

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

Leonardo Grocery,

Appellant,

v.

Case Number: C0211819

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification of Leonardo Grocery (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether or not 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 Leonardo 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

The agency’s record shows that FNS initially authorized Leonardo Grocery for SNAP participation as a small grocery store on June 21, 2006. In a letter dated September 20, 2018, 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 between the months of March 2018 and August 2018 and information obtained during a visit to the store by an FNS contractor on August 18, 2018. The attachments enclosed with the charge

letter specify the questionable and unusual SNAP transactions indicative of trafficking which were conducted at Appellant's firm during the review period. The letter noted that the penalty for trafficking is permanent disqualification, as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In a series of faxes received on October 4, 2018, the Appellant responded to the trafficking charges, claiming that questionable transaction amounts were due to monthly specials ending in zero ("00") or fifty ("50") cents, family members purchasing items in separate transactions throughout the day, customers forgetting items or noticing specials after a first transaction and purchasing additional items in a second transaction, the firm selling bulk cases of items, and the firm offering delivery for items with purchases **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The Appellant noted that many of their customers do not have transportation and that two buildings housing seniors were nearby, so offering bulk items and transportation or delivery has increased their customer base. The Appellant also submitted undated photographs of the store showing products being sold in bulk packages and with signage showing specials ending in "00" or "50" cents, as well as a listing of the firm's specials for the month of October 2018.

After reviewing the Appellant's response and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated November 5, 2018. This letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but determined that a CMP was not appropriate in this case 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 SNAP violations.

In a letter postmarked November 14, 2018, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as permanent disqualification from SNAP participation, an Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 found in the Food and 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) 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 [SNAP benefits] or trafficking in [SNAP benefits] 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, 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....

Trafficking means:

(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 § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food. [SNAP benefits] may not be accepted in exchange for cash...[and] may not be accepted in payment of interest on loans or for any other nonfood use.

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, [or] evidence obtained through a transaction report under an electronic benefit transfer system.... Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and **disqualification shall be permanent for a disqualification based on paragraph (e)(1) of this section.**[Emphasis added.]

7 CFR § 278.6(b)(2)(ii) states, in part:

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(b)(2)(iii) states:

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.

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 § 278.6(i) states, in part:

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

SUMMARY OF CHARGES

Leonardo Grocery was charged with trafficking, and subsequently permanently disqualified from participating in SNAP, based on an analysis of FNS records, which include observed store characteristics, recorded food stock, and store pricing gathered during a store visit, as well as Electronic Benefit Transfer (EBT) transaction data for March 2018 through August 2018. Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. In this case, the data for Leonardo Grocery reflected the following transaction patterns, which commonly indicate trafficking:

- There were an unusual number of transactions ending in a same cents value.
- There were multiple transactions made from the accounts of individual SNAP households within a set time period.
- Excessively large purchase transactions were made from recipient accounts.

APPELLANT'S CONTENTIONS

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

- Same cents transactions occurred because Appellant offers specials at the beginning of every month, selling merchandise in large quantities, by the case, for even dollar amounts with no cents;
- Multiple transactions occur because customers send family members to the store to purchase items throughout the day and customers often forget to purchase an item or cannot carry items purchased in bulk and make a second purchase as needed;
- Large transactions take place because Appellant offers free delivery to customers with purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C), serves customers with limited transportation, sells items in bulk, and has two senior housing buildings nearby for which transportation is provided. The combination of these factors has resulted in increased business for the firm; and
- Appellant would like reconsideration of the permanent disqualification decision in order to prove she is a hardworking, serious, minority woman who is trying to succeed.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions and evidence presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The primary issue for consideration in a case based on suspicious SNAP redemption data is whether or not the Retailer Operations Division adequately established that the Appellant firm engaged in the violation of trafficking. In other words, did the Retailer Operations Division, through a preponderance of the evidence, establish that it is more likely true than not true that the irregular and unusual transactions cited in the charge letter were the result of trafficking?

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm's EBT transactions, but also information obtained from an August 18, 2018, store visit conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report and photographs documented the following store size, description, and characteristics:

- Leonardo Grocery is a small corner grocery store, approximately 800 square feet in size, operating in the city of Perth Amboy, New Jersey;
- At the time of the store visit, the firm had no shopping carts or shopping baskets for

customers to use;

