

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

Mis Amigos,

Appellant,

v.

Case Number: C0201382

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is not sufficient evidence to support the Retailer Operations Division's determination to permanently disqualify Mis Amigos (hereinafter "Appellant") from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). Therefore, the permanent disqualification decision is reversed.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Mis Amigos.

AUTHORITY

7 U.S.C. § 2023 and its 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."

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified based on an analysis of EBT transaction data from March 2017 through July 2017. This involved the following transaction patterns which are common trafficking indicators:

- There were multiple transactions made from individual household benefit accounts within unusually short timeframes.
- Excessively large purchase transactions were made from recipient accounts.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Mis Amigos for SNAP participation as a convenience store on December 10, 2012. In a letter dated September 5, 2017, the 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 between the months of March 2017 and July 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In a letter dated September 12, 2018, the Appellant responded to the charge letter, stating that it has been in business for more than four years and would never commit trafficking violations. The Appellant argued that it had too much to lose to engage in such activities. The Appellant stated that its customers sometimes shopped at the store multiple times a day and encouraged FNS to visit the store and view its security camera footage to see how many different customers come into the store with the same EBT card. The Appellant further argued that many of its customers work in the fields and buy items in bulk, such as water, juice, snacks, and other goods. Based on the amount of inventory it has, the Appellant contended that it was easy for customers to spend large amounts at the store. Finally, the Appellant stated that there are not large stores in the neighborhood, so the store is very important to the community.

In response to these arguments, the Retailer Operations Division sent the firm a letter dated September 19, 2017. In this letter, the following was requested from the Appellant:

- Inventory invoices for all SNAP-eligible foods;
- Invoices for nonfoods, including tobacco products, alcohol, household supplies, etc.;
- Average mark-up information for all products sold;
- Cash register receipts for all sales, along with EBT receipts, if available; and
- Footage from the firm's security camera on DVD or flash drive, if possible.

In response to this request, the Appellant submitted the following documentation:

- A list of markup percentages for various items of merchandise, both food and nonfood.
- A letter from a distributor attesting that it provides dairy products to the Appellant firm.
- Five 9 x 12 manila envelopes (one for each review month) containing dozens of loose inventory invoices and receipts, roughly 150 pages in all.

After reviewing the Appellant's responses and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated October 16, 2017. This letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but that a CMP was not appropriate in this case because the

Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked October 26, 2017, the Appellant, now through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted. It should be noted that along with its request for review, the Appellant requested case file information from the agency relating to its disqualification decision. This request was considered a request under the Freedom of Information Act (FOIA) and was forwarded to agency FOIA officials. The Appellant then submitted a supplementary FOIA request on November 21, 2017. On November 28, 2017, FNS provided its response to the two FOIA requests. After reviewing the agency's response, the Appellant submitted an e-mail dated December 21, 2017, containing additional contentions and documentation to support its request for review.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

7 U.S.C. § 2021(b)(3)(B) states, in part:

...[A] disqualification under subsection (a) shall be...permanent upon...the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards...

7 CFR § 278.6(a) states, in part:

FNS may disqualify any authorized retail food store...if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, [or] evidence obtained through a transaction report under an electronic benefit transfer system....

7 CFR § 278.6(e)(1)(i) states:

FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, in part:

Trafficking means: The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone...

7 CFR § 271.2 states, in part:

Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption...

7 CFR § 278.6(b)(1) states, in part:

Any firm considered for disqualification...under paragraph (a) of this section...shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification.... The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter...

7 CFR § 278.6(c) states, in part:

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) of this section, 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, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(b)(2)(ii) states, in part:

Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence... that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).

7 CFR § 278.6(b)(2)(iii) states:

If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such a penalty.

7 CFR § 278.6(i) states, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking...if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program...

7 CFR § 279.4(a) states, in part:

Upon receipt of a request for review of administrative action, the administrative action shall be held in abeyance until the designated reviewer has made a determination. However, permanent disqualifications for trafficking shall not be held in abeyance and shall be effective immediately as specified in 278.6(b)(2) of this chapter. If the disqualification is reversed through administrative or judicial review, the Secretary shall not be held liable for the value of any sales lost during the disqualification period...

