

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

Temple Deli & Grocery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0219662

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a permanent disqualification of Temple Deli & Grocery (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by FNS’s Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Temple Deli & Grocery.

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.”

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified from SNAP based on an analysis of EBT transaction data from January 2019 through July 2019. This involved the following transaction patterns which are common trafficking indicators:

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

- The firm conducted EBT transactions that were large based on observed store characteristics and recorded food stock.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Temple Deli & Grocery for SNAP participation as a small grocery store on May 23, 2018. In a letter dated September 12, 2019, 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 between the months of January 2019 and July 2019. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made and supporting documentation submitted within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In a telephone call on September 20, 2019, and a letter postmarked October 25, 2019, the Appellant responded to the trafficking allegations, claiming that the firm has never violated the rules or regulations of SNAP. The Appellant stated that it reviews the program three times a year to ensure that it is complying with the rules. According to the Appellant the store is located in a residential area where about 65 percent of the households have multiple members living in the same household. The Appellant claimed that there are many instances where an EBT card holder makes a purchase and then **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** later makes another purchase, or even three different orders within a short period of time. This happens multiple times.

To support these arguments, the Appellant submitted 124 pages of inventory invoices from the review period. The Appellant stated that the firm's EBT machine does not print itemized receipts.

After reviewing the Appellant's response and documentation and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated December 2, 2019. This letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but determined that a CMP was not appropriate 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 SNAP violations.

In a letter postmarked December 9, 2019, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 AND REGULATIONS

The controlling law in this matter is found in the Food and 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 § 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, [or] evidence obtained through a transaction report under an electronic benefit transfer system.... [Emphasis added.]

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 states, in part:

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 § 271.2 states, in part:

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 § 278.6(b)(1) states, in part:

Any firm considered for disqualification...under paragraph (a) of this section...shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification.... The letter

shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter...

7 CFR § 278.6(c) states, in part:

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) of this section, 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, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(b)(2)(ii) states, in part:

Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence... that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).

7 CFR § 278.6(b)(2)(iii) states:

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.

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...

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant requests a review of the case because the store has never violated the SNAP rules.

In a follow-up letter postmarked January 25, 2020, the Appellant requested an additional two weeks to submit more evidence to prove that the firm did not violate the SNAP program. However, as of the date of this Final Agency Decision, no additional information or evidence has been submitted.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all evidence and contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The primary issue for consideration in a case based on suspicious SNAP redemption data is whether or not the Retailer Operations Division adequately established that the Appellant firm engaged in the violation of trafficking. In other words, did the Retailer Operations Division, through a preponderance of the evidence, establish that it is more likely true than not true that the irregular and unusual transactions cited in the charge letter were the result of trafficking?

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm's EBT transactions, but also information obtained from a February 2, 2019, store visit which was conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This store visit information was used to determine if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report and photographs documented the following store size, description, and characteristics:

- Temple Deli & Grocery is a small grocery store, roughly 700 square feet in size, operating in the city of Paterson, Passaic County, New Jersey.
- At the time of the contractor's visit, the firm did not have any shopping carts or hand-held baskets for customer use. This is not unusual, as customers shopping in small stores such as Temple Deli & Grocery tend to purchase only as much food as they can carry in their arms.
- The store visit photographs show one cash register, and agency records reflect the use of one EBT point-of-sale terminal for SNAP purchases. It appears that the firm does not use an optical scanner to ring up items on the cash register.
- The store's staple food stock is typical of a small grocery store or corner market, with a variety of staple food items as well as snack foods and nonfoods. The store also sells carbonated and uncarbonated drinks as well as hot and cold prepared food, such as sandwiches, burgers, chicken wings, and breakfast foods.
- Nonfood items at the store include lottery tickets, tobacco products, cleaning supplies, paper products, and other miscellaneous household merchandise.
- The checkout area consists of a small countertop, perhaps 12 inches by 24 inches in size. In order to reach the checkout counter, customers must reach across a slide-top freezer. The checkout area is not suitable for conducting large or rapid transactions as there is little space on the counter to place more than a few small items at a time and very little room for customers to maneuver with large amounts of groceries.
- There is no indication from the store visit report that the firm has a unique pricing structure. Most items in the store appear to end with a cents-value of 9, such as \$1.39, \$2.99, etc. This is a very common pricing structure among retail food stores. The report also states that the firm does not round transaction totals up or down at checkout.
- There is no evidence that the firm has special food packages for sale or that items are sold in bulk. According to the report, the most expensive food items available for purchase include a 21-ounce can of Enfamil infant formula for \$33.00; a 10-pound package of frozen chicken for \$17.00; and a 24-ounce package of frozen shrimp for \$15.99. Most items in the store appear to sell for \$5.00 or less. It should be noted that SNAP households

