

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

La Surtidora,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0224106

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS) finds there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification of La Surtidora (“Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against La Surtidora.

AUTHORITY

7 U.S.C. § 2023 and 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 SUMMARY

La Surtidora was initially authorized to participate in SNAP on December 4, 2007. In a letter dated January 6, 2020, the Retailer Operations Division charged Appellant with trafficking, as defined in § 271.2 of SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred between the months of May 2019 and October 2019 and information obtained during a visit to the store by an FNS contractor on October 26, 2019. The attachments enclosed with the charge letter specified the questionable and unusual SNAP transactions indicative of trafficking that were conducted at Appellant’s firm during the review period. The letter noted that the penalty for trafficking is permanent disqualification, as provided in 7 CFR § 278.6(e)(1). It informed Appellant of the right to respond to the charges within 10 days of receipt to explain

the irregular SNAP transaction patterns and provided that Appellant may request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking within 10 days of receipt of the charge letter, under the conditions specified in 7 CFR § 278.6(i).

In response to the charge letter, on January 16, 2020, Appellant, through counsel, requested documents under the Freedom of Information Act (FOIA). The FOIA Office responded to Appellant's FOIA request on June 9, 2021.

Appellant responded to the trafficking charges, through counsel, on October 1, 2021. Among other contentions, Appellant attempted to explain the irregular transaction patterns as due to the statistical results of the store's normal business operations and circumstances, local demographics, particular shopping habits of the store's clientele, and the availability of inventory and staple food items at the store. To support these explanations, Appellant submitted customer affidavits, tax returns, bank statements, and photographs of store inventory. Although after the deadline specified in the charge letter, Appellant also requested a CMP in lieu of a permanent disqualification.

After considering Appellant's reply and further evaluating the evidence, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated January 25, 2022. This letter informed Appellant that the firm would be permanently disqualified from SNAP upon receipt of the letter, in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that Appellant was not eligible for a trafficking CMP in accordance with § 278.6(i) because Appellant failed to submit sufficient evidence to demonstrate the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a January 26, 2022, letter, Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted. After receiving an extension of time to provide additional information in support of its position, Appellant, through counsel, submitted additional information on March 8, 2022.

STANDARD OF REVIEW

In an appeal of an adverse action, the appellant bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. This 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 law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

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

[A] disqualification under subsection (a) shall be...permanent upon...the first occasion or any subsequent occasion of a disqualification based on the purchase of [SNAP benefits] or trafficking in [SNAP benefits] 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, in part:

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

Trafficking means:

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

7 CFR § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food. [SNAP benefits] may not be accepted in exchange for cash...[and] may not be accepted in payment of interest on loans or for any other nonfood use.

7 CFR § 278.6(a) states, in part:

FNS may disqualify any authorized retail food store...if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, **inconsistent redemption data, [or] evidence obtained through a transaction report under an electronic benefit transfer system....** Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; for [a] period of 12 months to 10 years for a firm's second sanction; and **disqualification shall be permanent for a disqualification based on paragraph (e) (1) of this section.** [Emphasis added.]

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

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

7 CFR § 278.6(b)(2)(iii) states:

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

7 CFR § 278.6(e)(1)(i) states, 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, 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 CHARGES

FNS charged La Surtidora with trafficking based on an analysis of FNS records, which included observed store characteristics, recorded food stock, and store pricing gathered during a store visit, as well as Electronic Benefit Transfer (EBT) transaction data for May 2019 through October 2019. The attachments enclosed with the charge letter reflected the following transaction patterns, which commonly indicate trafficking:

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

APPELLANT'S CONTENTIONS

Appellant, through counsel, submitted a voluminous brief which included a considerable number of contentions and exhibits targeted to broadly question the validity of trafficking cases based on SNAP benefit redemption data, as well as the processes used to develop and decide these cases. Appellant also argues, in part, that normal SNAP household shopping behaviors, local business conditions, and other factors can explain the transactions identified in the charge letter. Appellant cites case law and past administrative review decisions in support of its contentions. For purposes of brevity, these broader arguments will not be specifically listed here.

Contentions specific to Appellant's case are summarized below:

- The store is a Mexican grocer and party supply store that has accept SNAP since 2007. It sells a variety and quantity of staple food items.
- The store visit inspector missed recording some higher priced items.
- Stores nearby are stacked upon one another and have more direct competition and so each receives smaller portion of the overall SNAP business.
- Nine customer affidavits are included as evidence stating that customers spend anywhere from \$30-\$200 at the store, and a majority stating they come in multiple times a day.
- The store was previously investigated twice and found not to be trafficking both times.

