

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

Garden Supermarket 1 LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0210627

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 Garden Supermarket 1 LLC (hereinafter “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 Garden Supermarket 1 LLC.

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 May 2018 through September 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 Garden Supermarket 1 LLC for SNAP participation as a convenience store on April 24, 2018. In a letter dated October 25, 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 May 2018 and September 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).

Between October 29, 2018, and November 20, 2018, the Appellant responded to the charge letter, providing a large number of inventory invoices and receipts from the months of August, September, and October 2018, as evidence that the firm does a large volume of business, and submitting a written explanation of how the business works. The Appellant argued that it cannot control how frequently a customer shops at the store or how much a customer spends. The Appellant argued that customers routinely shop at the store two or three times a day, and often purchase the same items, particularly at the beginning of the month. The Appellant further stated that the store is located near multi-family buildings, low-income housing, and schools, which results in more business. Additionally, the Appellant claimed that it stocks a large variety of inventory, including large, family-sized items, such as 50-pound bags of rice, 2.5 gallons of cooking oil, family-sized breakfast cereal, and meat specials every week. Finally, the Appellant claimed that the store offers good prices and customer service; its cashiers are trained to handle SNAP transactions correctly; and it offers free delivery with a purchase of \$80.00.

After considering the Appellant's response to the charges and further evaluating the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated December 18, 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 December 28, 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:

- The store is located in a busy area next to a school with another school soon to open. There are also multi-family buildings in the area.
- The firm has usual customers that visit the store two or more times a day and the firm does not have any control over that.
- Due to schools being next to the business, parents usually go to the Appellant store before and after school to make purchases.
- Regarding excessively large transactions, these are because the firm carries family-sized items, such as rice, cooking oil, frozen meat, cereal, drinks, etc.
- The store is 2,600 square feet in size and offers many products in different varieties.
- The Appellant sent inventory invoices to show that the firm frequently buys items for the store from various vendors. The Appellant also pays cash when purchasing inventory from places such as supermarkets or wholesale stores when they have specials.
- The Appellant has been working with USDA for only eight months and is trying its best to do the right thing and make the store the best it can be.

In support of its contentions, the Appellant submitted a large number of inventory invoices, receipts, and bank statements from the months of November and December 2018. This documentation supplements the invoices already provided to the Retailer Operations Division.

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 in this document.

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 July 28, 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:

- Garden Supermarket 1 LLC is a convenience store/corner market, approximately 2,550 square feet in size, operating in the city of Passaic, Passaic County, New Jersey.
- At the time of the contractor's visit, the firm had just one shopping cart and six handheld shopping basket for customer use, which is fairly typical for stores of this size. Customers shopping in such stores generally purchase only as much food as they can carry in their arms.
- The store visit photographs show two cash registers for food purchases and agency records reflect the use of one EBT point-of-sale device.
- It appears that the firm does not use optical scanners to process transactions.
- 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 little space on the counter to place more than a few items at a time and little room for customers to maneuver with large amounts of groceries.
- The firm's staple food inventory is sufficient for program eligibility. The overall breadth of staple foods is typical of a convenience store or corner market.
- 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, cleaning supplies, personal care items, and other miscellaneous household merchandise.

- The store also has a kitchen area, where deli meats and cheeses are prepared.
- There is no indication from the store visit report that the firm has a special pricing structure. Most prices end in 9, such as \$1.29, \$2.49, \$4.99, etc.
- According to the contractor's report, the most expensive SNAP-eligible food items are a 20-ounce can of Enfamil infant formula; a 20-pound bag of rice for \$11.99; and a 13.1-ounce container of Similac formula. It is notable that infant formula is not frequently purchased with SNAP benefits. Most SNAP households with children under the age of 5 are eligible for participation in the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), and infant formula is part of the WIC food package.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a convenience store or corner market, 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 Garden Supermarket 1 LLC to purchase large quantities of groceries, especially considering the overall inventory, the limited number of shopping carts and baskets, and the availability of larger SNAP-authorized stores nearby, including several grocery stores and a superstore less than a quarter of a mile away. 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 21 sets of transactions (43 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), an extraordinary amount for a convenience store like Garden Supermarket 1 LLC.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Such patterns and transaction totals at a convenience store or corner market are highly irregular and are often an indication of trafficking. As such, these transactions warrant further explanation.

The Appellant has argued that the store is located in a busy area next to a school and multi-family buildings. The Appellant contends that due to its location, the firm is exceptionally busy and it is not unusual to see customers visit the store multiple times a day, including parents who drop off and pick up their children from school. The Appellant argues that it does not have any control over how customers spend their SNAP benefits.

