

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

Ramos Grocery Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0219197

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 Ramos Grocery Inc. (Ramos Grocery 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 August 13, 2019, 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 March 2019 through June 2019. 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).

On August 19, 2019, Appellant, through counsel, requested documents under the Freedom of Information Act. (FOIA). FNS responded to the FOIA request on September 19, 2019. Appellant then submitted its reply to the charges to the Retailer Operations Division on November 17, 2019. Appellant denied trafficking and explained the transactions were normal based on the unique circumstances of the store.

After considering the retailer's reply and the evidence, the Retailer Operations Division issued a determination letter dated February 4, 2020. 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.

By letter dated February 13, 2020, Appellant, through counsel, appealed the Retailer Operations Division's determination and requested an administrative review.

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 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 USC § 2021(b)(3)(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 coupons or trafficking in coupons 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 that the definition of "coupon" includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

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, in part, as:

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:

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(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.

7 CFR § 278.6(b)(2) states, in part:

(ii) 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 as specified in § 278.6(i), 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).** [Emphasis added.]

(iii) **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. [Emphasis added.]

SUMMARY OF THE CHARGES

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from March 2019 through June 2019. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were multiple transactions made from individual benefit accounts within a set time period.
- There were multiple transactions that were considered large based on the observed store characteristics and recorded food stock.

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

Counsel's administrative review request is dated February 13, 2020. In subsequent correspondence submitted by e-mail on May 29, 2020, Appellant forwarded a copy of its original reply to the charges submitted to the Retailer Operations Division on November 17, 2019. This response contained the following summarized contentions:

- Appellant denies trafficking.
- USDA has provided no basis for its determination of what constitutes "large" transactions or any definition of factors to be considered in matching what it terms "store characteristics and recorded food stock" to transaction amounts.
- A multitude of factors affect any such calculation, including: city population, city location in the country, location within the city, income level in the surrounding community, spending habits of the location community, access to larger supermarkets common in suburban and rural areas but nonexistent in low income urban areas; local community access to transportation options; increased costs of security and insurance for firms in inner-city locations, and individual characteristics of the firm such as foot traffic, square footage, and relative proximity to other retail firms providing food sales services.
- Any attempt to allege trafficking based upon its ALERT program which analyzes raw transaction data can only be based upon illegal arbitrary and capricious standards which violate both procedural and substantive due process.
- The only other two nearby stores have closed.
- The fact that these two other stores have closed render the ALERT program conclusions invalid and skewed given that Appellant is now the only store of any size located within the large noted area populated by a large percentage of SNAP recipients.
- USDA's FOIA response regarding ALERT was denied.
- USDA must lay bare its process to demonstrate its validity.
- Appellant refers to *Nadia International Market v. United States of America*, US Dist. Court, D. Vermont, 2015.

- Sharing the investigative process would lead to nothing but a real deterrent to fraud when unscrupulous retailers realize they cannot escape a valid, tested system which is based upon legitimate assumptions and not hidden subjective conclusions.
- The list of “high dollar” transactions noted are not out of character for Appellant given the totality of the facts.
- These large purchases were made by a limited group of families who tend to make larger purchases (which are common to many families whether in the program or not) close to monthly funds availability.
- Only eight other transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in the entire four month period; 203 of the 252 large transactions were less 5 U.S.C. § 552 (b)(6) & (b)(7)(C); 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
- The Department’s process also denies my client due process by delaying its charging letter more than three months after the review period.
- Considering the thousands of transactions conducted over the review period, the number of transaction sets in this attachment are miniscule.
- Appellant submitted some register receipts that show the varieties of items being purchased at the date and time noted.
- The dollar amounts of the items listed on the receipts match the merchandise noted in the “general store characteristics” and associated USDA photos of my client’s store found in the tendered ALERT Case Analysis Document.
- The store visit photographs depict a well-stocked store with a majority of stock being allowed food products.
- It is far from uncommon for customers to return within the same day or the next day to purchase more items necessary for unexpected needs, forgotten items, and for items that couldn’t be carried in a single trip due to the lack of personal transportation or space on public transportation.
- It is not unusual for low-income households to allocate proportional shares of benefits among themselves which are processed separately in an effort to track proportional shares of the benefits.
- Both allegations are unsupported by normal investigative techniques including undercover “buy” of cash back, surveillance, or witness interviews.
- Basing a lifetime debarment upon unreliable and uncorroborated raw data would be a gross injustice.

