

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

Millers General Store,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0214699

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Millers General Store, (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 February 14, 2019.

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

By charge letter dated January 28, 2019, Retailer Operations Division informed ownership that Appellant was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 271 – § 278, based on EBT benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm." The charge letter stated, in relevant part, that “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.”

Appellant left a voice mail on February 7, 2019. FNS returned the call to ownership and Appellant acknowledged receipt of the charge letter dated January 30, 2019. Ownership stated that he would provide a response, to the charge letter, by February 11, 2019. Appellant was asked if more time was needed to respond and ownership stated no as he would be faxing over the letter. The record does not reflect that a response to the charge letter was actually received.

Retailer Operations Division gave consideration to the Appellant's reply and evidence of the case, and issued a determination letter dated February 14, 2019. This 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 February 19, 2019, 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 ..."

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 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. Your store conducted EBT transactions that are large based on the observed store characteristics and recorded food stock.

The first 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. As explanation for over 90 percent of the transactions brought into question, they were made within Millers General Store for the person who was receiving SNAP benefits. Some were double purchases, one behind the other for other persons that the customer had with them. It is not unusual for customers to come in together and make purchases for each other on the day that one receives their benefits and then come back together to make purchases when the other receives their benefits.
2. Some of the customers live in facilities and have reported that they don’t eat the food that is served in those facilities so they make large purchases to cover them for long periods of time during the month. Hence some of the large amounts.

No additional documentation was provided during this review. 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 file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during an August 13, 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:

- Information obtained during the store visit indicates the Appellant is a store front located beneath and inside an attached residential apartment building. Store name as posted on outside signage "5 U.S.C. § 552 (b)(6) & (b)(7)(C)" with the name "Millers General Store" posted inside the store.
- 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 1500 square feet.
- No shopping baskets and 1 cart 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.
- Some food stored in an area outside of public view that's approximately 400 square feet.
- Store has storage freezers or coolers but not 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 and does not offer delivery
- No food items priced over \$5.00
- 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, 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, no fresh meat or poultry. Most meats are canned, packaged or frozen.
- Appellant has empty or broken coolers.
- Shelves were sparsely stocked or empty and some stock contained a layer of dust.
- A kitchen/prepared food area with hot foods sold for onsite consumption.
- Food is sold for on-site consumption with a microwave available for heating. Posted menu
- 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.

- Appellant was deficient in the dairy products category and may have been ineligible to hold SNAP authorization at the time of the store visit.

The second 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 Appellant's store 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 27 sets of 59 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 Millers General Store 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. Multiple transactions within a set time period are methods which stores use to avoid high dollar transactions that cannot be supported and are indicative of trafficking.

Appellant contends that it is not unusual for customers to come together and make purchases for each other on the day that one receives their benefits and then come back together to make purchases when the other receives their benefits. With regard to this contention, it is important to note that the SNAP transactions identified 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 store's layout, the extent of the Appellant's stock and facilities and are indicative of trafficking. It is acknowledged that customers will sometimes shop together and even have separate transactions if one is doing the other a favor that is to be repaid later however; the amount of time between half of the transactions in this Attachment were completed in a time period that is questionable given the amount of products that would be needed to equal the high transactions amounts, the number of steps required to complete a legitimate SNAP transaction and the fact that Appellant's stock and physical characteristics were inconsistent with high dollar, rapid SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

Additionally, the record reflects that households traveled from 1.92 to 8.16 miles from Appellant's store area to shop at other larger SNAP authorized stores which is an indication that transportation was not an issue for SNAP households. The Appellant did not provide any additional documentation to support its claim that shoppers were making purchases for each other or that the second or subsequent transaction was a legitimate SNAP transaction. Based on the analysis above and Appellant's failure to adequately show that all of the transaction sets were as a result of legitimate SNAP purchases, a conclusion can be drawn, through a preponderance of evidence that the "unusual, irregular, and inexplicable" transaction patterns cited in Attachment 1 evidence trafficking as the most likely explanation.

Attachment 2 of the Charge letter - Your store conducted EBT transactions that are large based on the observed store characteristics and recorded food stock.

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.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Appellant contends that some of the customers live in facilities and have reported that they don't eat the food that is served in those facilities so they make large purchases to cover them for long periods of time during the month. With regard to this contention, although some facilities may offer individual rooms with limited space for food storage, it is inconceivable that SNAP households living in a group facility, where they are served meals, would purchase large sums of food without the ability to store those items. The record reflects that Appellant's store is located on the ground floor of an apartment building however the store visit photographs and documentation showed that Appellant's stock was minimal with sparsely stocked or empty shelves with some stock containing a layer of dust which is indicative of a low turnover rate on shelved items. Appellant did not offer any fresh meat or seafood, no fresh or frozen produce and had many empty or broken coolers and freezers. In fact, the store visit documentation indicates that Appellant was deficient in the dairy products category on the day of the store visit and my not have been eligible to maintain its SNAP authorization.

The record also reflects that Retailer Operations conducted an analysis of the shopping habits of four 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 Caddo County area of Louisiana. This is another strong trafficking indicator and indicates that Appellant was not considered a first choice destination for large SNAP purchases despite it being located on the ground floor of an apartment building.

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 recorded during the onsite visit to support such large transactions, the lack of evidence of invoices of food in inventory to cover Appellant's reasoning for the SNAP transaction 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 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 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 deemed 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.

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.

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 March 29, 2016. 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

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Millers General Store 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 Millers General Store 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 22, 2019