

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

RR El Carnicero Grocery & Produce,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0226388

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of RR El Carnicero Grocery & Produce (hereinafter referred to as “RR El Carnicero” or “Appellant”) as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against RR El Carnicero.

AUTHORITY

7 U.S.C. § 2023 and its 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 April 1, 2020, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of August 2019 through January 2020. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated the Appellant had the right to respond to the charges within ten (10) days of receipt to provide explanations for the irregular SNAP transaction patterns. The letter also stated that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten (10) days of receipt under the

conditions specified in 7 CFR § 278.6(i). The charge letter was delivered by UPS on April 3, 2020.

The Appellant responded to the charges through a series of letters, emails, faxes and telephone conversations including communication from the Appellant's accounting firm and other representatives. Among numerous contentions, the Appellant stated that the irregular transactions were explained by the store selling meat packages which customers purchased in bulk. These family plans ranged in price from \$40.99 to \$149.99 and store patrons would sometimes buy multiple plans at the same time. The Appellant did not request a trafficking CMP under 7 CFR § 278.6(i).

After considering the Appellant's responses and the evidence in the case, the Retailer Operations Division issued a determination letter dated August 26, 2020. The determination letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and 7 CFR § 278.6(e)(1). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of 7 CFR § 278.6(i) of the SNAP regulations. The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked September 1, 2020, the Appellant requested an administrative review of the Retailer Operation Division's determination. The request for administrative review was granted.

STANDARD OF REVIEW

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

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

7 U.S.C. § 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 § 278.6(e)(1)(i) states:

FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

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 § 271.2 defines eligible food, in part, as:

Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption

7 CFR § 278.6(a) states, in part:

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(i) states, in part:

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 CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from August 2019 through January 2020. This involved the following transaction patterns which are trafficking indicators:

- **Charge Letter Attachment 2:** Multiple transactions were made from the accounts of individual SNAP households within a set time period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
- **Charge Letter Attachment 3:** In a series of SNAP EBT transactions, the bulk of SNAP households' remaining benefits were depleted within short time frames. 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
- **Charge Letter Attachment 4:** The store conducted EBT transactions that are large based on the observed store characteristics and recorded food stock. 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Please note that the Retailer Operations Division dropped the charges in Charge Letter Attachment 1 after receiving and reviewing the Appellant's response to the April 1, 2020 charge letter.

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its response to the charge letter and in its request for administrative review, in relevant part:

- The store denies trafficking in SNAP benefits.
- The store's customer base is almost 80 percent impoverished. Store customers often buy over \$20 in meat as needed.
- The store markup is about 35 to 40 percent with a number of variables affecting the markup like quality of meats, prevailing market pricing, sales and spoilage.
- The store does not sell alcohol, tobacco or lottery tickets. The store sells a lot of meat, vegetables and other goods.
- Some patrons shop with family members and ask for their purchases to be rung up separately.
- Patrons will sometimes buy large quantities of goods with SNAP benefits and sell them to nearby restaurants or other parties for cash.

- It will be devastating if the store is permanently disqualified and will have an impact on the store and its employees, the owner and his family and the store's ability to process WIC transactions in the future.
- The store has provided invoices from August 2019 and January 2020 including Market Distributors (the source of most of the store's meat products) Goya, Restaurant Depot, Krasdale and Jetro. The store has also provided pictures of the business showing its food inventory and meat specials.

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

ANALYSIS AND FINDINGS

Authorization History

The Food & Nutrition Service (FNS) authorized RR El Carnicero Grocery & Produce for the SNAP on June 1, 2015. During the review period, the Retailer Operations Division classified the store as a medium grocery store based on reported sales and observed store inventory.

Store Visit Report

The Appellant complained that the charges were issued without a visit to the store. However, contrary to the Appellant's claim, the case record documents that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an August 12, 2019 store visit conducted by an FNS contractor to observe the nature and scope of the store's operation, stock and facilities. This information was then used to ascertain if there were justifiable explanations for the store's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- RR El Carnicero operates out of a storefront of approximately 800 square feet with an additional storage area of 300 square feet.
- The store had no shopping carts and only six (6) handheld shopping baskets for customer use.
- The store had one (1) cash register and one (1) point-of-sale device.
- The store did not have optical scanners or conveyor belts at the checkout.
- The store did not have a dedicated checkout area (the meat counter doubles as the checkout area),
- According to store personnel, the store did not offer delivery services or take telephone orders.

The SNAP eligible staple food stocked by the store consisted mainly of inexpensive canned and packaged goods along with fresh meat, fish, poultry and produce typical of a medium grocery store. The store also offers six (6) different meat packages or "family plans" at \$22.95; \$40.99; \$45.99; \$79.99; \$99.99; and \$149.99. The store also sells inexpensive accessory food items such

as snack foods, ice cream, candy, potato chips, coffee, tea, carbonated and non-carbonated drinks, condiments, and spices. The ineligible items sold by the store included paper goods and cleaning products.

