

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

Payless 99 Cents & Up Inc,

Appellant,

v.

Case Number: C0209673

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 sufficient evidence to support a finding that the permanent disqualification of Payless 99 Cents & Up Inc. (Payless 99 Cents & Up or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), 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), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

AUTHORITY

7 USC § 2021 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 10, 2018, the Retailer Operations Division charged 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 December 2017 through May 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant did not reply to the charges. After considering the evidence, the Retailer Operations Division issued a determination letter dated July 31, 2018. The determination letter informed Appellant that it was permanently disqualified from the SNAP in accordance with 7 CFR 278.6(c) and § 278.6(e)(1). The determination letter also stated that Appellant was not eligible for a trafficking CMP because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

By letter dated August 6, 2018, Appellant appealed the Retailer Operations Division's determination and requested an administrative review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions 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.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) and (e)(1) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 USC § 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 § 271.2 states that the definition of "coupon" includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

7 CFR § 271.2 states, in part, that, 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 § 271.2 defines trafficking, in part, as:

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 § 278.6(a) states:

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, evidence obtained through a transaction report under an **electronic benefit transfer system**, . . .” (emphasis added)

7 CFR § 278.6(b)(2)(ii) states, inter alia:

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(e)(1) reads, in part:

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

7 CFR § 278.6(i) states, inter alia:

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 § 278.6(b)(2) states, in part:

(ii) 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 as specified in § 278.6(i), 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).** [Emphasis added.]

(iii) **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. [Emphasis added.]

SUMMARY OF THE CHARGES

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from December 2017 through May 2018. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were multiple transactions made from individual benefit accounts in unusually short time frames.
- There were excessively large purchase transactions made from recipient accounts.

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

APPELLANT'S CONTENTIONS

In its August 6, 2018, administrative review request, Appellant provided the following summarized contentions, in relevant part:

- Most SNAP households buy a lot of stuff when they receive their benefits.
- SNAP households try to buy as much as they can and they are worried that Appellant will mess up and charge double amount while it is doing the counting.
- Sometimes SNAP customers do not know how much is on the card so they want to pay first part and then conduct another transaction.
- Appellant is strictly following the SNAP regulations.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced.

ANALYSIS AND FINDINGS

Store Visit

FNS authorized Payless 99 Cents & Up as a convenience store on August 15, 2011. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a March 28, 2018, store visit 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:

- Payless 99 Cents & Up is approximately 3,000 square feet, with a small storage area with containing non-food items outside of public view.
- The checkout area was small and limited in space.
- There were shopping baskets and shopping carts for customer use.
- There was one cash register and one point-of-sale device.
- There was no fresh meat.
- There was some packages of hot dogs and frozen chicken and shrimp.
- There was no fresh produce.
- Dairy included milk, butter, and coconut milk.
- Frozen food included fried chicken, ice cream, vegetables, sandwiches, chicken, fish, and waffles.
- Other staple foods available for purchase were cereal, juice, rice, bread, beans, pasta, and canned goods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included paper goods, cleaning products, party supplies, housewares, and gift items.
- There were empty shelves noted.

The SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. The contractor visit noted only two items with a price of \$5.00 or more: frozen fried chicken (\$5.99 and frozen shrimp (\$9.99). Given the available inventory, there was very little sign that the firm would be likely to have SNAP redemption patterns that differed significantly from those of similar-sized competitors, especially competitors that sell similar or identical food items.

Charge Letter Attachments

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.

Charge Letter Attachment 1. Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment documents 13 sets of transactions conducted by ten households that meet the parameters of this scan. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions

noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of Appellant's stock and facilities and are therefore indicative of trafficking. The photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Appellant multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale. The second and third transactions in each set are too large to consist of forgotten items.

Appellant explains that the transactions are customers checking their SNAP balance. None of these transactions are for low amounts indicative of SNAP households checking their balance as claimed by Appellant. It should be noted that as required by SNAP regulations at 274.12 (f), the EBT card holder must be able to check their account balance using the retailer's POS terminal without making any purchases or standing in a checkout line, and they can telephone a toll-free number for that information as well. Regulations also require that EBT card holders receive a POS terminal receipt showing the dollar amount of remaining benefits so, contrary to Appellant's contention, it would be unusual for many households to not know their SNAP balance.

Appellant explains that SNAP households are worried that Appellant will mess up and charge double so they break their purchases up into smaller amounts. It is unclear why customers would be worried that Appellant would charge the wrong amount. There is no evidence to support this statement. This pattern is not common and it is unclear why households would need to break their transactions up at Appellant but not other stores that they shop. This is not a credible explanation for the transactions.