In addition to the exhibits referenced above, Appellant submitted additional photos of store inventory, copies of inventory purchase invoices, and copies of the same customer affidavits previously provided to the Retailer Operations Division in response to the charge letter.

The preceding represents a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any that have not been specifically listed here.

ANALYSIS AND FINDINGS

This review examines the relevant information regarding the Retailer Operations Division's trafficking determination. The record must contain evidence sufficient to raise a presumption that trafficking occurred. In a trafficking determination, this evidence includes SNAP transaction data, considered together with other available information, such as store visit observations, the location and characteristics of competitor firms, and household shopping patterns. Once the presumption is established, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that it did not engage in trafficking. If Appellant fails to show this, the case will be sustained.

Retailers are provided opportunities to submit evidence accompanied by explanations of the legitimacy of questionable transactions, both to the Retailer Operations Division and here on administrative review. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

Based on the evidence in this case, the SNAP transactions listed in the January 6, 2020, charge letter were indicative of trafficking. Appellant has not provided reasonable explanations supported by sufficient credible and convincing evidence to demonstrate that these transactions were more likely due to reasons other than trafficking. Accordingly, the permanent disqualification is sustained. Discussed below are elements of the Retailer Operations Division's record, Appellant's contentions, and the findings of this review.

Store Characteristics

In reaching a disqualification determination, the Retailer Operations Division considered information obtained from a store visit conducted by an FNS contractor on October 26, 2019, to observe the nature and scope of the firm's operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns.

The store visit report and photographs documented that the Appellant store has about 3,500 square feet of sales space and about 500 square feet of storage space in three separate areas that contained only non-food items. The store had no fresh fruits and vegetables or unprocessed meats for sale. The store did not sell prepared food items. The store was a party supply store, selling pinatas, party favors, and decorations in addition to selling some food items and other household goods.

Although Appellant claims that the store visit inspector missed recording some higher priced, primarily bulk accessory food items, the store visit report and photographs show no evidence of many of the items identified by Appellant being sold at the store, or for the prices specified. While the photographs submitted by Appellant for administrative review show some of these items, these photographs likely show improved inventory since the store was charged with trafficking and were likely taken specifically for administrative review. The store visit report shows the highest priced item at sold at the store was a 5-pound bag of candy for \$15.99. The remaining three highest priced items at the store ranged from \$5.99 to \$8.49. The highest-priced items on the store visit report were identified in collaboration with store personnel.

With a few exceptions, 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. Given the available inventory, there was very little sign that the firm would likely have SNAP redemption patterns that differed significantly from those of similarly sized competitors, especially competitors that sell similar or identical food items.

SNAP Transaction Analysis

While SNAP households are not limited in the number of times they may use their SNAP benefit card or how much eligible food they may purchase in SNAP transactions, government analyses have found that stores likely trafficking SNAP benefits have particular transaction patterns or characteristics that are inconsistent with the transaction patterns and characteristics of similarly situated stores. The Charge Letter Attachments specify the unusual transactions and transaction patterns found at Appellant's store, which are considered together with other available

information, such as store visit observations, the location and characteristics of competitor firms, and household shopping patterns, to determine if the anomalies can be explained based on circumstances specific to the store.

Charge Letter Attachment 1: Multiple transactions were made from the accounts of individual SNAP households within a set time period. This attachment included 18 sets of transactions (40 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Violating stores often conduct multiple transactions from the same household account in short time periods to avoid the detection of single high-dollar transactions that cannot be supported by the retailer's inventory, store type, or structure.

The transactions in Charge Letter Attachment 2 included sets of transactions that were very large, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Several of the transactions within sets were close together, taking place within minutes or hours despite each being a large purchase that would likely last for a significant period of time. Although it is not uncommon for customers to have multiple transactions in a day or two, it is uncommon that, at a convenience store, such multiple transactions total 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 to 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.

Charge Letter Attachment 2: EBT transactions that are large based on the observed store characteristics and recorded food stock. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant's average transaction amount exceeds that of even larger store types, such as small, medium, and large grocery stores, in the same county or State during the review period.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Since the store sold primarily low dollar value items, it would take a very large volume of items to reach some of these transaction amounts. Again, the store's inventory and characteristics did not support the frequency of large transactions reflected in this Charge Letter Attachment. Additionally, there is nothing notable about the store that would make its redemption patterns differ so significantly from those of similarly-sized competitors offering similar food items.

