

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

La Commercial,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0202440

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 La Commercial as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

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

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 October 3, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of April 2017 through June 2017. The letter noted that the penalty for

trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated the Appellant had the right to respond to the charges within 10 days of receipt to provide explanations for the irregular SNAP transaction patterns. The letter also stated that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i). The charge letter was delivered via UPS on October 5, 2017.

The Appellant requested an extension of time to reply to the charge letter. The Retailer Operations Division granted an extension of time to reply, but noted that it could not grant an extension of time to request a trafficking CMP under 7 CFR § 278.6(i). The Appellant subsequently replied to the charge letter and offered a few explanations for the irregular transactions stating that the store was a participant in the Healthy Corner Stores program and that it also had accepted SNAP benefits as repayment on credit accounts. The Appellant also provided copies of its food purchase invoices and receipts.

After considering the evidence in the case, the Retailer Operations Division issued a determination letter dated December 13, 2017. The determination 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 under 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 sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked December 26, 2017, 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, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is covered in the Food & Nutrition Act of 2008, as amended, 7

U.S.C. § 2021, and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

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

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

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

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

7 CFR § 278.6(e)(1)(i) states:

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

7 CFR § 271.2 states, in part:

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

7 CFR § 271.2 states, in part:

Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption.

7 CFR § 278.6(a) states, in part:

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

7 CFR § 278.6(i) states, in part:

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

7 CFR § 278.6(b)(2) states, in part:

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

(iii) **If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days** specified in § 278.6(b)(1), **the firm shall not be eligible** for such a penalty. [Emphasis added.]

SUMMARY OF CHARGES

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

- **Charge Letter Attachment 1:** There were an unusual number of transactions ending in a same cents value. This attachment lists 223 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**
- **Charge Letter Attachment 2:** Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment lists 74 sets of 159 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**
5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- **Charge Letter Attachment 3:** Excessively large purchase transactions were made from recipient accounts. This attachment lists 303 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**
5 U.S.C. § 552 (b)(6) & (b)(7)(C).

APPELLANT'S CONTENTIONS

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

- The store's sales have increased due to its participation in the Healthy Corner Stores program.
- The store sells fresh fruits and vegetables.
- The store sells chile guajillo and pulla wholesale by the box. A 25-pound box costs \$137.50 and a 30-pound box costs \$148.37.
- The store accepts SNAP benefits as payments on credit accounts. The customer purchases food and pays half and then a week later pays the other half. This is why the store charges a customer twice.
- The Appellant has submitted purchase invoices and receipts and its sales and use tax return for April, May and June 2017.

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 History

The Food & Nutrition Service (FNS) authorized La Commercial for the SNAP on December 16, 2009. An owner signed the SNAP application for the store on October 25, 2009 and acknowledged that the owners were aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owners 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.

During the review period of April 2017 through June 2017, the Retailer Operations Division classified La Commercial as a small grocery store.

Store Visit Report

The case record documents that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an August 19, 2017 store visit conducted by an FNS contractor to observe the nature and scope of the store's operation, stock and facilities. This information was then used to

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

- La Commercial is approximately 2,000 square feet in size.
- The store had only two (2) shopping carts and twelve (12) handheld shopping baskets for customer use.
- The store had one (1) cash register and one (1) point-of-sale device.
- The store did not have an optical scanner or conveyor belts at the checkout.
- There was no evidence of a wholesale business.
- Store personnel confirmed that there was no storage space where food was kept out of customer view and that no food was stored offsite.
- Store personnel confirmed that the store had no freezers or storage coolers.
- Store personnel confirmed that La Commercial did not provide delivery services or take online or telephone orders.
- Food items generally had prices ending in x9 cents. The store did not have a special price structure 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Store personnel confirmed that the store did not round prices up or down at the checkout.
- The store did not sell fresh meat bundles, fresh seafood specials, and/or fresh fruit and vegetable boxes.
- The checkout area consisted of a long countertop which was crowded with merchandize and displays leaving an empty space of no more than two (2) feet by two (2) feet in size. The very limited space for stacking food at the checkout area made it not conducive to conducting large transactions.

The SNAP eligible food stocked by the store consisted mainly of inexpensive canned and packaged goods with a moderate amount fresh fruits and vegetables. The store did not sell any fresh meats or seafood. The store also stocked a large amount of snack foods and other accessory food items such as coffee, tea, condiments, and spices. The stocked ineligible items included health and beauty products, cleaning products and paper goods. Store personnel confirmed that the most expensive items sold by the store were 28.1 ounces of Nido powdered milk at \$11.99; seven (7) ounces of Nescafe coffee at \$7.99; 16 ounces of Queso Cotija cheese at \$6.99; and 16 ounces of Cotija Powder at \$5.99. Given the available inventory as noted above, there is no indication from the store visit report that the store would be likely to have SNAP transaction patterns significantly different from similar-sized competitors offering similar food items.

Same Cent Transactions

La Commercial conducted 2,421 SNAP transactions during the review period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits. The Appellant offered no explanation for this irregular transaction pattern.

The store visit report documented that most items in the store had price amounts ending in nine (9) cents. Store personnel also stated during the store visit that the firm did not round prices up or round prices down to the nearest dollar. Based on the store visit report, the Appellant's food inventory contains almost exclusively inexpensive canned and packaged goods, single-serving food items and accessory foods. The store did sell a moderate amount of fresh fruits and vegetables likely due to its participation in the Healthy Corner Stores program which is designed to allow stores to sell these items at a low price. Due to the store's mostly low cost foods, the larger dollar transactions cited in the charge letter would normally consist of multiple food products being purchased in one transaction. It is implausible that several of these relatively inexpensive items purchased together would disproportionally result in total purchase prices 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Instead when SNAP customers buy multiple food items, resulting in higher dollar amounts, the total transaction amount is more likely to result in a more random statistical spread of ending cent ranges 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Consequently, when there are a disproportional amount of transactions that end in a same cents value, it appears that these transaction amounts are contrived and therefore, in the absence of any compelling rationale to the contrary, are a strong indicator that the firm is trafficking in SNAP benefits. A preponderance of the evidence indicates that the irregular transactions cited in Charge Letter Attachment 1 are more likely than not a result of the store trafficking in SNAP benefits.

