

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

G&N Super-Market,

Appellant,

v.

Case Number: C0201663

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of G&N Super-Market as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against G&N Super-Market.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may . . . file a written request for review of the administrative action with FNS.”

CASE CHRONOLOGY

In a letter dated August 25, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of February 2017 through July 2017. The letter noted that the penalty for

trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated the Appellant had the right to respond to the charges within 10 days of receipt to provide explanations for the irregular SNAP transaction patterns. The letter also stated that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

The Appellant responded to the charges in a letter postmarked on September 5, 2017. Among other contentions, the Appellant generally stated that due to lack of transportation a large number of SNAP recipients prefer to purchase groceries at G&N Super-Market rather than other stores. Allegedly, these customers are coming into the store mostly at the beginning of the month and constantly purchasing the same products over and over. The Appellant stated that these clients include the elderly and disabled many of whom can barely walk or go beyond the store location. They shop repeatedly daily and monthly at the store. The Appellant did not request a trafficking CMP within the 10-day timeframe after receiving the charge letter.

After considering the Appellant's responses and the evidence in the case, the Retailer Operations Division issued a determination letter dated November 29, 2017. The determination letter informed the Appellant 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 the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations. The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked December 11, 2017, the Appellant, through counsel, requested an administrative review of the Retailer Operation Division's determination. The request for administrative review was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulation under Title 7 CFR

Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

7 U.S.C. § 2021(b)(3)(B) states, in part:

... a disqualification under subsection (a) shall be ... permanent upon ... the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards ...

7 CFR § 271.2 states that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

7 CFR § 278.6(e)(1)(i) states:

FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, in part:

Trafficking means the buying or selling of ... [SNAP] benefits for cash or consideration other than eligible food

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(a) states, in part:

FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, **evidence obtained through a transaction report under an electronic benefit transfer system....** [Emphasis added.]

7 CFR § 278.6(i) states, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking ... if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.

7 CFR § 278.6(b)(2) states, in part:

(ii) Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence as specified in § 278.6(i), that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). **This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).** [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 CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from February 2017 through July 2017. This involved the following transaction patterns which are trafficking indicators:

- **Charge Letter Attachment 1:** Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment lists 26 sets of 58 transactions totaling 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- **Charge Letter Attachment 2:** Excessively large purchase transactions were made from recipient accounts. This attachment lists 281 SNAP transactions totaling 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- The store owners deny that any of the transactions cited in the charge letter constitute trafficking.
- The multiple transactions made in a short time period are due to the normal shopping habits of SNAP customers. They will utilize the benefits immediately when loaded on the EBT card during the first few days of the month. Various family members will utilize the card for multiple transactions bringing home as much food as they can. There is nothing the store can do but sell the groceries to its customers.
- Regarding the transactions described as excessively large, most of these purchases deal with food for babies and children. Baby formula prices range from \$19.00 to \$24.00. It is not uncommon for customers to buy five (5) cans or more of formula.
- The store has never had any prior violations in over 20 years of operation. The store requests a formal warning letter as this case is similar to other cases where violations were limited and the proprietors had never been warned. In the alternative, the store owners request a limited period of disqualification such as 30 days.
- The store customers depend on the store being able to accept SNAP benefits.
- If the store loses its ability to accept SNAP benefits it will lose customers and potentially the store will go out of business.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Authorization and Compliance History

The Food & Nutrition Service (FNS) authorized G&N Super-Market for the SNAP on March 4, 1990. On April 24, 1996, the store was assessed a hardship CMP of \$9,132.00 in lieu of a less than permanent disqualification for SNAP violations discovered during an investigation. During the review period of February 2017 through July 2017, the Retailer Operations Division classified the store as a convenience store.

Store Visit Report

The case record documents that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a July 21, 2017 store visit conducted by an FNS contractor to observe the nature and scope of the store's operation, stock and facilities. This information was then used to

ascertain if there were justifiable explanations for the store's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- G&N Super-Market is approximately 1,060 square feet in size.
- The store had no shopping carts and only two (2) handheld shopping baskets for customer use.
- The store had one (1) cash register for groceries and one (1) point-of-sale device.
- The store had an optical scanner but no conveyor belts at the checkout.
- The store did not have any large bulk foods for sale. The store did not sell any expensive items such as fresh meat bundles, seafood specials, and/or large fresh fruit and fresh vegetable boxes.
- The checkout area consisted of a small countertop and window opening within a wood and plastic/glass display case. The limited space at the checkout area made it not conducive to conducting large transactions.

