

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

SM Grocery & Variety Inc,

Appellant,

v.

Case Number: C0190433

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 a Permanent Disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against SM Grocery & Variety Inc. (hereinafter “SM Grocery”) by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1)(i) in its administration of the SNAP when it imposed a Permanent Disqualification against SM Grocery on September 30, 2016.

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 July 12, 2016, the Retailer Operations Division informed the Appellant that his firm was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270 – 282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm." In letters received by the Retailer Operations Division on July 21, 2016 and July 28, 2016, the Appellant denied the trafficking allegations and provided explanations for the questionable SNAP transactions that were outlined in the July 12, 2016 Charge Letter.

After considering the Appellant's replies and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated September 30, 2016, informing the Appellant that SM Grocery was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations.

In a letter postmarked October 5, 2016, the Appellant requested an administrative review of the Retailer Operations Division's decision to permanently disqualify the firm from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated October 12, 2016.

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, amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6(e)(1)(i) of the Regulations establish the authority upon which a permanent disqualification may be imposed upon a retail food store or wholesale food concern. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

7 U.S.C. § 2021(b)(3)(B) states, *inter alia*:

... 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 § 278.6(a) 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].

7 CFR § 278.6(e)(1)(i) states:

Disqualify a firm permanently if: Personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, *inter alia*:

Trafficking means...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(f)(1) states, *inter alia*:

A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

7 CFR § 278.6(i) states, *inter alia*:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 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 ...

7 CFR § 278.6(b)(2) states, *inter alia*:

(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 penalty. [Emphasis added].

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from October 2015 through March 2016. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were multiple transactions made from individual benefit accounts in unusually short timeframes; and
- There were excessively large purchase transactions made from recipient accounts.

APPELLANT'S CONTENTIONS

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

In the Appellant's replies to the Charge Letter and in the review request postmarked October 5, 2016, the Appellant stated the following summarized contentions, in relevant part:

- The multiple transactions made from individual benefit accounts in unusually short timeframes are the result of SNAP customers forgetting to purchase a food item during their initial purchase at SM Grocery so **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, they make a second purchase for the forgotten food item;
- The Appellant did not realize that these types of SNAP transactions were a violation of the SNAP regulations;
- The excessively large purchase transactions are the result of SNAP customers

purchasing a lot of expensive meat items such as frozen fish and fresh beef, goat, lamb, and chicken;

- A permanent SNAP disqualification will impose a financial hardship on SM Grocery as a large percentage of the store's sales are from SNAP customers; and
- The Appellant is requesting that FNS reconsider its decision to permanently disqualify SM Grocery from participation in the SNAP and allow the store to continue to redeem SNAP benefits.

ANALYSIS AND FINDINGS

Store Characteristics

FNS authorized SM Grocery as a combination grocery/other store on February 14, 2013. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an April 21, 2016 store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information obtained from the store visit was also 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:

- SM Grocery is approximately 550 square feet in size and it has a storage area outside of the public view that is approximately 35 square feet in size;
- SM Grocery is located in an urban, residential area of Bronx, New York;
- There were no shopping carts and only two hand-held baskets available for customer use;
- SM Grocery has one cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- There was no optical scanner or conveyor belt for the speedy processing of transactions;
- SM Grocery has a food stock that is typical of combination grocery stores and it offers customers a minimal variety and amount of eligible staple foods for sale;
- There were no meat/seafood specials or bundles that might sell for high prices;
- SM Grocery is not a WIC Program vendor and it does not sell any infant food or infant formula;
- Per the store visit observations, the most expensive food items offered for sale at SM Grocery appear to be frozen fish and shrimp, fresh goat meat and chicken, and large bags of rice;
- It does not appear from the store visit observations that SM Grocery extends credit to customers;
- No signs were posted in the store nor were there any flyers advertising the availability of bulk foods offered at a discounted rate to include grocery package deals;

- The checkout counter has a limited space as it has miscellaneous items stocked there. As is indicated in photo #1 included below, there were large bags of rice and other food items obstructing the checkout counter. As such, the checkout counter does not provide adequate space for the large amounts of individual food items necessary to make up many of the large transactions cited in the Charge Letter Attachments;
- SM Grocery stocked only a small amount and variety of fresh meats to include goat meat and chicken;
- The store stocked a minimal amount of frozen meats to include shrimp and fish. However, these frozen food items were freezer burned indicating that these items are not sold on a regular or consistent basis;
- SM Grocery does not have a deli case/section in which deli meats and cheeses are sold by the pound;
- SM Grocery does not have a kitchen in which hot and/or cold prepared, ready-to-eat foods that are intended for immediate consumption and require no additional preparation are prepared and offered for sale to customers;
- Other meat items available for sale included a few cartons of eggs;
- SM Grocery stocked a moderate variety and amount of fresh produce items;
- SM Grocery did not stock any frozen fruits and it stocked a minimal amount and variety of frozen vegetables;
- Other staple foods available for purchase included such items as a minimal amount and variety of canned vegetables, pasta, rice, cereal, flour, milk, butter, snack foods, etc.;
- Much of the remaining food stock consisted of accessory foods such as carbonated and non-carbonated drinks, coffee, tea, candy, condiments, vegetable oil, and spices; and
- SM Grocery stocked ineligible nonfood items such as health and beauty items, paper products, household items, household cleaning supplies, over-the-counter medications, etc.