Multiple Transactions by the Same Household within a Short Time Period

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 small grocery store's stock and facilities and are thus indicative of trafficking.

Violating stores often conduct multiple split transactions from the same household account as a method to avoid the detection of single high dollar transactions that cannot be supported by the retailer's food inventory and infrastructure. Charge Letter Attachment 2 lists 74 sets of 159 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E). It is not credible that a small grocery store would have suspicious SNAP transactions greater than a supermarket or superstore. It is even less likely that these excessively large transactions would be conducted multiple times by the same household during a short time period.

The Appellant contends that the store accepts SNAP benefits as repayments on credit accounts. The customers purchase food and pays half and then a week later

pays the other half. Allegedly, this is why the store charges a customer twice. It should be noted that accepting SNAP benefits as a repayment on credit accounts is a violation of SNAP regulations and warrants a one-year disqualification under 7 CFR 278.2(f).

There is no evidence in the case record showing that the firm ever maintained credit accounts other than the Appellant's unsubstantiated claim. When a retailer claims it maintains credit accounts to explain irregular SNAP transactions and data patterns, FNS requires a level of detail regarding the legitimacy of the claim. This is because retailers have often made false admissions of credit in an attempt to obtain a lesser penalty after committing more egregious violations such as trafficking. Credit transactions must be accounted for with substantive evidence such as the dates credit was extended, to whom, for what amount, and for what items. Therefore, the Appellant's claim that these transactions are due to credit repayments cannot be accepted.

In addition, many of the transactions cited in Charge Letter Attachment 2 do not appear to be typical of a credit repayment followed by a legitimate SNAP purchase. When a credit repayment is made it will generally be for a large dollar amount and any second or subsequent legitimate SNAP purchase will be for a much smaller amount typical of the average SNAP transaction for a small grocery store. However, all of the transactions cited in Charge Letter Attachment 2 were greater than the average SNAP transaction at a North Carolina small grocery store during the review period.

The store visit pictures show that is unlikely that SNAP customers would want to shop at this store multiple times during a short time frame, or purchase such a large volume of items. In addition, the store's small checkout area and very limited counter space makes it unsuitable for conducting large transactions. The store also had only two (2) shopping carts for transporting food within the store. Based on the analysis above, and in the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

Excessively Large Transactions

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

Charge Letter Attachment 3 cites 303 SNAP transactions
5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E)

The substantial number of high dollar purchases atypical of a SNAP authorized small grocery store calls into question the legitimacy of these transactions. As noted previously, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors offering similar food items.

The Appellant claims that it sells chile guajillo and pulla wholesale by the box and that a 25- pound box costs \$137.50 and a 30-pound box costs \$148.37. However, this is contradicted by the store visit report in which store personnel indicated that the most expensive food item sold by the store was 28.1 ounces of Nido powdered milk at \$11.99. Although store pictures show that La Commercial sells chile guajillo and pulla, the pictures do not show that these items were for sale by box or in bulk and there is no signage offering these items in such quantities.

Sometimes a store may have higher than normal SNAP transactions due to the lack of access to other SNAP authorized stores in the area or if there are no other stores selling the same type of specialty or international food. However, the Retailer Operations Division determined that there are 39 surrounding SNAP authorized stores including two (2) supermarkets within a two-mile radius of La Commercial. Two (2) of the 39 stores carry international food items marketed towards Hispanic customers and one (1) of these sells fresh meat, poultry and fish. Therefore, a lack of access to other stores does not appear to explain the excessively large transactions at La Commercial.

Lastly, the case record documents that the Retailer Operations Division conducted a detailed analysis of three (3) households identified in the charge letter to analyze their shopping patterns at La Commercial compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at supermarkets and superstores. However, despite this access to better stocked stores, these sampled households often conducted excessively large transactions at La Commercial on the same day or within a few days of shopping at these other stores. It is highly unlikely that a small grocery store would have legitimate SNAP transactions comparable or larger than these SNAP authorized supermarkets and superstores.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the scarcity of shopping carts support the Retailer Operations Division determination. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on a preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 3 are more likely than not the result of trafficking in SNAP benefits.

Purchase Invoice Analysis

The Appellant, submitted purchase invoices for the review period in an attempt to show that it had a sufficient food inventory to support its SNAP redemptions. The record shows that the Retailer Operations Division conducted a thorough review of the purchase invoices and receipts dating from April 2017 and May 2017. To determine if the Appellant had sufficient food inventory to support its SNAP redemptions, the Retailer Operations Division compared the invoices and receipts for those months and compared them to SNAP redemptions for the same months.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The store's cash and credit card transactions should make the shortfall between the estimated retail food sales and the actual SNAP redemptions even greater. In conclusion, the case record documents that Retailer Operations analyzed the firm's purchase invoices in comparison with the firm's total SNAP redemptions during the same time period and properly concluded the firm had an insufficient food inventory to justify its actual SNAP redemption amounts.

CIVIL MONEY PENALTY

The Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i) even though it was informed of the right to do so in the charge letter. SNAP regulations at 7 CFR § 278.6(b)(2)(iii) states 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** specified in § 278.6(b)(1), 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 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 La Commercial, Appellant, is sustained.

RIGHTS AND REMEDIES

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

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

RONALD C. GWINN
Administrative Review Officer

March 20, 2018