In addition to the transactions in this attachment being unusually large, it is notable that the three largest transactions in this charge letter attachment were conducted manually. Manual transactions normally occur when a retailer is unable to swipe an EBT card (for example, if the card has a damaged magnetic stripe). A manual transaction is not inherently suspicious, but a pattern of manual transactions for primarily larger transaction amounts can be suspicious. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Here, Appellant's highest transactions were disproportionately conducted manually, without a working EBT card present.

Competitor Stores

The Retailer Operations Division reviewed the number of SNAP authorized retailers within a one-mile radius of Appellant to determine if households living near Appellant had access to other shopping options during the review period. Mapping showed a superstore, five supermarkets, three large grocery stores, seven medium grocery stores, six small grocery stores, and 31 other convenience stores within the one-mile radius. This comparison demonstrates that households shopping at Appellant likely had access to larger stores that may have lower prices and better inventory. With these shopping options, it is unlikely that SNAP recipients would expend their SNAP benefits in large amounts at Appellant's convenience store, and that they would do so recurrently.

Household Analysis

In addition to determining if households had access to other shopping options, the Retailer Operations Division conducted a household analysis to determine if households conducting suspicious transactions at Appellant actually utilized larger stores during the review period. As noted above, larger stores usually have lower prices and better inventory.

The analysis included examples of three households with unusual shopping patterns at Appellant that also regularly shopped at larger stores. These examples included a household that recurrently shopped at supermarkets or superstores on the same day, or within a day, of shopping at Appellant. Often the transactions amounts at Appellant were larger than the transaction amounts at the larger store types. This is unusual as a household is more likely to spend more of its SNAP benefits at the larger store type, which offers better prices and a larger inventory. A second household's address was located two miles from Appellant, but the household conducted nine transactions that met the parameters of the charge letter attachments at Appellant even though there were larger stores closer to the household address.

The Retailer Operations Division's analysis demonstrated that households shopping at Appellant during the review period had access to larger stores. In addition, the households' behavior further indicated that the transaction patterns in the Charge Letter Attachments were suspect.

Comparison with Similarly Situated Convenience Stores

The Retailer Operations Division reviewed Appellant's store transactions to determine how they compared to convenience stores nearby during the review period. The Retailer Operations Division chose six convenience stores near Appellant and found that Appellant's transactions were significantly aberrant when compared to similarly situated stores. For example, Appellant had more transactions that met the parameters of each of the charge letter attachments than the other six stores combined. Although Appellant claims to have less direct competition than nearby convenience stores, mapping did not show this to be true during the review period.

Evidence of Trafficking

Regarding Appellant's contentions with respect to the reliability of the ALERT system and confirmation bias, USDA employs a computerized fraud detection tool to identify EBT transactions that form patterns that have characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. The Retailer Operations Division analyzes the transaction data and patterns along with other documentation such as, information from the onsite store visit report including photographs of stock and the store layout, an analysis of recipient shopping behavior, and comparisons with similar store types in local area, to render a determination as to whether or not the questionable transaction patterns were, more likely than not, the result of trafficking.

The regulations at 7 CFR § 278.6(a) state 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, and that 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. This review has thoroughly examined the documentation provided by the Retailer Operations Division and finds that the identified EBT transactions along with other relevant information support the presumption that trafficking was likely occurring. Appellant has failed to provide sufficient evidence to show it did not engage in trafficking.

Tax Records/Bank Statements/Invoices

The Appellant contends that the submitted bank statements, inventory invoices, and tax return for the review period substantiate the firm's inventory and demonstrate that there was adequate eligible food items to account for the transactions during the review period. The bank statements provide general descriptions of transactions made by Appellant but do not provide detailed transactions that would allow FNS to evaluate the store's inventory. Likewise, the income and sales tax returns provide no information of the inventory purchased by the store or the individual SNAP transactions that occurred during the review period. As such, these documents do not offer additional insight as to what occurred during the charge letter transactions and do not validate that they were legitimate, bona-fide transactions.

Appellant also submitted 90 pages of vendor purchase receipts/invoices for review. Most of these invoices were not dated during the review period or did not have discernable dates on them. Of the limited invoices that reflected months within the review period, one invoice did not have enough information for analysis. The invoices dated within the review period that contained sufficient information for analysis showed SNAP eligible inventory purchases totaling \$2,726.07. Including a standard 40 percent markup, the retail value of the food purchased in the invoices during the review period was \$3,816.50. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Even if there were sufficient food stock at Appellant to mathematically support high dollar transactions, there does not appear to be anything that would reasonably attract SNAP households to shop there, a convenience store, and spend substantial amounts of their SNAP benefits.

Compliance History

Appellant contends that it has accepted SNAP benefits since 2007 and has been previously investigated twice but found not to be trafficking both times.

