

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

M & J Grocery Deli LLC,

Appellant,

v.

Case Number: C0204416

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that M & J Grocery Deli LLC, (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the program, 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(c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant by letter dated February 27, 2018.

AUTHORITY

7 U.S.C. § 2023 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 January 18, 2018, 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 June 2017 through November 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 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).

In correspondence dated January 25, 2018, Appellant, through counsel, replied to the charge letter and generally stated that it is being asked to disprove a negative which is impossible and all it can do is provide what is believed to be a reasonable explanation of the concerns. Ownership was present during all the transactions. As to item #1, dealing with multiple transactions, ownership states that many clients of the deli separate their merchandise and ask that it be charged separately. All the purchased items are lawfully purchased but the client makes the choice to buy them separately. Unless you provide me with a regulation or other authority that prohibits the merchant from accepting separate purchases from clients within some specified period of time, I fail to see any violation. As to items #2 dealing with large purchases, Appellant states that it sells baby formula, like Similac, that ranges in price from \$17.35 to \$29.19. You can see that this is expensive so when a mother buys three or four cans it adds up. The store also sold shrimp for a while which is expensive. It has boxes of cereal from \$4 to \$5, frozen chicken at \$6.99, Nido powdered milk at \$27.99 and so on. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. In the absence of guidance he should not be faulted, especially when this is the first time the issue has been brought to his attention. Appellant requested help to better service clients

After giving consideration to the Appellant's reply and evidence of the case, Retailer Operations Division issued a determination letter dated February 27, 2018. This letter informed ownership that they were permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also states that Retailer Operations Division considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, Retailer Operations Division determined that Appellant was not eligible for the CMP because it failed to submit sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated March 5, 2018, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

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

7 CFR § 278.6(a) states, *inter alia*, that “FNS may disqualify any authorized retail food store...from further participation in the program if the firm fails to comply with the Food and Nutrition Act of 1977, 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(c) reads, in part, “*Review of Evidence.* The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1)...the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS...”

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.” Trafficking is defined, in part, in 7 CFR § 271.2, as “the buying or selling of SNAP benefits for cash or consideration other than eligible food.”

7 CFR § 271.2 states in part that, “Eligible foods mean: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption.”

SUMMARY OF THE CHARGES

The charges on review were based on an analysis of SNAP electronic benefit transfer (EBT) transactions dated during the six month period of February 2016 through July 2016. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from individual benefit accounts in usually short time frames.
2. Excessively large purchase transactions were 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

The Appellant made the following summarized contentions in its response to the permanent disqualification letter issued by Retailer Operations Division, and its request for administrative review, in relevant part:

1. USDA cannot penalize a grocery for not following rules and regulations which do not exist, or for not implementing a program which USDA fails to disclose.
2. As for items 1, the clients of the deli separate their merchandise and ask that it be charged separately.

3. As for items 2, baby formula ranges in price from \$17.35 to \$29.19 and if a mother buys 3 or 4 cans it adds up. For a while the store sold shrimp and has other items like cereal at \$4 to \$5, frozen chicken at \$6.99, Nido powdered milk at \$27.99 etc.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant provided 303 sheets of the store's transaction history from April 2017 through February 2018. Some of the pages were duplicates and/or dated outside of the review period. The transaction history only contained an entry date, settled date, type of transaction, response and amount of the transaction. The transaction history was not itemized and did not have any identifying recipient or purchase information.

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

ANALYSIS AND FINDINGS

The FNS initially authorized the business as a convenience store on February 17, 2016. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during the October 18, 2017, store visit to the business 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 EBT transactions at Appellant that formed patterns indicative of trafficking. The firm review summary documented the following store size, description, and characteristics:

1. One cash register and one POS device with a small counter area partially obstructed by other smaller items available for sale. Register is located behind Plexiglas encasement.
2. Estimated to be approximately 800 square feet.
3. No shopping baskets or carts available for customers.
4. No adding machines or optical scanners were available at checkout. No specialty registers present.
5. Store does not operate through a night window or plastic barrier with food stock behind the barrier.
6. No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
7. Store had unusual pricing structure where prices ended with "5" or "0". Store does not round transaction totals.
8. No food stored in an area outside of public view.
9. Store has storage freezers or coolers but no food stored off site.
10. Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
11. Store does not take telephone orders but does not offer delivery.
12. Highest priced eligible food items were Baby Formula (\$17.55, \$28.00, \$26.00) and Red & White Canola Oil 96oz (\$8.19).

13. Store stocks a significant amount of non-food items such as but not limited to tobacco products, health and beauty aids, and paper goods, cleaning products, housewares, clothing items, charcoal and pet products.
14. Store stocks moderate amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products. No fresh fruits or produce, no fresh meat or poultry. Most meats are canned, packaged or frozen.
15. Kitchen/prepared food area with hot foods sold. Food is sold for off-site consumption and a microwave is available.
16. A deli or prepared food section where stock is used in preparation of food. Prices posted for meats/cheeses, prepared salads and prepared or made to order sandwiches.
17. No meat or seafood specials or bundles or fruit/vegetable boxes sold.

