

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

**Rh Victory Grocery Corp,**

**Appellant,**

**V.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0215110**

**FINAL AGENCY DECISION**

It is the decision of the USDA that the record indicates that Rh Victory Grocery Corp., (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the program, as initially imposed by the Retailer Operations Division was appropriate.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant by letter dated June 4, 2019.

**AUTHORITY**

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provide that “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS.”

**CASE CHRONOLOGY**

By charge letter dated March 20, 2019, Retailer Operations Division informed ownership that Appellant was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 271 – § 278, based on EBT benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm." The charge letter stated, in relevant part, that “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.”

In a March 29, 2019, telephone conversation followed by email correspondence dated March 29, 2019, Appellant, through counsel, requested a 30 day extension in which to respond to the charge letter. In email correspondence dated April 1, 2019, Appellant, through counsel, requested a CMP in lieu of disqualification. In a letter dated March 29, 2019, Retailer Operations Division granted the extension to May 1, 2019, and informed Appellant that the time to request a civil money penalty in lieu of permanent disqualification and to provide the documentation to support such a request has not been extended.

In correspondence dated May 1, 2019, Appellant, through counsel, responded to the charge letter and generally stated that most of the products sold are priced ending in .00, .25, .50 and .75 cents and as explained in the affidavit, items are priced in same cents values for convenience to customers and cashiers. Appellant provided a signed affidavit marked as Exhibit A. Appellant, through counsel, also stated that documentation provided records non-EBT credit and debit card transactions confirming that the majority of non-EBT purchases made by debit and credit card also end in same cents values. This documentation, for the months of July 2018 and August 2018 showing all non-cash transactions, was provided and marked at Exhibit B. Appellant states that there is no other evidence of trafficking noted in the Charge Letter and the totality of the evidence does not establish that Rh Victory engaged in trafficking. The transaction evidence reflecting non-EBT same cents purchases and the affidavit together rebuts the allegations of the Charge Letter. If it were only EBT transactions that ended in same cents values such as .00 or .50 then this would be a red flag however, as the attached records reflect, non-EBT purchases also ended with same cent values including .00, .25, .50 and .75. The records reflect that the majority of EBT and non-EBT purchases end in same cents values, thereby disproving the claim that same cents transactions indicated trafficking.

Appellant, through counsel, indicated that there are at least two homeless shelters close to Rh Victory. Ownership noted in his affidavit that there are two homeless shelters near the store and residents of those shelters redeem their EBT benefits in unusual ways. Some residents purchase multiple of the same items “in bulk” and other residents will purchase food items for an entire group of friends at one time. This behavior explains the instances of multiple same-day purchases reflected in Attachment 2. Considering the non-EBT card transactions also ending in same cents and the unique location of the store there is no evidence to sustain a finding of trafficking. In the event that USDA finds trafficking occurred, ownership respectfully submits that his firm be considered for a civil money penalty (SMP) as requested in his April 1, 2019 letter in lieu of permanent disqualification.

Retailer Operations Division gave consideration to the Appellant’s reply and evidence of the case, and issued a determination letter dated June 4, 2019. This letter informed Appellant that it was permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also stated that Retailer Operations Division considered Appellant’s eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, Retailer Operations Division determined that Appellant was not eligible for the CMP because it failed to submit sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated June 6, 2019, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted.

### **STANDARD OF REVIEW**

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

### **CONTROLLING LAW**

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

7 CFR § 278.6(a) states, *inter alia*, that "FNS may disqualify any authorized retail food store...from further participation in the program if the firm fails to comply with the Food and Nutrition Act of 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 ..."

7 CFR § 278.6(c) reads, in part, "*Review of Evidence*. The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1)...the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS..."

7 CFR § 278.6(e)(1) reads, in part, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined, in part, in 7 CFR § 271.2, as "the buying or selling of SNAP benefits for cash or consideration other than eligible food."