The SNAP eligible food stocked by the store consisted mainly of inexpensive canned and packaged goods with only a limited amount of fresh meats, fruits and vegetables. The store also sold snack foods and accessory food items such as coffee, tea, condiments, and spices. The stocked ineligible items included tobacco, lottery tickets, mobile phone accessories, automotive products, health and beauty products, paper goods, cleaning products, and general houseware. The store had a kitchen where SNAP ineligible prepared ready-to-eat sandwiches were made to order. The store also offered a money transfer service.

Store personnel confirmed that the most expensive item sold by the store was infant formula at \$23.19 a can. However, since the store was authorized for WIC, any customers with infants would likely purchase infant formula with WIC benefits not SNAP benefits. The next most expensive items were 20 pound bags of rice at \$12.49; Goya oil at \$10.79 a gallon; and Banquet fried chicken at \$10.49 a box. However, the store did not appear to have a large quantity of these items. 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 transaction patterns significantly different from similar-sized competitors offering similar food items.

Multiple Transactions by the Same Household within a Short Time Period

The Appellant states that it cannot deny a legitimate SNAP purchase for eligible food and has no choice but to sell regardless of how many purchases are made. Regarding this contention, it is true that SNAP households have no limit on the number of times they may use their SNAP cards or how much eligible food they may purchase. However, the SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display

characteristics of use inconsistent with the nature and extent of a convenience store's stock and facilities and are thus indicative of trafficking.

Violating stores often conduct multiple split transactions from the same household account as a method to avoid the detection of single high dollar transactions that cannot be supported by the retailer's food inventory and infrastructure. Charge Letter Attachment 1 lists 26 sets of 58 transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E). In fact, this average SNAP transaction is much larger than the average superstore SNAP transaction in Camden County during the review period. It is not credible that a convenience store would have suspicious SNAP transactions greater than a supermarket or superstore. It is even less likely that these excessively large transactions would be conducted multiple times by the same household during a short time period.

The Appellant states that SNAP recipients will utilize their benefits immediately when they are loaded on the EBT card during the first few days of the month. It is true that SNAP households tend to shop earlier in the month as opposed to later in the month however, this does not explain why a convenience store is having multiple irregular SNAP transactions each greater than a supermarket or superstore. While different family members can use the card, it is unlikely they would conduct excessively large dollar transactions in such a short period of time at a convenience store that does not offer a great variety and quantity of staple foods.

The store visit pictures show that is unlikely that SNAP customers would want to shop at this store multiple times during a short time frame, or purchase such a large volume of items. In addition, the store's small checkout area and very limited counter space makes it unsuitable for conducting large transactions. The store also had no shopping carts for transporting food within the store. Based on the analysis above, and in the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

Excessively Large Transactions

SNAP households have no limit on the amount of eligible food they may purchase (subject to the remaining balance on the card). However, the SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of a convenience store's stock and facilities and are thus indicative of trafficking.

Charge Letter Attachment 2 cites 281 SNAP transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E). This average transaction is also larger than the average SNAP purchase for a supermarket or superstore in Camden County during the review period. 5 U.S.C. § 552 (b)(7)(E).

The substantial number of high dollar purchases atypical of a SNAP authorized convenience store calls into question the legitimacy of these transactions. As noted previously, 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 offering similar food items.

The Appellant states that most of the transactions cited in Charge Letter Attachment 2 deal with food for babies and children. The Appellant specifically states that baby formula prices range from \$19.00 to \$24.00 and that it is not uncommon for customers to buy five (5) cans or more of formula. However, as noted above, G&N Super-Market is authorized to accept WIC benefits. It is very unlikely that a SNAP household with infants would choose to spend their limited SNAP benefits on infant formula when they could instead utilize their WIC vouchers to buy infant formula.