that include children under the age of five are almost always eligible for simultaneous participation in the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC). As a result, items such as expensive infant formula, are generally purchased as part of a WIC food package rather than with SNAP benefits.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a small grocery store, where households normally purchase a limited number of items to supplement their overall dietary needs. There was no indication that SNAP households would be inclined to regularly visit Temple Deli & Grocery to purchase large quantities of groceries, especially considering the constricted checkout area, the absence of shopping carts and baskets, and the availability of much larger grocery stores in the area, including four superstores within a one-mile radius of the store. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of similar-sized competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: There were a large number of transactions ending in a same cents value. This attachment lists 68 transactions ending in .50, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP redemptions. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). At the time of the contractor's inspection, the store did not appear to have a pricing structure which would result in so many transactions ending in .50, such as items ending in .25, .50, or .75. By all indications, most items ended with a cents value of 9, such as .99. Additionally, the store visit contractor noted that the firm does not round transaction totals up or down at checkout. As such, the likelihood that large, non-taxed transactions containing randomly-selected items would so frequently end in .50 is very low.

Unfortunately the Appellant has not offered any explanation or evidence related to the transactions listed in Attachment 1. Without compelling evidence to prove otherwise, this review finds it reasonable to conclude that the large number of .50 transactions in Attachment 1 were likely the result of trafficking violations.

Charge Letter Attachment 2: Multiple transactions were made from the accounts of individual SNAP households within a set time period. This attachment lists 45 sets of transactions (140 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E).

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) – an extraordinary amount for a small grocery store with no shopping carts or baskets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C). As the Appellant store is stocked with typical groceries and snack foods, it is difficult to comprehend what would have drawn this customer to spend almost twice as much at Temple Deli & Grocery than at a nearby superstore, which almost certainly has greater inventory and variety as well as shopping carts and baskets to help transport large amounts of groceries.

Such repetitive transactions and dollar amounts at a small grocery store like Temple Deli & Grocery are highly irregular and are often an indication of trafficking. As such, these transactions warrant further explanation.

In its response to the charge letter, the Appellant argued that there are many instances in which an EBT card holder will make an initial purchase and then 5 U.S.C. § 552 (b)(6) & (b)(7)(C) later make another purchase. Or they might even place three different orders within a short period of time.

Unfortunately, this explanation is not sufficient, as it does not offer details regarding why this shopping behavior occurs at the Appellant store, but not at other nearby stores. The Appellant has also not offered any evidence to prove that the transactions in Attachment 2 were legitimate. Such evidence might have included itemized cash register receipts to show what took place between the customer and the cashier at the point of sale.

Because the Appellant lacks a reasonable explanation and supporting evidence, this review finds that trafficking was a likely cause of the transaction patterns listed in this attachment.

Charge Letter Attachment 3: The store conducted EBT transactions that were large based on observed store characteristics and recorded food stock. This attachment lists 102 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with a small grocery store in the state of New Jersey. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a small grocery store in New Jersey was \$10.06. In Passaic County, the average was even lower, at just \$10.02 per transaction; but the average transaction in Attachment 3 is more than five times larger than the average purchase amount for this store type.