- The store visit photographs show one cash register for food purchases and agency records reflect the use of one EBT point-of-sale device;
- The store does not appear to use optical scanners to process transactions;
- The store's staple food stock is sufficient in each of the four staple food categories. The food selection is typical of a small grocery store. The store does not appear to sell specialty items such as bundles of meat or seafood or large boxes of fruit and vegetables. However, the store does appear to sell some bulk items, such as large containers of infant formula;
- SNAP-eligible, non-staple accessory food items available at the store include carbonated and uncarbonated drinks, snacks, candy, and condiments. The store also sells ineligible, nonfood items, including tobacco products, lottery tickets, and miscellaneous household merchandise;
- The store does not take telephone or online orders, nor does it offer delivery;
- The store has a kitchen and deli area where made-to-order sandwiches are prepared. Deli meats and cheeses are also sold by the pound.
- The checkout area consists of a very small counter space where items can be placed for purchase. To reach the counter, a customer must reach across a slide-top floor freezer. The constricted checkout area is not suitable for conducting large or rapid transactions as there is very little space on the counter to place more than a few items at a time and little room for customers to maneuver with large amounts of groceries.
- There is no indication from the store visit report that the firm has a special pricing structure, although most items appear to end with a cents-value of 9, such as \$23.89, \$1.49, etc. In the store visit photos, a few low-priced items are priced for even dollar amounts of \$1.00 or \$2.00, or for "50" or "75" cents. The report also states that the firm does not round transaction totals up or down at checkout.
- According to the contractor's report, the most expensive food items available for purchase include a 3.5-pound container of infant formula for \$27.99; a 12.9 oz. container of infant formula for \$23.89; a 12.5 ounce container of infant formula for \$21.99; and a 2.5 gallon bottle of cooking oil for \$22.99.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a small grocery store. Given the size of the store, it appears unlikely that households would frequently visit Leonardo Grocery to purchase large quantities of groceries, especially considering the absence of shopping carts and baskets, the very constricted checkout area, and the availability of much larger grocery stores in the area, including eight medium grocery stores, one large grocery store, two supermarkets, and two superstores within a one-mile radius of the store.

Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns would differ so significantly from those of nearby, similarly-sized competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: There were an unusual number of transactions ending in a same cents value. During the review period, the Appellant conducted 948 transactions 5 U.S.C. § 552 (b)(7)(E). Of these, this attachment lists 5 U.S.C. § 552 (b)(6) & (b)(7)(C). When such transactions are not supported by a specific pricing structure at the store, they are a strong indicator of trafficking in SNAP benefits. The store visit report shows that most prices end with a cents-value of 9 (e.g. \$1.49). A few low-value items in the store visit photos end in even dollar amounts of \$1.00 or \$2.00, or for “50” or “75” cents, but it is unlikely that these low-priced items would add up to the large transaction totals as frequently as reflected in the attachment. A portion of the report, completed in collaboration with store personnel, provides that the firm does not round transaction totals up or down at checkout. The Appellant has not offered rounding as a possible reason for these transactions either. As such, the likelihood that so many transactions would legitimately end in “00” or “50” cents is very low.

Appellant contends these transactions are the result of monthly specials ending in “00” and “50” and provided the Retailer Operations Division a list of specials for the month of October 2018 showing 34 items ending in these cents values, as well as recent photos of the store showing items with prices marked in these cents values. However, the store visit photos and the sales prices listed in the store visit report do not show a large variety of items being sold for these cents values. Rather, just a few low-priced items in store visit photos are for prices ending in 25 cent increments, such as “00”, “50”, or “75” cents. It is likely that any monthly specials of bulk items would have evident at the time of the store visit, but the store visit photos show no visible listing of such specials and the signage and bulk items shown in the Appellant’s undated photos did not appear in the store visit photos. Rather, the signage likely was added to items in the store after the time of the store visit and the photos cannot be considered an accurate representation of store conditions as they existed during the review period.

Without compelling evidence to correlate and demonstrate that the transactions in this attachment were legitimate purchases of eligible food, the Appellant has failed to adequately explain these irregular transactions. Accordingly, a preponderance of the evidence indicates that the irregular transactions cited in Charge Letter Attachment 1 are more likely than not a result of trafficking of SNAP benefits.

Charge Letter Attachment 2: Multiple transactions were made from the accounts of individual SNAP households within a set time period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E). The frequency of irregular transactions patterns at the subject store did not occur at nearby competitor stores.

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Appellant contends that these rapid transactions took place for a number of reasons, to include that different family members purchase merchandise through the day, customers forget to purchase items in a first transaction or see a special too late and a second transaction is required, or that customers cannot carry all items to the register at once and leave items to be purchased in

a second transaction a short time later. While this may be true on occasion, the frequency of multiple transactions within a set time period is highly irregular when comparing this firm to other similar stores in the area. If customer behavior at Appellant's store is typical for the local area, then nearby stores would have very similar SNAP transaction patterns. This is not the case.

