

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

Los 3 Hernandez Mini Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0203491

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 a **Permanent Disqualification** from participation as an authorized retailer in the Supplemental Nutrition Assistance Program¹ was properly imposed against Los 3 Hernandez Mini Market (hereinafter “Los 3 Hernandez Mini Market” and/or “Appellant”) and its owners of record, by the Retailer Operations Division of the FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a Permanent Disqualification against Los 3 Hernandez Mini Market in a letter dated November 16, 2017.

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.

¹ Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

CASE CHRONOLOGY

In a letter dated October 24, 2017, the Retailer Operations Division informed Appellant that it was being charged with violation of the terms and conditions of the SNAP regulations, 7 CFR §§ 270-282, based on Electronic Benefit Transaction (EBT) SNAP benefit transactions considered to “establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm.” The Retailer Operations Division record indicates Appellant responded in writing. Following documented consideration of Appellant’s response the Retailer Operations Division advised Appellant of a final determination of permanent disqualification from participation in the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1) for trafficking violations, in a letter dated November 16, 2017, documented to have been delivered to Appellant on November 20, 2017.

The determination letter also advised that the 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. The Retailer Operations Division determined that the Appellant was not eligible for the trafficking CMP because the Appellant did not timely submit sufficient evidence to demonstrate the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated November 22, 2017, received in the offices of the Administrative Review Branch on November 30, 2017, Appellant, through its ownership, submitted an appeal of the Retailer Operations Division’s assessment, requesting an administrative review of the action. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an 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 AND REGULATIONS

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)², 7 U.S.C. § 2021 and promulgated through regulation under Title 7 of the Code of Federal Regulations (CFR),³ part 278. In particular 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.

² Effective October 1, 2008, the *Food Stamp Act of 1977* was superseded by the *Food and Nutrition Act of 2008*, as amended through P.L. 110-246.

³ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

7 U.S.C. § 2021(b)(3)(B) states, in relevant 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 § 278.6(e)(1)(i) states, in relevant part:

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

7 CFR § 271.2(1) defines trafficking, in relevant part:

“ ... the buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits ... for cash or consideration other than eligible food either directly, indirectly, in complicity or collusion with others, or acting alone:...”

7 CFR § 271.2 states, in relevant 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.”

7 CFR § 278.6(a) states, in relevant part:

“FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food & 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) states, in relevant 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...”

7 CFR § 278.6(b)(2)(ii), states, in relevant 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).**” [Emphasis added]

7 CFR § 278.6(i), states, in relevant part:

“FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in §271.2 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.” [Emphasis added]

SUMMARY OF THE CHARGES

The Retailer Operations Division materials and the charge letter dated October 24, 2017, reveal that charges were based on an analysis of EBT SNAP benefit transaction data during the six (6) month period of April 2017 through September 2017 and involved three (3) patterns of EBT transaction characteristics indicative of trafficking as follow:

- Attachment #1 lists an unusual number of SNAP EBT transactions ending in the same cents value.
- Attachment #2 lists multiple SNAP EBT transactions made from individual benefit accounts in unusually short timeframes.
- Attachment #3 lists excessively large purchase transactions made from the accounts of SNAP recipients.

APPELLANT’S CONTENTIONS

In the letter dated November 22, 2017, ownership, on behalf of Appellant, contends that:

- Appellant is innocent of all charges.
- Ownership is comprised of honest people who want to work to make a living.

The preceding represents only a brief summary of Appellant’s contentions 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 herein.

ANALYSIS AND FINDINGS

On review, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed.

With regards to Appellant’s contentions in explanation of questionable transactions, the issue in review is whether there is sufficient evidence, through a preponderance of that evidence, that it is more likely true than not true that the questionable transactions were the result of trafficking.

Appellant Operations:

The record reveals that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a store visit conducted by FNS contracted personnel on October 7, 2017.

The October 7, 2017 visit was authorized by a self-declared owner and resulted in materials reflecting observations made, and responses received, from the owner during the store visit which describes the nature and scope of Appellant's operation, as well as the stock and facilities.

The record indicates that Appellant was authorized in SNAP effective November 19, 2014 as a small grocery store, in accordance with FNS definitions.

