

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

La Mexicana Groceries,)
)
Appellant,)
)
 v.)
)
Retailer Operations Division,)
)
Respondent.)
_____)

Case Number: C0191118

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that La Mexicana Groceries, (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 September 1, 2016.

AUTHORITY

7 U.S.C. § 2023 and its 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 27, 2016, 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 2015 through May 2016. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR

§ 278.6(i).

The Appellant replied to the charges by letter dated August 5, 2016, and generally stated “throughout the years of managing a business I have always looked for ways to improve the popularity and sales of my business. I have acquired many sales tactics that have helped me reach my goal to gain clients. One of those sale tactics I use is setting price tags on ninety-nine cents rather than rounding up to the next dollar. For example products such as sodas and cooking oil are set at \$15.99 and \$24.99 respectively. These methods I believe have been successful to me and have brought up sales. Not only do I have prices that end up with ninety nine cents but I also have prices that end in whole dollars. The ice cream that I sell is one dollar and also I have tortilla that cost 2 for 5 dollars. With these two tactics, my clients buy from the vast majority of products I have to offer and the totals add up to be high quantities quickly.” [sic]

Appellant also stated my business is located in a small town. I am one of two businesses in town that sells Mexican products that many people of Hispanic backgrounds seek. I have gained loyal customers that try to buy most of their groceries with me. Another reason that multiple transactions were made in short time frames was that many people come early in the morning and come throughout the day because they forget groceries. I cannot prevent them from coming in and purchasing in my business multiple times. After much observation I decided to work with Costco Wholesale and other companies to buy products that came in bigger packages. My customers valued this because not only would I bring bigger quantities but I would also bring products that they could get from Costco because they didn’t have a membership card. As a result of these aspects of my business, people buy all/most of their groceries from me and stock up for the entire month. The large quantities of product meant that the prices would also be high and the amounts of my sales would go up. I have always followed the rules of SNAP and I have taken the responsibility that none of those rules are broken.

Retailer Operations Division issued a Determination letter dated September 1, 2016. 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 September 7, 2016, 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 six month period of December 2015 through May 2016. This involved three patterns of EBT transaction characteristics indicative of trafficking:

1. Unusual number of transactions ending in the same cents value.
2. Multiple transactions were made from individual benefit accounts in usually short time frames.
3. Excessively large purchase transactions were 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

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:

- I use a sales tactic by setting price tags ending on ninety-nine cents rather than rounding up to the next dollar. I also have prices that end in whole dollars. With these two tactics my clients buy from the vast majority of products I have to offer and the totals add up to be high quantities quickly.
- I am one of two businesses in town that sells Mexican product that many people of Hispanic backgrounds seek. With that said I have gained loyal customers that try to buy most of their groceries with me.
- Multiple transactions were made in short time frames because many people come early in the morning and come throughout the day because they forget groceries. I cannot prevent them from coming in and purchasing in my business multiple times.
- I decided to work with Costco Wholesale and other companies to buy products that came in bigger packages and my customers valued this because not only would I bring bigger quantities but I would also bring products that they couldn't get from Costco because they don't have a membership card.
- Another reason in which quantities summed up to be large is because during the month, people would run out of food stamps and would ask me if I could let them get food until their food stamps would come in. When they paid me back, a month's worth of food would be large quantities which sometimes were all of that person's food stamps.

In subsequent correspondence postmarked September 28, 2016, Appellant made an additional contention and stated:

- I explained in my last letter that I did commit the mistake of allowing my customers to pay off credit with their food stamps and was an additional factor that explained the suspicious activity. Now I am writing a new letter asking for a review of my case because I don't want to be found guilty for trafficking of SNAP benefits but instead I accept that I haven't followed SNAP regulations at the lesser extent (giving credit to customers in need). [sic]

Appellant provided seven color photographs of receipts displayed on a counter top in support of its position that credit was offered. Some receipts contained names and amounts and only one, that contained a date, was dated during the review period. All other receipts containing dates were dated for September 2016 which is after the review period. Some receipts were covered by other receipts and none of the receipts contained itemized food products that were allegedly given on credit.

