

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

Extra Kleen Food & Deli LLC,

Appellant,

V.

Retailer Operations Division,

Respondent.

Case Number: C0213734

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Extra Kleen Food & Deli LLC, (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 December 11, 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 November 21, 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 May 2018 through October 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 November 29, 2018 telephone call, Appellant responded to the charge letter and generally stated that the firm extends credit accounts to SNAP customers. Retailer Operations Division informed counsel that the acceptance of SNAP benefits as payment for items sold to a household on credit is a violation of SNAP regulations at 278.2(7). Counsel was also informed that a firm that commits such violations shall be disqualified from participation for a period of one year.

In correspondence dated November 29, 2018 and received on November 30, 2018, Retailer Operations Division notified Appellant that the acceptance of SNAP benefits as payment for items sold to a household on credit is a violation of SNAP regulation 278.2(f) and a firm that commits such violations shall be disqualified from participation for a period of one year. Appellant was asked to provide documentation to support that food items were purchased on credit as noted in its response to the charge letter. The requested documentation and any information, explanation or evidence regarding the charges must be provided within 10 days of receipt of the request letter.

In correspondence dated December 3, 2018, Appellant provided a handwritten letter with a credit ledger of customers containing dates and amounts owed for the month of November 2018 which is outside of the review period of May 1, 2018 to October 31, 2018.

Retailer Operations Division issued a Determination letter dated December 11, 2018. The letter informed Appellant that it was permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also stated that Retailer Operations Division 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 postmarked December 13, 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 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(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 May 2018 through October 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 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:

- I never knew giving credit was against the program.
- My intention is to help people when they need any kind of food and they don’t have money to pay.

Appellant did not provide any additional documentation in support of its position. 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 authorized the business as a convenience store on September 18, 2017. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during an October 30, 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:

- One cash register and one POS device with a small counter area partially obstructed by other smaller items available for sale.
- Estimated to be approximately 3000 square feet.
- There were three hand baskets but no carts available for customers.
- No adding machines or optical scanners were available at checkout. No specialty registers present.
- Store does not operate through a night window or plastic barrier with food stock behind the barrier.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- No unusual pricing structure such as ending most products with 00 cents and does not round transaction totals.
- No food stored in an area outside of public view.
- No storage freezers or coolers and no food stored off site.
- Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
- Store does take telephone orders but does not offer delivery.
- Highest priced eligible food items were Similac Infant Formula (\$14.99), Salmon (\$7.99), Chicken (\$8.99) and Macaroni & Cheese (\$19.99) (Also served with the hot food items).
- Store stocks a significant amount of non-food items such as but not limited to paper products, household products, tobacco products, health and beauty aids, lottery tickets, clothing items, hot foods and cleaning products.
- Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products. No fresh fruits or produce. Some fresh chicken which is also used in the hot food area.
- Shelves were sparsely stocked and some were empty or contained empty spaces.
- A kitchen/prepared food area with hot foods sold for onsite/off-site consumption. Microwave available.

- No deli or prepared food section. Stock is not used in preparation of food.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.

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, this attachment documents 12 sets of 26 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. The store visit report does not indicate any compelling reason for customers to consider Extra Kleen Food & Deli LLC a first choice destination to fulfill large purchases of food, or that they would have made relatively large, multiple purchases at the store within a set time period.

Based on Appellant's inventory it is unlikely that households would legitimately conduct SNAP purchases in amounts ranging **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in this store during multiple purchases. The presence of these transactions taking place two or more times in a set time period is more indicative of trafficking than legitimate SNAP sales.

Appellant contends that it never knew giving credit was against the program and ownerships intention was to help people when they needed any kind of food when they don't have money to pay. With regards to this contention, SNAP regulations at § 278.2(f) provides, inter alia, that: **“Food stamp benefits shall not be accepted by an authorized retail food store in payment for items sold to a household on credit. A firm that commits such violations shall be disqualified from participation in the Food Stamp Program for a period of one year”**.

Since attributing suspicious EBT transactions to credit may be an attempt to avoid a more serious sanction which is appropriate for a trafficking violation indicated by the available evidence, to refute charges of trafficking, as part of the retailer's reply to the charge letter, the retailer must provide adequate proof that credit accounts existed at the time the suspicious EBT transactions occurred. It is imperative that the retailer provide evidence to refute charges of trafficking so that the Retailer Operations Division can compare such proof with the transactions outlined in the charge letter.

The record reflects that Retailer Operations Division presented Appellant with an opportunity to provide documentation and any information, explanation or evidence in support of its claim that the charge letter transactions were as a result of credit accounts. Retailer Operations Division requested that counsel provide documentation to support that food items were purchased on credit as noted in the response dated November 29, 2018, and that the documentation must identify specific accounts along with corresponding dates and amounts.

Appellant provided a handwritten letter with a credit ledger of customers with dates and amounts owed for the month of November 2018 which is outside of the review period of May 1, 2018 to October 31, 2018. The ledger contained 12 names of customers by their first name only. A date for each customer had a list of dates with amounts next to them. There were no details of what was purchased. There was nothing provided that would identify each person as a SNAP beneficiary other than by first name. The retailer did not provide sales receipts or any lists of what each person was allowed to take on credit. FNS cannot adequately determine if the credit account customers are SNAP beneficiaries. The credit ledger provided does not provide information as to what was purchased on credit and balances carried forward from the previous month of October 2018. The balances were for the month of November which is outside of the review period. No other explanations were provided to explain the transaction activity cited in the charge letter.

Additionally, Appellant signed the SNAP Application FNS Form 252 Certification and Signature page which states, “By signing below, you are confirming your understanding of and agreement with the following: ... I accept responsibility on behalf of the firm for violations of the Supplemental Nutrition Assistance Program regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full time, or part-time. These include violations such as but not limited to: ...Accepting Supplemental Nutrition Assistance Program benefits as payment on credit accounts or loans....” Appellant’s signature also acknowledged the statement “I have read, understand and agree with the conditions of participation outlined in the Privacy Act, Use and Disclosure, Penalty Warning and Certification Statements, and agree to comply with all statutory and regulatory requirements associated with participation in the Supplemental Nutrition Assistance Program.” SNAP regulations at §278.2(f) states in relevant part: “(f) Paying credit accounts. Food stamp benefits shall not be accepted by an authorized retail food store in payment for items sold to a household on credit. A firm that commits such violations shall be disqualified from participation in the Food Stamp Program for a period of one year.”

In conclusion, it is determined that it is 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 128 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.

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 Onondaga County area of New York. This is another strong trafficking indicator.

It is important to note that when purchasing food, people generally do not spend large sums at convenience stores. They usually stop at convenience stores to pick up quick snacks and/or a beverage, or for a few staple food items that they need, such as bread, milk, tortillas, or a can or two of some food, but which are not considered worth a trip to the supermarket to get. It is rare for a convenience store to have purchases such as those cited for Appellant's store. The record reflects that most of the households in the charge letter shopped at larger stores within one to three days of visiting Appellant's store. It is also not logical for SNAP households who shopped at larger better stocked supermarkets and superstores to open credit accounts with a convenience store.

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 the 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 convenience 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 charge letter. 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' 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' 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

The 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 dated November 21, 2018. 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' decision, not to impose a trafficking CMP in lieu of disqualification, is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

Ownership has not provided sufficient evidence to rebut the convincing 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 Extra Kleen Food & Deli LLC 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 Extra Kleen Food & Deli LLC 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

July 8, 2019