Given that the Appellant firm has a moderate inventory of staple foods as well as other SNAP-eligible items, including snacks and drinks, it is probable that there would be an occasional purchase where the transaction amount is high, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As such, there may be some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 3. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from nearby, similar-sized competitors, especially considering the absence of shopping carts and baskets and the availability of much larger stores in the area. The substantial number of high-dollar transactions in a seven-month period calls into question the legitimacy of these transactions.

Attachment 3 lists six transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) during the review period, including a high of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering how many food items it would typically take to add up 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and considering that Temple Deli & Grocery has no shopping carts or baskets, and considering the limited space in the checkout area, this review finds it difficult to believe that every large transaction in Attachment 3 was a legitimate purchase of eligible food.

Unfortunately, the Appellant has not offered any contentions specific to the transactions listed in this attachment. The Appellant did provide a large number of inventory invoices, but these documents do little to support the Appellant's claim that the transactions were valid. After receiving the Appellant's inventory evidence, the Retailer Operations Division conducted a thorough analysis of the documents. The agency discovered that the firm had more SNAP redemptions (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) during the seven month review period than eligible food inventory purchases (5 U.S.C. § 552 (b)(6) & (b)(7)(C)). Even if the Appellant had a 60 percent markup on its inventory, the firm would have had approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) more in SNAP redemptions than what it purchased in food inventory. Of course, it is possible that the Appellant did not provide all of its inventory evidence from the seven month review period. But the data suggests that there was far more going on at the store with SNAP transactions than just the sale of eligible food.

This review does not doubt that Temple Deli & Grocery sells eligible food items and conducts legitimate SNAP business. But when unusually large transactions form patterns that are substantially different from comparable stores in the area, further evidence from the Appellant is warranted to verify that there is not something more, such as trafficking or other program violations, taking place. In this case, the Appellant has not offered any compelling evidence, such as itemized cash register receipts, to help explain what occurred between the customer and store personnel at the point of sale. Accordingly, it is the finding of this review that trafficking was a likely cause of the transaction patterns found in Attachment 3.

Except for the rule that SNAP benefits are to be used only for the purchase of eligible food, the regulations do not govern or mandate how a SNAP household spends its benefit allotment, including how many times a household may use its EBT card at a particular location or how large an individual transaction can be. However, the transactions noted in the charge letter are questionable not because they exceed any limits for use, but because they display patterns of use that are inconsistent with the store's documented physical characteristics and food inventory. It should be further noted that the transactions identified in the charge letter are not marginally abnormal, but decidedly so, especially in comparison with other nearby SNAP-authorized stores with similar characteristics. This review does not contend that frequent or large EBT transactions are overtly suspicious when they occur on an occasional or intermittent basis, but when such transactions form questionable patterns on a consistent basis over a substantial period of time, such activity is considered highly irregular, and a firm's intent to comply with program regulations is called into question.

In an appeal of adverse action, the onus is on the Appellant to prove by a preponderance of the evidence that the administrative action should be reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that trafficking did not occur. Unfortunately the Appellant's contentions and evidence do not meet this standard.

Civil Money Penalty

The Retailer Operations Division determined that the Appellant firm was not eligible for a civil money penalty in lieu of permanent disqualification for trafficking because it did not submit

sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a CMP to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate supporting documentation within 10 days of receipt of the charge letter. The case record shows that the Appellant did not request a trafficking CMP when it replied to the charge letter and there is no evidence that the Appellant submitted any documentation that would indicate that the firm had a compliance policy or program of any kind.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

An analysis of the Appellant's EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify Temple Deli & Grocery from SNAP participation. This data provided sufficient evidence for this review to conclude that the questionable transactions and patterns listed in the charge letter were more likely than not the result of trafficking violations committed by the Appellant. Likewise, the Appellant has not proven by a preponderance of the evidence that the administrative action should be reversed.

Based on a review of all available information in this case, the decision to impose a permanent disqualification against the Appellant, Temple Deli & Grocery, under the ownership **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

JON YORGASON
Administrative Review Officer

April 16, 2020