

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

Providence Deli and Grill Mart,

Appellant,

v.

Case Number: C0204723

Retailer Operations Division,

Respondent.

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 Providence Deli and Grill Mart (Providence Deli 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 December 26, 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 August 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 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 letter dated January

6, 2018. Appellant denied trafficking and explained the transactions were normal due to the unique circumstances of the store. Appellant requested a CMP.

After considering the retailer's reply and the evidence, the Retailer Operations Division issued a determination letter dated February 13, 2018. 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 postmarked February 15, 2018, Appellant, through counsel, 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 August 2017 through November 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 subsequent information dated April 4, 2018, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- The EBT data relied upon by the agency has been subject to audit.
- The audit revealed different redemptions in STARS and Alert for some months for some stores.
- Transactions that should be identified as fraud could go undetected.
- It is clear that there were material discrepancies found in the data.
- The allegations are based entirely on the ALERT data.
- As OIG concluded FNS uses two information systems to administer SNAP, STARS and ALERT, and both systems should reflect the same data.
- Appellant has denied the allegations.
- Frequent transactions are the result of the cardholder request and are not against the regulations.

- It is well known that on numerous occasions, customers make successive purchases, sometime while right in line to check out, and also return later in the day for various reasons including that they hand carry groceries and can only carry so much.
- *Skyson USA, LLC v. United States*, No. CV 09-00278BMK, 2010 WL 651032, at *3 to show that it is not unreasonable for a customer or household to shop at any given store one or more times a day.
- The transactions are indicative of the buying habits of card holders living in the area.
- Appellant provided receipts for several transactions.
- The transactions refute any notion of trafficking and demonstrate customers buying what they want.
- The market serves an economically challenged clientele.
- The market can do little to stop customer from using their benefits.
- *Corder v. United States*, 107 F.3d 595, 597 (8th Cir. 1997) discussed the availability of a CMP and the Court indicated that Congress did not specify the factors FNS must consider in imposing a CMP in lieu of a permanent disqualification.
- Appellant is an important resource to the community.
- Appellant serves a diverse group of citizens including residents of low-income housing, elderly, and those who must walk to the market due to lack of transportation.
- SNAP is very important to Appellant's economic viability.
- Appellant is within walking distance to many customers.
- An extraordinary hardship will ensnare the community if Appellant is no longer able to accept benefits.
- The owner/operator carefully reviewed the regulations, all SNAP material, and the training video.
- Appellant is a small business and did what it could do.
- *Ghattas v. United States*, 40 F.3d 281, 285 (8th Cir. 1994) noted that a different approach is necessary for a small establishment with few employees in regards to the required training program.
- Firm ownership was not aware, did not approve, or was not in any way involved in the conduct or approval of illegal trafficking violations.
- This is the first occasion of any trafficking violation against the store.
- Appellant had an effective SNAP training program in place and has reviewed the training video by the Agency and all correspondence from the Agency.
- The two alleged violations are not supported by evidence

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 Providence Deli as a convenience store on March 28, 2017. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division

considered information obtained during an October 18, 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:

- Providence Deli is approximately 1000 square feet.
- There was no shopping baskets or shopping carts for customer use.
- The store does not offer any promotional specials, packaged, or bulk items.
- There was no fresh meat, poultry, or fish.
- There was no fresh produce.
- Dairy included butter, ice cream, and infant formula.
- Other staple food items included bread, cereal, pasta, rice, eggs, and a selection of canned goods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included tobacco products, health and beauty aids, paper products, pet food, and cleaning products.

The highest priced items, as confirmed onsite by the owner, were Similac infant formula - \$17.99, oil - \$5.99, juice - \$5.99, and cereal - \$5.59. The SNAP eligible food stocked by the store was generally of a low dollar value 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 19 sets of transactions conducted by 17 households 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant explains that it cannot stop a customer from shopping. In addition, counsel contends that on numerous occasions, customers make successive purchases, sometime while right in line to check out, and also return later in the day for various reasons including that they had hand carry groceries and can only carry so much. The SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but 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, or significant bulk items for sale. The transactions are too large to consist of a forgotten item or two.

The Retailer Operations Division determined that households that are conducting rapid, repetitive, and large transactions at Appellant are frequently shopping at better-stocked and more competitively-priced grocery stores, sometimes on or about the same day they shopped at Appellant. Based on the shopping patterns of these SNAP customers, transportation to other stores did not appear to be an issue and customers do not appear to rely on Appellant for all of its grocery needs.

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 216 SNAP transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant did not stock a profusion of high dollar staple food items and had no fresh unprocessed, poultry, fish, or fresh produce.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

Appellant, through counsel, contends that the market can do little to stop customer from using their benefits. Again, these transactions are suspicious not because they exceed a certain amount but rather because they display characteristics of use inconsistent with the nature and extent of the store's stock and facilities and are therefore indicative of trafficking. The store photographs indicate that the store has no shopping baskets or carts, no fresh meat, and no fresh produce.