Appellant is currently reported to be open from 9AM until 9PM, Monday through Saturday, and from 9AM until 8PM on Sunday; operating out of a commercial space of approximately 250 square feet at street level of what appears to be a two-story building. (See photos below)

The material indicates that Appellant operation includes one (1) center aisle. Front opening refrigerated coolers line the back wall. The wall opposite the entrance shows an area for checkout, candy, snacks and chips, and tobacco. Adjacent to the register area are non-foods such as cleaning supplies and paper products, fronted by a chest type freezer containing ice. The opposite wall has dry and packaged foods and is fronted with a novelty ice cream freezer. The center aisle is stocked with canned and dry foods on both sides. Sketch of store provided for reference below:

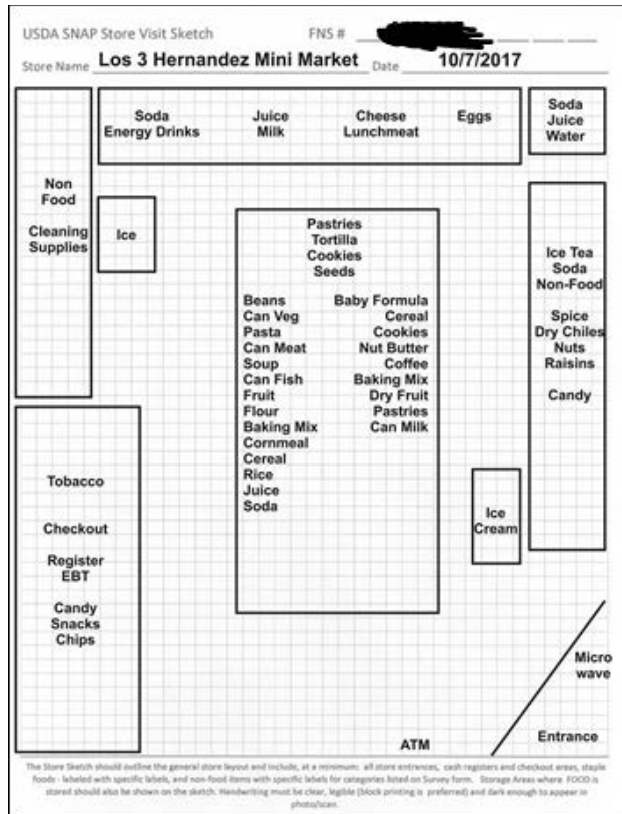


Photo # 24 – Store Sketch

The store visit materials describe Los 3 Hernandez Mini Market to be operating with one (1) general use cash register that is not equipped with scanning technology; and, one (1) point-of-sale (POS) terminal. The checkout operation is seen in the certified store visit photographs to include limited space for placement of products presented for purchase, further hampered by merchandise displays.

The store visit materials document that there are no hand-held shopping baskets or shopping carts available to support the delivery of purchases to the counter/checkout area for the completion of merchandise price totaling and payment.

Certified photographs from the October 7, 2017, contracted store visit are presented below:



Photo # 39 – Store Entrance



Photo # 19 – Storefront

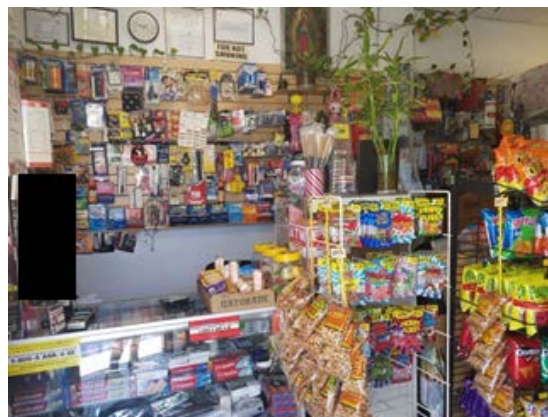


Photo # 25 – Checkout area



Photo # 22 – ATM at Entrance in front of Checkout



Photo # 35 – Store Overview – Back to Front



Photo # 29 – Store Overview – Front to Back



Photo # 5 Infant Formula – marked not for retail sale

The inventory checklist completed at the time of the October 7, 2017 store visit identifies food varieties available in each of the four (4) staple food groups as follows:

- Four (4) varieties of dairy products including two (2) cans of infant formula (see Photo #25 above) that are marked in red “Not for Retail Sale”; five (5) packages of cheese; and, more than 20 units of milk and novelty ice cream.

- Seven (7) varieties of fruits and vegetables with more than 20 units of 100 percent fruit juices, identified as the only fresh/frozen/or refrigerated item in the fruits and vegetables staple food group. There are three (3) varieties have between six (6) and 20 stocking units; and the remaining two (3) varieties include more than 20 units. There are no fresh/frozen or refrigerated fruits or vegetables identified with only canned and packaged goods marked on the inventory form or seen in the certified photographs.
- Eight (8) varieties of breads and cereals were identified with one (1) package of corn meal/grits; two (2) varieties with between six (6) and 20 units; and the remaining five (5) varieties available in units of 20 or more. Notably much of the inventory consists of snack foods and the only fresh foods are bread loaves and snack cakes.
- Four (4) varieties of meat/poultry/fish staple foods are identified in the store visit materials with two (2) units of deli meats; five (5) units of canned meats; between six (6) and 20 units of eggs; and, more than 20 units of canned fish.

