

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

San Miguel Grocery,

Appellant,

V.

Retailer Operations Division,

Respondent.

Case Number: C0229051

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that San Miguel Grocery, (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 July 23, 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 May 28, 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 December 2019 through April 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).

In correspondence dated June 3, 2020, Appellant replied to the charge letter and generally stated that the firm has been in the neighborhood for many years before ownership took over the business from their father and his wife. Appellant stated that since the firm has been well known for many years, they have loyal customers, some who do not have transportation or money to get to big supermarkets to do their necessary food shopping. Appellant indicated that it offers a variety of food that people need on a daily basis. We have attached copies of receipts and photos of our food inventory expenses to show how our firm operates with our food stock. Our firm does not have control over the frequency our customers or household members of our customers want to go for our food grocery services. We are new to this USDA Food Program and we would like to know if EBT food holders have a limit as far as how many times they can make a transaction in our store because if there is a limit than we did not know about this and we will be glad to enforce this with our customers if needed. We believe that we have not committed trafficking violations because all EBT transactions made in our firm have been made for essential foods to our customers.(sic) Appellant provided six (6) color photographs of the store's stock.

After giving consideration to the Appellant's reply and evidence of the case, Retailer Operations Division issued a determination letter dated July 23, 2020. 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 July 27, 2020, Appellant, through counsel, 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 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(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 December 2019 through April 2020. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from the accounts of individual SNAP households within a set time period.
2. Your store conducted EBT transactions that are large based on the observed store characteristics and recorded food stock.

The 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. I would like to apologize for any misrepresentation of myself the transactions might impose on our personality and ethics which I can guarantee do not reflect the true self of us and the professional business ethics we use to run my business.
2. I started taking actions and telling customers they have to either make smaller purchases or get products as they are consumed because the amounts of purchase are reflecting a negative view of my ethics and business management with the SNAP program.
3. I believe we have been canceled unfairly, we did not receive any investigator to our store. All basis are electronically, an investigation in person would prove we do not commit fraud and have high standards in ethics.
4. I have no control on the timing and amounts of purchases of individuals in my store.
5. I ask for consideration of no disqualification action and ask for the SNAP program to continue monitoring my transactions for proof that I have taken action regarding this issue and to demonstrate such transactions will not continue as repetitive patterns nor unusual and irregular.

Appellant did not provide any additional information during this review. The preceding may represent a brief summary of Appellant's contentions in this matter however, in reaching a decision, full attention has been given to all contentions presented, including any not specifically recapitulated or referenced herein.

ANALYSIS AND FINDINGS

The FNS initially authorized the business as a small grocery store on October 17, 2019. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during the March 29, 2020, store visit to the business conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock and facilities. This information was then used to ascertain if there were justifiable explanations for the EBT transactions at Appellant that formed patterns indicative of trafficking. The firm review summary documented the following store size, description, and characteristics:

1. One cash register and one POS device with a small counter area partially obstructed by other smaller items available for sale.
2. Estimated to be approximately 944 square feet.
3. Store has 10 shopping baskets but no shopping carts available for customers.
4. No adding machines or optical scanners were available at checkout. No specialty registers present.
5. Store does not operate through a night window or plastic barrier with food stock behind the barrier.
6. No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.

7. No unusual pricing structure such as ending most products with 00 cents and does not round transaction totals.
8. Food is not stored in an area outside of public view.
9. Store has storage freezers or coolers but no food stored off site.
10. Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
11. Store does not take telephone or online orders and does not offer delivery
12. Highest priced eligible food items were Mazola Corn Oil (\$12.99), Café Bustelo Coffee (\$8.99), Banquet Frozen Fried Chicken (\$8.99) and Similac Advance Infant Formula (\$18.49).
13. Store stocks a significant amount of non-food items such as but not limited to paper products, household products, tobacco products, automotive products, health and beauty aids, gift items, and cleaning products.
14. Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products. No fresh meat or poultry and fresh produce is limited. Most meats are canned, packaged or frozen.
15. No kitchen/prepared food area and no hot foods sold.
16. No deli or prepared food section. Stock is not used in preparation of food. Microwave available for onsite consumption of some foods (used by employees only).
17. 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 – Multiple transactions were made from the accounts of individual SNAP households within a set time period.

There were 27 sets of 60 SNAP transactions that met the parameters of this attachment. Multiple transactions conducted by the same household account within a set time period is a method which violating stores use to avoid the detection of single high dollar transactions that cannot be supported by the retailer's inventory and structure. Occurrences of two or more significant transactions is an indicator that these transactions do not reflect the additional purchase of forgotten items especially when some of the transactions exceed the previous transaction amount. It's unusual for a client to conduct multiple transactions in a store with the available stock as shown in the store's photos.

Appellant did not offer any specific evidence or justification for the SNAP transactions cited in Attachment 1 of the charge letter. With regard to the aforementioned contentions, the record reflects that there are 15 authorized stores within a 1 mile radius of Appellant's store which include small, medium and large grocery stores, supermarkets and super stores. This confirms SNAP recipients had access to larger food outlets with higher varieties of stock at presumably lower prices.

Furthermore, while it is acknowledged that SNAP households can consist of many members, the Appellant has offered only conjecture that the transactions listed in the charge letter were made by larger households. No actual evidence was presented by the Appellant that identifies specific transactions as being made by households with multiple members. It is important to note that the SNAP transactions identified in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the layout and extent of Appellant's stock and facilities and are indicative of trafficking.

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 197 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 average small grocery store purchase transaction amount during the review period was \$14.33. During that same period, Appellant had 197 transactions which were higher than 85% of all small grocery store purchase transactions in the area.

Retailer Operations 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 Worcester County area of Massachusetts. This is another strong trafficking indicator. The record reflects that SNAP households that shopped at Appellant's store also shopped at other stores and expended 24 percent more, during the review period, at other stores than at Appellant's store. Appellant did not provide any specific explanations for the transactions cited in the charge letter.

Appellant contends that it provided invoices and receipts. The record reflects that a review of the invoices/receipts provided, for Jan, February and March of the review period, using a 40 percent markup shows that Appellant's redemptions were greater than its purchases during the months provided. SNAP redemptions that significantly exceed the documented inventory is unusual and likely indicative of trafficking. It is important note that even if there were sufficient food stock at Appellant to mathematically support the high dollar transactions, there does not appear to be anything that would reasonably attract SNAP households to shop at Appellant, which is a small grocery store offering limited stock, and spend substantial amounts of their SNAP benefits. Also, even if there were sufficient staple food purchases to account of the SNAP redemptions, there is not enough information to determine whether they account for the sum of

Appellant's SNAP and non-SNAP transaction activity. While the overall dollar amount of SNAP activity is relevant, the charge letter did not cite as evidence Appellant's SNAP sales total. Rather, the ROD identified a series of different suspicious transaction patterns.

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.

It is noted that neither the poverty rate nor economic impact of losing SNAP authorization provide any evidence to support the unusual transaction patterns noted in the charge letter. 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 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 small grocery stores in the State.

In the absence of evidence for the legitimacy for such transaction patterns based on information submitted by 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 was notified in the charge letter dated May 28, 2020, that it had 10 calendar days upon receipt of the charge letter to provide required documentation in order to be considered for the trafficking CMP. Appellant failed to provide Retailer Operations Division with the required documentation to be considered for a trafficking CMP in lieu of 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 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 San Miguel Grocery 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 San Miguel Grocery 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

December 15, 2020