The Appellant's original response to the charge letter stated that its customers, including the elderly, lacked transportation and had a lack of access to other SNAP authorized stores. It is true that sometimes a store may have higher than normal SNAP transactions due to the lack of access to other SNAP authorized stores in the area. However, the Retailer Operations Division determined that bus routes running along River Avenue provide easy access to other nearby SNAP authorized stores for individuals lacking their own personal transportation. Within a one-mile radius of G&N Super-Market there are 32 comparable or larger SNAP authorized stores. These nearby stores include 14 small grocery stores, three (3) medium grocery stores, a supermarket and a superstore. A government report on SNAP benefit redemption patterns revealed that households most often redeemed their benefits at supermarkets and superstores with only four (4) percent of all households never shopping in a supermarket or superstore. Thus, when a supermarket or superstore is available, it is highly unlikely that a SNAP recipient would conduct excessively large SNAP transactions at a convenience store with a limited selection of staple foods like G&N Super-Market.

Lastly, the case record documents that the Retailer Operations Division conducted an analysis of the shopping habits of the households identified in the charge letter. Charge Letter Attachment 2 identified 99 households with excessively large SNAP transactions during the review period; of these, 65 percent shopped at a large grocery store, supermarket or superstore within three (3) days of shopping at G&N Super-Market. Approximately 46 percent shopped at a large grocery store, supermarket or superstore within one (1) day of shopping at G&N Super-Market. This further indicates that these households did in fact have access to larger and better stocked SNAP authorized stores.

The Retailer Operations Division also conducted a more detailed analysis of three (3) households identified in the charge letter to analyze their shopping patterns at G&N Super-Market compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at supermarkets and superstores.

However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at G&N Super-Market on the same day or within a day of shopping at supermarkets and superstores on multiple occasions. Under these circumstances, it is highly unlikely that a convenience store with limited staple foods would have legitimate SNAP transactions comparable or larger than these SNAP authorized supermarkets and superstores.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts support the Retailer Operations Division determination. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on a preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 2 are more likely than not the result of trafficking in SNAP benefits.

No Prior Violation/Request for Warning Letter

The Appellant states it has had no prior violations and that the owners were not warned of any violations prior to the issuance of the charge letter. Regarding this contention, the SNAP regulations do not require the Retailer Operations Division to give prior warnings before issuing a charge letter for trafficking. SNAP regulations at 7 CFR § 278.6(e)(7) states that FNS will "send the firm a warning letter if violations are too limited to warrant a disqualification." However, trafficking transactions are not considered to be "violations that are too limited to warrant a disqualification." Trafficking in SNAP benefits is an extremely serious violation and both 7 U.S.C. § 2021(b)(3)(B) and 7 CFR § 278.6(e)(1)(i) state that a **first time violation** warrants a permanent disqualification. Therefore, the Appellant's contentions do not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

Hardship to SNAP Customers

The Appellant claims that the local SNAP community will suffer a hardship if G&N Super- Market is permanently disqualified from the SNAP. Regarding this contention, there is no provision in SNAP law or regulations that would waive or reduce a permanent disqualification for trafficking due to a purported hardship to SNAP customers. Where there is a hardship to SNAP households due to a lack of authorized stores in the area, FNS may impose a hardship CMP on a firm in lieu of a **less than permanent** disqualification. However, the regulations at 7 CFR § 278.6(f)(1) clearly state that "a civil money penalty for hardship to [SNAP] households **may not be imposed** in lieu of a permanent disqualification." [Emphasis added.] Because the Retailer Operations Division

has taken action to permanently disqualify the Appellant firm, a hardship CMP in lieu of disqualification cannot be granted.

It should also be noted that there are 32 comparable or larger SNAP authorized stores located within a one-mile radius of the Appellant store including a supermarket and a superstore. Therefore, it is unlikely that the local SNAP community will suffer a hardship as opposed to a mere inconvenience due to the permanent disqualification of Sister Food Market.

Hardship to Firm

The Appellant contends that a permanent disqualification will create a financial hardship for the owners and the store may potentially go out of business. With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in the 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 either the ownership personally or the firm resulting from the imposition of such penalty. To allow store ownership to be excused from assessed administrative penalties based on a purported economic hardship 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 may 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 imposed.

CIVIL MONEY PENALTY

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. 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'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 the Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify the retailer. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges.

In the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did in fact occur as determined by the Retailer Operations Division. Based on the discussion above, the decision to impose a permanent disqualification against G&N Super-Market, Appellant, is sustained.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

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

RONALD C. GWINN
Administrative Review Officer

March 5, 2018