Although Appellant may have refused to traffic to an unknown undercover investigator, this is not evidence that Appellant always enforces the SNAP rules and regulations. The refusal might be because Appellant's personnel do not commit SNAP violations with unknown households for fear of being caught or because an unidentified clerk did not wish to commit SNAP violations at the given time.

Case Law and Past Administrative Reviews

With regard to the case law cited by the Appellant, it is beyond the scope and authority of this review to determine the applicability of same. This review is limited to consideration of whether or not the Retailer Operations Division duly adhered to the Food and Nutrition Act of 2008, as amended, and the implementing regulations, and whether or not the action taken is sustainable by a preponderance of the evidence. Therefore, the application of any judicial precedent is better addressed via judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

With regard to the prior Final Agency Decisions cited by the Appellant, this administrative review decision is based on the specific circumstances of this case as documented by the materials provided by the Appellant and the Retailer Operations Division. This administrative review decision does not establish policy or supersede Federal law or regulations. The determination in this case conforms to SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations.

Customer Affidavits

In support of its contentions, Appellant submitted eight customer affidavits in which customers attested to making frequent or large purchases at the store, and/or a preference for shopping at the store because of factors such as the store's location, food prices, or good customer service.

Although customer affidavits attested to customers shopping at Appellant for different reasons, analyzed shopping patterns show that households shopping at Appellant, in fact, also shopped at larger, better stocked, and more competitively priced grocery stores, often on the same day. Additionally, the Retailer Operations Division conducted a search in the State administrative terminal using the names and address in these affidavits. Two of the households did not appear in the system, while two were found not to have conducted transactions that appeared in the charge letter attachments. These anomalies raise doubts regarding these affidavits and therefore the statements have little probative value in the case. While four households that completed affidavits had conducted transactions at Appellant during the review period, this represents a small portion of the 75 households that conducted the violative transactions on the charge letter attachments. Additionally, customer affidavits are often unreliable, even if well-intentioned. They typically do not represent a household's actual shopping behavior or demographics because households

generally do not retain records of transactions or it is difficult to recall spending patterns at a specific location.

Summary

This review finds that the attachments furnished with the charge letter adequately identify irregular patterns of SNAP transactions, thereby indicating that trafficking was likely taking place. The transactions listed in the charge letter are highly unusual and substantially different from comparable stores in the area. Based on these and other factors, such as the store's physical characteristics and inventory and household shopping patterns, the case for trafficking is convincing.

On review, the Appellant failed to prove, by a preponderance of the evidence, that the administrative action should be reversed. The Appellant has not offered sufficient and compelling evidence that the "unusual, irregular, and inexplicable" transactions and patterns cited in the charge letter were not caused by trafficking. In fact, the Appellant offered no reliable evidence to support its contentions regarding specific transactions listed in the charge letter. Given the totality of the record, this review finds the transactions listed in the charge letter attachments were, more likely than not, the result of trafficking violations committed by the Appellant. Therefore, the Retailer Operations Division's decision to impose a permanent disqualification against La Surtidora is sustained.

CIVIL MONEY PENALTY (CMP)

Appellant now requests, in the alternative, that it be assessed a trafficking CMP and contends to have implemented an effective compliance program to prevent SNAP violations. However, Appellant did not request consideration for a trafficking CMP in lieu of a permanent disqualification within 10 days of the receiving the charge letter dated January 6, 2020, even though it was informed of the requirement to do so.

SNAP regulations, at 7 CFR § 278.6(b)(2)(ii), mandate that a request for a trafficking CMP along with supporting documentation shall be submitted within 10 days of receipt of the charge letter. SNAP regulations, at 7 CFR § 278.6(b)(2)(iii), also state, in part, that "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 ... the firm shall not be eligible for such a penalty." Even if Appellant had submitted a timely request, it likely would 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 correctly determined that Appellant is ineligible for a trafficking CMP in lieu of disqualification.

CONCLUSION

The Retailer Operations Division's analysis of the EBT transaction record for La Surtidora was the primary basis for its determination to permanently disqualify the retailer. This review finds

this data provides substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Store visit photographs and documentation further support the trafficking determination. Appellant has not proven, by a preponderance of evidence, that the administrative action should be modified or reversed.

Based on a review of all the information available in this case, the determination by the Retailer Operations Division to impose a permanent disqualification against La Surtidora, under the ownership of Jose I. Nuno and Marcela Nuno, is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this determination are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in SNAP regulations, at 7 CFR § 279.7. If 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 Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a Complaint is filed, it must be filed within 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.

MICHELLE WATERS
ADMINISTRATIVE REVIEW OFFICER

March 17, 2023