The four (4) most expensive items available for sale at the time of the store visit were identified to include:

- Enfamil infant formula selling for \$17.99 for the eight (8) ounce can. Only two (2) cans were shown in stock and those are both marked as “Not for Retail Sale” (see photos above);
- Nescafe instant coffee selling in containers of 200 grams for \$7.99;
- Nescafe instant cinnamon coffee with a 6.7 ounce jar selling for \$7.49; and
- Fruit Loops breakfast cereal selling in a 21.7 ounce box for \$5.99.

No fresh or frozen meats beyond the two (2) units of deli meats; no frozen offerings such as boxes of chicken, individual prepared meals, or frozen vegetable or snacks were identified in the official store visit photographs as available for customer purchase.

Non-SNAP products and services offered at Appellant include tobacco products, mobile phones and phone cards, automotive products, health and beauty aids, paper goods, cleaning products; automotive products; housewares; gift items; party goods; and souvenirs. Appellant advertised services include out of country money transfer; and a visible ATM.

Charge Letter Attachment Analysis:

The data reflected in the letter of charges dated October 24, 2017 is the result of information gained primarily from the Anti-Fraud Locator using Electronic Benefits Transfer (EBT) Retailer Transactions (ALERT) system which is a fraud detection, decision support system designed to monitor and track electronically conducted retail transactions completed by SNAP recipients in authorized meal program and food retailer locations.

The ALERT System facilitates management of the program by providing transaction-level information to Federal personnel charged with the responsibility of SNAP retailer management and compliance. The system uses pre-defined criteria or patterns for potential fraud detection. Pre-formatted reports provide information on those stores and transactions meeting the criteria. ALERT supports both online analysis and online queries and reports for use by FNS. The system

does not make the final determination instead it is used by Retailer Operations Division to develop information and evidence for consideration in support of their development of an ultimate decision.

Attachment #1: Represents an unusual number of SNAP EBT transactions ending in a same cents value. The materials list a total of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) ending in the same cents value 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The data represents over 35 percent of Appellant's total SNAP redemptions; and, more than 21 percent of the total transactions conducted in the focus period.

The Retailer Operations Division documents that the repeated occurrence of transactions ending in the same number appear disproportionate and therefore contrived. The store visit materials do not indicate that there is any unusual pricing structure identified.

Appellant indicated in response to the letter of charges that it did not know that totals ending in the amounts identified were considered trafficking. Twelve (12) receipts with totals ending in the prices identified were presented for review.

The Retailer Operations Division discounted the materials from consideration because they were dated outside of the focus period and simply included merchant copy receipts with handwritten merchandise and prices, totaling to the amount on the receipt, listed next to each receipt.

On review it is determined that although the individual transaction totals are not singularly suspicious, there is a suspicious repetition of the same numbers, and totals that are significantly high amounts, without evidence of merchandise in stock that would likely total such amounts. It is also noted for the record that Appellant understands that totals ending in the amounts listed are considered trafficking is not accurate. It is not that the ending numbers themselves represent trafficking but rather that the patterns of repetition raise suspicion.

Attachment #2: Represents multiple SNAP EBT transactions made from individual benefit accounts in unusually short timeframes and includes 296 transactions; grouped in 136 sets; where 87 households redeemed SNAP benefits in sets of two (2) to five (5) transactions; 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The transactions listed represent 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or almost 36 percent of Appellant's total SNAP redemptions during the focus period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Retailer Operations Division documents that completing multiple transactions within a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) period is a method used by some stores to avoid high dollar transactions that cannot be supported and are indicative of trafficking.

Retailer Operations Division determined that given Appellant's operational information it is not reasonable that households could bring to the counter quantities of SNAP eligible foods, in the amounts identified in the Attachment #2 materials, from the inventory identified at the store visit to support the transaction amounts or the transaction sets as listed.

Appellant has not provided explanation or evidence to counter the conclusion drawn by the Retailer Operations Division.

On review it is noted that the transactions listed include characteristics which add to the suspicion of their legitimacy. For example there are 12 transactions that are noted to have been completed outside the business hours of Appellant (9AM – 9PM). Similarly there are two (2) transaction sets in which at least one (1) of the transactions was completed in a different method than the other transactions in that set. Typically SNAP EBT transactions are conducted in the “swipe” method which indicates the card is on site and being swiped to complete the action. Other times, SNAP EBT cards do not properly function on the POS devices resulting in “manual” transaction processing. It is highly unusual for the same card to swipe on some transactions and not on other transactions conducted in a series of transactions
5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Attachment #3: Represents **excessively large purchase transactions made from the accounts of SNAP recipients** with 503 transactions in amounts 5 U.S.C. § 552 (b)(6) & (b)(7)(C) conducted by 173 households at Los 3 Hernandez Mini Market in the focus period. The transactions represent 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or more than 71 percent of Appellant’s total SNAP redemptions recorded in the focus period.

