

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

Jay's Grocery,

Appellant,

v.

Case Number: : C0214054

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 Jay's Grocery 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, when it imposed a permanent disqualification against Jay's Grocery.

AUTHORITY

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

CASE CHRONOLOGY

In a letter dated February 26, 2019, 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 March 2018 through August 2018. 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 charge letter was delivered to the Appellant by UPS on February 27, 2019.

The Appellant called the Retailer Operations Division twice to complain about the charge letter. However, the Appellant did not offer any explanations for the irregular transaction patterns cited in the charge letter. Therefore, the Retailer Operations Division issued a determination letter dated March 21, 2019. The letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and 7 CFR § 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 7 CFR § 278.6(i). The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP because the Appellant failed to submit evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP. The determination letter was delivered to the Appellant on March 22, 2019.

In a letter postmarked April 1, 2019, the Appellant 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, 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 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 defines trafficking, in part, as:

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 defines eligible food, in part, as:

Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods 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).

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from March 2018 through August 2018. This involved the following transaction patterns which are trafficking indicators:

- **Charge Letter Attachment 1:** Multiple transactions were made from individual benefit accounts in a set time frame. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- **Charge Letter Attachment 2:** Unusually large purchase transactions were made from recipient accounts based on the observed store characteristics and recorded food stock. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

APPELLANT'S CONTENTIONS

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

- The store cannot control how and when people spend their benefits or how much food they purchase.
- The store has been investigated by the USDA in the past without any trafficking violations or sales of SNAP ineligible items by the owner. However, a store employee did allow the purchase of ineligible food items in exchange for SNAP benefits. That employee was fired and the store stopped giving bonuses to employees for sales and instead paid them a flat amount.
- All of the transactions cited in the charge letter are legitimate and most come from three (3) households. One of these households consists of a mother and her three (3) daughters and eleven (11) grandchildren. Instead of cooking for the kids they will purchase microwaveable food they can prepare for themselves such as a hot pocket for \$1.75 or a frozen burger for \$2.50. If a drink or a snack is added it adds up roughly to a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transaction. They will repeat the transactions later for dinner.
- Lunchmeat is \$8.50 per pound and cheese is \$8.00 and people usually buy two (2) pounds of meat and cheese per pound with drinks and chips. Cereal and a gallon of milk cost \$11.00 in the store and Similac is \$22 a can. People have no choice but to shop at Jay's Grocery as the transportation costs to go to other larger markets are prohibitive.
- The prices are high because everything is expensive today. If you go to a Royal Farm or a 7-11 a soda or a bag of chips will cost almost \$21.00 and Jay's Grocery prices are about the same.

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

Jay's Grocery, a convenience store, was first authorized for the SNAP on June 15, 2006. On December 7, 2009, the store was disqualified for six (6) months for exchanging ineligible items for SNAP benefits. On May 11, 2012, the store was disqualified for a year for exchanging ineligible items for SNAP benefits. On September 20, 2018 the store received an official warning letter for the sale of ineligible items.

FNS last authorized Jay's Grocery for the SNAP on June 24, 2014. The owner signed the SNAP application for the store on April 23, 2014 and acknowledged that the owner was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time." The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible items.

Store Visit Report

The case record documents that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a November 3, 2018 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:

- Jay's Grocery is a convenience store of approximately 672 square feet in size. There was an additional small storage area of approximately 140 square feet containing mostly soft drinks and some other food and non-food items.
- The store had no shopping carts and no handheld shopping baskets for customer use.
- The store had one (1) cash register and one (1) point-of-sale device for purchases.
- The store did not have any optical scanners and there was no conveyor belt at the checkout area.
- The clerk/cashier was located behind a wood and Plexiglas barrier with a small turnstile window for conducting transactions. There was no exterior ledge or counter for stacking purchases. The lack of space for stacking food at the checkout area made it not conducive to conducting large transactions.
- There were no large bulk foods, expensive international or specialty foods that might sell for a high price. There were no fresh meat/poultry/seafood bundles or large boxes of fresh fruit and vegetables for sale.

The SNAP eligible staple food stocked by the store consisted mainly of inexpensive canned and packaged goods. The store also sold a large amount of inexpensive accessory food items such as snack foods, ice cream, candy, potato chips, coffee, tea, carbonated and non-carbonated drinks,

condiments, and spices. The stocked ineligible items included tobacco, health and beauty products, paper goods, and household cleaning products.

