

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

Nana's Supermarket,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0199218

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 Nana's Supermarket (Nana's Supermarket or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

AUTHORITY

7 USC § 2021 and the implementing regulations at 7 CFR § 279.1 provide that "A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS."

CASE CHRONOLOGY

In a letter dated May 23, 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 September 2016 through February 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided

by 7 CFR § 278.6(e)(1). The letter also noted that Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant replied to the charges by fax on May 25, 2017. Appellant denied trafficking and explained that the transactions were normal based on the unique circumstances of the store. Appellant explained that the transactions were conducted by people that purchased SNAP benefits from people selling them in front of the store. Appellant also explained that its meat packages result in large purchase transactions. The Retailer Operations Division requested invoices of Appellant's meat purchases and Appellant submitted the invoices on July 3, 2017.

After considering the evidence and the retailer's reply, the Retailer Operations Division issued a determination letter dated July 10, 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 dated July 21, 2017, Appellant, through counsel, appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted. On August 10, 2017, counsel requested documents under the Freedom of Information Act (FOIA) and on November 2, 2017, counsel withdrew its FOIA request.. Counsel provided information in support of its administrative review request on November 21, 2017.

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 September 2016 through February 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 July 21, 2017, administrative review request, and subsequent correspondence submitted on November 21, 2017, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- The store's customers typically conform to the traditional transaction patterns of other SNAP participants in that they make large and frequent purchases within a week of receiving their benefits and frequently 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- Review decisions have been under the errant belief that the ALERT system has been proven to be accurate in finding fraud.
- ALERT fails to account for special business practices, differences in demographics, foodstuffs, and geographic areas.
- Another issue is whether appropriate comparison stores have been selected to compare Appellant's transactions.
- Within nearly three-quarters of a mile there is only one store that could be distantly compared to Appellant but even their selection of meat and their location is fundamentally different than Appellant.
- Court cases have cautioned the USDA that it is relying too deeply upon numbers generated by ALERT. (*Brooklyn Mini Market vs. U.S.*, Federal Western District of New York, 12-CV-6708, Document 26, Order Denying Motion for Summary Judgment and *Skyson USA vs. U.S.*, 2010 WL 651032 (D. Hawaii 2010)).
- It is not uncommon for Appellant's customer to make multiple purchases in a short period of time after the customer receives its benefits.
- In some instances multiple members of the same household will shop together and make their purchases separately using the same account in quick succession.
- Co-shopping is one of the trends in the U.S.
- Different household members will shop separately (using the same account) to pick up different needs, and personal needs on top of the household's need and different household participants will travel to the store together to make purchases, and then separate their purchases to track what amount each party has used from the benefit accounts.
- The dates of the purchases correlate with the dates that households receive their benefits.
- There is certainly inventory on its shelves at any given time to account for the transactions.
- There is sufficient time for the clerk to ring up the transaction.
- Assuming the household didn't feel like driving or was unable to use a car at the time they were able to get groceries, Nana's Supermarket is the likely place to go to get groceries.
- The transactions were more likely for eligible food items purchased on rare occasion 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of one another.
- The charges are based upon the Alert system's presupposition that the scans used actually indicative of the SNAP violations and the subsequent analysis of the data by an analyst, who's never been to the store, may or may not have an understanding on how the business is run, and then bases his or her decision upon a mountain of assumptions.

- Context is based on the premise that you can compare the data meaningfully to other local stores to create a baseline and that you have a good feel for what the other comparison stores are doing in their business operations and there isn't a different logical explanation for how these transactions come to pass.
- There is no credible evidence that trafficking or any other infraction is occurring at Nana's Supermarket.

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 Nana's Supermarket as a small grocery on June 6, 2014. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a August 23, 2016, 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:

- Nana's Supermarket is approximately 900 square feet, with no additional food storage 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.
- The check-out counter space was limited and surround by a Plexiglas display case with an ice cream cooler in front.
- There were meat packages advertised for \$29.99, \$34.99, \$49.99, and \$69.99.
- The fresh meat available on the day of the store visit included pork chops, sausage, and chicken pieces.
- There were packages of bacon and hot dogs and there were loaves of deli meat to slice.
- There were limited amounts of fresh produce including single bananas on the checkout counter, four heads of cabbage, mangoes, apples, lemons, peaches, tomatoes, green peppers, cucumbers, onions, potatoes, sweet potatoes, and lettuce.
- Dairy included milk, yogurt, cheese, butter, ice cream, and infant formula.
- Frozen food included dinners, vegetables, pizza, fried chicken, and breakfast foods.
- Other staple foods available for purchase were eggs, juice, rice, bread, beans, cereal, pasta, and canned goods.
- The store's staple food stock was adequate in each of the four staple food categories.

- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- There was a menu with prepared and hot food items.
- Ineligible items included tobacco products, health and beauty products, and household products.

Based on the store visit information, it would not be surprising for local customers to make purchases of meats or a meat package. However, there is no indication that SNAP households would be inclined to frequently visit the store to purchase large quantities of other grocery items, especially considering the limited stock of other staple foods and the absence of shopping carts and baskets. Apart from meat items, the available food was primarily of a low-dollar value. Given the available inventory, there was very little sign that the firm would be likely to have SNAP redemption patterns that differed significantly from those of similar-sized competitors, especially competitors that sell similar or identical food items.

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 37 sets of transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Counsel contends that there is sufficient inventory on its shelves at any given time to account for the transactions and that there is sufficient time for the clerk to ring up the transaction. The cashier does have sufficient time to ring up the transactions and that is not the issue at hand with the transactions listed in this Attachment. Even if Appellant has the eligible food stock to support the transactions, the question remains as to why this transaction pattern is evident at Appellant and not at other similar stores. In addition, the Retailer Operations Division conducted an analysis of some of the households that conducted transactions listed on this attachment and determined that many of these households are making what would appear to be normal food purchases at supermarkets or super stores on the same day, day prior, or day after conducting transactions at Appellant. Thus, these households have access to transportation or at least access to other authorized firms.

Counsel contends that the dates of the purchases correlate with the dates that households receive their benefits. This may be true but this is not evidence that the transactions are for eligible food items only. The Retailer Operations Division analyzed the shopping activity of households listed in the Attachment and determined there was unusual patterns. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Retailer Operations determined that it was unlikely that this household would conduct nearly the same identical transactions on these two days in two different months.

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 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. 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)(6) & (b)(7)(C).

In its reply to the charges, Appellant explained that there were household members selling their SNAP benefits outside of the store and that is what these transactions are from. Appellant did not submit any evidence to support this allegation. Again, given the elapsed time between the transaction sets, all but one set did not occur within the same visit. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Counsel explains that co-shopping results in a higher number of transactions that occur in a shorter period of time than expected. Co-shopping may occur but it is unlikely the reason that Appellant has more frequent large transactions by the same household than other similar stores during the review period. This would manifest itself in comparable firms having similar transaction patterns – 5 U.S.C. § 552 (b)(6) & (b)(7)(C). But this is not the case. It is unlikely that households would be more likely to co-shop at Appellant than at other similar stores.

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 326 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transaction amounts are not consistent with the store's inventory. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar-sized competitors. The frequency of high-dollar purchases in a six-month period calls into question the legitimacy of these transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant did not submit any evidence to support larger priced meat plans. In fact, it appears that the advertised meat plans are the same meat plans that were advertised under previously authorized firms, including the original store that was disqualified on January 6, 2012, which is the store name that is still listed on the sign advertising the meat plans. It is questionable how meat plans stayed the same through a period of three different owners. The packages were the same and priced the same. It is possible but unlikely.

Counsel contends that there are no similar comparison stores. As noted previously, there is no indication from the store visit report that Appellant would be likely to have SNAP redemption patterns significantly different from similar-sized competitors offering similar food items. The Retailer Operations Division determined that the nearest small grocery's food stock and physical

amenities were superior to Appellant. Furthermore, Appellant did not provide any evidence as to how Nana's Supermarket is unique in comparison to nearby competitors.

The Retailer Operations Division did compare Appellant to six nearby competitor stores. The Retailer Operations Division determined that each of the two transaction patterns of Appellant, described in each of the charge letter attachments, exceed the other six authorized stores, as seen on the table herein. The data from these nearby stores provided adequate evidence to demonstrate that the transaction patterns at the Appellant firm were highly unusual and indicative of possible trafficking violations.

