

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

Family Express Deli & Grocery,

Appellant,

v.

Case Number: C0178370

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Family Express Deli & Grocery, (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the program, 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(c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant by letter dated June 10, 2018.

AUTHORITY

7 U.S.C. § 2023 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

By charge letter dated December 18, 2014, Retailer Operations Division informed ownership that Appellant was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 271 – § 278, based on EBT benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm." The letter of charges stated, in relevant part, that “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.”

In correspondence dated December 23, 2014, Appellant, through counsel, responded the charge letter and generally stated that the client vehemently denies that he or anyone involved with or employed by the business has engaged in such activities. The owner of the business, since being authorized to accept food stamp benefits has continuously trained and tested his employees concerning the SNAP regulations and requirements. The vendor has maintained an exemplary record and I submit that such an unblemished record is evidence of his continued compliance with the law and his training and supervision of his employees. Regular customers of this business often call the store to place their food orders and then personally pick-up these orders at which time they pay. Attachment 1: Most of these customers do not own motor vehicles and need to make multiple trips to transport their purchases. They also allow others to use their card or they themselves use the card for other families. Attachment 2: Recipients tend to buy food in large amounts after the benefits are added to the card. Recipients use much of the balance of their food stamps account in this store which is the local store which accepts food stamp.

Counsel made a demand to be furnished with case documentation by way of a Freedom of Information Act request which was completed on February 3, 2015. The record reflects in correspondence dated March 25, 2015, counsel submitted an appeal to the documentation received in the original FOIA request dated December 23, 2014. In correspondence dated December 18, 2015 another appeal was submitted by counsel citing improper application of FOIA Exemptions and inadequate responses. A new attorney was assigned to the retailer and Appellant, through counsel, was provided with the final requested FOIA documentation on June 12, 2018. In correspondence dated June 18, 2018, Appellant, through counsel, supplied an additional response to the charge letter and basically restated all of the contentions as stated in the December 23, 2014 response.

Retailer Operations Division gave consideration to the Appellant's replies and evidence of the case, and issued a determination letter dated June 10, 2018. This letter informed Appellant that it was permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also stated that Retailer Operations Division considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, Retailer Operations Division determined that Appellant was not eligible for the CMP because it failed to submit sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated July 14, 2018, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted.

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 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

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) (c) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 CFR § 278.6(a) states, *inter alia*, that “FNS may disqualify any authorized retail food store...from further participation in the program 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 ...”

7 CFR § 278.6(c) reads, in part, “*Review of Evidence.* 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) ...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...”

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.” Trafficking is defined, in part, in 7 CFR § 271.2, as “the buying or selling of SNAP benefits for cash or consideration other than eligible food.”

7 CFR § 271.2 states in part that, “Eligible foods mean: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption.”

SUMMARY OF CHARGES

The charges on review were based on an analysis of SNAP electronic benefit transfer (EBT) transactions dated during the three-month period of April 2014 through June 2014. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from individual benefit accounts in usually short time frames.
2. Excessively large purchase transactions were made from recipient accounts.

The first 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

The Appellant, through counsel, made the following summarized contentions in its response to the permanent disqualification letter issued by Retailer Operations Division, and its request for administrative review, in relevant part:

1. The charge of trafficking is based solely on a faulty analysis of records, with no additional or further investigation. My client vehemently denies that he or anyone involved with or employed by this firm has engaged in such activities. There is no other evidence that shows the firm's intent to violate the regulations.
2. The owner has continuously trained and tested his employees concerning the SNAP regulations and requirements.
3. The owner has maintained an exemplary record and such an unblemished record is evidence of his continued compliance with the law and his training and supervision of his employees.
4. FNS should subject this owner to a CMP as a disqualification would cause hardship to participating households.
5. Baby food items are expensive with cans of Enfamil selling at \$20 to \$34.99.
6. Attachment 1: Most of these customers do not own motor vehicles and need to make multiple trips to transport their purchases. They also allow others to use their card or they themselves use the card for other families.
7. Attachment 2: Recipients tend to buy food in large amounts after the benefits are added to the card. Recipients use much of the balance of their food stamps account in this store which is the local store which accepts food stamps.
8. Regular customers often call the store by telephone to place their large grocery orders and then personally pick-up these orders at which time they pay along with additional items.
9. The statute of limitations precludes the bringing of such charges after such a long period of time, as it prejudices the owner by no longer having access to receipts, surveillance videos or records due to the gap in time before the charges were brought.

No other information or documentation was provided during this review. The preceding may represent a brief summary of Appellant's contentions in this matter however, in reaching a decision, full attention has been given to all contentions presented, including any not specifically recapitulated or referenced herein.