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its original request for administrative review, in relevant part:

- Appellant disputes that it has trafficked in EBT benefits at any time.
- The two claims of trafficking as set forth in the charge letter are not evidence sufficient to support a finding of trafficking.
- Appellant has located 71 EBT receipts, and not one of them matches the household numbers listed in the charge letter. There are also multiple households listed with a 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which appears to be a placeholder used by FNS to hide the true household number. This purposeful alteration of the household information is unfair and deprives the Appellant access to the customers whose transactions are in question. Appellant cannot understand why FNS would do this except to hinder a retailer's efforts to defend himself.
- Appellant attempted to obtain household information from its third-party processor, but because the account had been deactivated by FNS, Appellant was unable to access its own history of transactions.
- Appellant has submitted a simultaneous request for information from FNS and asks that the review be conducted after receipt of the requested information and a reasonable time to provide supplementary contentions.
- The allegations of trafficking are based solely on select, anecdotal compilations of transactions occurring in a five-month period.
- Appellant's counsel is familiar with EBT trafficking cases, which sometimes involve as many as five different types of patterns, sometimes comprising 50 or more pages, and often supported with direct evidence of trafficking through undercover buys. In this case, however, there are a total of four pages of transactions. This is quite easily the shortest list of transactions Appellant's counsel has ever seen in support of a trafficking allegation. This should give the administrative review officer pause in considering whether to side with the position of trafficking taken by FNS.
- Regarding multiple transactions in a short period of time (Attachment 1):
 - Since FNS has altered the household numbers (5 U.S.C. § 552 (b)(6) & (b)(7)(C)), Appellant is unable to determine the extent to which some households are duplicated.
 - Appellant has not control over the number of times an EBT card is used at the store. There are many instances where the card is used by different household members on the same day, or where the card is used by the same household member on the same day.

- In some cases, the transactions were not even on the same day, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This is so scant as to be an unreliable indicator of trafficking.
- Regarding excessively large transactions (Attachment 2):
 - Attachment 2 suffers from the same problem as Attachment 1, which is that there are too few items with the data set to be statistically significant. During the review period, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
 - While FNS may utilize redemptions data to ascertain violations, Appellant believes it is necessary for the data to have statistical significance rather than being piecemeal portions over the course of the review period.
 - The claim of largeness is also misplaced. The average SNAP transaction in the United States is between \$27 and \$28. For this to be “average,” there would necessarily be transactions both higher and lower than that amount.
 - It appears that FNS simply lists transactions in excess of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on the basis that a purchase above the national average indicates trafficking. This is an illogical and problematic way to establish trafficking.
 - 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
 - The market’s location is fairly distant from any larger supermarket and Mis Amigos has a significant number of farm labor customers who will make full-case purchases, mostly beverages for other farm laborers.
 - Because there are so few transactions, the administrative review officer should not be misled into believing that the only explanation is trafficking.
 - The Appellant has located 71 EBT receipts and can see that many show a large beginning SNAP balance, often in the hundreds of dollars. It is not unreasonable that a customer with that kind of available funds would purchase between 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of merchandise, particularly where the store is located a fair distance from larger supermarkets.
- The lack of other transaction scans is evidence of non-trafficking. Had there been additional evidence, FNS would have included it.
- FNS has taken a severe and unjustified position. The evidence is insufficient in light of the total number of transactions conducted over a five-month period at a store that is open seven days a week from 7 a.m. to 12 a.m., and where valid alternative explanations exist. Mis Amigos, which has no prior violations and no prior warnings, should not be subject to disqualification.

In support of these contentions, Appellant submitted a copy of the FOIA request that was made simultaneous to the request for administrative review. Appellant also provided copies of 71 EBT receipts that correspond with transactions listed in the charge letter.

After receiving the agency’s FOIA response, the Appellant submitted additional contentions and documentation. While some of the contentions were the same as in its original request for review, a large number of contentions were new. These are summarized below:

- In the five-month review period, there were 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

