

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

LA Mega Grocery LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0200465

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 LA Mega Grocery LLC (Appellant or La Mega Grocery) 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 July 11, 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 December 2016 through May 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 did not timely reply to the charge letter. After considering the evidence, the Retailer Operations Division issued a determination letter dated July 27, 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 letter postmarked July 28, 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 December 2016 through May 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 administrative review request dated July 17, 2017 and subsequent correspondence dated September 1, 2017, Appellant provided the following summarized contentions, in relevant part:

- The store has a capability to provide clients with any amount they desire to purchase.
- Appellant cannot turn away any customer that comes to the store with an EBT card and they can purchase what they want as long as the items are food items.
- Appellant does not keep track of customers and does not manage how they spend their benefits.
- The EBT and cash register receipts were thrown away.

- Appellant has not done anything wrong.
- The disqualification will affect the business since Appellant is located in a low income community.

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 Appellant as a small grocery on January 19, 2016. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a May 30, 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:

- Appellant is approximately 1100 square feet, with an additional food storage area of 100 square outside of public view.
- There were no shopping baskets or shopping carts for customer use.
- There was one cash register and one point-of-sale device.
- There was no optical scanner for the speedy processing of transactions.
- The check-out counter space was small and limited and surrounded by a Plexiglas wall.
- There were no meat/seafood specials or bundles that might sell for high prices.
- There was a deli case with limited meat and cheese that was sold by the pound and used for made to order sandwiches.
- There was no unprocessed fresh meat or poultry.
- In addition to the deli meat, there was bacon, sausage, and hot dogs.
- There was limited fresh produce including some lettuce and tomatoes that were likely used for the prepared sandwiches.
- Dairy included milk, yogurt, cheese, butter, ice cream, and infant formula.
- Other staple foods available for purchase were eggs, juice, bread, cereal, rice, pasta, limited canned goods, and snack foods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included tobacco products, lottery, and health and beauty products.

The SNAP eligible food stocked by the store was generally of a low dollar value, with the exception of infant formula, 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 50 sets of transactions conducted by 31 households 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant contends that it cannot turn away any customers that come to the store with the EBT card as long as they purchase food items. 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, profusion of large packages, or significant bulk items for sale. The second and third transactions in each set are too large to consist of a forgotten item or two.

5 U.S.C. § 552 (b)(7)(E). 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 164 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transaction amounts are not consistent with the store's inventory. Based on the store visit report, the firm does not offer food in bulk or any specialty foods that might sell for a high price. Instead, the store carries mostly inexpensive canned and packaged goods and single-serving food items. There was no fresh unprocessed meat and limited fresh produce on the day of the store visit and there were no shopping carts or shopping baskets. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

5 U.S.C. § 552 (b)(7)(E). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering Appellant's eligible food stock, infrastructure, and proximity to larger, better stocked stores this is highly unlikely and likely indicative of trafficking.

The Retailer Operations Division also compared Appellant to three nearby comparable small groceries. Each of the two transaction patterns of Appellant exceeds the other 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)

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 48 other authorized firms, including nine combination stores, 30 other small groceries, three medium groceries, three large groceries, two supermarkets, and one super store. 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.

Lastly, the Retailer Operations Division examined three households identified in the charge letter to analyze their shopping patterns at Appellant 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, all of the sampled households conducted excessively large transactions at Appellant 5 U.S.C. § 552 (b)(7)(E) of shopping at a supermarket or super store. It is highly unlikely that a small grocery without shopping carts or baskets would have legitimate SNAP transactions comparable to supermarkets or super stores which have a superior breadth and depth of stock at 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.

Denies Trafficking

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 order for the administrative action to be reversed. Appellant did not provide any compelling justifications for the transactions listed on the charge letter attachments. Appellant did not furnish itemized receipts for the questionable transactions or invoices as evidence of stocking adequate eligible foods to cover the SNAP redemption totals. 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.

Economic Hardship

With regards to Appellant's contention that the disqualification will affect its business, it is recognized that economic hardship is a likely consequence whenever a store is permanently disqualified from participation in SNAP. **5 U.S.C. § 552 (b)(7)(E)**. To excuse ownership from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that the firm will incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposition.

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 is also sustained.

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

November 9, 2017