With regard to these contentions, this review does not dispute the Appellant's contention that the store is conveniently located and that it does a brisk business. It is further noted that SNAP regulations do not provide limitations on the number of transactions that can be made by SNAP households or how large the individual transactions can be. However, the transactions noted in Attachment 1 are questionable not because they exceed any limits for use, but rather because they display patterns of use that are inconsistent with the store's documented physical

characteristics and in comparison with similar stores in the area, which do not exhibit such transaction patterns. It should be further noted that the transaction patterns identified in the charge letter are not marginally abnormal, but decidedly so. This review does not contend that the EBT transactions detailed in the charge letter are overtly suspicious when they occur on an occasional or intermittent basis. But when such transactions form repetitive and questionable patterns on a consistent basis over a substantial period of time, such activity is considered highly irregular, and a firm's intent to comply with program regulations is called into question.

It must be noted that the Appellant has not offered any evidence to show that the specific transactions in question were legitimate purchases of eligible food. Such evidence could have included itemized cash register receipts or other accounting records to show exactly what was purchased during each transaction. While the Appellant did submit some inventory invoices and receipts, such evidence, by itself, does not provide details of the questionable transactions.

Because the Appellant's evidence offers little insight into the specific transactions in question, and because the transactions themselves are highly unusual, it is reasonable for this review to conclude that trafficking was a likely cause of the transaction patterns listed in this attachment.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 243 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 New Jersey. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a convenience store in New Jersey was \$8.50. In Passaic County, the average was slightly higher at \$8.67 per transaction, but the average transaction in Attachment 2 is more than 11 times larger than the average purchase amount for this store type. Even if the store were classified as a small grocery store rather than a convenience store, the transactions in Attachment 2 would still be nine times larger than the state average.

Given that the Appellant firm has a moderate inventory of staple foods and other SNAP-eligible items, such as snacks and drinks, and given that the store has a small number of baskets to help customers carry their merchandise, 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, 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 availability of much larger stores in the area. The substantial number of high-dollar transactions in a five-month period calls into question the legitimacy of these transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering how many low-priced food items it would typically take to add up **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**e, and considering the store's characteristics, this review finds it unlikely that SNAP households would legitimately choose to spend large portions of their benefit allotments at a store such as Garden Supermarket 1 LLC.

Included in Attachment 2 are a few unusually repetitive transaction totals. For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Of course, with more transactions that occur at a given store, the greater the likelihood that a transaction total will be duplicated. But these stand out as particularly unusual given their frequency and large size. That a number of randomly-selected items would so frequently result in these transaction totals is highly irregular. 5 U.S.C. § 552 (b)(7)(E).

It is further notable that many of the transactions listed in Attachment 2 were made by SNAP households who shopped at much larger supermarkets and superstores 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of shopping at Garden Supermarket 1 LLC. For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is difficult for this review to comprehend what was available at Garden Supermarket 1 LLC that would not have been available at a supermarket or superstore, where overall inventory and variety are substantially greater and where prices are likely lower. This is just one of many similar examples from the transactions listed in Attachment 2.

The Appellant contends that large transactions are due to the firm carrying family-size items, such as rice, cooking oil, frozen meat, cereal, drinks, etc. It also claims that customers sometime buy the same items. The store also offers free delivery for purchases over \$80.00.

While the Appellant's inventory and convenience may indeed attract some customers, it stands to reason that such characteristics would impact other similar-sized stores in the immediate area. And yet, comparable stores nearby do not have nearly the number of unusual transactions and patterns that Garden Supermarket 1 LLC does. Additionally, the Appellant has offered no evidence to show how often it makes free grocery deliveries and whether or not such a service has an impact on how customers shop at the store. Also, the Appellant has offered no evidence, such as itemized cash register receipts, to prove that the transactions in question were legitimate purchases of eligible food.

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, the onus is on the Appellant 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's contentions and evidence do not sufficiently address the specific transactions in question. 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.

Appellant's Evidence

In its response to the charge letter, the Appellant provided a large number of inventory invoices and receipts from the months of August, September, and October 2018. In its request for administrative review, the Appellant submitted many more invoices and receipts, this time from

the months of November and December 2018. Included with the receipts were bank statements from each month.

With regard to these documents, it must first be noted that the time period in question in this case is May 2018 to September 2018. As such, any invoices, receipts, or bank statements dated September 2018 or later have no relevance to this matter, as they do not portray store conditions or inventory levels during the relevant time period.

While inventory records can be useful in demonstrating that the firm had sufficient stock to account for the SNAP transactions during the review period, inventory records alone do little to persuade this review that the transactions listed in the charge letter were legitimate purchases of eligible food, as they offer no insight into what transpired at the cash register. Similarly, the firm's bank statements provide no record of what took place during each transaction. Accordingly, it is the finding of this review that the Appellant's documentation does not provide a valid basis for reversing the disqualification sanction or for mitigating the penalty imposed.

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 trafficking civil money penalty when it 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 Garden Supermarket 1 LLC 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, Garden Supermarket 1 LLC, 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

June 10, 2019