- The transactions listed in Attachment 1 represent either 0.56 percent or 0.52 percent of the total number (whichever number of total transactions listed above is actually correct). This is not statistically significant.
- Applying the same math to Attachment 2, the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) “excessively large” transactions represent either 1.77 percent or 1.65 percent of the total number of transactions that were made at the store. While these percentages are larger than Attachment 1, Appellant believes them to also be statistically insignificant.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The store makes many “full case” sales, and has a number of high-priced items like infant formula and menudo. These contribute to transactions above the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) threshold.
- The agency’s Case Analysis Document has several inaccuracies, including the use of sales figures from 2012, which were much higher in 2017. The higher sales figures underscore that after the Appellant owner purchased the store, it moved away from being just a “food stamp” store to a more varied market. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The Case Analysis Document also incorrectly states that the Appellant did not store any products outside of customer view, or that there were no storage areas, coolers, or freezers, or that the store had empty shelves and dusty cans. All of these claims are false. In the “sample photos” in the Case Analysis Document, no empty shelves can be seen. Additionally, the store has considerable storage areas and has provided photographs to prove this.
- The store visit report also contains many inaccuracies, including the aforementioned issue of storage areas. As for empty shelves and dusty cans, this is false. None of the contractor’s photos show empty shelves other than a single photograph of a bakery rack where fresh bread had partly sold out. The remaining photos show no appreciable collection of dusty items, although in late June, there is considerable wind-driven dust from surrounding farmlands in the area.
- The Appellant made two separate requests for information from FNS, both of which were deemed FOIA requests. One of those requests asked for records of actions taken against any of the households identified as having committed the violations listed in the charge letter attachments. FNS responded by saying, “There are no responsive records.” This means that even though the Appellant is alleged to have trafficked, FNS has not taken any action against the households who are on the other side of any trafficking violations. This is unfair, as it implies that the retailer trafficked, but the card holder did not.
- FNS’s refusal to disclose the identity of any households listed in the charge letter is a violation of due process. However, the Appellant was able to identify four of the households.
- If 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is only one household, there are only five households involved in Attachment 1. In Attachment 2, only 20 households are involved (5 U.S.C. § 552 (b)(6) & (b)(7)(C)). Three of the identified households have written letters in support of the firm. Seven others, who do not appear to be listed in the charge letter, also wrote letters of support.
- The disqualification process does not comply with due process under the U.S. Constitution. For example, retailers are given only 10 days to reply to the charges. This is unduly short to address such significant allegations. Additionally, FNS refused to disclose most of what was sought in FOIA requests and allowed no hearing other than

what was done in writing. This does not allow for cross-examination of any witnesses in support of the agency's allegations. Furthermore, if the decision is sustained in administrative review, and the retailer wants to sell or transfer his business, he is subject to a huge civil money penalty, "and takes the retailer's property, all on ten days notice and without disclosure of relevant materials or a meaningful hearing."

In support of this second set of contentions, the Appellant submitted the following documentation:

- A copy of the firm's FOIA requests, dated October 25, 2017, and November 21, 2017, along with a copy of counsel's letter of representation, showing that it represents the Appellant in this matter;
- Copies of FNS's FOIA response, including:
 - The FOIA response cover letter, dated November 28, 2017;
 - A copy of the Retailer Operations Division's Case Analysis Document;
 - A listing of every SNAP transaction that occurred at the store during the review period; and
 - A copy of the contractor's store visit report and photographs;
- Three pages of quarterly tax filings from the year 2017 as well as a short spreadsheet summarizing the firm's sales for 2017;
- Twenty (20) undated photographs depicting various storage areas outside of the store, including a shed behind the store, an open-air fenced area, and storage within the store itself, including a large freezer. Many of these photos show very large amounts of soda and water;
- Ten letters of support from SNAP customers. Nine of the letters are hand-written, and most simply state that the customers shop at Mis Amigos on a regular basis.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The primary issue for consideration in a case based on questionable SNAP redemption data is whether or not the Retailer Operations Division adequately established that the Appellant firm engaged in the violation of trafficking. In other words, did the Retailer Operations Division, through a preponderance of the evidence, establish that it is more likely true than not true that the irregular and questionable transactions cited in the charge letter were the result of trafficking?

After a thorough review of all evidence in this case, it is the determination of this review that the Retailer Operations Division's case does not reach a level of persuasiveness to conclude that trafficking was the most likely reason for the transaction patterns listed in the charge letter. There is not a way for this review to definitively conclude that trafficking did not, at any point, occur at the Appellant firm; nor would it be possible to do so in a case based on inconsistent redemption data. However, a determination of permanent disqualification must be supported to such a degree as to conclude that trafficking is the most plausible explanation. In light of the evidence and

information that was provided by the Retailer Operations Division as well as the documentation and explanation provided by the Appellant, it is the determination of this review that there are other legitimate theories, besides trafficking, for the unusual transaction patterns listed in the charge letter.

CONCLUSION

It is the determination of this review that the Retailer Operations Division has not met the burden of proving, by a preponderance of the evidence, that the transactions listed in the charge letter were, more likely than not, the result of trafficking. Therefore, it is the conclusion of this review that trafficking was likely not committed by the Appellant firm. As such, the determination to impose a permanent disqualification against Mis Amigos is hereby reversed.

RELEASE OF INFORMATION

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

JON YORGASON
Administrative Review Officer

May 18, 2018