

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

L&Y Grocery Deli LLC,

Appellant,

v.

Case Number: C0202793

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the permanent disqualification of L&Y Grocery Deli LLC (L&Y Grocery or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), 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), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

AUTHORITY

7 USC § 2021 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 October 20, 2017, the Retailer Operations Division charged 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 Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i). Appellant replied to the charges by fax on October 31,

2017. Appellant denied trafficking and explained the transactions were normal due to the unique circumstances of the store.

After considering the retailer's reply and the evidence, the Retailer Operations Division issued a determination letter dated November 8, 2017. The determination letter informed Appellant that 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 Appellant was not eligible for a trafficking CMP because 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 postmarked November 17, 2017, Appellant appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions 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.

CONTROLLING LAW

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

7 CFR § 271.2 states, in part, that, "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 § 271.2 defines trafficking as: "(1) 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 § 278.6(a) states, inter alia, 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 on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an **electronic benefit transfer system**, . . ." (emphasis added)

7 CFR § 278.6(b)(2)(ii) states, inter alia: “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(e)(1) reads, in part, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.”

7 CFR § 278.6(i) states, inter alia: “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

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from February 2017 through July 2017. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were multiple transactions made from individual benefit accounts in unusually short time frames.
- There were excessively large purchase transactions made from recipient accounts.

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking.

APPELLANT’S CONTENTIONS

In its appeal request postmarked November 17, 2017, Appellant provided the following summarized contentions, in relevant part:

- The disqualification is affecting its clients who are used to getting most of its food supplies at Appellant given they some do not have transportation.
- Some of its customers have children with disabilities.
- The business is not doing anything illegal or inappropriate.
- Appellant provided receipts to show that most purchases occur within the first 10 days of the month, which is when most get their benefits and customers rush to the store to get all the groceries that they need.
- Appellant is a small business and has the right to sell to all customers,

- Appellant's customers shop every month.
- Appellant sells one pound to 20 pounds of sausage, rice, flour, oil, cans, milk, eggs, and pasta.
- On average clients spend 5 U.S.C. § 552 (b)(6) & (b)(7)(C) monthly as they buy food for the whole month.
- Most of the spending happens on the first purchase they make after getting their SNAP benefits.
- The determination to permanent disqualify Appellant was based on an assumption not proof which is unfair and unethical.

In support of its contentions, Appellant attached 15 pages of invoices of products that it sells.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced.

ANALYSIS AND FINDINGS

Store Visit

FNS authorized L&Y Grocery as a convenience store on September 9, 2016. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a September 1, 2017, store visit 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:

- L&Y Grocery is approximately 600 square feet.
- There were no shopping baskets or shopping carts for customer use.
- The check-out area is small and surrounded by a Plexiglas display case.
- There was a large ice cream freezer directly in front of the cash register that customers must reach over to checkout.
- The store does not offer any promotional specials, packaged or bulk items
- There was a deli case with a small amount of deli meat (three partial loaves).
- There were three packages of bacon, two packages of fish, one package of sausage, and some rolls of meat.

- There was limited fresh produce including nine tomatoes, eight limes, three red peppers, 13 potatoes, some onions, one avocado, and four bananas.
- Dairy included milk, butter, cheese, and ice cream.
- Other staple food items included eggs, tortillas, juice, cereal, rice, and a selection of canned goods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- There were 10 pounds bags of rice for \$5.99 and 20 pounds bags of rice for \$10.99.
- Ineligible items included include tobacco products, health and beauty aids, paper goods, and cleaning products.

The SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food 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 redemption patterns significantly different from similar-sized competitors.

Charge Letter Attachments

Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

Charge Letter Attachment 1. Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment documents 16 sets of transactions conducted by seven different households that total 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Retailer Operations Division determined that average transaction amount listed on this attachment was larger than the average SNAP transaction for a **super store** located in Passaic County, New Jersey. The record also reflects that customers conducting rapid, repetitive, and large transactions at Appellant frequently spent SNAP benefits at better-stocked and more competitively-priced grocery stores, sometimes on or about the same day they shopped at Appellant. Based on the shopping patterns of these EBT customers, transportation to other stores did not appear to be an issue.

Appellant contends that it has the right to sell to all customers and its clients shop at its location every month. 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 Appellant's stock and facilities and are therefore indicative of trafficking. Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The photographs from the store visit offer no legitimate explanation as to why SNAP customers would routinely shop at Appellant multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, or significant bulk items for sale. The transactions are too large to consist of a forgotten item or two.

While there are legitimate reasons why a SNAP household may shop at a given store multiple times in a day, the repetitive transactions cited in Attachment 1 is not normal shopping behavior at a convenience store with no shopping baskets or carts. 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.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 122 SNAP transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C). 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. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

Appellant contends that it sells one pound to 20 pounds of sausage, rice, flour, oil, cans, milk, eggs, and pasta. On the day of the store visit, there was one package of sausage available for purchase. The firm does sell the above described items, but that items do not explain the high dollar transactions. The highest priced items on the day of the store visit were 10 pound bags of rice for \$5.99 and 20 pound bags of rice for \$10.99.

The Retailer Operations Division determined that Appellant's total SNAP transaction dollar volume and average SNAP transaction were larger than the average for convenience stores in the county and the average in the State. The Retailer Operations Division also compared Appellant to three nearby convenience groceries. The transaction patterns of Appellant exceeded the other three authorized stores, as seen on the table. The Retailer Operations Division considered this an indicator of trafficking.