Other than the meat packages, the most expensive items sold by the store were:

- Fresh ground beef at \$17.99 per five (5) pound unit.
- Netuno snapper at \$14.99 per two (2) pound unit.
- Goya corn oil at \$12.99 a gallon.
- Arrachera (Skirt Steak) at \$11.00 per pound.

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 transaction patterns significantly different from similar-sized competitors offering similar food items. While the Retailer Operations Division acknowledged that the store is well stocked for a medium grocery store and has a wide selection of meat/poultry/fish and produce, it is not optimized to routinely process individual transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or series of multiple transactions conducted over an abbreviated time period 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Appellant also provided pictures of the store but these do not significantly differ from the photographs taken during the store visit.

Multiple Transactions by the Same Household within a Set Time Period

SNAP households have no limit on the number of times they may use their SNAP cards or how much eligible food they may purchase. However, 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 this medium grocery store's stock and facilities and are thus indicative of trafficking.

Violating stores often conduct multiple split transactions from the same household account as a method to avoid the detection of single high dollar transactions that cannot be supported by the retailer's food inventory and infrastructure. This is sometimes accomplished by a retailer purchasing a card and PIN from a household and then running transactions spread out over time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C) AND 5 U.S.C. § 552 (b)(7)(E)

The Appellant store owner stated to the Retailer Operations Division that some patrons shop with family members and ask for their purchases to be rung up separately. However, the Appellant offers no reliable evidence to support this and the explanation does not fit the transactions described above. A SNAP household is defined as a household that purchases and prepares meals together and there would be no need to ring up transactions separately. Households that purchase and prepare meals separately are considered separate households. It is unlikely that a family relying on SNAP to supplement their nutritional needs would share these benefits with another family that purchases and prepares meals separately.

The store visit report indicated that the store did not offer a delivery service and this was confirmed by the Retailer Operations Division in a telephone conversation with the store owner. It is reasonable to conclude that sometimes shoppers living in the area will split up their shopping trips if they don't have transportation and are limited in what they can physically carry. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** It is not credible that this amount of food is being carried home on each separate trip.

In conclusion, the store visit pictures show that it is unlikely that SNAP customers would shop at the store and purchase such a large volume of items multiple times during a short time period. In addition, the store's small checkout area and limited counter space makes it unsuitable for conducting large transactions. The store also had no shopping carts and only six (6) handheld shopping baskets for transporting food within the store which would be required for the larger dollar transactions. Based on the analysis above, and 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.

Depletion of Benefits within a Short Time Frame

5 U.S.C. § 552 (b)(6) & (b)(7)(C) AND 5 U.S.C. § 552 (b)(7)(E)

The small amount of time between the balance inquiry and the single large transaction (entirely depleting the account) would not allow sufficient time for shopping. In addition, the store visit report documented that the store did not accept telephone orders so these cannot be explained by a customer picking up a pre-ordered amount of food. The store owner later contradicted the store visit report by stating that the store accepted telephone orders; however, there is no evidence in the case to support this claim.

Most households do not spend all or a majority of their monthly benefits in a single day at one store. A government report on SNAP shopping patterns indicates that after the first day of benefit issuance, on average, 80 percent of a household's allotment remains unspent. Even after seven days, 40 percent of benefits still remain unspent. It takes two weeks to deplete 80 percent of one's benefits, and three weeks to deplete 90 percent. Depleting one's entire allotment in a single day, or in a single large transaction, leaving no benefits for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP households. Based on a preponderance of the evidence this irregular transaction pattern is more likely than not the result of trafficking in SNAP benefits.

Excessively Large Transactions

SNAP households have no limit on the amount of eligible food they may purchase (subject to the remaining balance on the card). However, the SNAP transactions noted in the charge letter are questionable **not** because they exceed any regulatory limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of this medium grocery store's stock and facilities and are thus indicative of trafficking.

5 U.S.C. § 552 (b)(6) & (b)(7)(C) AND 5 U.S.C. § 552 (b)(7)(E)

The substantial number of high dollar purchases atypical of a SNAP authorized medium grocery store calls into question the legitimacy of these transactions. As noted previously, 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 offering similar food items. Although the sale of meat packages may explain the lower dollar transactions cited in the charge letter, it does not explain the higher dollar transactions. For example, the most expensive meat package sold by the store cost \$149.99; however, most of the transaction in Charge Letter Attachment 4 greatly exceeded this amount. It is also unlikely that SNAP recipients would purchase multiple meat packages as this would be a large amount of food to store at home and the store did not have shopping carts or offer delivery service to facilitate the transportation of multiple meat packages within the store or to the customers' home.

