or coolers to the retail shelves.
- The store visit photographs show two cash registers for food purchases and agency records reflect the use of one EBT point-of-sale device.
- The report indicates that the firm uses an optical scanner to process transactions, but it is not visible in the contractor's photos.
- 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 very little space on the counter to place more than a few items at a time.
- The store's staple food stock is sufficient in each of the four staple food categories: dairy; breads/cereals; fruits/vegetables; meat/poultry/fish.
- 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 tobacco products, alcoholic beverages, personal care items, and other miscellaneous household merchandise.
- The store also sells hot food items, including pizza, chicken wings, and breakfast sandwiches. Hot foods are not eligible for purchase with SNAP benefits.
- In one of the contractor's photographs, it appears that the store has blocks of ham (roughly 5-10 pounds each) located in a walk-in refrigerated storage unit. It is unknown if

these items are for individual purchase or for use in the kitchen area. If for individual purchase, it is not known why such items would not be in the coolers on the retail floor where customers could access them. There is ample room in the coolers for such items. It appears that there were approximately 10 of these items in the refrigeration unit at the time of the contractor's visit.

- There is no indication from the store visit report that the firm has a special pricing structure. From all indications, most prices appear to end in 9, such as \$1.49, \$5.99, etc.
- According to the store visit report, the most expensive food items for sale at the store include a large can of boiled peanuts for \$9.99; a four-pack of 8.4 fluid-ounce cans of Red Bull energy drink for \$7.99; an 11.3 ounce can of Folgers coffee for \$5.99; and a 25.5 ounce bag of frozen chicken tenders for \$5.99.

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 Elmore Grocery to purchase very large quantities of groceries, especially considering the availability of larger SNAP-authorized stores within a few miles of the store. 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 24 sets of transactions (60 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). Considering the amount of food it would take to add up to these transaction totals and considering the availability of much larger stores in the area, it seems unlikely that SNAP customers would repeatedly visit a convenience store to make such large purchases.

In its original response to the charges, the Appellant argued that Elmore Grocery is located in a very rural area and that many of its customers do not have transportation and are forced to make repeat visits to the store because they cannot walk home everything they want in a single visit.

While this argument may be true, the Appellant has unfortunately offered no evidence, such as itemized cash register receipts, to show that the transactions were legitimate purchases of eligible food. The transactions listed in Attachment 1 are highly unusual in comparison with similar stores in the area. As such, documentation from the Appellant is necessary to help explain why such repetitive transactions patterns may have occurred. As noted earlier, in an appeal of adverse action, the onus is on the Appellant to prove by a preponderance of the evidence that the administrative action should be reversed. This means providing relevant evidence which would support a conclusion that trafficking was not occurring. Anecdotal explanations without supporting documentation do little to convince this review that the transactions in Attachment 1 were legitimate. Because the Appellant has offered little information beyond conjecture and has

submitted no evidence to support its claims, it is reasonable for this review to conclude that trafficking was a likely cause of the unusual transaction patterns listed in this attachment.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 76 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 Alabama. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a convenience store in Alabama was \$6.72. In Elmore County, the average was a bit higher, at \$7.94 per transaction. But the average transaction in Attachment 2 is almost 10 times larger than the average purchase amount for this store type.

Given that the Appellant firm has a moderate inventory of staple foods and other SNAP-eligible items and considering the availability of shopping carts and the rural setting of the store, it is probable 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 well be some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 2. However, it must be remembered that Elmore Grocery is a typical convenience store with limited overall inventory and where it is unlikely that customers will purchase substantial amounts of food. Further, the agency's record shows that many, if not most, of the customers who shopped at Elmore Grocery frequently shopped at much larger stores in the area, including both a supermarket and superstore located less than five miles away. Some households frequently traveled farther than that to do their grocery shopping. This strongly suggests that transportation is not as substantial an obstacle as the Appellant claims.

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 and the presence of larger stores in the vicinity. 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). Given the fact that there are much larger grocery stores in the area with substantially greater inventory and variety, this review finds it unlikely that SNAP households would legitimately choose to spend large portions of their benefit allotments at a small store such as Elmore Grocery.

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

It is difficult for this review to comprehend what was available at Elmore Grocery that would not have been available at a substantially larger superstore just a short time later.

In its response to the charge letter, the Appellant argued that customers will purchase meat from Elmore Grocery that will last the household for a week or a month. It further contended that some families buy all of their groceries at Elmore Grocery.

While these arguments may be true, the Appellant has once again failed to offer any evidence at all to support these claims. Such evidence might have included itemized cash register receipts to prove what was purchased in each transaction or inventory records to show that large amounts of meat were bought and sold by the firm. Without compelling documentation to prove otherwise, this review has little option but to conclude that the transactions listed in this attachment were likely the result of trafficking, as the transactions listed in Attachment 2 are highly unusual in comparison with nearby stores of similar size.

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.

In an appeal of adverse action, it is the Appellant's responsibility to prove, by a preponderance of the evidence, that the administrative action should be reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that trafficking did not occur. Unfortunately, the Appellant has not offered any evidence and its anecdotal contentions do not sufficiently address the specific transactions listed in the charge letter. Therefore, it is the conclusion of this review that the transactions in the charge letter were, more likely than not, the result of trafficking violations committed by the Appellant.

Hardship to SNAP Recipients

The Appellant has stated that most of its customers have shopped at Elmore Grocery for a number of years and trust that the store's meats are fresh and that its prices are reasonable. The Appellant contends that its customers depend on the firm to care for their needs.

With regard to this contention, it is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and a household is forced to use its benefits elsewhere. Regulations at 7 CFR § 278.6(f) do allow, in some circumstances, for a civil money penalty to be imposed in lieu of disqualification when there is an absence of other SNAP-authorized retailers in the area. However, the regulations are clear that a CMP for hardship to SNAP households may not be imposed in lieu of permanent disqualification for trafficking.

Therefore, the Appellant's contention that the community will be adversely affected does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Timeliness of Response

The Appellant has claimed that the determination letter issued by the Retailer Operations Division stated that its response was late. The Appellant disputes this characterization, contending that it took the charges very seriously and made an immediate response. In support of this contention, the Appellant submitted a copy of a receipt showing that its response was sent by priority mail.

After reviewing the August 7, 2018, determination letter, this review can find no mention of the Appellant's response being "late." The letter does say that the Appellant's reply was received on July 30, 2018, rather than July 20, 2018. It is possible that "30" rather than "20" was an inadvertent misprint, as the Appellant's mailing receipt clearly shows that delivery was expected to occur on July 20, 2018. However, there is no indication whatsoever that the date of response had any bearing on the agency's determination of trafficking. There is also no indication anywhere else in the agency's record that the Appellant's response was "late" or untimely in any respect. As such, this review finds this contention to be inconsequential.

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 civil money penalty when it originally replied to the charge letter and there is no evidence that the Appellant submitted any documentation that would indicate that the firm had a compliance policy or training program of any kind. Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), 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 Elmore Grocery 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, Elmore Grocery & Package Store, 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

February 22, 2019