

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

Munchies Corner Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0230453

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that Munchies Corner Market, (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 August 24, 2020.

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 July 8, 2020, 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 November 2019 through March 2020. 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).

During a July 15, 2020 telephone call, Appellant responded to the charge letter and generally stated that he offers credit. Retailer Operations Division explained that offering credit was a violation and to discontinue offering credit. In correspondence dated July 16, 2020, Retailer Operations Division informed Appellant that the acceptance of SNAP benefits as payment for items sold to a household on credit is a violation of SNAP regulation 278.2(f). A firm that commits such violations shall be disqualified from participation for a period of one year. Please provide documentation to support that food items were purchased on credit as noted in the response provided on July 15, 2020. Please provide the requested documentation and any information, explanation, or evidence you have regarding the charges outlined in our letter on July 8, 2020, within 10 calendar days of your receipt of this letter. Appellant was informed that a response must be submitted by July 27, 2020.

In email correspondence received on July 28, 2020, Appellant replied to the credit information request letter and stated that the charges were read, and it has taken top priority so that the problem does not happen again. Appellant requested reconsideration and the opportunity to show that they are capable of maintaining their business to SNAP regulations. A number of photographs were provided of the store as well as a special menu labeled for Emergency Transition Situations based on emergency needs.

Retailer Operations Division issued a Determination letter dated August 24, 2020. 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 August 27, 2020, 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 five-month period of November 2019 through March 2020. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. The bulk of SNAP households’ remaining benefits were depleted within short time frames.
2. Your store conducted EBT transactions that are large based on the observed store characteristics and recorded food stock.

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. According to our understanding of what was to be provided as evidence about the promo we have for people/families who are currently in Transition or Homeless.
2. I would also like to submit and demonstrate to CMP and SNAP the produce and products that we offer to our neighborhood because many of our clients are low income and are in

the food stamp program and elderly for their convenience most of them are on food so if they ask for a certain type of meat or produce we try to make their request available.

3. If you can reconsider your decision and review the pictures that I am providing to give you a general idea of what we sell in our market.

Appellant provided 29 color photographs of the store's stock as well as a copy of the July 1, 2020 through September 30, 2020 Sales Overview Report and the April 1, 2020 through July 1, 2020 Sales Summary Report.

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 August 5, 2019. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a June 27, 2019, store visit to the business conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. FNS utilized the June 27, 2019 store visit information due to COVID-19 restrictions. This information was then used to ascertain if there were justifiable explanations for the EBT transactions at Appellant that formed patterns indicative of trafficking. The firm review summary documented the following store size, description, and characteristics:

- One cash register and one POS device with a small counter area partially obstructed by other smaller items available for sale.
- Estimated to be approximately 800 square feet.
- Approximately eight hand baskets but no shopping carts available.
- No adding machines or optical scanners were available at checkout. No specialty registers present.
- Store does not operate through a night window or plastic barrier with food stock behind the barrier.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- No unusual pricing structure such as ending most products with 00 cents and does not round transaction totals.
- No food is stored in an area outside of public view.
- Store has 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 Joseph Farms Jack Cheese Block (\$12.00/4lb block), Coffee Mate (\$6.99), Nescafe Coffee (\$7.99) and Folgers Coffee (\$6.99).
- Store stocks a moderate amount of non-food items such as but not limited to paper products, household products, cleaning products, housewares, gift items, party goods, souvenirs, automotive products and health and beauty aids.

- 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.
- No kitchen/prepared food area
- No hot foods sold for onsite consumption.
- No deli or prepared food section. Stock is not used in preparation of food.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.

The issue for consideration is whether Retailer Operations Division has presented a convincing case that Appellant likely trafficked in SNAP benefits. Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

Attachment 1 of the Charge Letter - The bulk of SNAP households' remaining benefits were depleted within short time frames

This attachment lists 19 sets of 41 transactions **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 report¹ 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.

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 Appellant provide documentation to support that food items were purchased on credit as noted in the response dated July 15, 2020, and that the documentation must identify specific accounts along with corresponding dates and amounts. The record reflects that Appellant did not provide the requested documentation to support its claim of credit.

Appellant did not offer, with its review request, any explanation or related evidence in an attempt to clarify or justify the specific transactional behavior noted in Attachment 1 of the charge letter therefore, based on the analysis above and in the absence of any compelling evidence to the contrary, the irregular and unusual transaction pattern cited in the charge letter is unlikely and a strong indicator of trafficking in SNAP benefits.