ANALYSIS AND FINDINGS

The FNS originally authorized the business as a convenience store on June 24, 2013. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a June 30, 2014, store visit to the business 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 EBT transactions at Appellant that formed patterns indicative of trafficking. The firm review summary documented the following store size, description, and characteristics:

- One cash register and one POS device with a small counter area partially obstructed by other smaller items available for sale and completely enclosed in Plexiglas.
- Estimated to be approximately 800 square feet.
- No shopping baskets or carts available for customers.
- No adding machines or optical scanners were available at checkout. No specialty registers present.
- Store operates through a night window or plastic barrier with food stock behind the barrier.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- No food stored in an area outside of public view
- Sell hot food but none for on-site consumption. A deli or prepared food section with prepared/made to order sandwiches.
- Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
- Store stocks a significant amount of non-food items such as but not limited to paper products, household products, tobacco products, health and beauty aids, and pet products.
- Store stocks ample amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products. No fresh fruits or produce, no fresh meat or poultry. Most meats are canned, packaged or frozen.
- Menu board posted as well as board showing prices of cold cut meats and cheese by the pound.
- No kitchen/prepared food area with hot foods sold for onsite consumption.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.

The second issue for consideration is whether Retailer Operations Division has presented a convincing case that Appellant likely trafficked in SNAP benefits. Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant's store during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

Attachment 1 of the Charge letter - Multiple transactions were made from individual accounts in unusually short timeframes.

There were 73 sets of 159 SNAP transactions that met the parameters of this attachment. Multiple transactions conducted by the same household account within a set time period is a method which violating stores use to avoid the detection of single high dollar transactions that cannot be supported by the retailer's inventory and structure.

Appellant, through counsel, contends that most of these customers do not own motor vehicles and need to make multiple trips to transport their purchases. They also allow others to use their card or they themselves use the card for other families. With regard to this contention, it is important to note that the SNAP transactions identified 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 store's layout, the extent of the Appellant's stock and facilities and are

indicative of trafficking. When purchasing food, people generally do not spend large sums at convenience stores. They usually stop at convenience stores to pick up quick snacks and/or a beverage, or for a few staple food items that they need, such as bread, milk, tortillas, or a can or two of some food, but which are not considered worth a trip to the supermarket to get. It is rare for a convenience store to have multiple large purchases such as those cited for Appellant's store.

Furthermore, Retailer Operations Division conducted an analysis of the shopping habits of the households identified in the charge letter. This analysis concluded that these households also shopped at other area grocery stores including full-line supermarkets and superstores that offer a much larger quantity and variety of eligible food items for likely better prices either on the same day or within days of visiting Appellant's firm. This again indicates that lack of access to other stores is not at issue. However, despite this access to large supermarkets and superstores, these households consistently conducted much higher transactions at the Appellant firm than at better stocked supermarkets/superstores in and around the Kings County area of New York. This is another strong trafficking indicator. The store does not carry any fresh meat and no specialty or ethnic foods that would support the high dollar transactions. The record reflects that there are 15 supermarkets and nine (9) superstores less than one-mile from Family Express including three (3) that are approximately 1 block away. It is questionable that SNAP households would choose to make large multiple purchases at Appellant's store when there are larger better stocked, and seemingly better priced, supermarkets and superstores within walking distance.

Appellant, through counsel, did not provide any additional documentation to support its claim that shoppers were making multiple purchases or allowing others to use the EBT card to justify all of the transaction sets in this Attachment. Based on the analysis above and Appellant's failure to adequately show that all of the transaction sets were as a result of legitimate SNAP purchases, a conclusion can be drawn, through a preponderance of evidence that the "unusual, irregular, and inexplicable" transaction patterns cited in Attachment 1 evidence trafficking as the most likely explanation.

Attachment 2 of the Charge letter - Excessively large purchase transactions were made from recipient accounts.

There were 785 SNAP transactions that met the parameters of this attachment. Based on the results of the contracted store visit, the large transaction amounts are not consistent with the store's inventory of low priced foods. The firm does not offer food in bulk or any ethnic or specialty foods that sell for a high price. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

Appellant, through counsel, contends that recipients tend to buy food in large amounts after the benefits are added to the card. Recipients use much of the balance of their food stamps account in this store which is the local store which accepts food stamps. Regular customers often call the store by telephone to place their large grocery order and then personally pick-up these order at which time they pay along with additional items. With regard to these contentions, Appellant did not provide any documentation or evidence that it accepted call in grocery orders or that it sold large amounts of groceries. Appellant did not provide any register receipts or purchase invoices to substantiate that it sold and restocked large amounts of eligible food items.

Additionally, the record reflects that although Appellant's store has ample stock indicative of a convenience store, the inventory does not support the Attachment 2 transactions as cited in the charge letter. As previously stated the store does not carry any fresh meat and no specialty or ethnic foods that would support the high dollar transactions. The record also reflects that there are 15 supermarkets and nine (9) superstores less than one-mile from Family Express including three (3) that are approximately 1 block away.

Based on the data presented in the Attachments, and in the absence of sufficient evidence as to the legitimacy of such transactions, a conclusion can be drawn, through a preponderance of evidence that the "unusual, irregular, and inexplicable" transactions and patterns cited in the charge letter Attachments evidence trafficking as the most likely explanation. In this case, ownership did not provide sufficient evidence to legitimize Appellant's transaction data as outlined in the charge letter.

