

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

Los Palmaritos Deli Grocery Corp.,)	
)	
Appellant,)	
)	
v.)	Case Number: C0187137
)	
Retailer Operations Division,)	
)	
Respondent.)	
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FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division (“ROD”) to impose a permanent disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) against Los Palmaritos Deli Grocery Corp. (“Appellant”).

ISSUE

The issue accepted for review is whether the ROD took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a Permanent Disqualification against Appellant on August 4, 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 February 9, 2016, the ROD charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of SNAP transaction patterns that "establish clear and repetitive patterns of unusual, irregular, and inexplicable activity for your type of firm." This letter of charges states, in relevant part, “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.” The letter

also states that “. . . under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of a permanent disqualification of a firm for trafficking.”

Appellant replied to the ROD’s charges in writing. The record reflects that the ROD received and considered this information prior to making a determination. The ROD determined that Appellant’s contentions did not outweigh the evidence that the store was trafficking. Based on the preponderance of evidence, the ROD concluded that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

The ROD issued a determination letter dated August 4, 2016. This letter informed Appellant that it was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6 (c) and 278.6(e)(1) for trafficking violations. The letter also states the ROD considered Appellant’s eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. The ROD determined that Appellant was not eligible for the CMP because Appellant had not submitted sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

On August 12, 2016, Appellant appealed the ROD’s determination and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means 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 argument asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented 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 in the event that personnel of the firm engaged in trafficking of SNAP benefits.

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(a) 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) reads, 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(e)(1)(i) reads, in part:

FNS shall [d]isqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

Trafficking is defined in 7 CFR § 271.2, 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”

Also at 7 CFR § 271.2, eligible food is defined as:

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)(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.

SUMMARY OF CHARGES

The charges under review were based on an analysis of SNAP Electronic Benefit Transfer (EBT) transaction data during the period from June 2015 through November 2015. This analysis identified the following patterns of SNAP transaction activity indicative of trafficking:

- Multiple transactions made from the same accounts in unusually short time frames; and,
- Excessively large transactions.

The attachments furnished with the charge letter specify the questionable and unusual SNAP transactions indicative of trafficking which were conducted at Appellant during the review period.

APPELLANT'S CONTENTIONS

Appellant's contentions regarding this matter are essentially as follows:

- Appellant apologizes and has corrected the deficiency. Appellant sent three store photos with SNAP compliance notices; and,
- Appellant offers food bundles. Appellant engaged in a vigorous marketing campaign of these bundles to the nearby residents, many of whom are SNAP recipients. Appellant provided store photo with the flyer, a receipt from a graphics company, and two pages of demographics information.

The preceding may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any not specifically recapitulated.

ANALYSIS AND FINDINGS

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 ROD determined that Appellant's contentions did not outweigh the evidence. Evidence relied upon by the ROD was considered in this administrative review, including SNAP transaction data, store visit observations, location and characteristics of competitor firms, and household shopping patterns. The issue in this review is whether, through a preponderance of evidence, is it more likely true than not true that questionable transactions were the result of trafficking.

Store Characteristics

The case file supports that in reaching a disqualification determination, the ROD considered information obtained during a December 2, 2015 store visit conducted by a USDA contractor to observe Appellant’s operation, stock and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm’s irregular SNAP transaction patterns. The store visit report documented the following store size, description, and characteristics:

- The contractor estimated the store to be about 1,000 square feet with no food stored outside of public view. It is in an urban, residential area;
- The available inventory of SNAP-eligible food items showed stock typical of a small grocery store, including being composed predominantly of inexpensive items;
- There was only one cash register and one electronic SNAP terminal device;
- There were no shopping carts or hand baskets;
- There were also no scanners or conveyor belts;
- There was no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers; and,
- There were no meat or seafood specials or bundles.

In addition, the store's checkout counter space area was cluttered, small and surrounded by Plexiglas affording very little surface area on which to place items for large purchases and precluding the processing of more than one customer at a time.

There was no indication that SNAP households were inclined to visit the store regularly to purchase large quantities of grocery items. The available food was primarily of a low-dollar value and there was no hint that the firm sold items in bulk. Given the available inventory, there was no sign that Appellant would be likely to have SNAP redemption patterns that differed significantly from those of similarly-sized competitors.

Repeat Transactions by the Same Household

7 USC 2018 (b)(7)(e):

7 USC 2018 (b)(7)(e)

7 USC 2018 (b)(7)(e).

The Case Analysis Document identifies many other similarly-sized stores located within one mile of Appellant. There is no basis for unusually high customer attraction to Appellant, there being no great price advantage, profusion of ethnic goods, or special or custom services rendered. Oddly, some SNAP households spent considerably less at the larger stores than at Appellant.

