

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

Emely Mini Market Inc,

Appellant,

v.

Case Number: C0211773

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Emely Mini Market Inc. (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the program, 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(c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant by letter dated September 26, 2018.

AUTHORITY

7 U.S.C. § 2023 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 August 30, 2018, Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of February 2018 through July 2018. 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 the Appellant could request a trafficking civil

money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

In a September 4, 2018, telephone conversation, Appellant asked Retailer Operations Division what he needed to submit as far as a reply to the charge letter. Appellant was informed that it needed to provide proof/evidence that the transactions listed in the charge letter attachments were for legitimate purchases of SNAP eligible food items. In a facsimile dated September 7, 2018, Appellant provided 25 invoices with no explanation. In a September 10, 2018, telephone conversation, the Appellant inquired whether the invoices were received and informed Retailer Operations Division that it would be sending more. Retailer Operations Division asked what the stores mark-up rate was. In a facsimile dated September 20, 2018, Appellant provided an additional 56 pages of invoices in support of its position.

After giving consideration to the Appellant's reply and evidence of the case, Retailer Operations Division issued a determination letter dated September 26, 2018. This letter informed ownership that they were permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also states that Retailer Operations considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, Retailer Operations Division determined that Appellant was not eligible for the CMP because it failed to submit sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated September 27, 2018, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted.

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 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

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) (c) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 CFR § 278.6(a) states, *inter alia*, that "FNS may disqualify any authorized retail food store...from further participation in the program if the firm fails to comply with the Food and

Nutrition Act of 1977, 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(c) reads, in part, “*Review of Evidence.* 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)...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...”

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.” Trafficking is defined, in part, in 7 CFR § 271.2, as “the buying or selling of SNAP benefits for cash or consideration other than eligible food.”

7 CFR § 271.2 states in part that, “Eligible foods mean: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption.”

SUMMARY OF THE CHARGES

The charges on review were based on an analysis of SNAP electronic benefit transfer (EBT) transactions dated during the six-month period of February 2018 through July 2018. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from the accounts of individual SNAP households within a set time-period.
2. Excessively large purchase transactions were 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

The Appellant, through counsel, made the following summarized contentions in its response to the permanent disqualification letter issued by Retailer Operations Division, and its request for administrative review, in relevant part:

1. I incorporate by reference my previous submission of all receipts, which I submitted of my original objection to being disqualified from the SNAP program.
2. My routine business is to round down the final tally of all sales to the nearest \$.99.
3. Typically, a single household of several family members will have a single EBT card, which they each use.

4. Without EBT, I will not be able to survive.

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

ANALYSIS AND FINDINGS

The FNS initially authorized the business as a small grocery store on September 6, 2016. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during the July 6, 2018, store visit to the business 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 EBT transactions at Appellant that formed patterns indicative of trafficking. The firm review summary documented the following store size, description, and characteristics:

1. One cash register and one POS device with a small counter area partially obstructed by other smaller items available for sale. Register and counter area enclosed in Plexiglas.
2. Estimated to be approximately 500 square feet.
3. No shopping baskets or carts available for customers.
4. No adding machines or optical scanners were available at checkout. No specialty registers present.
5. Store does not operate through a night window or plastic barrier with food stock behind the barrier.
6. No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
7. No unusual pricing structure such as ending most products with 00 cents and does not round transaction totals.
8. Some food stored in an area outside of public view and has storage freezers. No food stored off-site. Store uses the basement for storage of excess soda.
9. Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
10. Store takes telephone orders for prepared food but does not offer delivery
11. Highest priced eligible food items were Similac Sensitive (\$17.99), Pedialyte (\$6.39), Maxwell House Coffee (\$5.19) and Buffalo Chicken (\$6.99).
12. Store stocks a significant amount of non-food items such as but not limited to pet products, health and beauty aids, tobacco products, paper goods, cleaning products, and housewares.
13. Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products. Limited fresh produce, no fresh meat or poultry. Most meats are canned, packaged or frozen.
14. A kitchen/prepared food area with hot foods sold for onsite consumption.
15. Food is sold for on-site consumption with a microwave available for heating.
16. A deli or prepared food section where stock is used in preparation of food.
17. No meat or seafood specials or bundles and no fruit/vegetable boxes sold.