There is no compelling reason for customers to consider Providence Deli as a first choice destination to fulfill large purchases of food, or to make cumulative purchases

5 U.S.C. § 552 (b)(6) & (b)(7)(C) resulting in large amounts.

The Retailer Operations Division compared Appellant to four nearby convenience stores. The transaction patterns of Appellant exceed 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)

Counsel explains that some households do not have access to transportation. It is true that 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 there are 59 other authorized stores within a one-mile radius of Appellant, including two supermarkets and three large groceries. There are 113 SNAP households listed on this Attachment and 59 of these households shopped at a super store, supermarket, or large grocery within one day of its suspicious transaction at Appellant and 67 SNAP households shopped at one of these larger store types within two days of its transactions at Appellant.

The Retailer Operations Division analyzed the shopping patterns of three households identified in the charge letter. All of these households had access to, and shopped at supermarkets and super stores. However, despite this access to better stocked stores, each of the three households conducted excessively large transactions at Providence Deli 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of shopping at a supermarket or super store. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Similar transactions patterns were noted in the other two households that were analyzed. There is no legitimate reason why households would conduct large transactions at Appellant when these households had just visited or planned to visit larger stores with a better selection of staple foods including 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.

Receipts

With its reply to the Retailer Operations Division, Appellant submitted cash register receipts. The cash register receipts have a different store name listed. In addition, the items were not itemized to determine if the items were eligible food items. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). On the day of the store visit, the highest priced items, as confirmed onsite by the owner, were Similac infant formula - \$17.99, oil - \$5.99, juice - \$5.99, and cereal - \$5.59. Given that there were no other items with these prices, it is more likely that these receipts were created to respond to the charges and is not credible evidence that the transactions listed on this Attachment were for eligible food items only.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). However, it would be unusual for a SNAP household to purchase infant formula with SNAP benefits, as households who participate in SNAP would also be eligible to participate in the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). WIC has a more lenient income threshold for participation, and a higher participation rate of eligible participants, than SNAP. Thus, although the store sells infant formula, it is not credible that the sale of these items would adequately explain the store's excessively large transactions. It is unlikely that the majority of these transactions are solely due to the sale of formula. Appellant did not provide any receipts or invoices that it stocked sufficient inventory, including formula, to support the questionable redemptions.

Court Cases Cited

As to the court cases cited by counsel, the administrative review process is to determine whether FNS followed the Food and Nutrition Act and the regulations issued under the Act when it took

action against the retailer. The administrative review officer is not responsible for determining whether any court cases cited by counsel apply to Appellant's situation. If this final agency decision is appealed to the federal district court, the judge is responsible for determining whether the court cases cited by counsel are on point and applicable to the case presently under review.

Economic Hardship

Counsel reports SNAP is very important to Appellant's economic viability. It is recognized that economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. 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.

Household Hardship

Counsel explains that Appellant is within walking distance to many customers and the community will face an extraordinary hardship if Appellant is no longer able to accept benefits. In addition, counsel states that Appellant serves a diverse group of citizens including low-income housing residents, elderly, and those who must walk to the market due to lack of transportation. As indicated, the Retailer Operations Division determined that there are 59 other SNAP authorized stores within a one-mile radius of Appellant. Moreover, where there is a hardship to SNAP households, FNS may impose a hardship CMP on a firm in lieu of a disqualification where there is a lack of authorized stores in the area. However, the regulations at 7 CFR §278.6(f)(1) clearly state that "a civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a permanent disqualification." Because the Retailer Operations Division has taken action to permanently disqualify Appellant's firm, a hardship CMP in lieu of disqualification cannot be granted.

No Previous Violations

Appellant contends that it has not had any previous SNAP violations. A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

Economic Hardship

Appellant states that the disqualification will be a big blow to the business if it is disqualified from SNAP for any period of time. It is recognized that economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. 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.

Evidence

Counsel contends that the allegations are based entirely on the ALERT data and there is no evidence to support the allegations of trafficking. The charge letter attachments are derived from transaction reports under the electronic benefit transfer system. Specifically, FNS uses 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.

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.]

Counsel refers to an OIG audit concerning the STARS and ALERT systems. Counsel states that it is clear that there were material deficiencies found with the data relied upon for enforcement activities of the Agency. There was nothing presented by counsel that suggests that the data surrounding the questionable transactions was not accurate. Counsel even states the opposite from the audit and that the audit revealed that "transactions that should be identified as fraud could go undetected."

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. Appellant did not provide any compelling justifications for the transactions listed on the charge letter attachments. It did not furnish itemized receipts for the questionable transactions or any invoices or 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.

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 10 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.

The criteria for a trafficking civil money penalty in lieu of disqualification is defined under 7 CFR §278.6(i) which reads, in part:

In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in §278.6(i)(1); and

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in §278.6(i)(2); and

Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm

In its January 6, reply to the Retailer Operations Division, Appellant explained that the owner/operator carefully reviewed the regulations and all SNAP material and the training video. However, Appellant did not submit any documentary evidence to show what the alleged SNAP training consisted or when it was provided to its employees. The Retailer Operations Division determined Appellant's narrative explanation describing the training program is not substantial evidence that Appellant met all four criteria required by 7 CFR § 278.6(i). Additionally, neither

the size of an organization nor the number of its personnel is a consideration in determining the eligibility of a firm for a civil money penalty in lieu of permanent disqualification for trafficking.

Appellant fell short of the regulatory standard for a trafficking CMP as it did not provide **substantial** evidence that it met all four criteria required by 7 CFR § 278.6(i). 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 owners 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, 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

June 12, 2018