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 June 26, 2014. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a June 18, 2016, 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 register and 1 POS device, a small counter area, approximately 2ft x 2ft in size, partially obstructed by other smaller items available for sale.
- Less than 10 shopping baskets or carts available for customers (1 of each shown in photographs).
- No adding machines or optical scanners available at checkout
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- No hot sold for take-out and or for onsite consumption.
- No deli or prepared food section.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.
- Estimated 1800 square footage and no food stored in storage area out of public view
- Does not operate through a night window or plastic barrier with food stock behind the barrier.
- Store is not a delivery route, farmers' market or specialty food store primarily selling one food type such as meat, poultry, seafood, bread, fruit or vegetables.
- Store stocks a significant amount of non-food items such as but not limited to household products, cleaning products, personal hygiene and beauty products, paper products, pet products, gift items, hats and clothing items, novelty items, and weight loss products.
- Store stocks minimal amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products.
- Store had some empty shelves and narrow aisles. Merchandise is crowded in and among the shelves.
- Few large and bulk packages of flour, rice, cooking oil and cases of soda.
- No fresh or frozen meat or produce.

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 – There were an unusual number of transactions ending in a same cents value. 7 USC 2018 (b)(7)(e):

[7 USC 2018 (b)(7)(e)]

Appellant contends that it uses a sales tactic by setting price tags ending on ninety-nine cents rather than rounding up to the next dollar. Ownership also stated that the store has prices that end in whole dollars. [7 USC 2018 (b)(7)(e)].

[7 USC 2018 (b)(7)(e)].

Based on the analysis above, it appears that the transactions cited in the charge letter are contrived and therefore, in the absence of plausible evidence to the contrary, are likely the result of trafficking in SNAP benefits.

Attachment 2 of the Charge Letter - Multiple transactions were made from individual accounts in unusually short timeframes. [7 USC 2018 (b)(7)(e)]:

[7 USC 2018 (b)(7)(e)]

Appellant contends that multiple transactions were made in short time frames because many people come early in the morning and come throughout the day because they forget groceries. I cannot prevent them from coming in and purchasing in my business multiple times. Regarding these contentions, it is important to note that the SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of the store's stock and facilities and are indicative of trafficking. The Appellant firm is a convenience store that does not compare in size and stock to the larger supermarkets and or super stores where SNAP households often shop.

It is expected that customers will sometimes forget an item or see something at the checkout and decide to purchase it after they've already completed their transaction. In such instances, it is reasonable to expect the subsequent purchase to be for a nominal amount because it is quite rare to find very expensive items positioned at the checkout area, especially in smaller stores. However, in a number of questionable transactions, the subsequent transactions were for amounts that exceed any nominal, afterthought purchase. In some cases the amounts of subsequent transactions equaled or exceeded the preceding transaction amount.

During the contracted store visit conducted on June 18, 2016, it was observed that there was no fresh or frozen meat or produce, only a few large or bulk packages of flour, rice and cooking oil. A few cases of soda, some empty shelving, and the merchandise were crowded among the shelves. Appellant only offered one shopping cart, one shopping basket for customer use in transporting goods, and the checkout area was also very small, with only about 2 by 2 feet of available uncluttered counter space, affording very little surface area on which to place items for large purchases. There was only one cash register, one SNAP terminal device, and no working scanner or conveyor belt to expedite high dollar or rapid transactions.

When purchasing food, people generally do not spend large amounts at convenience stores. Instead, they usually stop at convenience stores to pick up quick snacks and/or a

beverage, or for a few staple food items that they need, such as bread, milk, or a can or two of food. It is irregular for a convenience store to have purchases such as those cited. Furthermore, 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. La Mexicana Groceries is not set up to provide for all of one's food needs with no fresh meats or produce and lacks an abundant depth and breadth of staple foods.

Sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, the record confirmed that nine (9) SNAP authorized retailers are within one-mile of Appellant's store and includes small and medium grocery stores, supermarket and four additional convenience stores. Therefore, lack of access to other stores does not appear to be an explanation for the Appellant firm's abnormally high SNAP transaction amounts.

Additionally, Retailer Operations Division conducted an analysis of three households that shopped at Appellant during the review period, and determined that these households also shopped at full-line supermarkets and superstores that offer a much larger quantity and variety of eligible food items for likely better prices yet expended more of their SNAP benefits at Appellant's store than at the larger, likely better priced supermarkets and superstores. This indicates that lack of access to other stores is not an issue. In conclusion it is more likely true than not true that the irregular transactions cited in the charge letter for Attachment 2 are due to trafficking in SNAP benefits.

In conclusion, 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.