Appellant, through counsel, contends that the owner has continuously trained and tested his employees concerning the SNAP regulations and requirements and the owner has maintained an exemplary record and such an unblemished record is evidence of his continued compliance with the law and his training and supervision of his employees. With regard to these contentions, such a record of program participation with no previously documented violations does not constitute valid grounds for mitigating the impact of the present serious charge of trafficking. Further, the Act itself provides that a store's disqualification "shall be permanent upon ... the first occasion of a disqualification based on ... trafficking ... by a retail food store."

Statute of Limitations

Appellant, through counsel, contends that the statute of limitations precludes the bringing of such charges after such a long period of time, as it prejudices the owner by no longer having access to receipts, surveillance videos or records due to the gap in time before the charges were brought. With regard to this contention, it is noted that the date of the charge letter is December 18, 2014. Appellant's original attorney provided a written response on December 23, 2014, submitting an FOIA request for records so that a reply to the charge letter dated December 18, 2014, could be submitted. The FOIA request was completed on February 3, 2015. The record reflects that counsel submitted two appeals to the information received in the FOIA which extended the timeline in this case. FNS did not wait to charge the store. The original charge letter was issued in 2014 and the final FOIA response was issued on June 12, 2018. There was nothing preventing the attorney at the time from gathering any video evidence, register tapes, invoices, etc. that were available and storing them until a final FOIA response was issued, and a reply was offered by the attorney. There was no unnecessary delay in this case. Therefore, Appellant's contention, through counsel, appears as an attempt to draw attention away from the charges and to dismiss any action that may be taken by FNS by an alleged delay in the charges to the store.

The transaction data and overall firm record convincingly demonstrate repetitive patterns of unusual, irregular, and inexplicable SNAP activity for this type of firm indicative of trafficking. Once Retailer Operations Division established the convincing case against Appellant, ownership

bears the burden of proving, by a preponderance of the evidence, that the administrative action 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. If this is not demonstrated, the case is to be sustained.

As noted, 7 CFR § 278.6(a) states that 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 inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Retailer Operations Division has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns in two attachments of EBT transaction data, the inadequacy of the firm's eligible food stock as observed and recorded during the onsite visit to support such large transactions, the lack of evidence of invoices of food in inventory to cover Appellant's reasoning for the SNAP transaction totals for the review months, the lack of explanation for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant, and the irregular SNAP transaction data of Appellant as compared to other convenience stores in the State.

Faulty Analysis of Records

Appellant, through counsel, contends that the charge of trafficking is based solely on a faulty analysis of records, with no additional or further investigation. My client vehemently denies that he or anyone involved with or employed by this firm has engaged in such activities and there is no other evidence that shows the firm's intent to violate the regulations. As to the reliability of the ALERT system, it is a database software solution that has passed rigorous government testing, meets quality assurance requirements and has been certified to accurately reflect the transaction data received from State EBT data banks compiled from the actual EBT transactions of individual stores. Retailer Operations Divisions use ALERT as a tool to identify EBT transactions that form patterns having characteristics indicative of trafficking and saves the Retailer Operations Division time and effort of having to make such compilations manually. ALERT does not determine or conclude that trafficking has occurred. The Retailer Operations Division must still analyze 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 questionable transactions were, more likely than not, the result of trafficking. Therefore, although the Retailer Operations Division does not manually prepare the transaction data upon which they may charge firms with trafficking violations, the raw transaction data is reliable, and the Retailer Operations Division has the authority to analyze and use that data in evidence to substantiate a determination that violations have occurred.

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 for the legitimacy 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. While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations determined that Appellant's contentions did not outweigh the evidence in the record.

The purpose of the administrative review process is to ensure that firms aggrieved by Retailer Operations Division's adverse actions have the opportunity to have their position fairly considered by an impartial review authority prior to that adverse action becoming final. Appellant has been duly given, and has taken the opportunity to present to USDA through the administrative review process whatever evidence and information it deemed pertinent in support of its position that Retailer Operations Division' adverse action should be reversed. Therefore, any evidence and information that Appellant presented to Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to Appellant's right to a fair and thorough review.

Ownership has not provided sufficient evidence to rebut the convincing case that Appellant most likely trafficked in SNAP benefits. As such, the SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have trafficked, which is that FNS shall disqualify the firm permanently.

CIVIL MONEY PENALTY

Appellant, through counsel, contends that the owner should be subject to a CMP as a disqualification would cause hardship to participating households. With regard to this contention, and in further regard to civil money penalty assessments in lieu of disqualification, Part 278.6(f)(1) of the SNAP regulations provides for such assessments in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs. However, this regulation also sets forth the following specific exception to assessments thereunder: "A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification." Therefore, this civil money penalty provision is not applicable in the present case.

The Appellant did not timely 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 dated December 18, 2014. 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.

Therefore, the Retailer Operations Division' decision, not to impose a trafficking CMP in lieu of disqualification, is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Family Express Deli & Grocery from participation in the SNAP. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Therefore, based on a review of all the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged by Retailer Operations Division. Based on the discussion herein, the determination to impose a permanent disqualification against Family Express Deli & Grocery is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to 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 (FOIA), 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.

Monique Brooks
Administrative Review Officer

November 20, 2018