The Retailer Operations Division indicates that the average small grocery store transaction in the State of California in the focus period was \$14.56; 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Retailer Operations Division documents that review of the store visit materials did not reveal any specialty food items, no fresh meat, and no individual products that would justify the amounts identified as excessively large in the cited attachment. Further, the Retailer Operations Division documents that the transactions are suspicious in consideration of the operation and facilities of Appellant.

As previously indicated the store visit materials, completed in cooperation with the owner authorizing the October 7, 2017 contracted store visit, reveal that the highest priced item for sale is Infant Formula which is clearly identified as not for retail sale. Instant coffee and breakfast cereal with prices less than \$7.99, with not many of those items seen in the certified store visit photographs to be in stock, can hardly be expected to support total individual transactions
5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Comparison/Competitor Store Information:

Retailer Operations Division documents that the subject firm is located in an area that is extremely well served by alternative SNAP authorized retailers identifying six (6) competitor small grocery stores within a one-mile radius. A total of 58 SNAP authorized retailers were identified within a one-mile radius of Appellant with a large grocery store only .26 miles away and a superstore .30 miles away. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

An analysis of the SNAP redemptions, transaction count, average transactions, and incidence of occurrence of suspicious transactions in the same categories as those identified for Appellant was completed. The results are demonstrated in the following table:

Table Redacted per 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Clearly Appellant's results are suspiciously distinct when evaluating the State as a whole, the county, and two (2) of its closest competitors. There has been no reasonable explanation offered for the distinctions.

Household Analysis:

The Retailer Operations Division documents analyzing the transactions of three (3) of the households identified in the charge letter attachments as responsible for suspicious transactions. The documented findings indicate that each of the households analyzed had access to, and shopped at, supermarkets and super stores, some visiting the larger stores either the same day or within a day or two of conducting suspicious transactions at Appellant.

Denial of Charges:

Regarding the Appellant's denial of having committed any SNAP violations, indicating that nothing wrong has been done; further indicating that ownership are not criminals but represent individuals with clean records who only want to work to make a living. This review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is, as indicated previously, is to determine whether the Appellant demonstrates by a preponderance of the evidence that the permanent disqualification should be reversed.

In this case, therefore, if the Appellant demonstrates by a preponderance of the evidence that trafficking did not occur in the Appellant's firm, then trafficking will be considered not to have occurred and the disqualification reversed. If this is not demonstrated the case is to be sustained. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

Civil Money Penalty

Part 278.6(f)(1) of the SNAP regulations provides for civil money penalty assessments in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs. However, this regulation also sets forth the following specific exception to assessments thereunder: "A civil money penalty for hardship to Food Stamp [SNAP] households may not be imposed in lieu of a permanent disqualification." Therefore, this civil money penalty provision is not applicable in the present case.

As previously indicated the November 16, 2017 determination letter advised Appellant of the ineligibility for consideration for a trafficking civil money penalty (CMP) according to the terms

of Section § 278.6(i) of the SNAP regulations. The letter of charges dated October 24, 2017 advised Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days.

The record documents that Appellant made a request for the imposition of a CMP in lieu of permanent disqualification in their letter, received by the Retailer Operations Division on November 6, 2017, responding to the charges. The request simply states that ownership asserts that Appellant is an asset to the community and is willing to pay a CMP to remain authorized.

7 CFR §278.6(i) specifies the criteria for a firm's eligibility for a civil money penalty in lieu of permanent disqualification for trafficking indicating. "FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in §271.2 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." The criteria listed therein are, as a whole, specifically identified as a *minimum* standard that firms must meet in order to be eligible for such a penalty. The statute and the regulation allow no flexibility below the level of this stated standard. Appellant provided no evidence of the existence of any compliance policy and program to prevent violations of the SNAP, therefore, Retailer Operations Division could not consider the imposition of a CMP in lieu of disqualification.

On review the Retailer Operations Division's determination that Appellant firm is ineligible for the imposition of civil money penalties in lieu of disqualification is affirmed.

CONCLUSION

The Retailer Operations Division analysis of Appellant's EBT transaction records, upon which charges of violations are based, together with observations made during the contracted store visit provide substantial evidence that questionable transactions during the focus period have characteristics that are not consistent with legitimate sales of eligible food to SNAP customers at a store of the nature and scope as described in the preceding materials. Rather, the characteristics are indicative of illegal trafficking in program benefits.

Therefore, based on a review of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged and that the Retailer Operations Division has provided substantial evidence of trafficking violations.

Based on the discussion above, the decision to impose a permanent disqualification from participation in the SNAP against Los 3 Hernandez Mini Market is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR §279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

NANCY BACA-STEPAN
Administrative Review Officer

April 9, 2018