5 U.S.C. § 552 (b)(7)(E)

Counsel also contends that if customers did not feel like driving or did not have immediate access to transportation, households would choose to shop at Nana's Supermarket. Sometimes a firm may have higher than average SNAP transactions amounts due to the lack of access to other SNAP authorized stores. The Retailer Operations Division determined that there are 43 other authorized stores within a one-mile radius of Appellant including one supermarket and one super store.

There were 35 households that conducted a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at a supermarket, super store, or large grocery. The Retailer Operations Division examined four households identified in the charge letter to analyze their shopping patterns at Nana's Supermarket compared to their shopping patterns at other SNAP authorized stores. However, despite this access to better stocked stores, each of the four households conducted excessively large transactions at Nana's Supermarket 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of shopping at a supermarket or super store. Many of these transactions were larger than the transactions conducted at the supermarkets or super stores. It is highly unlikely that a small grocery would have legitimate SNAP transactions comparable to supermarkets or super stores which have a superior breadth and depth of stock at likely better prices.

Between December 5 and 6, 2016, one household conducted two large SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). There is no legitimate reason why households would conduct large transactions at Appellant when these household had just visited or planned to visit larger stores with a better selection of fresh meat and produce and likely better prices.

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

Invoice Analysis

Appellant submitted invoices from the review period to support that these large transactions were due to the sale of meat packages. The Retailer Operations Division analyzed the invoices for December 2016, January 2017, and February 2017, which were the months that had the most invoices. The retailer verbally stated that it only orders from one vendor to purchase all of the meat products. The Retailer Operations Division determined that the majority of the invoices show items Appellant used for its prepared and hot and prepared food menu. It is important to note that the majority of the items listed on the hot food/deli menu would be SNAP ineligible because they are sold hot at the time of purchase. The Retailer Operations Division included all invoices in favor to the retailer. Even with a 50% mark-up, the Retailer Operations Division that the submitted invoices support less than half of the SNAP redemptions for the months reviewed. Consideration also has to be given to cash and credit card sales. Thus, the the submitted invoices do not support that the sale of meat packages explain the majority or all of the transactions cited in the charge letter.

ALERT

Appellant makes multiple contentions regarding the agency's ALERT system. The ALERT system is a computerized fraud detection tool to identify SNAP transactions that form patterns having characteristics indicative of trafficking. However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still conduct an extensive analysis of the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether the questionable transactions were, more likely than not, the result of trafficking. Lastly, Appellant is always given a chance to explain the specific transaction patterns before the determination letter is issued and during the administrative review.

The legality of this method is supported by 7 CFR §278.6(a) which states, inter alia, "FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, **evidence obtained through a transaction report under an electronic benefit transfer system**" [Emphasis added.]

The documentation and evidence provided by the Retailer Operations Division was thoroughly examined and there is no evidence to suggest that the decision was based on "a mountain of assumptions." From all indications, the Retailer Operations Division obtained the EBT data (provided by ALERT), found it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough investigation before concluding that trafficking was likely occurring. Appellant's implication that the Retailer Operations Division simply charged a store with trafficking violations simply because it was listed on some computerized reports is unfounded.

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

Case Law

Appellant cites some case law which it claims supports its position on the ALERT system. It should be noted that considerations of legal precedent through case law, or the lack thereof in relation to the present case, is beyond the scope of this review. Instead this administrative review is limited to whether the Retailer Operations Division appropriately followed the Food and Nutrition Act of 2008, as amended, and the regulations promulgated under the Act, and whether the action taken is sustainable by a preponderance of the evidence. Therefore, any application of a supposed judicial precedent would best be addressed in a judicial review in a court of law. Accordingly, no further findings or conclusions are rendered in this regard.

CIVIL MONEY PENALTY

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR § 278.6(i). Appellant was informed that it would need to provide both the request and supporting evidence within ten calendar days of receiving the charge letter and that no extension of time could be granted for making the request or for providing the required evidence. Appellant did not request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i), even though it was informed of the right to do so in the charge letter.

Even if a timely request had been submitted, Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy to prevent SNAP violations. Therefore, the Retailer Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

The Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program

violations did occur as charged by the Retailer Operations Division. The determination to impose a permanent disqualification against Appellant is sustained.

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

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. If a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant's owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

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

Mary Kate Karagiorgos
Administrative Review Officer

December 21, 2017