

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

El Moral,

Appellant,

v.

Case Number: C0203547

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 the permanent disqualification of El Moral (El Moral or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

ISSUE

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

AUTHORITY

7 USC § 2021 and the implementing regulations at 7 CFR § 279.1 provide that “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS.”

CASE CHRONOLOGY

In a letter dated November 16, 2017, the Retailer Operations Division charged 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 April 2017 through September 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant replied to the charges by letter dated December 7, 2017. Appellant denied trafficking and explained that the transactions were due to repayment of credit accounts with SNAP benefits. The Retailer Operations Division requested documentation of the alleged credit accounts by letter dated December 20, 2017. Appellant replied on December 28, 2017, and explained that there was no documentation of the credit accounts as the receipts are torn up after payment is made.

After considering the evidence and the retailer's reply, the Retailer Operations Division issued a determination letter dated February 6, 2018. The determination letter informed Appellant that it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that Appellant was not eligible for a trafficking CMP because 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 February 17, 2018, ownership appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear 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, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) and (e)(1) 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 have engaged in trafficking SNAP benefits.

7 CFR § 271.2 states, in part, that, "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 § 271.2 defines trafficking as: "(1) 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(a) states, inter alia, that "FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part.

Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an **electronic benefit transfer system**, . . .” (emphasis added)

7 CFR § 278.6(b)(2)(ii) states, inter alia: “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(e)(1) reads, in part, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.”

7 CFR § 278.6(i) states, inter alia: “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.”

SUMMARY OF THE CHARGES

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from April 2017 through September 2017. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were an unusual number of transactions ending in a same cents value.
- There were multiple transactions made from individual benefit accounts in unusually short time frames.
- The majority or all of individual recipient benefits were exhausted in unusually short periods of time.
- There were excessively large purchase transactions made from recipient accounts.

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

APPELLANT’S CONTENTIONS

In its administrative review request postmarked February 17, 2018, and subsequent correspondence postmarked April 2, 2018, Appellant provided the following summarized contentions, in relevant part:

- Appellant understands that the store was disqualified even though the accusations were not accurate.
- The previous letter stated that it would be disqualified for one year and Appellant is confused why that decision was voided.

- Appellant requests that it be permanently disqualified but not subject to a fine if it sells its store.
- Appellant has proof that the store was up for sale prior to the disqualification.
- The selling of the store has nothing to do with the permanent disqualification.

In support of its contentions, Appellant submitted five page online real estate advertisement for business to show that the store was up for sale prior to the charges.

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

ANALYSIS AND FINDINGS

Store Visit

FNS authorized El Moral as a small grocery on December 17, 2014. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an October 3, 2017, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- El Moral is approximately 1,200 square feet.
- There were two shopping baskets but no shopping carts for customer use.
- There was one cash register and one point-of-sale device.
- There was no scanner for the quick processing of transactions.
- The check-out counter space was small.
- There were no meat/seafood specials or bundles that might sell for high prices.
- There was limited fresh meat.
- There was some frozen poultry and seafood.
- There was fresh produce including oranges, cauliflower, limes, plums, grapes, apples, avocados, pineapples, pears, tomatoes, squash, peppers, bananas, and onions.
- Dairy included milk, ice cream, cheese, butter, and infant formula.
- Other staple foods available for purchase were eggs, juice, cereal, rice, flour, and limited canned goods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- The non-food items included health and beauty products, paper goods, and cleaning products.

The highest priced items were assorted frozen shrimp - \$15.99, organic moringa powder - \$14.99, tea- \$14.99; and coca cola case of 35 - \$12.00. The store employee indicated that the cases of soda were used to fill the cooler but occasionally they are sold by request. 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 redemption patterns significantly different from similar-sized competitors.

Charge Letter Attachments

Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

Charge Letter Attachment 1. There were an unusual number of transactions ending in a same cents value. During the review period, there were 137 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. When such patterns are unsupported by special pricing structures, they are a strong indicator of trafficking in SNAP benefits.