In support of its contentions, Appellant provided the following documents:

- Material Appellant received with its FOIA request;
- Thirteen pages of receipts for some of the transactions; and
- Four pages of Google Maps of area and location of nearby stores that have closed.

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 Ramos Grocery as a convenience store on December 14, 2017. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a July 9, 2019, 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:

- Ramos Grocery is approximately 500 square feet.
- There were no shopping baskets and shopping carts for customer use.
- There was no optical scanner.
- There was one cash register.
- There was limited space on the checkout counter and the checkout occurred through a window in a Plexiglas wall/display case.
- There was several units of hot dogs and some sausage as well as some frozen ground beef and steak, and some bags of frozen shrimp.
- There were no bulk packages or advertised specials for large packages.
- There was limited fresh produce including a basket of onions and one lime.
- Dairy included milk, butter, sour cream, infant formula, and cheese.
- Other staple foods available for purchase were eggs, juice, bread, cereal, rice, beans, pasta, and a selection of canned goods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- The store sold nachos and Italian beef sandwiches with inventory from the store.
- Ineligible items included tobacco, health and beauty products, cleaning products, and paper products.

The most expensive items noted on the day of the store visit were case of Red Bull - \$31.99; Enfamil baby formula - \$22.99; frozen beef patties - \$9.99, and three boxes of cereal and one gallon of milk- \$9.99. 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 29 sets of transactions

conducted by 15 different households 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits that meet the parameters of this scan. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

Appellant, through counsel, explains that it is far from uncommon for customers to return within the same day or the next day to purchase more items necessary for unexpected needs, forgotten items, and items that couldn't be carried in a single trip. The SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of Appellant's stock and facilities and are therefore indicative of trafficking. Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The photographs from the store visit offer no 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 forgotten items.

Appellant also states that it is not unusual for households to allocate proportional shares of benefits among themselves. Appellant further explains that households may have their own items which are purchased as a group, but imputed separately in an effort to track proportional shares of the benefits. Each of the listed transaction sets occurred 5 U.S.C. § 552 (b)(6) & (b)(7)(C) apart; thus it is unlikely that they were occurring during the same visit. The Retailer Operations Division compared Appellant to three other convenience stores and determined that there was only one other similar transaction set conducted at any of the other three stores. Appellant did not provide a likely explanation as to why households would shop differently at Appellant than at other similar stores.

Counsel contends that considering the thousands of transactions conducted over the review period, the number of transaction sets in this attachment are miniscule. Stating that only a small percentage of transactions are irregular or abnormal does not explain the irregular transactions. It is not unusual for a store to have largely legitimate SNAP transactions while conducting a small number of trafficking violations with a few trusted households. Moreover, the Retailer Operations Division determined that these transaction sets comprised 15.13% of the transactions that met the parameters of this scan. In the absence of a credible explanation for the irregular transaction patterns, the most likely explanation is that they are a result of the store trafficking in SNAP benefits.

Appellant has not offered any evidence to show that the transactions listed in Charge Letter Attachment #1 were legitimate purchases of eligible food.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 252 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Retailer Operations Division determined that of the 252 transactions listed in this

attachment, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The frequency of high-dollar purchases in a four-month period calls into question the legitimacy of these transactions.

Counsel contends that a limited number of families make large purchases when their benefits are issued. The evidence show that there were 87 households that conducted the 252 questionable transactions listed on this Attachment. The Retailer Operations Division determined that the Appellant's stock of food items is typical of a small convenience store, and consists mostly of lower priced convenience sized canned and boxed groceries along with condiments, snacks, and eligible beverages. The only fresh produce was a small basket of onions and one lime. There was no fresh unprocessed meat. The only meat products include several units of hot dogs, around eight packages of frozen ground beef and steak, and several small bags of frozen shrimp. Given its available inventory, it is unclear why households are drawn to Appellant to make large purchases at Appellant when it benefits are issued.

The Retailer Operations Division also determined that Appellant conducted 284 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The average for convenience stores in the state was 28.61 SNAP transactions in this same dollar range. The Retailer Operations Division determined that Appellant's recorded food stock does not support such differences in redemption data and in an indicator of trafficking. Appellant did not provide any credible explanations as to why Appellant is likely to have more large dollar transactions than other similar store types.