Attachment 3 of the Charge Letter - Excessively large purchase transactions were made from recipient accounts. [7 USC 2018 (b)(7)(e)]. Based on results of the contracted store visit, the large transaction amounts are not consistent with the store's inventory and low priced foods. Although the firm offers very few items in bulk containers and offers some ethnic foods catering to the Hispanic community; the record reflects that there are two other international stores within .45 miles of Appellant that also cater to the Hispanic community. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions. [7 USC 2018 (b)(7)(e)]:

[7 USC 2018 (b)(7)(e)]

Appellant contends that it worked with Costco Wholesale and other companies to buy products that came in bigger packages and customers valued this service because they now had access to products they could not get at Costco because they did not have a membership card. Store visit photographs indicated that there were a few bulk bags of flour, rice, and containers of cooking oil, as well as a few cases of soda however; Appellant did not provide any purchase receipts or invoices to confirm it purchased and sold large amounts of staple foods, offered large amounts of food items in bulk or in large packages to substantiate the transactions cited in the charge letter.

Retailer Operations Division compared the Appellant's SNAP transactions with the average convenience store in Madera County California. The average convenience Store transaction

in Madera County during the review period was \$7.31. 7 USC 2018 (b)(7)(e).

7 USC 2018 (b)(7)(e)

It is important to reiterate that Appellant's store is a convenience store with one shopping cart, one hand basket, no fresh or frozen meat or produce, and the stock consists mainly of canned, packaged, snack, and accessory Hispanic brand foods.

CREDIT OFFERED

Appellant made the contention that another reason in which quantities summed up to be large is because during the month, people would run out of food stamps and would ask if I could let them get food until their food stamps would come in. When they paid me back, a month's worth of food would be large quantities which sometimes were all of that person's food stamps. In subsequent correspondence Appellant stated, I explained in my last letter that I did commit the mistake of allowing my customers to pay off credit with their food stamps and was an additional factor that explained the suspicious activity.

Now I am writing a new letter asking for a review of my case because I don't want to be found guilty for trafficking of SNAP benefits but instead I accept that I haven't followed SNAP regulations at the lesser extent (giving credit to customers in need). [sic]

Appellant provided seven color photographs of receipts displayed on a counter top in support of its position that credit was offered. Some receipts contained names and amounts and only one, that contained a date, was dated during the review period. All other receipts containing dates were dated for September 2016 which is after the review period. Some receipts were covered by other receipts and they did not contain itemized food products that were allegedly given on credit. No other documentation was provided.

With regard to the aforementioned contention pertaining to the alleged credit accounts, it can be generally accepted that Appellant may have established credit accounts for some of the SNAP customers. However, sufficient evidence or documentation has not been presented in support of this contention. Appropriate documentation may have included ledger books noting the following:

- The SNAP recipients names and addresses;
- A detailed listing of the alleged SNAP eligible food items purchased;
- The dates of the alleged SNAP eligible food purchases; and
- The dates the payments were made on the alleged credit accounts with SNAP benefits.

Moreover, when Appellant signed an FNS-252, "SNAP Application for Stores" certifying thereby that the owner read, understood and agreed with the conditions noted therein which included the following statement: "I accept responsibility on behalf of the firm for violations...including...:

- Trading cash for SNAP benefits (i.e. trafficking)
- Accepting SNAP benefits as payment for ineligible items
- Accepting SNAP benefits as payment on credit accounts or loans
- Knowingly accepting SNAP benefit payments from people not authorized to use

them.”

Participation can be denied or withdrawn if my firm violates any laws or regulations issued by Federal, State or local agencies...”

In addition, when the firm was authorized, Appellant was provided a package of material including:

- A copy of the SNAP regulations;
- An authorization packet, which included their authorization permit and other posting materials; and
- Training material, which would have included a training module issued on a DVD which also discussed the acceptance of SNAP benefits as payments on credit accounts were not allowed.

It is apparent Appellant received the material as some of it, such as the FNS Authorization number, which would have been necessary to have in order to procure an EBT Point-of-sale (POS) device. Therefore, the contention relating to credit account payments with SNAP benefits has been dismissed due to the lack of credible and verifiable evidence for all of the transactions noted in the Charge letter dated July 27, 2016. As such, this contention does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

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 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 three attachments of EBT transaction data, the inadequacy of the firm's eligible food stock as observed and recorded 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.

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Therefore, based on this empirical data, and in the absence of evidence for the legitimacy for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the unusual, irregular, and inexplicable transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation. While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence in the record.

The 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 July 27, 2016, 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 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 La Mexicana Groceries 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 La Mexicana Groceries is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 USC § 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your rights 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), it may be necessary to release this document and related correspondence and records upon request. If we receive such a request, we will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

Monique Brooks
Administrative Review Officer

November 22, 2016
DATE