Photo #1: Limited space at checkout counter which is obstructed by bags of rice and other items:



On review, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed.

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. Based on this empirical data, and in the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the most likely explanation for “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges is trafficking. Transactions having such characteristics sometimes do have valid explanations that support that they were the result of legitimate purchases of eligible food items. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, the Retailer Operations Division determined that the Appellant’s contentions did not outweigh the evidence. The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Multiple Transactions Made from Individual Benefit Accounts in Unusually Short Timeframes (Charge Letter Attachment 1):

This Attachment documents 36 sets of transactions (74 total transactions) **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Violating stores often conduct multiple transactions from

the same household account as a method to avoid detection of single high dollar transactions that cannot be supported by the retailer's food inventory and infrastructure.

The Appellant contends that the multiple transactions made from individual benefit accounts in unusually short timeframes are the result of SNAP customers forgetting to purchase a food item during their initial purchase at SM Grocery so 5 U.S.C. § 552 (b)(6) & (b)(7)(C), they make a second purchase for the forgotten food item. The Appellant did not realize that these types of SNAP transactions were a violation of the SNAP regulations.

However, the Appellant's unsubstantiated statement is not supported by available evidence. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Also, many of the transaction sets included a second and/or third transaction that is larger than the initial transaction. Therefore, it is highly unlikely that the second and/or third transaction was for the purchase of a "forgotten food item" as indicated by the Appellant.

While there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, the SNAP transactions noted in the Charge Letter are questionable because they display characteristic of use inconsistent with the nature and extent of the store's stock and facilities and are indicative of trafficking. Although it is not uncommon for customers to conduct more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. SM Grocery is not set up to provide for all of one's food needs with only a small amount and variety of fresh meats, only a small amount and variety of frozen meats, no frozen fruits, only a small amount and variety of frozen vegetables, and lacks an abundant depth and breadth of staple foods. Also, the store visit observations indicate that there is no evidence of a price advantage or custom or special services rendered at the subject store that are not offered at other authorized SNAP stores in the area. It is irregular for combination grocery stores to have purchases such as those cited, especially when SM Grocery stocks only a few high priced food items in minimal quantities so the majority of food items stocked at the store are low priced items.

A review of client shopping data for the review period shows that clients shopping at SM Grocery are also shopping at other area grocery stores, as well as a full-line supermarkets and super stores that most likely offer customers a much larger quantity and variety of eligible food items for better prices. Based on these shopping patterns, transportation to other stores is not an issue for these SNAP customers. Yet, these customers continue to shop and spend suspicious high dollar amounts in short timeframes at SM Grocery, where the eligible food stock is limited, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at better stocked stores. This is a strong indicator of trafficking.

Sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, there are a total of 50 SNAP authorized retailers located within a 0.35 mile radius of SM Grocery that can meet the nutritional needs of SNAP

customers. Many of these authorized SNAP stores are of a comparable size or larger than SM Grocery and offer a comparable or greater quantity and variety of food products at comparable or better prices as compared to the subject store. As mentioned above, SNAP customers that shopped at SM Grocery during the six month review period also shopped at other area grocery stores and, therefore, transportation to other stores is not an issue for these customers. Therefore, lack of access to other authorized stores does not appear to be an explanation for SM Grocery's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

The Appellant did not provide any compelling justification as to why SNAP households are conducting multiple transactions at SM Grocery or evidence that all of the irregular transactions cited in the Charge Letter were for eligible food items only. 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.

Excessively Large Purchase Transactions (Charge Letter Attachment 2)

This Attachment lists 570 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. As noted previously, there is no indication from the store visit report that SM Grocery would be likely to have SNAP redemption patterns significantly different from similar-sized competitors offering similar food items.

The Appellant contends that the excessively large purchase transactions are the result of SNAP customers purchasing a lot of expensive meat items such as frozen fish and fresh beef, goat, lamb, and chicken. However, as is indicated in photos #2 and #3 included below, the store visit photos indicate that SM Grocery stocks only a small amount and variety of fresh meats to include goat meat and chicken. In addition, photo #4 included below shows that the subject store offered only a minimal amount of frozen meats to include shrimp and fish. However, these frozen food items were freezer burned indicating that these items are not sold on a regular or consistent basis. The Appellant did not provide FNS with copies of cash register receipts dated during the review period that listed and validated that SNAP customers had purchased large amounts of expensive frozen or fresh meats from SM Grocery. Considering that SNAP benefits are calculated to provide households with a bare minimum of food security, it is unreasonable to believe that SNAP households would continue to make such large purchases at SM Grocery—a store that does not have the food stock to support the suspicious transactions that were made during the review period.