The issue for consideration is whether Retailer Operations Division has presented a convincing case that Appellant likely trafficked in SNAP benefits. 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.

Attachment 1 of the Charge Letter - Multiple transactions were made from individual accounts in unusually short timeframes.

There were 44 sets of 113 SNAP transactions that met the parameters of this attachment.

Multiple transactions conducted by the same household account

5 U.S.C. § 552 (b)(6) & (b)(7)(C) is a method which violating stores use to avoid the detection of single high dollar transactions that cannot be supported by the retailer's inventory and structure.

Appellant, through counsel, contends that the clients of the deli separate their merchandise and ask that it be charged separately. With regard to this contention, the transaction sets in this Attachment included anywhere from two to six transactions per set. Appellant has one register, one POS device and limited counter space which limit the feasibility of large transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant's stock is very limited, it carries no fresh meat or fresh produce, it does not offer any specialty or ethnic foods, no foods sold in bulk at high prices and does not carry food items that cannot be purchased at larger, better stocked stores.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

It must be noted that SNAP households have no limits on the number of times they may use their SNAP cards or how much eligible food they may purchase however, when purchasing food, people generally do not spend large sums at convenience stores. They usually stop at convenience stores to pick up quick snacks and/or a beverage, or for a few staple food items that they need, such as bread, milk, eggs, or a can or two of some food, but which are not considered worth a trip to the supermarket to get. It is rare for a convenience store to have purchases such as those cited in Attachment 1.

In addition, customers will sometimes forget an item or see something at the checkout and decide to purchase it after they've already completed their transaction. In such instances, it is reasonable to expect the subsequent purchase to be for a nominal amount because it is quite rare

to find very expensive items positioned at the checkout area, especially in smaller stores. However, in a number of questionable transactions, the subsequent transactions were for amounts that exceed any nominal, afterthought purchase. In some cases the amounts of subsequent transactions equaled or exceeded the preceding transaction amount. Appellant's contention does not adequately explain these transactions, particularly those that are more than a few minutes apart.

In conclusion, it is therefore more likely true than not true that the irregular transactions cited in the charge letter Attachment 1 are due to trafficking in SNAP benefits.

Attachment 2 of the Charge Letter - Excessively large purchase transactions were made from recipient accounts.

There were 267 SNAP transactions that met the parameters of this attachment. Based on the results of the contracted store visit, the large transaction amounts are not consistent with the store's inventory of low priced foods. The firm does not offer food in bulk or any ethnic or specialty foods that sell for a high price. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions. Transactions in this **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

Appellant, through counsel, contends that baby formula ranges in price from \$17.35 to \$29.19 and if a mother buys 3 or 4 cans it adds up. For a while the store sold shrimp and has other items like cereal at \$4 to \$5, frozen chicken at \$6.99, Nido powdered milk at \$27.99 etc. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. With regard to this contention, Appellant's layout and inventory does not support a high percentage of transactions markedly exceeding the average transaction amount of similar stores. There appears to be no basis for customer attraction to M & J Grocery Deli LLC with there being no great price advantage or specialty food offerings. The food stock offered at the subject firm is readily available to SNAP customers at larger retail food stores, which carry a wider variety of food stock to include fresh meat, dairy, and produce.

Moreover, households with small children who are eligible for FSP benefits are also eligible for WIC benefits. The WIC Program provides participants with vouchers to obtain free baby formula, as well as other products for lactating women, infants and children, from participating vendors. The record reflects that M & J Grocery Deli participates in the WIC Program and takes in WIC vouchers at an average monthly value of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, substantiating that WIC vouchers are, in fact, being redeemed in the store. Therefore, if baby formula is what everyone is, in fact, purchasing, it would be more reasonable for them to use their WIC vouchers to obtain free formula than to pay for formula using their SNAP benefits.

Appellant, through counsel, provided 303 sheets of the store's transaction history from April 2017 through February 2018. Some of the pages were duplicates and/or dated outside of the review period. The transaction history only contained an entry date, settled date, type of transaction, response and amount of the transaction. The transaction history just shows that transactions took place however they were not itemized and did not have any identifying recipient or purchase information and therefore, did not clarify or justify the transactions cited in Attachment 2 of the charge letter. Appellant did not provide any purchase receipts or invoices to

clarify or justify the transactions in this attachment.

Retailer Operations Division compared the Appellant's SNAP transactions with the average convenience store in Lehigh County, Pennsylvania. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This is questionable particularly when Appellant is stocked with mostly inexpensive packaged, canned, snack, and accessory food items and carries an assortment of single-serving beverages, precooked frozen items and does not offer any fresh meat (other than deli meats and cheeses that are also used to prepare menu items) fresh produce, and does not carry any specialty, ethnic or items in bulk that would sell at high prices.