The photographs from the store visit show that the majority of items ending in a 9 cent value. The store's inventory contains almost exclusively inexpensive food items and accessory foods with the exception of infant formula. It is possible that some of the smaller transactions are the result of purchasing one same cent item and this could explain some of the lower dollar same cent transactions. However, the larger transactions cited in the charge letter would most likely consist of the purchase of several relatively inexpensive items and it is unlikely that these purchases would routinely total to an amount ending in same cents.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Consequently, when many transactions end in a same cents amount, it appears that these transaction amounts are contrived and in the absence of compelling evidence to the contrary, are suggestive of trafficking.

Appellant failed to provide a credible explanation for the same cent transactions listed on Charge Letter Attachment #1.

Charge Letter Attachment 2. Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment documents 29 sets of transactions conducted by 17 different households **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

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 Appellant's stock and facilities and are therefore indicative of trafficking. Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The photographs from the store visit offer no legitimate explanation as to why SNAP customers would routinely shop at Appellant multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant

bulk items for sale. The second and third transactions in each set are too large to consist of a forgotten item or two.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is questionable what these households could be purchasing at Appellant, a store with no shopping carts and limited fresh meat, or other high priced items that could amount to such large dollar values.

A review of client shopping data for the review period shows that clients shopping at El Moral are also shopping at other area groceries, as well as supermarkets and super stores that offer the customers a much larger quantity and variety of eligible food items. Based on these shopping patterns, transportation to other stores is not an issue for these EBT customers. Yet, these customers continue to shop and spend high dollar amounts in short time frames at Appellant, often on the same day, of their purchases at better-stocked stores.

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.

Charge Letter Attachment 3. The majority or all of individual recipient benefits were exhausted in unusually short periods of time. The charge letter attachment lists 26 transaction sets conducted by 12 households **5 U.S.C. § 552 (b)(6) & (b)(7)(C).** SNAP recipients do not normally exhaust their benefits in such a short period of time.

A government report on SNAP shopping patterns¹ indicates that on average SNAP households have less than one-quarter of their benefits left by the middle of the month. On the day the issuance was distributed, the average household redeemed more than a fifth of its benefit. By the first week, the average household had redeemed over half of its benefit, and by the second week, over three-quarters of it. Households redeemed about an additional 10 percent of benefits by the end of the third week (exhausting 90 percent of benefits) and ultimately redeemed 97 percent of their monthly benefits by the end of the day before receiving their next issuance. Therefore, transactions in which SNAP benefits are exhausted in one or a few transactions during a short period of time are suggestive of trafficking.

Appellant did not present any valid explanations or documentation that legitimizes these transactions.

Charge Letter Attachment 4: Excessively large purchase transactions were made from recipient accounts. This attachment lists 197 transactions, **5 U.S.C. § 552 (b)(6) & (b)(7)(C).** **5 U.S.C. § 552 (b)(6) & (b)(7)(C).** These large transaction amounts are not consistent with the store's inventory with few high priced items and no grocery carts. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

¹ Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program, Mathematica Policy Research, by Laura Castner and Juliette Henke, for the U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, February 2011.

The Retailer Operations Division did compare Appellant to three nearby small groceries. This transaction pattern of Appellant exceeds the other authorized stores, as seen on the table. The Retailer Operations Division considered this an indicator of trafficking.

5 U.S.C. § 552 (b)(7)(E)

The Retailer Operations Division compared Appellant to other small groceries in Cook County. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Considering Appellant's eligible food stock, infrastructure, and proximity to larger, better stocked stores this is highly unlikely and likely indicative of trafficking.

Given that the Appellant firm does have a moderate inventory of staple foods as well as some eligible accessory foods, such as soft drinks and snacks, 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 are almost certainly some legitimate SNAP transactions listed among the transactions listed in this Attachment. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar-sized competitors, especially considering the lack of high-priced food items and the absence of specially-priced meat bundles, large or expensive packages, or ethnic foods. The substantial number of high-dollar transactions in a six-month period calls into question the legitimacy of these transactions.

Appellant has contended that most of the large transactions are the result of the firm allowing a few of its SNAP customers to shop on credit and then pay the store back when the household's benefit allotment is replenished. As indicated previously, credit transactions must be accounted for with substantive evidence such as to the dates credit was extended, to whom, for what amount, and for what items. Appellant did not submit any documentation to support the alleged credit accounts. Thus, the Retailer Operations Division properly determined that the evidence submitted by the Appellant was insufficient to justify the irregular transactions cited in the charge letter.