The Appellant store owner told the Retailer Operations Division that patrons will sometimes buy large quantities of goods with SNAP benefits and sell them to nearby restaurants or other parties for cash. The Appellant did not indicate how he knows this and provided no evidence to support this contention.

Sometimes a store may have higher than normal SNAP transactions due to the lack of access to other SNAP authorized stores in the area. However, the Retailer Operations Division used agency mapping systems to document that, during the review period, there were at least eight (8) comparable or larger stores located within a one-mile radius of RR El Carnicero. These included five (5) medium grocery stores, a large grocery store, a supermarket and a superstore. One of these other medium grocery stores was also owned by the Appellant but did not exhibit the same irregular transactions patterns. It is also noteworthy that the other SNAP authorized stores in the area do not exhibit the same irregular transaction patterns identified in the charge letter despite the shared neighborhood characteristics. In conclusion, a lack of access to SNAP authorized stores does not appear to explain the Appellant store's excessively large transaction patterns. When a supermarket or superstore is available, it is highly unlikely that a SNAP recipient would conduct excessively large SNAP transactions at a medium grocery store like RR El Carnicero.

Lastly, the case record documents that the Retailer Operations Division conducted a detailed analysis of four (4) selected households identified in the charge letter to analyze their shopping patterns at RR El Carnicero compared to their shopping patterns at other SNAP authorized stores. All of these households also had access to, and shopped at, larger stores including superstores and supermarkets. One of these households lived over five (5) miles away from RR El Carnicero and was bypassing other well stocked stores. Despite this access to better stocked supermarkets and superstores, these sampled households often conducted excessively large transactions at RR El Carnicero on the same day or within a few days of shopping at these much larger stores. It is highly unlikely that a medium grocery store like RR El Carnicero would have legitimate SNAP transactions comparable or larger than these SNAP authorized superstores with a better overall selection and variety of staple food items at likely better prices.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited

availability of counter space for checking out and the lack of shopping carts support the Retailer Operations Division determination. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on a preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 4 are more likely than not the result of trafficking in SNAP benefits.

Purchase Invoices

The store owner told the Retailer Operations Division that he purchases eligible stock from vendors at the same time for both the Appellant store and another store owned by him of the same name, but all stock stored at the Appellant store is for the exclusive use of that subject store.

The Appellant provided purchase invoices from the review period in order to show that the Appellant store had sufficient food inventory to support its SNAP redemptions. The case record documents that the Retailer Operations Division thoroughly reviewed these purchase invoices, including additional invoices provided for the administrative review. The Retailer Operations Division only omitted those invoices that were duplicates, undated, outside the review period, or otherwise did not provide sufficient information such as the name of the vendor, what was purchased or the price of what was purchased. The Retailer Operations Division then analyzed the purchase invoices to determine if they could support the store's actual SNAP redemptions during the review period.

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

However, even if the store had a sufficient food inventory to support its SNAP redemptions, it would not explain the irregular SNAP transactions cited in Charge Letter Attachments 2, 3 and 4. In fact, violating stores often conduct largely legitimate transactions while also conducting trafficking transactions with a smaller number of trusted households. In such cases, a store would normally have a sufficient amount of food inventory to support its SNAP redemptions, but would still be in violation of SNAP rules against trafficking.

In conclusion, the administrative record documents that the Retailer Operations Division analyzed the firm's purchase invoices in comparison with the firm's total SNAP redemptions during the same time period and properly concluded the firm had an insufficient food inventory to justify its actual SNAP redemption amounts.

Hardship to the Firm

The Appellant contends that a permanent disqualification would be devastating to the store and it would likely have to close causing a hardship to the owner, store employees and their families. With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in the 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 either the owner personally or the firm resulting from the imposition of such penalty. To allow stores to be excused from assessed

administrative penalties based on a purported economic hardship would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

TRAFFICKING CIVIL MONEY PENALTY

The 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. The SNAP regulation at 7 CFR § 278.6(b)(2)(ii) mandates that a request for a trafficking CMP along with supporting documentation shall be submitted within ten (10) days of receipt of the charge letter.

The SNAP regulation at 7 CFR § 278.6(b)(2)(iii) also states, in part, that “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 ... the firm **shall not be eligible** for such a penalty.” [Emphasis added.]

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’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 the Appellant’s EBT transaction record in comparison with actual store circumstances was the primary basis for its determination to permanently disqualify the retailer. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Stores caught in trafficking violations consistently display particular, characteristic patterns of transactions, including those cited in the letter of charges.

In the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges support trafficking as the most likely explanation. 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 in fact occur as determined by the Retailer Operations Division. Based on the discussion above, the decision to impose a permanent disqualification against RR El Carnicero Grocery & Produce, Appellant, is **sustained**.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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. Please note that the judicial filing timeframe is specified in the Act, and this office cannot grant an extension.

Under the Freedom of Information Act, FNS is 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.

RONALD C. GWINN
Administrative Review Officer

January 7, 2021