

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review
Alexandria, VA 22302**

Guanche Deli Grocery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0201907

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Guanche 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(a) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Guanche Deli Grocery by letter dated September 19, 2017.

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

In a letter dated September 6, 2017, 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 also noted 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 did not reply to the Charge letter. After giving consideration to the Appellant's failure to reply and evidence of the case, Retailer Operations Division issued a determination letter dated September 19, 2017. This letter informed ownership that they were permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also states that Retailer Operations 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 October 2, 2017, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted. On October 5, 2017 and again on November 1, 2017, Counsel for the Appellant was contacted and informed that a Letter of Representation (LOR), signed by ownership, was required in order for the agency to communicate the specifics of this review with the attorney. Counsel did not provide the required document.

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) 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, in part 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 1977, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations,

inconsistent redemption data, *evidence obtained through a transaction report under an electronic benefit transfer system...*” (Emphasis added)

7 CFR § 278.6(e)(1) reads, in part, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.” 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.”

7 CFR § 278.6(b)(2)(ii) states, in part, that: “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(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.”

SUMMARY OF THE 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:

1. Multiple transactions were made from individual benefit accounts in unusually short time frames.
2. The majority or all of individual recipient benefits were exhausted in unusually short periods of time.
3. 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 identified irregular and questionable transactions were the result of trafficking in SNAP benefits.

APPELLANT'S CONTENTIONS

In its response to the charge letter and in its request for administrative review, Appellant made the following summarized contentions, in relevant part:

- Unfortunately, his customers are indigent individuals who have a hard time sustaining their living and out of the goodness of his heart, ownership gave many of his return customers' credit in order to allow for them to feed their families.
- Ownership has been participating with the SNAP since the inception of the store without incident.
- The disqualification will put this store out of business and will leave a void for grocery items in the neighborhood. We request a civil monetary penalty (CMP) in lieu of a permanent disqualification.
- The business has never had any issues with state or federal laws, enforcement and/or any issues with the SNAP program.
- Based on the definition of trafficking in Section 271.2, there is no evidence whatsoever of trafficking here. We have accessed the regulations found in Title 7 of the United States Code which pertain to FNS and SNAP. The entire chapter is silent on transactions made within a short time frame, exhausted in unusually short periods of time and silent on transactions that are excessively large.

Appellant provided copies of five sheets of an alleged credit ledger. The sheets contained what appeared to be a first name and a list of various amounts only.

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 initially authorized the business as a small grocery store on April 17, 2003. The record reflects that Appellant's store type was changed to a convenience store on March 1, 2017. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during an August 8, 2017, 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 firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- One cash register and one POS device with a small counter area approximately 2ft x 2ft, partially obstructed by other smaller items available for sale.
- No shopping baskets or carts available for customers.
- No adding machines or optical scanners were available at checkout. One specialty register present.

- Store does not operate through a night window or plastic barrier with food stock behind the barrier.
- No unusual pricing structure such as ending most products with 00 cents and does not round transaction totals.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- No kitchen/prepared food area with hot foods sold for onsite consumption or takeout.
- Store has a deli or prepared food area and sells meat/cheese by the pound. Some stock is used in food preparation.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.
- Estimated to be 784 square feet with no food stored in storage area out of public view.
- Store has storage coolers or freezers.
- Store does not take telephone or online orders and does not offer delivery.
- Store is not a delivery route, farmers' market or specialty food store primarily selling one food type such as meat, poultry, seafood, bread, fruit or vegetables.
- Highest priced items were Infant Formula (\$19.99), Rice (\$11.99), Corn Oil (\$7.99), and Turkey Ham (\$6.99).
- Store stocks a significant amount of non-food items such as but not limited to paper products, household products, tobacco products, alcohol products, health and beauty aids, cleaning products, phone cards and lottery.
- Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products.

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 benefit accounts in unusually short time frames.

