

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

Marlin’s Food Market & Cafe Inc,

Appellant,

v.

Case Number: C0210360

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Marlin’s Food Market & Cafe 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 28, 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 2, 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 January 2018 through June 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).

Retailer Operations Division issued a determination letter dated August 14, 2018, permanently disqualifying Appellant from the SNAP. The determination letter was rescinded by letter dated August 20, 2018, in order to adequately consider Appellant's response to the charge letter dated August 2, 2018.

In correspondence dated August 11, 2018, received by Retailer Operations Division on August 16, 2018, Appellant replied to the charge letter and generally stated that it has tried to maintain the EBT account according to the rules and regulations learned from the Department training classes. Ownership stated that it always monitors the monthly sales of EBT transactions in the firm. Appellant indicated that there are no other stores within three blocks of its store that sells items found in its store. Appellant also stated that it sells six types of Honduras bread, seven types of Guatemala cheese, two types of dry fish, some Spanish stuff and if someone buys American groceries with these items the bill goes up. I purchase these items every week costing 5 U.S.C. § 552 (b)(6) & (b)(7)(C), from three different companies. Some customers ask to pay separate and for this reason the card is charged multiple times. Another reason for multiple charges is that we give credit to some of our EBT customers. We do not make money through any illegal means. This is the first complaint against our firm in the last 16 years.

In correspondence dated August 20, 2018, Retailer Operations Division requested that Appellant provide documentation to support that food items were purchased on credit as noted in the response dated August 11, 2018, and that the documentation must identify specific accounts along with corresponding dates and amounts. Appellant was informed that the requested documentation and any information, explanation, or evidence must be provided within 10 calendar days of receipt of this letter. Appellant failed to provide the requested documentation.

Retailer Operations Division issued a second Determination letter dated September 28, 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 dated October 7, 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 January 2018 through June 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:

1. Someone made a complaint against us to the Department and the Department Officials may believe that complaint.
2. I have included my monthly sales tax paper and monthly credit card statement so you can check how much money we sale in taxable and non-taxable items and how much money we sell through EBT. I also included three invoices so you may know where we buy the Spanish groceries.
3. It sells six types of Honduras bread, seven types of Guatemala cheese, two types of dry fish, some Spanish stuff and if someone buys American groceries with these items the bill goes up. I purchase these items every week costing **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, from three different companies.
4. Some customers ask to pay separate and for this reason the card is charged multiple times. Another reason for multiple charges is that we give credit to some of our EBT customers.

Appellant provided a copy of all correspondence received from Retailer Operations Division, its response to the charge letter, a copy of its April 2018 and May 2018 Sales Tax, a copy of its April 2018 and May 2018 Card Processing Statements and four purchase invoices dated October 2018. 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 April 17, 2002. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a May 22, 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:

- Two cash registers and one POS device with one small checkout area partially obstructed by other smaller items available for sale.
- Estimated to be approximately 1400 square feet.
- No shopping baskets or carts available for customers.
- Optical scanner available at checkout however it is not shown in any of the photographs. 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 not take telephone or online orders and does not offer delivery
- Highest priced eligible food items were Salvadorian Cream (\$12.00), Nescafe Classico (\$12.99) and Coconut Almond Milk (\$5.99).
- Store stocks a significant amount of non-food items such as but not limited to paper products, household products, tobacco products, alcohol products, pet products, and mobile phones/phone cards.
- Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products. Minimal amounts of fresh fruits or produce with some appearing in a state of deterioration. No fresh meat, poultry or seafood.
- A kitchen/prepared food area with hot foods sold for onsite consumption. Microwave available for heating. There was no hot food menu or prices posted.
- A 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.
- Some empty spots on shelves.

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.

There were 25 sets of 57 SNAP transactions that met the parameters of this attachment. Multiple transactions conducted by the same household account **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** 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 some customers ask to pay separate and for this reason the card is charged multiple times. Another reason for multiple charges is that we give credit to some of our EBT customers. Appellant stated that this was out of ignorance of the SNAP regulations. With regard to these contentions, it is important to note that at the time of authorization, ownership was given a training guide that clearly explains that credit is not allowed. The training guide is available online and is translated into many languages. This guide states that SNAP customers must pay for their purchases at the time of sale and that a retailer may not accept SNAP benefits as payments on credit accounts. Additionally, 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. If the retailer does not provide adequate proof, the determining office shall permanently disqualify the retailer for trafficking.

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 August 11, 2018, and that the documentation must identify specific accounts along with corresponding dates and amounts. Appellant did not provide any evidence or documentation to support its claim of credit.

The record reflects that there are much larger stores with more reasonable prices 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. 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 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. Given the common practice of violating retailers breaking up large, suspicious transactions into multiple, smaller transactions to avoid detection, a firm’s explanation and evidence for why these transactions are occurring in a set time period in a convenience store should be both rational and compelling. Appellant's explanations are neither.

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 146 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.

There are 26 surrounding SNAP authorized stores within a one mile radius of Appellant's store which include two medium grocery stores, one large grocery store, three supermarkets, one superstore and nine other convenience stores. The retailer cited the destruction of a local supermarket as a cause for the increase in customers. However, there are 3 supermarkets, a superstore and a large grocery store within a 1 mile radius of Appellant's store with the large grocery store being a mere .26 of a mile away and a supermarket located approximately a half mile from Appellant.

Additionally, the high dollar transactions at Appellant's store are suspicious because the store does not sell fresh meat, poultry, or bulk items and only has a modest selection of produce available for purchase. The store is stocked almost exclusively with inexpensive food items and the May 22, 2018, store visit report recorded only two food items priced in excess **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

Appellant provided a copy of its April 2018 and May 2018 Sales Tax, a copy of its April 2018 and May 2018 Card Processing Statements and four purchase invoices dated October 2018, however these documents do not offer compelling or adequate explanations for the transaction patterns cited in the charge letter and are therefore, considered insufficient evidence in this case.

Appellant contends that someone made a complaint against the store to the Department and this is the cause of the disqualification. With regard to this contention, it is important to note that the extensive analysis of Appellant's EBT transaction record, upon which charges of violations are based, provides substantial evidence that questioned transactions during the focus period have characteristics that are not consistent with legitimate sales of eligible food to EBT customers at a store of this type and size. Rather, the characteristics are indicative of illegal trafficking in program benefits. In addition to the raw data of suspicious transactions, the file also notes that Appellant has no shopping carts or shopping baskets available for customers to carry the many items no doubt necessary for questioned transactions as large as listed.

In addition, Appellant has two registers but one EBT device, very limited counter space, and insufficient stock to explain as legitimate the program redemptions. A review of the record has yielded no indication of error or discrepancy in the reported findings by Retailer Operations that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it appears the Retailer Operations Division has provided substantial evidence of trafficking violations, in the two patterns of EBT transaction characteristics indicated in the letter of charges, and that it is more likely true than not that program violations did, in fact, occur as charged.

CFR § 278.6(a), which establishes the authority upon which FNS may disqualify any authorized retail food store, reads, in 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."

Therefore, that the Retailer Operations used computer printouts of transaction data and other reports, in addition to store visit observations and an analysis of household shopping behavior, in rendering a finding that violations indicative of trafficking are occurring, is as valid a means of establishing facts as direct evidence obtained through an on-site investigation and the eye witnessing of trafficking

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.

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'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 August 2, 2018, 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.

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 Marlin's Food Market & Cafe 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 Marlin's Food Market & Cafe 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

May 16, 2019