The Retailer Operations compared Appellant to three other convenience stores located within a one-mile radius of Appellant. Appellant's average SNAP transaction amount and its total SNAP redemption dollar value was greater than the other three stores for the review period. The Retailer Operations Division compared Appellant to three other convenience stores that were located nearby. Appellant's average SNAP transaction amount and total SNAP dollar volume was greater than each other three stores. In fact, Appellant's average SNAP transaction amount for the review period was double the average transaction amount for two of these comparator stores. The Retailer Operations Division also determined that the transaction pattern of Appellant exceeded the three nearby convenience stores. The data from these nearby stores show that without a credible explanation, the transaction patterns at the Appellant firm were highly unusual and indicative of possible trafficking violations.

5 U.S.C. § 552 (b)(7)(E)

The Retailer Operations Division determined that within a one-mile-radius of Appellant there are at least 61 other authorized retailers including nine combinations stores, 24 other convenience stores, ten small groceries, three two medium groceries, three supermarkets, and four super stores. The Retailer Operations Division examined three households identified in the charge letter to analyze their shopping patterns at Appellant compared to their shopping patterns at other SNAP authorized stores. However, despite this access to better stocked stores, each of the other households conducted excessively large transactions at Appellant within a short time of shopping at a supermarket or super store. It is questionable as to 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 fresh meat and produce and likely better prices.

Closing of Nearby Stores

Counsel contends that the closing of two nearby stores caused an increase in Appellant's explains the transactions patterns. Counsel provided maps showing the location of these stores relative to Appellant. The Retailer Operations Division reviewed the maps and agreed that the two stores were permanently disqualified from SNAP. However, given the timeframe of these disqualifications, the Retailer Operations Division did not find that there was a causal relationship between the closing of these stores and the transactions listed in the Charge Letter Attachments. As indicated previously, there were 61 other actively redeeming retailer within one mile of Appellant, including a supermarket that was located 0.31 miles from Appellant. Moreover, although the closing of a nearby store could possibly increase a firm's total SNAP redemptions it is an unlikely explanation for an increase in questionable transition patterns. Furthermore, that a nearby store is disqualified from SNAP for trafficking and then there is an increase in questionable transactions at another store is not convincing evidence that the second store is not trafficking. It could be reasoned that households needed another store to traffick at given their previous location has closed.

Receipts

Appellant, through counsel, submitted cash register receipts and the corresponding POS receipt for 12 of the questionable SNAP transactions. (One of the transactions did not include the EBT/POS receipts and there was a set of receipts that was a duplicate.) The receipts included general information with prices. The Retailer Operations Division determined that since the receipts were not itemized, the receipts are not sufficient evidence that the transactions were for eligible food items only.

Agency FOIA Response

Counsel contends that it is unable to make its case without some of the information that it requested under the FOIA request. With regard to this contention, it should be noted that this review has no authority relating to agency FOIA responses. As such, no opinions or findings can be rendered. When a FOIA response is given, if the requester is not satisfied with the response or feels that information that should have been released was improperly withheld, it has the option of appealing the FOIA response.

Evidence

Appellant, through counsel, makes multiple contentions regarding the agency's ALERT system. Appellant states that a multitude of factors to consider including: city population, city location in the country, location within the city, income level in the surrounding community, spending habits of the location community, access to larger supermarkets; local community access to transportation; and individual characteristics of the firm such as foot traffic, square footage, and relative proximity to other retail firms providing food sales services. In addition, counsel warns that basing a lifetime debarment upon unreliable and uncorroborated raw data would be a gross injustice.

The transaction reports are derived from the ALERT system, 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.]

The documentation and evidence provided by the Retailer Operations Division was thoroughly examined. 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 bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed and 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 offered insufficient evidence to prove that the transactions listed in the charge letter were legitimate purchases of eligible food. 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. It should be noted that considerations of legal precedent through case law 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.

Time Period between Violations and Charge Letter

Counsel reports Appellant’s due process was denied by delaying the charging letter by more than three months after the review period. The Retailer Operations Division issued the charge letter

on August 19, 2019. The review period was March 2019 through June 2019. There does not appear to be much of a delay in the issuing of the charge letter given that the analysis that the Retailer Operations Division must conduct beforehand. A review of the case record indicates that the agency did not act improperly in issuing its charge letter.

Summary

In the absence of evidence to legitimize such transaction patterns, a conclusion can be drawn, through a preponderance of evidence that the irregular transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation.

CIVIL MONEY PENALTY

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

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

CONCLUSION

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

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

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. If a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant's owner

resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

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

MARY KATE KARAGIORGOS
Administrative Review Officer

June 16, 2020