Sometimes a firm may have higher than average SNAP transactions amounts due to the lack of access to other SNAP authorized stores. However, the Retailer Operations Division determined that there are 19 authorized firms located within a one-mile radius of Appellant, including five other small groceries and four supermarkets. Thus, households who shop at Appellant have access to and do shop at large grocery stores, supermarkets and super stores, among all other types of authorized stores.

Lastly, the Retailer Operations Division analyzed the shopping patterns of three households that conducted transactions listed on the charger letter attachments. All of these households had access to, and shopped at supermarkets and super stores. However, despite this access to better stocked stores, all of the sampled households conducted excessively large transactions at El Moral **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of shopping at a supermarket or super store. It is not plausible that the firm's customers would regularly purchase large amounts of merchandise at Appellant when larger, better stocked stores are readily available and in the vicinity of the Appellant firm.

While some households may have conducted legitimate transactions at Appellant, insufficient evidence was presented to support this argument. 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. Therefore, based on this empirical data, and in the absence of evidence to legitimize 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 evidence trafficking as the most likely explanation.

Credit Repayments

Appellant informed the Retailer Operations Division that many of these transactions were due to repayments on credit accounts. It is possible that a household with a credit debt may pay off the amount owed, and then make a subsequent purchase shortly afterward, typically during the same visit to the store. That might explain two transactions in quick succession.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is not clear why one household would have to return to the store multiple times a day to pay off a credit account.

When a retailer claims it maintains credit accounts to explain irregular SNAP transactions and data patterns, FNS requires a level of detail regarding the legitimacy of the claim. This is because retailers have often made false admissions of credit in an attempt to obtain a lesser penalty after committing more egregious violations such as trafficking. Credit transactions must be accounted for with substantive evidence such as the dates credit was extended, to whom, for what amount, and for what items. Appellant did not submit any documentation to support the alleged credit accounts.

One Year Penalty vs Permanent Disqualification

The record shows that Appellant was charged with trafficking by letter dated November 16, 2017. This letter informed Appellant that it would be permanently disqualified if it was determined that the transactions were the result of trafficking. Appellant replied to the charge letter by letter dated December 7, 2017, and explained that the transactions were the result of SNAP customers repaying credit accounts with SNAP benefits. The Retailer Operations Division sent Appellant a letter on December 20, 2017, requesting documentation of the alleged credit accounts. This letter explained that accepting SNAP benefits for repayment for items sold on credit is a violation of SNAP regulation 278.2(f) and firms that commit such violations shall be disqualified for one year. This letter did not state that Appellant was no longer at risk of permanent disqualification. The Retailer Operations Division ultimately determined that there was no evidence to support Appellant’s explanation of credit accounts and that the transactions were more likely trafficking, and therefore the firm was permanently disqualified.

Transfer of Ownership Civil Money Penalty

Appellant contends that its store was for sale prior to the firm being charged with violations and prior to the permanent disqualification. Appellant requests that it be allowed to sell its store without penalty. The permanent disqualification letter dated February 6, 2018, stated that if

ownership sold or transferred the store after its disqualification, it would be subject to and liable for a TOCMP as provided by SNAP regulations at 7 CFR § 278.6(f)(2),(3), and (4). Specifically, 7 CFR § 278.6(f)(2) reads, in part, “In the event any retail food store . . . which has been disqualified is sold or the ownership thereof is otherwise transferred . . . , the person or other legal entity who sells or otherwise transfers ownership . . . shall be subjected to and liable for a civil money penalty” There are no provisions for a waiver of this penalty.

The purpose of this review is limited to determining whether the Retailer Operations Division’s decision to permanently disqualify Appellant was appropriate. Thus, any potential TOCMP is not within the scope of this administrative review.

CIVIL MONEY PENALTY

Appellant did not timely 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 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.”

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 Appellant’s EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. 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 occur as charged by the Retailer Operations Division. The determination to impose a permanent disqualification against Appellant is sustained.

The Retailer Operations Division also determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations. Under review, the denial of a trafficking CMP is also sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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's owner resides or is 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.

Mary Kate Karagiorgos
Administrative Review Officer

June 6, 2018