Photo #2: SM Grocery stocked only a small amount and variety of fresh meats to include goat meat:



Photo #3: SM Grocery stocked only a small amount and variety of fresh meats to include chicken:



Photo #4: Frozen meat items in stock (fish and shrimp) at time of FNS store visit were freezer burned:



The record shows that there are 50 SNAP authorized retailers located within a 0.35 mile radius of SM Grocery. Several of the area SNAP authorized stores are larger than the subject store and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store. An analysis of the shopping patterns for all of the SNAP households listed in this Attachment shows that all of the households shopping at SM Grocery have access to transportation and that all are regularly shopping at a variety of larger stores, including super stores and supermarkets, located nearby and at several miles distance from the Appellant's location. While SM Grocery does offer some staple food items, SNAP recipients are already shopping at other larger SNAP retailers located in proximity to the Appellant's business offering a greater quantity and variety of products, including fresh and frozen meats/seafood and produce, at lower prices. Therefore, the store has nothing to attract SNAP customers as there are no special or custom services offered that are not available at other area SNAP authorized stores.

The Appellant did not submit any vendor invoices to FNS for foods purchased for SM Grocery during the six month review period in order to help substantiate that the Appellant had purchased enough staple food items to cover/explain the SNAP transactions that occurred at the store during the review period. Therefore, FNS could not conduct a vendor invoice analysis. However, it is important to note that even if the Appellant had provided FNS with all of the store's vendor invoices that were dated during the review period and the invoices showed that the Appellant had purchased sufficient food inventory to account for the firm's SNAP redemption volume, sufficient inventory alone does not explain the suspicious patterns of SNAP transactions such as consecutive transactions by individuals during the same store visit or in a single day.

Even the large dollar transactions would remain questionable if there were sufficient food inventory to support such transactions when consideration is made of there being only a minimal variety of stock in the store, a small amount and variety of fresh meats, a small amount and variety of frozen meats, no frozen fruits and a minimal amount and variety of

frozen vegetables, a greater variety of foods at comparable or lower prices at other stores, no shopping carts and only two hand-held baskets available for customer use, and very little counter space to place food for purchase at the checkout counter. Even if there were sufficient food stock at SM Grocery to mathematically support high dollar transactions, there does not appear to be anything that would reasonably attract SNAP households to shop there, a combination grocery store, in some cases traveling a few miles to do so, and spend substantial amounts of their SNAP benefits.

Lastly, the case record documents that the Retailer Operations Division conducted a detailed analysis of three SNAP households identified in the Charge Letter to analyze their shopping patterns at SM Grocery compared to their shopping patterns at other SNAP authorized stores. Each of these households had access to, and shopped at larger stores including super stores and/or supermarkets. It is obvious that these SNAP households had transportation available to them to reach these other authorized stores. However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at SM Grocery often **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of shopping at the larger stores where they conducted much smaller SNAP purchases. It is highly unlikely that a combination grocery store with minimal staple foods would have legitimate SNAP transactions greater than these larger and better stocked stores.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding those 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 and hand-held baskets support the Retailer Operations Division's determination. It is not plausible that the store's customers are carrying large amounts of food around the store without the benefit of shopping carts and/or hand-held baskets. 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 the preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 2 are more likely than not the result of trafficking in SNAP benefits.

Disqualification Imposes Financial Hardship on Store

The Appellant contends that a permanent SNAP disqualification will impose a financial hardship on SM Grocery as a large percentage of the store's sales are from SNAP customers. However, there is no provision in the SNAP regulations or internal agency policy directives for 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 allow store ownership from being excused 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, the Appellant's contention that the firm may 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 imposed.

Reconsideration of Imposed Permanent Disqualification Requested

The Appellant is requesting that FNS reconsider its decision to permanently disqualify SM Grocery from participation in the SNAP and allow the store to continue to redeem SNAP benefits. However, the Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that "... a disqualification . . . 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 ...". In keeping with this legislative mandate, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked.

CIVIL MONEY PENALTY

As previously indicated, the September 30, 2016 Determination Letter advised the Appellant of the ineligibility for consideration for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. The letter of charges dated July 12, 2016 advised the Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The regulations specify that such documentation must, in part, establish that there was an effective compliance policy and training program and that both were in effect and implemented prior to the occurrence of violations. The letter indicates that no information was provided by the Appellant for consideration; therefore, on review the Retailer Operations Division's determination that the Appellant firm is ineligible for the imposition of civil money penalties in lieu of disqualification is affirmed.

CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record, upon which charges of violations are based, together with observations made during the store visit and an analysis of customer shopping behaviors, provide substantial evidence that

questionable transactions during the focus period have characteristics and display patterns that are not consistent with legitimate sales of eligible food to SNAP benefit customers at a store of this type, size and makeup. Rather, the characteristics are indicative of illegal trafficking in program benefits. The Appellant's contentions do not outweigh this evidence.

The record has yielded no indication of error or discrepancy in the reported findings by the Retailer Operations Division 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 is more likely true than not true that program violations did, in fact, occur as charged. Therefore, the decision to impose a permanent disqualification from participation in the SNAP against SM Grocery & Variety Inc. is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (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, 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.

LORIE L. CONNEEN
Administrative Review Officer

December 5, 2017