

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

Morenaje Deli Café,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0199514

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Morenaje Deli Café (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(a) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Morenaje Deli Café by letter dated June 13, 2017.

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 March 23, 2017, 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 October 2016 through March 2017. 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).

The Appellant did not reply to the Charge letter. After giving consideration to the Appellant's failure to reply and evidence of the case, Retailer Operations Division issued a determination letter dated June 13, 2017. This letter informed ownership that they were permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also states that Retailer Operations considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, Retailer Operations Division determined that Appellant was not eligible for the CMP because it failed to submit sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated June 19, 2017, 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 2008¹, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) 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, in part that, "FNS may disqualify any authorized retail food store...from further participation in the program if the firm fails to comply with the Food and Nutrition Act of 1977, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, *evidence obtained through a transaction report under an electronic benefit transfer system...*" (*Emphasis added*)

7 CFR § 278.6(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."

¹ Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246

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.”

7 CFR § 278.6(b)(2)(ii) states, in part, that: “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(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.”

SUMMARY OF THE CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from October 2016 through March 2017. This involved the following transaction patterns which are trafficking indicators:

1. Multiple transactions were made from individual benefit accounts in unusually short time frames.
2. The majority or all of individual recipient benefits were exhausted in unusually short periods of time.
3. Excessively large purchase transactions were made from recipient accounts.

The first issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the identified irregular and questionable transactions were the result of trafficking in SNAP benefits.

APPELLANT’S CONTENTIONS

In its response to the charge letter and in its request for administrative review, Appellant made the following summarized contentions, in relevant part:

- I do not understand the charge of trafficking. The transactions that have been processed in my business have been legitimate and I was not aware of a limit on the time frame between the transactions that I placed for customers; nor did I know that there is supposed to be a purchase limit amount for these customers.

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 small grocery store on May 20, 2015. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during an April 17, 2017, 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 firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- One cash register and one POS device with a counter area that is approximately 1ft x 1.5ft in size, partially obstructed by other smaller items available for sale and based on store visit photographs, enclosed behind Plexiglas.
- No shopping baskets or carts available for customers.
- An optical scanner was available at checkout.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- Store typically ends price values in x9 and does not have a special pricing structure.
- Store does not round transaction totals up or down at checkout.
- Coffee, Cereal, Crackers and Bacon appear to be the highest priced items in the store.
- Does not take telephone orders, store food offsite, or offer a delivery service.
- Hot foods sold for take-out and for onsite consumption.
- A deli or prepared food section available with no prices posted for the meat and cheese by the pound. Prepared/made-to-order sandwiches with a microwave for kitchen use only.
- Store stock of lunchmeat, cheese, tomatoes and lettuce is being used in the deli/prepared food section.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold. Store also does not sell one type of food.
- Estimated at 825 square feet with no food stored in a storage area out of public view.
- The aisles are tightly packed with various items such as boxes or bottles found on the floor sometimes obstructing merchandise on the shelves. This would make it difficult to maneuver, find or carry items throughout the store.
- Does not operate through a night window or plastic barrier with food stock behind the barrier.
- Store is not a delivery route, farmers' market or specialty food store primarily selling one food type such as meat, poultry, seafood, bread, fruit or vegetables.
- Store stocks a significant amount of non-food items such as but not limited to household cleaning products, personal hygiene products, tobacco products, paper products, cookware, diapers,
- Store stocks ample amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products.
- Store did not sell any fresh or frozen meat or seafood other than hotdogs, deli meat and eggs.
- Empty or broken coolers were noticed in store.

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 individual benefit accounts in unusually short time frames.

During the review period, this attachment lists six sets of 12 transactions conducted by four households 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits. 5 U.S.C. § 552 (b)(7)(E). Although the number of transactions, in this Attachment, is minimal, the transaction amounts and time between each transaction appear excessive and inexplicable given the store's available stock and facilities.

The Appellant did not reply to the Charge letter but contends, in its review request, that it was not aware of a limit on the timeframe between customer transactions nor was it aware that there is supposed to be a purchase limit amount for these customers.