¹ 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

Retailer Operations also conducted an analysis of the shopping habits of three of the households identified in the charge letter. This analysis concluded that these households also shopped at other area grocery stores including full-line supermarkets and superstores that offer a much larger quantity and variety of eligible food items for likely better prices either on the same day or within days of visiting Appellant's firm. This again indicates that lack of access to other stores is not at issue. However, despite this access to large supermarkets and superstores, these households consistently conducted much higher transactions at the Appellant firm than at better stocked supermarkets/superstores in and around the San Diego County area of California. 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 - Your store conducted EBT transactions that are large based on the observed store characteristics and recorded food stock

There were 99 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.

The record reflects that the owner claims that a special verbal contract is drafted for families in "transition". This "verbal" contract shows daily, weekly, and monthly offerings in exchange for SNAP benefits and only for those in emergency situations and in special circumstances. The items in the special contract are taken from the regular posted menu of prepared food items. It appears a 30-day supply of a daily Torta meal, which includes a small bag of chips and a 16oz bottle of water, is reduced to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) discount. It appears that Appellant may be requiring SNAP recipients to pre-pay for this transition special, which is a violation of SNAP regulations, as food must be paid for at time of receipt.

In the reply to the charge letter, Appellant did not specify how many households at any given time were receiving the stated special. As the form states that an in-person appointment is necessary, it seems unlikely that Appellant would not know how many households were receiving the special or that there would be a large number of households included. The charge letter dated July 8, 2020, lists 52 unique household numbers however during the review period of November 2019 through March 2020, there were only three (3) households transaction amounts that exactly matched 5 U.S.C. § 552 (b)(6) & (b)(7)(C). While those three transactions may be explained by Appellant's claim of meal specials, it does not explain or justify the remaining transactions conducted by 49 other households. The record reflects that it does not appear that all of the households in the charge letter are reliant upon the secret transient menu as they are clearly shopping elsewhere, with clear means to travel as evident by their location.

Aside from the explanation of transition families receiving special meal packages, no other explanation was provided for the transactions cited in Attachment 2 of the charge letter. It is

therefore more likely true than not true that the irregular transactions cited in the charge letter Attachment 2 are due to trafficking in SNAP benefits.

Based on this empirical data, and in the absence of sufficient evidence as to the legitimacy of such transactions, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the charge letter evidence trafficking as the most likely explanation. In this case, ownership did not provide sufficient evidence to legitimize Appellant’s transaction data as outlined in the Attachments. Retailer Operations Division determined that Appellant’s contentions did not outweigh the evidence that the store was trafficking and concluded, through a preponderance of evidence, that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

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

As noted, 7 CFR § 278.6(a) states that FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 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 inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Retailer Operations Division has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns in two attachments of EBT transaction data, the inadequacy of the firm’s eligible food stock as observed and recording during the onsite visit to support such large transactions, the lack of evidence of invoices of foods in inventory to cover SNAP redemption totals for the review months, the lack of explanation for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant, and the irregular SNAP transaction data of Appellant as compared to other convenience stores in the State.

Generally, stores caught in trafficking violations consistently display particular characteristic transaction patterns including those cited in the charge letter and, in the absence of evidence for the legitimacy of such transaction patterns, based on information submitted by the Appellant and a comparison of the store’s characteristics and available stock to the transaction patterns cited in the charge letter, a conclusion can be drawn through a preponderance of evidence that the unusual, irregular, and inexplicable transactions and patterns evidence trafficking as the most likely explanation. While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations Division determined that Appellant’s

contentions did not outweigh the evidence in the record.

The purpose of the administrative review process is to ensure that firms aggrieved by Retailer Operations Division' adverse actions have the opportunity to have their position fairly considered by an impartial review authority prior to that adverse action becoming final. Appellant has been duly given and has taken the opportunity to present to USDA through the administrative review process whatever evidence and information it deems pertinent in support of its position that Retailer Operations Division' adverse action should be reversed. Therefore, any evidence and information that Appellant presented to Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to Appellant's right to a fair and thorough review.

CIVIL MONEY PENALTY

Appellant contends that it would submit and demonstrate that a CMP is warranted. Appellant failed to provide Retailer Operations Division with the required documentation to be considered for a trafficking CMP in lieu of disqualification and the photographs provided of the store and the special transient menu does not rise to the level, required by regulation, to be considered for a CMP in lieu of permanent 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' analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Munchies Corner Market 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 Munchies Corner Market 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

January 26, 2021