While SNAP regulations do not limit the number of transactions a SNAP household makes, or how large individual transactions can be, the transactions noted in the charge letter are questionable because they display benefit redemption patterns that are inconsistent with the store's document physical characteristics and in comparison with similar stores in the area. The transactions identified in the charge letter are not marginally abnormal, but decidedly so given that the extent to which they recur over a six-month review period.

Appellant has offered no evidence to prove that the questionable transactions were legitimate purchases of eligible food, but rather relies on anecdotal explanations without any documentation. Because the Appellant has offered no evidence to support its claims, the review concludes that trafficking was a likely cause of the transaction patterns listed in Charge Letter Attachment 2.

Charge Letter Attachment 3: Excessively large purchase transactions were made from recipient accounts. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These transactions are questionable because they are inconsistent with the nature and extent of a small grocery store's inventory and facilities and in comparison to transactions at similar small grocery stores in the area.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E). Given that the Appellant firm has a moderate inventory of SNAP eligible foods, it is possible that there would be an occasional purchase where the transaction amount is high. As such, there may well be some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 3. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from nearby, similar-sized competitors, especially considering the absence of shopping carts and baskets and the very constricted checkout area. The substantial number of high-dollar transactions in a six-month period calls into question the legitimacy of these transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering how many food items it would typically take to add up 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and given that the store does not have any shopping carts or baskets, and that there are much larger grocery stores in the area with substantially greater inventory and variety, this review finds it unlikely that SNAP households would legitimately choose to spend large portions of their benefit allotments at a small store such as Leonardo Grocery.

Appellant contends that the high dollar transactions are due to offering delivery for purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and due to sales of bulk items. Also, Appellant claims some customers have limited transportation and that there are two senior-living buildings nearby for which transportation is provided. However, the store visit report, completed in collaboration with store personnel, provides that the firm does offer delivery, nor does it take telephone or online orders. There is no indication that transportation is offered to customers.

While the store does have some high priced items for sale, such as infant formula, the vast majority of SNAP households with infants are eligible for and participate in the WIC program, in which infant formula is part of the food package. Because infant formula is so expensive, many households use their WIC benefits to purchase such items in order to save their SNAP benefits for other foods.

Unfortunately, the Appellant only offers uncorroborated contentions, with no evidence, to show that transactions in question were legitimate purchases of eligible food. Without credible evidence, such as cash register receipts or inventory and accounting records, to explain the unusual transaction patterns listed in Charge letter Attachment 3, it is reasonable for this review to conclude that trafficking was likely a cause of these transactions.

It is the finding of this review that the attachments furnished with the charge letter adequately identify irregular patterns of SNAP transactions, thereby indicating that trafficking was likely taking place. The transactions listed in the charge letter are highly unusual and substantially different from comparable stores in the area. Based on these and other factors, such as the store's physical characteristics and inventory, the case for trafficking is convincing.

In an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. This means submitting sufficient and compelling evidence that the "unusual, irregular, and inexplicable" transactions and patterns cited in the charge letter were not caused by trafficking. Unfortunately, the Appellant offered little evidence to support its contentions regarding specific transactions listed in the charge letter. This is wholly insufficient to warrant reversal of the agency's permanent disqualification determination. In the absence of reasonable evidence from the Appellant, it is the conclusion of this review that the transactions listed in the charge letter attachments were, more likely than not, the result of trafficking violations committed by the Appellant.

Minority/Female Owned Business

The Appellant has requested that she be allowed to prove herself as a hardworking, serious minority woman who is trying to succeed in the world.

There are no provisions in the statute or regulations allowing/requiring consideration of minority or gender status in decisions involving SNAP-benefit trafficking. The only alternate sanction, once trafficking has been determined, is the imposition of a trafficking civil money penalty in accordance with the regulations at 7 C.F.R. § 278.6(i), which will be discussed in greater detail below.

Civil Money Penalty

As noted earlier, the Retailer Operations Division determined that the Appellant firm was not eligible for a civil money penalty in lieu of permanent disqualification for trafficking because it

did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and training program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a civil money penalty to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate documentation within designated timeframes. The case record shows that the Appellant did not request a civil money penalty when it replied to the charge letter and there is no evidence that the Appellant submitted any documentation that would indicate that the firm had a compliance policy or training program of any kind.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record was the primary basis for permanently disqualifying Leonardo Grocery from SNAP participation. This data provided sufficient evidence showing that the questionable transactions and patterns listed in the charge letter are consistent with trafficking in SNAP benefits. Likewise, the Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

Based on a review of all available information and evidence in this case, the decision to impose a permanent disqualification against the Appellant, Leonardo Grocery, under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

MICHELLE WATERS
Administrative Review Officer

March 6, 2019