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

### **SUMMARY OF CHARGES**

The charges on review were based on an analysis of SNAP electronic benefit transfer (EBT) transactions dated during the six-month period of August 2018 through January 2019. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. There were a large number of transactions ending in the same cents value.
2. Multiple transactions were made from the accounts of individual SNAP households within a set time period.

The first issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking.

### **APPELLANT'S CONTENTIONS**

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

1. The finding did not address the fact that records provided showed a pattern of non-EBT purchases mostly end in same cents values. Thus, there was no evidence that only EBT purchases end in same cents value. Retailer Operations Division should not simply look at EBT records but must look to non-EBT records as well to determine whether there is evidence that only EBT purchases end in same cents value.
2. The sole remaining evidence consists solely of the days with multiple EBT card charges from the same card. This alone is insufficient to support a finding and there are many other ground for this as mentioned in the prior submission that account for this. The charge letter does not allege excessively large transactions or rapid transactions, no any of the other firm evidence of trafficking.

No additional documentation was provided during this view though Appellant, through counsel, referenced previously submitted evidence in support of its position. The preceding may represent a brief summary of Appellant's contentions in this matter however, in reaching a decision, full attention has been given to all contentions presented, including any not specifically recapitulated or referenced herein.

### **ANALYSIS AND FINDINGS**

The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a December 15, 2018, store visit to the business conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock and facilities. This information was then used to ascertain if there were justifiable explanations for the EBT transactions at Appellant that formed patterns indicative of trafficking. The firm review summary documented the following store size, description, and characteristics:

1. One cash register and one POS device with a small counter area partially obstructed by other smaller items available for sale. One specialty register dedicated to lottery, western union, etc.
2. Store estimated to be approximately 1050 square feet.
3. No shopping baskets or carts available for customers.
4. No adding machines or optical scanners were available at checkout.

5. Store does not operate through a night window or plastic barrier with food stock behind the barrier.
6. No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
7. No unusual pricing structure such as ending most products with 00 cents and does not round transaction totals.
8. Food is not stored in an area outside of public view.
9. Store has storage freezers or coolers but no food stored off site. Contents consist of food for hot and/or cold prepared foods.
10. Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
11. Store takes telephone orders but does not offer delivery.
12. Highest priced eligible food items were Deli Cheese (\$7.99/LB), Deli Turkey (\$9.99/LB), Deli Ham (\$9.99/LB) and Deli Salad (\$7.99/LB).
13. Store stocks a significant amount of non-food items such as but not limited to paper products, cleaning products, lottery tickets, tobacco products, alcohol, mobile phones/phone cards, automobile products and health and beauty aids.
14. Store stocks limited amounts of staple food products. Most meats are canned, packaged or frozen.
15. A kitchen or prepared food area with hot foods sold for onsite consumption.
16. Stock is used in the deli/prepared food section (meat and cheeses)
17. No meat or seafood specials or bundles or fruit/vegetable boxes sold.

The second issue for consideration is whether Retailer Operations Division has presented a convincing case that Appellant likely trafficked in SNAP benefits. Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant's store during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

**Attachment 1 of the Charge Letter – There were a large number of transactions ending in a same cents value.**

This attachment lists 1,163 transactions that met the parameters of this Attachment. When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits.

Of the 1,163 transactions analyzed in this Attachment, 773 or approximately 57.73 percent ended in 00 cents and 390 or approximately 29.13 percent ended in 50 cents. The store visit documentation indicates that Appellant does not have a special pricing structure that would account for the percentage of transactions that ended in 00, and 50 cents and the store does not round transactions totals up or down at checkout. When there are a disproportionate amount of transactions ending in same cent value it appears the transactions are contrived and absent any compelling rationale to the contrary it is a strong indicator of trafficking. Especially when item prices end with a standard \*9 it is implausible that several of these relatively inexpensive items purchased together would routinely total to a purchase amount ending in 00 cents. The store

visit photographs did not clearly show all pricing labels though a couple of items clearly ended in a \*9 value. Though the store visit documentation indicates that the store did not have an unusual pricing structure (i.e. prices ending in 00, 25, 50, 75 cent values), no direct evidence was provided to show that Appellant priced all items in the store ending in 00, 25, 50 and 75 cent values.