At the time of the store visit, store personnel stated that the four (4) most expensive food items sold by the store were 12.4 ounces of Similac at \$23.00; 16-ounces of Kraft Deluxe American cheese at \$7.99; 24 ounces of Kellogg's Rice Krispies cereal at \$5.99; and 16 ounces of Great Value bacon at \$5.00. As the store is WIC authorized any formula purchases would more likely than not be made with WIC benefits instead of SNAP benefits.

Given the available inventory and store layout 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 Set Time Period

The Appellant states that the store cannot control how and when people spend their benefits or how much food they purchase. 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.

5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(7)(E)

The Appellant contends that all of the transactions cited in the charge letter are legitimate and most come from three (3) households. One of these households allegedly consists of a mother and her three (3) daughters and eleven (11) grandchildren. Instead of cooking for the kids they will purchase microwaveable food they can prepare for themselves such as a hot pocket for \$1.75 or a frozen burger for \$2.50. If a drink or a snack is added it adds up roughly to a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transaction. They will repeat the transactions later for dinner.

Regarding the Appellant's contention above, there were 21 different households that had irregular transaction patterns in Charge Letter Attachment 1. However, the Appellant only references three (3) households and did not provide any information to assist the Retailer Operations Division to verify its claims. Even if one were to accept the Appellant's contentions regarding the three (3) unidentified households, this still leaves 18 households with irregular transactions cited in Charge Letter Attachment 1 that are not explained. Therefore, the Appellant's response is inadequate.

The evidence in the case file documents that it is unlikely that SNAP customers would shop at the store and purchase such a large volume of items multiple times during a set time frame. In addition, the store's small checkout turnstile and lack of counter space makes it unsuitable for conducting large transactions. The store also had no shopping carts or shopping baskets for transporting food within the store which would be required for the larger dollar transactions.

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

The Appellant states that the store cannot control how and when people spend their benefits or how much food they purchase. It is true that 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 regulatory 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.

5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(7)(E)

The store visit pictures show that the store layout is not conducive to these excessively large transactions. There were no shopping carts or handheld shopping baskets for transporting food around the store and the no space at the checkout counter for stacking purchases. In addition, the store's stock is mainly inexpensive snack foods, single serving food items and accessory food items. The store visit report and pictures do not show that the firm offered any specialty or international items, fresh meat/seafood bundles, or boxes of fresh produce that would justify high dollar transactions atypical of a convenience store. The store did sell Similac; however, as the store was WIC authorized this product would be more likely to be purchased with WIC benefits than SNAP benefits. The Retailer Operations Division properly considered these factors in making its determination that the transaction patterns cited in the charge letter are more likely than not due to trafficking.

The Appellant states that prices are high because everything is expensive today. The Appellant alleges that, if you go to a Royal Farm or a 7-11, a soda or a bag of chips will cost almost \$21.00 and Jay's Grocery prices are about the same. However, if this were true then other nearby SNAP authorized convenience stores would show the same irregular transaction patterns as Jay's Grocery and they do not.

The Appellant states that people have no choice but to shop at Jay's Grocery as the transportation costs to go to other larger markets are prohibitive for the store's customers. 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 there were 72 SNAP authorized stores located within less than a one-mile radius from Jay's Grocery. These SNAP authorized stores included a supermarket and two (2) superstores. This shows that recipients wishing to purchase eligible food at an authorized retail location have many other shopping options located within a reasonable distance. Thus, the firm was clearly not the only food store in the area, not the best-stocked store, and almost certainly not among the most economical, as superstores and supermarkets are typically the most price competitive stores in a

given market. A government report¹ 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.

The case record also documents that the Retailer Operations Division conducted a detailed analysis of nine (9) households identified in the charge letter to analyze their shopping patterns at Jay's Grocery compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at larger stores including grocery stores, supermarkets and/or superstores. However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at Jay's Grocery on the same day or within a day or two of shopping at these larger stores. It is highly unlikely that a convenience store with limited staple foods would have legitimate SNAP transactions comparable or larger than these SNAP authorized grocery stores, supermarkets or 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 lack of counter space for stacking purchases and the lack of shopping carts and shopping baskets 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.

CIVIL MONEY PENALTY

The Appellant did not 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. The SNAP regulation at 7 CFR § 278.6(b)(2)(ii) mandates that a request for a trafficking CMP along with supporting documentation shall be submitted within ten (10) days of receipt of the charge letter.

The SNAP regulation at 7 CFR § 278.6(b)(2)(iii) also states, in part, that "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 ... the firm **shall not be eligible** for such a penalty." [Emphasis added.]

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

¹ "Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program," report prepared by Mathematica Policy Research for the Food and Nutrition Service, February 2011.

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 Jay's Grocery, 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

June 25, 2019