Retailer Operations also conducted an analysis of the shopping habits of three of the households identified in the charge letter. This analysis concluded that these households also shopped at other area grocery stores including full-line supermarkets and superstores that offer a much larger quantity and variety of eligible food items for likely better prices either on the same day or within days of visiting Appellant's firm. This again indicates that lack of access to other stores is not at issue. However, despite this access to large supermarkets and superstores, these households consistently conducted much higher transactions at the Appellant firm than at better stocked supermarkets/superstores in and around the Lehigh County area of Pennsylvania. This is another strong trafficking indicator.

Based on this empirical data, and in the absence of sufficient evidence as to the legitimacy of such transactions, a conclusion can be drawn, through a preponderance of evidence that the "unusual, irregular, and inexplicable" transactions and patterns cited in the charge letter evidence trafficking as the most likely explanation. In this case, ownership did not provide sufficient evidence to legitimize Appellant's transaction data as outlined in the Attachments. Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence that the store was trafficking and concluded, through a preponderance of evidence, that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

Based on an analysis conducted by the Retailer Operations Division, and a review of Appellant's stock and facilities, a charge letter was issued as a result of questionable transactions that took place during the review period. Appellant was notified of these transactions and given the opportunity to clarify the transactions as cited in the charge letter. The transaction data and overall firm record convincingly demonstrate repetitive patterns of unusual, irregular, and inexplicable SNAP activity for this type of firm indicative of trafficking. Once Retailer Operations Division established a convincing case against Appellant, ownership bears the burden of proving, by a preponderance of the evidence, that the administrative action 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. If this is not demonstrated, the case is to be sustained.

As noted, 7 CFR § 278.6(a) states 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 inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Retailer Operations Division has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns in two attachments of EBT transaction data, the inadequacy of the firm's eligible food stock as observed and recorded during the onsite visit to support such large transactions, the lack of evidence of invoices of foods in inventory to cover SNAP redemption totals for the review months, the lack of explanation for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant, and the irregular SNAP transaction data of Appellant as compared to other small grocery stores in the State.

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 for the legitimacy 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. While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence in the record.

The purpose of the administrative review process is to ensure that firms aggrieved by Retailer Operations Division's adverse actions have the opportunity to have their position fairly considered by an impartial review authority prior to that adverse action becoming final. Appellant has been duly given, and has taken the opportunity to present to USDA through the administrative review process whatever evidence and information it deems pertinent in support of its position that Retailer Operations Division's adverse action should be reversed. Therefore, any evidence and information that Appellant presented to Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to Appellant's right to a fair and thorough review.

CIVIL MONEY PENALTY

Appellant, through counsel, contends that USDA cannot penalize a grocery for not following rules and regulations which do not exist, or for not implementing a program which USDA fails to disclose. With regards to this contention, Appellant was advised of the provisions at 7 CFR §278.6(i) & (j) for the imposition of a civil money penalty in lieu of permanent disqualification for trafficking in the charge letter of January 18, 2018 which also advised Appellant that documentation of eligibility for that alternative sanction was to have been provided within a specific time limit. Having received no request for the CMP, and in the absence of any documentation to support that possibility, a CMP was not imposed in lieu of permanent

disqualification. Based on a review of the record, that decision is sustained as appropriate pursuant to 7 CFR §278.6(b)(1); §278.6(b)(2)(ii) and (iii); and, §278.6(i).

Moreover, the civil money penalty for trafficking was established, in part, for firms that have formal training programs for their managers and employees but whose employees, despite such training and ownership's best efforts to comply with SNAP regulations, and without the knowledge or approval of ownership, still commit violations. Therefore, if as Appellant contends, he was present for all of the transactions, then even if Appellant did provide adequate documentation of an effective compliance policy and training program, it would not be a valid basis for qualifying the firm for a civil money penalty assessment in this case. That is, if Appellant alone operates the store and there are no employees, then ownership would have been involved in the violations charged, and a compliance policy and training program implemented by ownership, which would ordinarily serve to protect them from rogue employees who violate, cannot, in turn, also protect ownership when ownership themselves commits SNAP violations. Additionally, Appellant received the same Authorization Kit that is sent to all retail food stores when they are newly authorized in the SNAP, including various information booklets, signs and posters indicating the Do's and Don'ts, rules of the SNAP available in several languages, **a copy of the SNAP regulations**, and a training video,

As previously stated, Appellant was notified in the charge letter dated January 18, 2018, that it had 10 calendar days upon receipt of the charge letter to provide required documentation in order to be considered for the trafficking CMP. Appellant failed to provide Retailer Operations Division with the required documentation to be considered for a trafficking CMP in lieu of disqualification. Therefore, Retailer Operations Division correctly determined that Appellant was not eligible for a trafficking CMP as set forth in the SNAP regulations.

CONCLUSION

Ownership has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. As such, the SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have trafficked, which is that FNS shall disqualify the firm permanently.

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify M & J Grocery Deli LLC from participation in the SNAP. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Therefore, based on a review of all the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged by Retailer Operations Division. Based on the discussion herein, the determination to impose a permanent disqualification against M & J Grocery Deli LLC is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with

respect to 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 (FOIA), 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.

Monique Brooks
Administrative Review Officer

June 11, 2018