18. Some empty or sparsely stocked shelves as well as in the coolers. Narrow and cluttered aisles and some dusty cans/packages.
19. Hot and Cold Prepared food menu.

The issue for consideration is whether Retailer Operations Division has presented a convincing case that Appellant likely trafficked in SNAP benefits. 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.

Attachment 1 of the Charge Letter – Multiple transactions were made from the accounts of individual SNAP households within a set time-period.

During the review period, there were 25 sets of 66 SNAP transactions that met the parameters of this attachment. Multiple transactions conducted by the same household account within a set time-period is a method which violating stores use to avoid the detection of single high dollar transactions that cannot be supported by the retailer's inventory and structure.

Appellant contends that typically a single household of several family members will have a single EBT card, which they each use. With regard to this contention, it must be noted that SNAP households have no limits on the number of times they may use their SNAP cards or how much eligible food they may purchase. The transactions in this Attachment occurred in multiples of 2, 3, 4 or 5 transactions within a set time-period and do not contain the characteristics associated with a recipient purchasing forgotten items a short time after checking out or households returning to purchase a forgotten item or two.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a certain amount of time. For example, mothers may shop and later send a child to the store to pick-up a forgotten item nonetheless; it is unusual that the second or subsequent transaction amount would be for more than a nominal amount. Additionally, it is questionable why households would visit Appellant up to five times in a set time-period expending benefits in amounts ranging from **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Appellant's stock is very limited; it carries no fresh meat or seafood, minimal fresh produce, that is also used when preparing food items, it does not offer any specialty or ethnic foods, no foods sold in bulk at high prices and does not carry food items that cannot be purchased at larger, better stocked stores.

In conclusion, it is therefore more likely true than not true that the irregular transactions cited in the charge letter Attachment 1 are due to trafficking in SNAP benefits.

Attachment 2 of the Charge Letter - Excessively large purchase transactions were made from recipient accounts.

There were 159 SNAP transactions that met the parameters of this attachment. Based on the results of the contracted store visit, the large transaction amounts are not consistent with the store's inventory of low priced foods. The firm does not offer food in bulk or any ethnic or specialty foods that sell for a high price. Therefore, the substantial number of high dollar

purchases calls into question the legitimacy of these transactions. Appellant's transactions ranged from 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The record reflects that 63 percent of the households that shopped at Appellant's store during the review period also shopped at larger supermarkets and superstores 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of shopping at Appellant's store and 76 percent shopped at these larger stores 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of visiting Appellant's store.

Appellant contends that it provided invoices and receipts of inventory in support of its position that will explain the SNAP transactions in the charge letter. With regard to this contention, Retailer Operations Division conducted an analysis of the eligible purchase invoices and receipts provided by Appellant in its reply to the Charge letter and determined that Appellant's purchases, including a 50% mark-up, were insufficient to account for Appellant's total SNAP redemptions during the review period. As seen in the following chart, Appellant's SNAP redemptions, during the review period, were not covered by the eligible food purchases as listed in the invoices provided.

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Retailer Operations Division compared the Appellant's SNAP transactions with the average small grocery store in Philadelphia County, Pennsylvania. The average transaction amount for a small grocery store in the County is \$8.49. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This is questionable particularly when Appellant is stocked with mostly inexpensive packaged, canned, snack, and accessory food items and carries an assortment of single-serving beverages, and does not offer any fresh meat, minimal produce, and does not carry any specialty, ethnic or items in bulk that would sell at high prices. The record also reflects that Appellant had some empty or sparsely stocked shelves and some cans/packages contained a layer of dust, which is indicative of low turnover in shelved products.