Appellant explains that customers like to get as much food as they can when they receive their benefits. The Retailer Operations Division determined that four of the ten households conducted a transaction at a large grocery store, supermarket, or super store on the same day as conducting a transaction flagged on this Attachment. Seven households conducted a transaction at a large grocery store, supermarket, or super store within two days of conducting their flagged transaction at Appellant. The question is why households that are regularly shopping at much larger stores offering a greater quantity and variety of SNAP eligible food stock would be conducting multiple, high dollar value transactions at a convenience store that offers a marginal selection of staple food items.

While there are legitimate reasons why a SNAP household may shop at a given store multiple times in a day, the repetitive transactions cited in Attachment 1 is not normal shopping behavior at a convenience store. In the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 233 transactions conducted by 92 households **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These large transaction amounts are also not consistent with the store's inventory. The photographs from the store visit indicate that the counter space was small, and there was no fresh meat and no fresh produce. It is unlikely that customers would consider Appellant as a first choice destination to fulfill large purchases of food. Appellant's

average SNAP transaction amount was close to double the average SNAP transaction amount for convenience stores in the state and in the county.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). There was no evidence of a special pricing structure or bulk packages for sale that would cause such a phenomenon. This is a highly abnormal pattern and suggests that the transaction amounts were contrived.

The Retailer Operations Division compared Appellant to two other nearby convenience stores. Each of the two transaction patterns of Appellant, described in each of the charge letter attachments, exceed the other two authorized stores, as seen on the table herein. The number of transactions meeting this pattern during the review period is irregular. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar-sized competitors.

5 U.S.C. § 552 (b)(7)(E)

Sometimes a firm may have higher than normal SNAP transactions amounts due to a recipient's lack of access to other SNAP authorized stores. However, the Retailer Operations Division determined that there are eight combination groceries, 86 other convenience stores, 97 small groceries, 35 medium groceries, four large groceries, 12 supermarkets, and four super stores within a one-mile radius of Appellant. The Retailer Operations Division also determined that 52 of the 92 households that conducted a transaction on this Attachment conducted a transaction at a large grocery store, supermarket, or super store on the same day as conducting its flagged transaction at Appellant. Sixty-six households of the 92 households conducted a transaction at a large grocery store, supermarket, or super store within one day of its flagged transaction at Appellant and 76 households conducted a transaction with a large grocery store, supermarket, or super store within two days of conducting its flagged transaction at Appellant.

The Retailer Operations Division examined five households identified in the charge letter to analyze their shopping patterns at Payless 99 Cents & Up compared to their shopping patterns at other SNAP authorized stores. Despite access to better stocked stores, each of the five households conducted excessively large transactions at Payless 99 Cents & Up within a short time of shopping at a supermarket or super store. Again, it is questionable as to why households would conduct large transactions at Appellant, when these households had just visited or planned to visit larger stores with a better selection of fresh meat and produce and likely better prices.

In summary, Appellant's layout, business structure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. 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 to legitimize 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.

Evidence

FNS utilizes a computerized fraud detection tool to identify SNAP transactions that form patterns having characteristics indicative of trafficking. However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still conduct an extensive analysis of the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether the questionable transactions were, more likely than not, the result of trafficking.

The legality of this method is supported by 7 CFR §278.6(a) which states, inter alia, “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, **evidence obtained through a transaction report under an electronic benefit transfer system**” [Emphasis added.]

Appellant states that it is strictly following the SNAP regulations. Appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed and that the transactions detailed in the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. Appellant offered no relevant evidence to prove that the transactions listed in the charge letter were legitimate purchases of eligible food. In the absence of compelling information or documentation weighed in comparison to the evidence provided by the Retailer Operations Division, the evidence weighs in favor of the Retailer Operations Division’s determination that SNAP-benefit trafficking substantially produced the transaction activity at issue.

Civil Money Penalty

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR §278.6(i). Appellant was informed that it would need to provide both the request and supporting evidence within ten calendar days of receiving the charge letter and that no extension of time could be granted for making the request or for providing the required evidence. The Retailer Operations Division determined that Appellant was not eligible for a CMP because there was insufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program prior to the SNAP violations in this case. For example, there was no documentary evidence showing that SNAP training was provided to its employees.

CONCLUSION

The Retailer Operations Division’s analysis of Appellant’s EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program

violations did occur as charged by the Retailer Operations Division. The determination to impose a permanent disqualification against Appellant is sustained.

The Retailer Operations Division also determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations. Under review, the denial of a trafficking CMP was deemed correct and proper.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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 the Appellant's owner resides or is 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, 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

December 4, 2018