While there are legitimate reasons why a SNAP recipient might return to a small grocery store in a short period of time, the examples in Attachment 1 indicate a series of purchases that total to large amounts. SNAP benefits are intended to supplement the food budget for households whose net income is near or below the Federal Poverty Level. It is difficult to believe customers who must rely on SNAP benefits to make ends meet prefer to pay higher prices and spend considerable amounts of their benefits at a small grocery store. Spending sizable portions of one's SNAP benefit allotment in a small grocery store when there are larger stores at which one also shops, which carry more variety of foods at a lower cost, is unreasonable customer behavior. Moreover, households listed in this attachment conducted this strange shopping pattern of making substantial purchases at Appellant multiple times during the review period.

7 USC 2018 (b)(7)(e).

Large Transactions

The food stock and facilities of Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at such stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. It is rare for a small grocery store such as Appellant's to have purchases like those included in Attachment 2 to the charge letter. **7 USC 2018 (b)(7)(e):**

7 USC 2018 (b)(7)(e)

7 USC 2018 (b)(7)(e).

7 USC 2018 (b)(7)(e). Households typically shop to obtain a certain collection of food items, irrespective of the total cost (other than to remain within allotment balances), and do not strive to achieve a particular total. The purchase amount of eligible food items typically approximates a random total. **7 USC 2018 (b)(7)(e)**.

Based on the store layout, infrastructure, and available inventory, it is not credible that the Appellant would so frequently conduct transactions closely resembling those typically found at a supermarket or superstore. It is not plausible that the firm's customers would regularly carry very large amounts of merchandise around the store without the benefit of shopping carts or shopping baskets, especially since larger, better stocked stores are readily available and in the vicinity of the Appellant firm. Appellant set up to process high-dollar transactions, as indicated by its lack of equipment to facilitate large transactions and limited counter space. There are no legitimate bases for SNAP customers' unusual attraction to the firm such as a superior selection of staple foods, price advantages, package specials, bulk or promotional items, an extensive variety of otherwise unavailable ethnic food items, or special services rendered. Appellant failed to provide convincing evidence to establish the legitimacy of these excessively large transactions, such as itemized cash register receipts. Based on all of these factors, the large volume of transactions for high-dollar amounts is unlikely to indicate a pattern of legitimate food purchases.

Meat Packages

Appellant asserts it sells food bundles which explain the large purchases. The evidence does not support this contention. The picture provided by Appellant of the flyer advertising these bundles indicates the prices of the five bundles are between \$2.99 and \$5.99, with one item at \$3.99. A participant who bought all of these bundles – twice – would still not reach the lowest transaction amount indicated on Attachment 2. The store review report also documented that this flyer was not present at that time and that the firm did not have meat or seafood specials or bundles.

While there may have been occasions when Appellant food bundles, based on the prices of the packages and evidence from the store visit it is more likely true than not true that the sale of fresh fish and meat bundles packages does not explain the large SNAP transactions that occurred at Appellant. A more likely explanation for the unusual and irregular pattern of high-dollar transactions is trafficking.

Appellant's Responsibilities

Appellant apologizes. When ownership signed the FNS application to become an authorized SNAP retailer, this included a certification and confirmation that the owner(s) would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time." The violations listed on this certification document include trafficking. Regardless of whom the ownership of a store may choose to handle store business, ownership is accountable for the

proper handling of SNAP benefit transactions.

This review is limited to consideration of the circumstances at the time the ROD's determination was made. It is not within the scope of this review to consider actions Appellant may have taken subsequent to this decision to begin to comply with program requirements. There is no provision in SNAP regulations for reducing an administrative penalty on the basis of corrective actions implemented subsequent to findings of program violations. Therefore, Appellant's contention that it has "corrected the deficiency" does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be most serious, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification "shall be permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store." In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS must disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved.

Summary

The ROD determined that Appellant likely trafficked in SNAP benefits. The charges of violations were based on the ROD's assessment that there was substantial evidence that the questionable transactions occurring during the review period displayed patterns inconsistent with legitimate sales of eligible food to SNAP participants. The evidence the ROD considered in support of its determination included the irregular SNAP transaction data of Appellant as compared to similar stores, observations made during an store visit by a USDA contractor including the inadequacy of the firm's staple food stock to support such large transactions, the availability of other SNAP-authorized stores located close to Appellant, and shopping behaviors of Appellant's customers. The transaction data and overall firm record demonstrate the patterns of unusual, irregular, and inexplicable SNAP activity for this firm is likely the result of trafficking.

Upon review, Appellant failed to prove by a preponderance of the evidence that the administrative action should be reversed. Appellant provided inadequate explanations for the suspicious transactions and insufficient evidence to legitimize its transaction data. It has not convincingly rebutted the ROD's determination that Appellant most likely trafficked in SNAP benefits. 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 must disqualify the firm permanently.

CONCLUSION

The record has yielded no indication of error in the finding by the Retailer Operations Division

that Appellant trafficked in SNAP benefits. A review of the evidence in this case supports that it is more likely true than not true that program violations did occur as charged. Based on the discussion above, the determination by the Retailer Operations Division to impose a permanent disqualification against Los Palmaritos Deli Grocery Corp. from participation as an authorized retailer in SNAP is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released could constitute an unwarranted invasion of privacy.

RICH PROULX
ADMINISTRATIVE REVIEW OFFICER

October 3, 2016

DATE