This attachment lists 18 sets of 40 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

Retailer Operations conducted an analysis of the shopping habits of three 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 **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of visiting Appellant's firm. As an example, it does not seem credible that:

- **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**
- **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**

- 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

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 Queens County area of New York. This is another strong trafficking indicator.

Appellant, through counsel, did not offer, with its review request, any explanation or related evidence in an attempt to clarify or justify the specific transactional behavior noted in the Attachment 1 of the Charge letter therefore, based on the analysis above and in the absence of any compelling evidence to the contrary, the irregular and unusual transaction pattern cited in the charge letter is unlikely and a strong indicator of trafficking in SNAP benefits.

Based on this empirical data, 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 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 Attachment.

Attachment 2 of the Charge letter – The majority or all of an individual recipient benefits were exhausted in unusually short periods of time.

This attachment lists 52 sets of 60 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in which individual recipient benefits were exhausted or nearly exhausted. Studies of historical transaction data shows that SNAP recipients do not normally exhaust their benefits in one or two transactions on the same day. A government report¹ on SNAP shopping patterns indicates that after the first day of benefit issuance, on average, 80 percent of a household’s allotment remains unspent. Even after seven days, 40 percent of benefits still remain unspent. It takes two weeks to deplete 80 percent of one’s benefits, and three weeks to deplete 90 percent.

Although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefits in only a few transactions or in a single day. Depleting one’s entire allotment in one or two days, or in a single large transaction, leaving no benefits for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP benefit households. Additionally, Appellant is a moderately stocked convenience store with no fresh meat and limited produce. Based on the contracted store visit report and photographs, there appears to be no basis for exceptional customer attraction to Guancho Deli Grocery, there being no great price advantage, profusion of specialty or ethnic goods, or special or custom services rendered therefore, it is inconceivable that households would expend their entire monthly allotment in this store.

Appellant, through counsel, contends that his customers are indigent individuals who have a hard time sustaining their living and, out of the goodness of his heart, gave many of his return

¹ U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program*, by Laura Castner and Juliette Henke. Project officer: Anita Singh, Alexandria, VA: February 2011

customers' credit in order to allow for them to feed their families. With regard to the contention pertaining to the alleged credit accounts, it can be generally accepted that Appellant may have established credit accounts for some of the SNAP customers. However, sufficient evidence or documentation has not been presented in support of this contention.

Moreover, when Appellant signed an FNS-252, "SNAP Application for Stores" certifying thereby that the owner read, understood and agreed with the conditions noted therein which included the following statement: "I accept responsibility on behalf of the firm for violations...including...:

- Trading cash for SNAP benefits (i.e. trafficking)
- Accepting SNAP benefits as payment for ineligible items
- **Accepting SNAP benefits as payment on credit accounts or loans**
- Knowingly accepting SNAP benefit payments from people not authorized to use them."
- Participation can be denied or withdrawn if my firm violates any laws or regulations issued by Federal, State or local agencies..."

In addition, when the firm was authorized, Appellant was provided a package of material including:

- A copy of the SNAP regulations;
- An authorization packet, which included their authorization permit and other posting materials; and
- Training material, which would have included a training module issued on a DVD which also discussed the acceptance of SNAP benefits as payments on credit accounts were not allowed.

It is apparent Appellant received the material as some of it, such as the FNS Authorization number, which would have been necessary to have in order to procure an EBT Point-of-sale (POS) device. Therefore, the contention relating to credit account payments with SNAP benefits has been dismissed due to the lack of credible and verifiable evidence for all of the transactions noted in the Charge letter dated September 6, 2017. As such, this contention does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Based on the above analysis, the Retailer Operations Division presented a convincing case that Guanche Deli Grocery trafficked in SNAP benefits which the Appellant failed to adequately rebut.

Attachment 3 of the Charge letter - Excessively large purchase transactions were made from recipient accounts.