Regarding this contention, SNAP households have no limit on the number of times they may use their EBT cards; however, 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 the store's stock and facilities and are indicative of trafficking. The Appellant firm is a small grocery store that does not compare in size and stock to the larger supermarkets and or super stores where SNAP households often shop.

Sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, the record reflects that there are at least 63 authorized SNAP retailers within one mile of Appellant that include eight supermarkets and four superstores. Therefore, lack of access to other stores does not appear to be an explanation for the Appellant firm's abnormally high SNAP transaction amounts.

Retailer Operations also conducted an analysis of the shopping habits of eight 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 Union County area of New Jersey. This is another strong trafficking indicator.

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 – The majority or all of an individual recipient benefits were exhausted in unusually short periods of time.

During the review period, This attachment lists 38 sets of 45 transactions, involving 24 households, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in which individual recipient benefits were exhausted or nearly exhausted. Studies of historical transaction data shows that SNAP recipients do not normally exhaust their benefits in one or two transactions on the same day. A government report² on SNAP shopping patterns indicates that after the first day of benefit issuance, on average, 80 percent of a household’s allotment remains unspent. Even after seven days, 40 percent of benefits still remain unspent. It takes two weeks to deplete 80 percent of one’s benefits, and three weeks to deplete 90 percent.

Although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefits in only a few transactions or in a single day. Depleting one’s entire allotment in one or two days, or in a single large transaction, leaving no benefits for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP benefit households. Based on the contracted store visit report and photographs, there appears to be no basis for exceptional customer attraction to Morenaje Deli Cafe, there being no fresh or frozen meat, seafood or vegetables, no great price advantage, profusion of specialty or ethnic goods, or special or custom services rendered therefore, it is inconceivable that households would expend their entire monthly allotment in this store.

Appellant did not offer any explanation or related evidence in an attempt to clarify or justify the specific transactions behavior noted in Attachment 2.

Attachment 3 of the Charge letter - Excessively large purchase transactions were made from recipient accounts.

During the review period, this attachment lists 120 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 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. Other than prepackaged meat and lunchmeat, the firm does not offer any fresh or frozen meat or seafood, 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).

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The record reflects that there are 63 other SNAP authorized retailers within one mile of Appellant’s store which include eight supermarkets and four superstores. In comparison to the larger store types, Appellant’s average transaction amount, during the review period, was more than the large grocery stores and slightly less than that of supermarkets and superstores in Union County New Jersey. Appellant’s breadth and depth of

² U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program*, by Laura Castner and Juliette Henke. Project officer: Anita Singh, Alexandria, VA: February 2011

stock does not compare to the larger grocery stores, supermarkets and superstores and there does not appear to be any compelling reason for Appellant to have a higher average transaction amount than these better stocked stores.

Appellant did not offer any explanation or related evidence in an attempt to clarify or justify the specific transactions behavior noted in Attachment 3. Based on the above analysis, the Retailer Operations presented a convincing case that the Morenaje Deli Cafe trafficked in SNAP benefits which the Appellant failed to adequately rebut. The attachments furnished with the charge letter identify the irregular patterns of SNAP transactions which indicate that trafficking was taking place at the firm during the review period. As there is more than one pattern of trafficking, a determination that the Appellant firm engaged in trafficking becomes more convincing.

The transaction data and overall firm record convincingly demonstrate repetitive patterns of unusual, irregular, and inexplicable SNAP activity for this type of firm indicative of trafficking. Once Retailer Operations Division established a convincing case against Appellant, ownership bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. If this is not demonstrated, the case is to be sustained.

As noted, 7 CFR § 278.6(a) states that FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Retailer Operations has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns identified in the charge letter, the lack of food inventory necessary to support the firm's SNAP redemptions as observed and recorded during the onsite visit, the lack of purchase invoices of foods to cover SNAP redemption totals for the review months, the lack of adequate explanations for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant, and the irregular SNAP transaction data of Appellant as compared to other small grocery stores in the State. Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Therefore, based on this empirical data, and in the absence of evidence for the legitimacy for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the unusual, irregular, and inexplicable transactions and patters 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 owner 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 May 23, 2017. 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' analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Morenaje Deli Cafe. 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 above, the determination to impose a permanent disqualification against Morenaje Deli Cafe 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

September 12, 2017