Retailer Operations also conducted an analysis of the shopping habits of three of the households identified in the charge letter. This analysis concluded that these households also shopped at other area grocery stores including full-line supermarkets and superstores that offer a much larger quantity and variety of eligible food items for likely better prices either on the same day or within days of visiting Appellant's firm. This again indicates that lack of access to other stores is not at issue. However, despite this access to large supermarkets and superstores, these households consistently conducted much higher transactions at the Appellant firm than at better-stocked supermarkets/superstores in and around the Philadelphia County area of Pennsylvania. This is another strong trafficking indicator.

Appellant contends that its routine business is to round down the final tally of all sales to the nearest \$.99. With regard to this contention, Retailer Operations Division did not find any unusual transaction patterns that would indicate that Appellant had an unusual amount of transactions that ended in 99 cents. Additionally the store visit report indicates that Appellant did not have an unusual pricing structure nor was there any evidence that transaction totals were rounded. Therefore, Appellant's contention that it tallies all sales to the nearest 99 cents does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Based on this empirical data, and in the absence of sufficient evidence as to the legitimacy of such transactions, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the charge letter evidence trafficking as the most likely explanation. In this case, ownership did not provide sufficient evidence to legitimize Appellant’s transaction data as outlined in the Attachments. Retailer Operations Division determined that Appellant’s contentions did not outweigh the evidence that the store was trafficking and concluded, through a preponderance of evidence, that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

The transaction data and overall firm record convincingly demonstrate repetitive patterns of unusual, irregular, and inexplicable SNAP activity for this type of firm indicative of trafficking. Once Retailer Operations Division established a convincing case against Appellant, ownership bears the burden of proving, by a preponderance of the evidence, that the administrative action 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. If this is not demonstrated, the case is to be sustained.

As noted, 7 CFR § 278.6(a) states 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 inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Retailer Operations Division has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns in two attachments of EBT transaction data, the inadequacy of the firm’s eligible food stock as observed and recording during the onsite visit to support such large transactions, the lack of evidence of invoices of foods in inventory to cover SNAP redemption totals for the review months, the lack of explanation for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant, and the irregular SNAP transaction data of Appellant as compared to other small grocery stores in the State.

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 for the legitimacy for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the unusual, irregular, and inexplicable transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation. While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations Division determined that Appellant’s contentions did not outweigh the evidence in the record.

The purpose of the administrative review process is to ensure that firms aggrieved by Retailer

Operations Division's adverse actions have the opportunity to have their position fairly considered by an impartial review authority prior to that adverse action becoming final. Appellant has been duly given, and has taken the opportunity to present to USDA through the administrative review process whatever evidence and information it deems pertinent in support of its position that Retailer Operations Division's adverse action should be reversed. Therefore, any evidence and information that Appellant presented to Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to Appellant's right to a fair and thorough review.

CIVIL MONEY PENALTY

Appellant was notified in the charge letter dated October 5, 2016, that it had 10 calendar days upon receipt of the charge letter to provide required documentation in order to be considered for the trafficking CMP. Appellant failed to provide Retailer Operations Division with the required documentation to be considered for a trafficking CMP in lieu of disqualification. Therefore, Retailer Operations Division correctly determined that Appellant was not eligible for a trafficking CMP as set forth in the SNAP regulations.

Appellant contends that without EBT it will not be able to survive. With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations 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 ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA.

Furthermore, giving special consideration to economic hardship of 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, ownerships contention that it will not survive, based on the assessment of an administrative penalty, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CONCLUSION

Ownership has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. As such, 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 shall disqualify the firm permanently.

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Emely Mini Market Inc. from participation in the SNAP. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Therefore, based on a review of all the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged by Retailer Operations Division. Based on the discussion herein, the determination to impose a permanent disqualification against Emely Mini Market Inc. is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (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 (FOIA), 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.

Monique Brooks
Administrative Review Officer

April 16, 2019