This attachment lists 155 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. 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.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). During the review period, Appellant's average SNAP transaction amount and SNAP redemptions were also compared to that of four larger small grocery stores, located within a ½ mile of Appellant's store, and the record reflects that Appellant's average SNAP transaction and SNAP redemptions were considerably higher.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The record reflects that there are at least 42 SNAP authorized retailers including 16 other convenience stores, 14 small grocery stores, six(6) medium grocery stores, three (3) large grocery stores, and three (3) superstores within one half mile of Appellant's store.

Based on the above analysis, the Retailer Operations presented a convincing case that the Guanche Deli Grocery trafficked in SNAP benefits which the Appellant failed to adequately rebut. The attachments furnished with the charge letter identify the irregular patterns of SNAP transactions which indicate that trafficking was taking place at the firm during the review period. As there is more than one pattern of trafficking, a determination that the Appellant firm engaged in trafficking becomes more convincing.

Record of Participation in SNAP

Appellant, through counsel, contends that Guanche Deli Grocery has participated in SNAP since its inception and the business has never had any issues with state or federal laws, enforcement, and/or any issues with the SNAP program. With regard to this contention, for the purposes of this review, a record of no previously documented instances of violations or misconduct regarding participation in the SNAP does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges. SNAP regulations do provide for warning letters in some cases. Specifically, 7 CFR 278.6(e)(7) states "send the firm a warning letter if violations are too limited to warrant a disqualification." However, the Appellant was charged with trafficking in SNAP benefits which warrants a permanent disqualification. Trafficking violations are not "violations that are too limited to warrant a disqualification." Therefore, the Appellant's contention does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

No Evidence of Trafficking

The Appellant, through counsel, contends that based on the definition of trafficking in Section 271.2, there is no evidence whatsoever of trafficking here. We have accessed the regulations found in Title 7 of the United States Code which pertain to FNS and SNAP. The entire chapter is silent on transactions made within a short time frame, exhausted in unusually short periods of time and silent on transactions that are excessively large. With regards to this contention, With regards to Appellants' contention that the substance of the Retailer Operation's case against the firm is derived from computer printouts and that there are no independent live witnesses to affirm the trafficking allegations, 7 CFR §278.6(a), which establishes the authority upon which FNS may disqualify any authorized retail food store, reads, in 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.” Therefore, that the Retailer Operations Division used computer printouts of transaction data and other reports, in addition to store visit observations and an analysis of household shopping behavior, in rendering a finding that violations indicative of trafficking are occurring, is as valid a means of establishing facts as direct evidence obtained through an on-site investigation and the eye witnessing of trafficking.

Moreover, 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, i.e. multiple transactions made from individual benefit accounts in unusually short time frames; the majority or all of an individual recipient benefits were exhausted in unusually short periods of time; and excessively large purchase transactions were made from recipient accounts.

Therefore, based on this empirical data, and 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. Nevertheless, transactions having such characteristics do sometimes have valid explanations that support that they were the result of legitimate purchases of eligible food items, and this is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, however, the Retailer Operations Division determined that Appellant’s failure to respond to the charge letter and lack of explanation did not outweigh the evidence.

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 a 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 previously 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 has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns identified in the charge letter, the lack of food inventory necessary to support the firm’s SNAP redemptions as observed and recorded during the onsite visit, the lack of purchase invoices of foods to cover SNAP redemption totals for the review months, the lack of adequate explanations 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 County and

State.

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 Division determined that Appellant's contentions did not outweigh the evidence in the record. The owner 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

The Appellant, through counsel, contends that the disqualification will put the store out of business, leave a void for grocery items in the neighborhood, and requested a civil money penalty in lieu of a permanent disqualification. With regard to these contentions, as previously noted, there are 42 SNAP authorized retailers within a half mile radius of Appellant that include other convenience stores, small, medium and large grocery stores as well as superstores. Therefore Appellant's disqualification will not leave a void for grocery items in the neighborhood. Moreover, 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 September 6, 2017. 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 Guanche Deli Grocery. 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 above, the determination to impose a permanent disqualification against Guanche 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

December 12, 2017