5 U.S.C. § 552 (b)(7)(E)

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Retailer Operations Division also compared Appellant to the same three similar nearby stores. Appellant conducted more SNAP transactions in each dollar range than each of the competitor stores. Considering Appellant's eligible food stock and infrastructure, this is highly unlikely and likely indicative of trafficking.

Sometimes a firm may have higher than average SNAP transactions amounts due to the lack of access to other SNAP authorized stores. However, the Retailer Operations Division determined that within a one-mile radius of Appellant, there are 117 other authorized firms, including 39 other convenience stores, 51 small groceries, 11 medium groceries, three large groceries, four supermarkets, and two super stores. It is not plausible that the firm's customers would regularly purchase large amounts of merchandise at Appellant when larger, better stocked stores are readily available and in the vicinity of the Appellant firm.

The Retailer Operations Division determined that there were 36 households that conducted the transactions listed in the charge letter. Of these 36 households, 24 households shopped at a large grocery, supermarket and/or super store within one day of shopping at Appellant during the review period. In addition, 19 of the 36 (52%) households with flagged transactions shopped at a large grocery, supermarket or super store **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** they completed a transaction at Appellant.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The photographs from the store visit show a limited amount of staple food items, with limited fresh produce and meat. Given Appellant's inventory and the fact that households are shopping at larger stores, the evidence does not support that households are conducting the majority of their grocery shopping at Appellant.

The Retailer Operations Division examined four households identified in the charge letter to analyze their shopping patterns at L&Y Grocery compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at supermarkets and super stores. However, despite this access to better stocked stores, each of the four households conducted excessively large transactions at L&Y Grocery **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of shopping at a supermarket or super store. Based on the large transactions conducted at supermarkets and super stores, it is clear that these households do not depend on Appellant for their major food item needs as Appellant contends. There is no legitimate reason why households would conduct large transactions at Appellant when these household had just visited or planned to visit larger stores with a better selection of staple foods including fresh meat and produce and likely better prices

In summary, Appellant's layout, business structure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Therefore, based on this empirical data, and in the absence of evidence to legitimize 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.

Invoice Analysis

Appellant submitted 15 pages of invoices for the eligible food items it purchased during the review period to support its SNAP redemptions. Each of the invoices was analyzed. Even with a generous 65% mark-up, the Retailer Operations Division determined that the submitted invoices did not support the firm's SNAP redemptions during the review period. Consideration also has to be given to cash and credit card sales. Although the inventory receipts submitted support the firm's claim that they sell rice, flour, cans, milk, and pasta; the submitted receipts do not demonstrate that the firm's stock could support their redemptions during the review period. The large dollar transactions remain questionable even if there was sufficient food inventory to support such transactions when consideration is made of there being no fresh unprocessed meat and limited fresh produce, a large inventory of low-dollar value snack food and beverages, a greater variety of food at lower prices at other stores which many customers also shop, no shopping baskets or carts, and little counter space to place food for purchase for checkout. There does not appear to be anything that would reasonably attract SNAP households to shop there, a convenience store, and spend substantial amounts of their SNAP benefits.

Household Hardship

Appellant contends that the disqualification is affecting its clients who have no means of transportation are used to getting most if not all of its food supplies at Appellant. Where there is a hardship to SNAP households, FNS may impose a hardship CMP on a firm in lieu of a disqualification where there is a lack of authorized stores in the area. 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." Because the Retailer Operations Division has taken action to permanently disqualify Appellant's firm, a hardship CMP in lieu of disqualification cannot be granted. Moreover, the Retailer Operations Division determined that there are 177 other authorized stores located within a one mile radius of Appellant where households can shop.

Evidence

Appellant contends that the determination was based on an assumption and not proof which is unfair and unethical. However, the charge letter attachments are in fact derived from transaction reports under the electronic benefit transfer system. Specifically, the ALERT system is a computerized fraud detection tool to identify SNAP transactions that form patterns having characteristics indicative of trafficking. However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still conduct an extensive analysis of the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether the questionable transactions were, more likely than not, the result of trafficking. Lastly, Appellant is always given a chance to explain the specific transaction patterns before the determination letter is issued and during the administrative review.

The legality of this method is supported by 7 CFR §278.6(a) which states, inter alia, "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.]

Appellant must provide a preponderance of evidence that the transactions detailed in the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. In the absence of compelling information or documentation weighed in comparison to the evidence provided by the Retailer Operations Division, the evidence weighs in favor of the Retailer Operations Division’s determination that SNAP-benefit trafficking substantially produced the transaction activity at issue in the present case.

CIVIL MONEY PENALTY

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR § 278.6(i). Appellant was informed that it would need to provide both the request and supporting evidence within ten calendar days of receiving the charge letter and that no extension of time could be granted for making the request or for providing the required evidence. 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.

Even if a timely request had been submitted, 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 compliance policy to prevent SNAP 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 Appellant’s EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. 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 occur as charged by the Retailer Operations Division. The determination to impose a permanent disqualification against Appellant is sustained.

The Retailer Operations Division also determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations. Under review, the denial of a trafficking CMP was deemed correct and proper.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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's owner resides or is 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, 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.

Mary Kate Karagiorgos
Administrative Review Officer

March 19, 2018