Appellant through counsel contends that the finding did not address the fact that records provided showed a pattern of non-EBT purchases mostly end in same cents values. Thus, there was no evidence that only EBT purchases end in same cents value. Retailer Operations Division should not simply look at EBT records but must look to non-EBT records as well to determine whether there is evidence that only EBT purchases end in same cents value. With regard to this contention, the record reflects that the attorney provided what appears to be a legitimate print-out of a transaction history for the months of July 2018 and August 2018, which includes the first month of the review period (August 2018) for this case. The transactions show that in addition to EBT transactions, there were also debit, Master, Discover, and Visa Card transactions. Almost all of the transactions consisted of amounts ending in 00, 25, 50 or 75 cent values. Therefore, it appears that the attorney has a point regarding the fact that the stores end prices are not limited to just EBT customers.

It is important to note that even though the purchase amounts mostly end in same cent values, there was no store signage to indicate such a price structure exists and as previously stated, the store visit review indicates that the store does not have an unusual price structure nor does the store round transaction totals up or down at checkout. Without itemized cash register receipts that provide a description of the items purchased, FNS cannot conclude that all of the transactions listed in Attachment 1 were for legitimate food purchases.

SNAP transactions are not compared to debit or credit card transactions because credit card and debit transactions likely included sales of non-food items including more expensive items such as tobacco products or alcohol and could even include cash-back. Therefore, the credit card and debit transactions cannot be used to justify the firm's irregular SNAP transactions as cited in Attachment 1 of the charge letter. In addition, it is important to note that these transactions significantly decreased or ceased after the charge letter was delivered to the retailer on March 21, 2019, this is a clear indication that illegal transaction activity may have been occurring prior to this date and during the review period.

Furthermore, the documentation submitted by Appellant, marked as Exhibit B showing Appellant's non-cash transactions, though they show cent values ending in .00, .50, .25, and .75, or that some of its non-EBT transactions, exceeding some of its EBT transactions, cannot be accepted as concrete evidence that the transactions cited in the charge letter were not as a result of trafficking. The printouts only show transaction amounts and do not show details of the items purchased. It cannot be determined if these transactions consisted of both food and non-food purchases or if the transaction amounts consisted of or included cash-back from the debit or credit cards. It is the determination of this review that these transactions cannot be adequately compared to EBT transactions which should only consist of eligible staple food purchases and therefore, based on the analysis above, it appears that the transactions cited in the charge letter

are contrived and thus, in the absence of plausible evidence to the contrary, are likely the result of trafficking in SNAP benefits.

**Attachment 2 of the Charge letter – Multiple transactions were made from the accounts of individual SNAP households within a set time-period.**

There were 18 sets of 62 SNAP transactions that met the parameters of this attachment. Multiple transactions conducted by the same household account within a set time period is a method which violating stores use to avoid the detection of single high dollar transactions that cannot be supported by the retailer's inventory and structure. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The store visit report indicated that there are no other storage areas to store other eligible foods outside of the retail sales area or out of public view. The staple food inventory consists primarily of canned and packaged dry goods, refrigerated deli items, and limited dairy products and produce. The store does not sell items such as meat bundles, seafood specials, and/or fruit or vegetable boxes. The store sells made-to-order hot and cold sandwiches and offers a cafeteria-style hot food service. The store visit report also did not indicate that there were any foods sold in bulk amounts. The four most expensive items sold were all perishable deli products.

The record reflects that there are a number of homeless shelters in the area. Shelters normally provide meals to homeless individuals, but do not provide food storage for these individuals. It is unlikely that the homeless SNAP recipients would purchase items that would spoil in a day or two if not refrigerated. They would also not have the facilities to prepare any food items. In fact, if they are receiving meals from homeless meal providers, it is unlikely that they would need to purchase large amounts of food items that would need to be stored. The record also reflects that a nearby homeless shelter was contacted and FNS was informed that the shelter provided three meals a day plus snacks and at no time are individuals allowed to bring in any food due to the possibility of rodent infestation. It was also stated that this policy is the same for all shelters in the area. Although some of the individuals have SNAP benefits and may buy a sandwich or a snack at a store, they have no means to prepare or cook perishable items or store any food items therefore it is inconceivable that they would purchase large amounts of staple food items or make multiple large purchases in a set time period.

The record reflects that there are 143 SNAP authorized retailers with a two-mile radius of Appellant's store. Retailer Operations conducted an analysis of the shopping habits of five of the households identified in the charge letter. This analysis concluded that these households also shopped at other area grocery stores including full-line supermarkets, medium and large grocery stores as well as superstores that offer a much larger quantity and variety of eligible food items for likely better prices either on the same day or within days of visiting Appellant's firm. This again indicates that lack of access to other stores is not at issue. However, despite this access to these larger stores, these households consistently conducted much higher transactions at the Appellant firm than at better stocked larger stores in and around the Kings County area of New York. This is another strong trafficking indicator. Based on the analysis above and Appellant's failure to adequately show that all of the transaction sets were as a result of legitimate SNAP purchases, a conclusion can be drawn, through a preponderance of evidence that the "unusual, irregular, and inexplicable" transaction patterns cited in Attachment 2 evidence trafficking as the

most likely explanation.

### **No Evidence of Trafficking**

The extensive analysis of Appellant's EBT transaction record, upon which charges of violations are based, provides substantial evidence that questioned transactions during the focus period have characteristics that are not consistent with legitimate sales of eligible food to EBT customers at a store of this type and size. Rather, the characteristics are indicative of illegal trafficking in program benefits. In addition to the raw data of suspicious transactions, the file also notes that Appellant has no shopping carts or shopping baskets available for customers to carry the many items no doubt necessary for the questioned transactions and the store visit documentation indicates that Appellant did not have an unusual pricing structure to account for the unusual, irregular and inexplicable transactions as cited in the charge letter. A review of the record has yielded no indication of error or discrepancy in the reported findings by Retailer Operations that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it appears the Retailer Operations has provided substantial evidence of trafficking violations, in the two patterns of EBT transaction characteristics indicated in the letter of charges, and that it is more likely true than not that program violations did, in fact, occur as charged.

The transaction data and overall firm record convincingly demonstrate repetitive patterns of unusual, irregular, and inexplicable SNAP activity for this type of firm indicative of trafficking. Once Retailer Operations Division established the convincing case against Appellant, ownership bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. If this is not demonstrated, the case is to be sustained.

As noted, 7 CFR § 278.6(a) states that FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

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



Generally, stores caught in trafficking violations consistently display particular characteristic transaction patterns including those cited in the charge letter and, in the absence of evidence for the legitimacy of such transaction patterns, based on information submitted by the Appellant and a comparison of the store's characteristics and available stock to the transaction patterns cited in the charge letter, a conclusion can be drawn through a preponderance of evidence that the unusual, irregular, and inexplicable transactions and patterns evidence trafficking as the most likely explanation. While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence in the record.

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

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

### **CIVIL MONEY PENALTY**

The Appellant did not timely request consideration nor provide sufficient evidence 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 dated March 20, 2019. Even if a timely request had been submitted, the 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 SNAP compliance policy and program prior to the violations. Therefore, the Retailer Operations Division' decision, not to impose a trafficking CMP in lieu of disqualification, is sustained as appropriate pursuant to 7 CFR § 278.6(i).

### **CONCLUSION**

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Rh Victory Grocery Corp. from participation in the SNAP. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Therefore, based on a review of all the evidence in this case, it is more likely

true than not true that program violations did, in fact, occur as charged by Retailer Operations Division. Based on the discussion herein, the determination to impose a permanent disqualification against Rh Victory Grocery Corp is sustained.

### **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

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

Monique Brooks  
ADMINISTRATIVE REVIEW OFFICER

November 26, 2019