

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

Los Compadres Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0220166

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 Program (SNAP) was properly imposed against Los Compadres Market (Appellant) by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1)(i) in its administration of the SNAP, when it imposed a permanent disqualification against Los Compadres Market on October 2, 2019.

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 September 17, 2019, the Retailer Operations Division informed the Appellant that Los Compadres Market was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270 –282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm." 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 did not reply to the charges within the specified 10 calendar days of receipt of the September 17, 2019 Charge Letter. After considering the evidence in the case, the Retailer Operations Division issued a Determination Letter dated October 2, 2019, informing the Appellant that Los Compadres Market was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations. The letter also stated that the Appellant was not eligible for a trafficking civil money penalty (CMP) as the Appellant did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked October 3, 2019, the Appellant requested an administrative review of the Retailer Operations Division's decision to permanently disqualify the firm from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated November 12, 2019.

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 the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6(e)(1)(i) of the Regulations establish the authority upon which a permanent disqualification may be imposed upon a retail food store or wholesale food concern. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

7 U.S.C. § 2021(b)(3)(B) states, inter alia:

... 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(a) states, inter alia:

FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence

obtained through a transaction report under an electronic benefit transfer system ...
[Emphasis added].

7 CFR § 278.6(e)(1)(i) states:

Disqualify a firm permanently if: Personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, inter alia:

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 § 278.6(f)(1) states, inter alia:

A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

7 CFR § 278.6(i) states, inter alia:

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 ...

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

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

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

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from January 2019 through June 2019. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were multiple transactions made from the accounts of individual SNAP households within a set time period; and
- There were EBT transactions conducted that are large based on the observed store characteristics and recorded food stock.

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

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the administrative review request, the Appellant stated the following summarized contentions, in relevant part:

- The Appellant is located in a very populated residential area. Many of the store's customers, who are neighbors, live less than two minutes from the firm. They regularly make their food purchases throughout the week or more days due to the proximity.
- The store's prices are \$0.50 to \$35.00 per product. The Appellant sells basic products of the family basket including meats, seafood, cereals, vegetables, canned goods, fruits, bread, juices, etc.
- The transactions documented in the Charge Letter Attachments appear to have been conducted in a short time. Some customers are not aware of their EBT card balance. They choose several products and when they go to pay for them, they ask the cashiers to charge a part of the products first or the items that they believe are more necessary. They can then see the balance that they have left on the EBT card and complete their grocery purchases.
- In other cases, customers purchase some products and then see or remember other products that they need and return quickly to purchase them. Some customers purchase products, leave, and then return to purchase something else as the Appellant is located close to them.
- With regard to the transactions documented in Charge Letter Attachment 2, there were 62 transactions noted **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** FNS believes that these transaction amounts are high according to the inventory of the store. Although this is a small business, the Appellant has a reasonable inventory to be able to sell the amounts referred to in the Charge Letter.

In support of these contentions, the Appellant submitted the following documents for review:

- Four (4) cash register receipts;
- Three (3) photos of the outside of the Appellant firm and the surrounding neighborhood; and

- Eight (8) photos of current food stock.

ANALYSIS AND FINDINGS

Store Characteristics

FNS authorized Los Compadres Market as a small grocery store on May 1, 2017. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an August 14, 2019 store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information obtained from the store visit was also used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Approximately 1,400 square feet in size and approximately 20 square feet of additional storage outside of public view that stocked predominantly drinks and non-food items;
- No shopping carts and two hand-held baskets available for customer use;
- One cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- One checkout counter area with limited check-out counter space and was partially obstructed by an ice cream freezer;
- No optical scanners;
- Had empty coolers;
- Had some scantily filled shelves;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals;
- No meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers;
- No indication from the store visit report that the firm has a special pricing structure, such as prices ending in \$x.x9 and/or \$x.00;
- Transaction totals are not rounded up or down at the checkout counter;
- Telephone and on-line orders were not taken and delivery was not offered;
- The four most expensive food items in stock were Milagroso rice at \$26.59 per 50 pounds (1 unit in stock); Carolina rice at \$14.99 per 20 pounds (5 units in stock); various brands of rice at \$11.99 per 20 pounds (7 units in stock); and Mazola vegetable oil at \$11.99 per one gallon (6 units in stock);
- No fresh or frozen meats, poultry, or seafood;
- Had a kitchen but hot foods were not sold;
- Deli meats and cheeses were sold by the pound; however, no prices were posted in the store for these items;
- Meat items included units of canned/potted meat, deli meats, canned fish, sausage, hot dogs, eggs, and packaged fish;

- Dairy included milk (cow and coconut varieties), margarine, cheese, and yogurt;
- A limited variety and amount of fresh produce;
- Other staple foods available for purchase included such items as juice, pasta, rice, cereal, baking mix, loaf bread, bagels, buns/rolls, corn meal, tortillas, flour, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, snack foods, cakes/pastries, spices/seasonings, and condiments; and
- Ineligible nonfood items included tobacco products, health and beauty aids, paper products, household cleaning supplies, lottery tickets, housewares, pet food, and clothing.

The available inventory of SNAP eligible food at the time of the store visit showed food stock that would be typical of a small grocery store, where households normally purchase a limited number of items. 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. There was little indication that SNAP households would be inclined to regularly visit the store to purchase large quantities of groceries. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of similar sized competitors.

Charge Letter Attachments

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.

Stores caught in trafficking violations consistently display particular characteristics or patterns of transactions, including those cited in the letter of charges. Nevertheless, transactions having such characteristics are sometimes valid and sufficient evidence that support that they were the result of legitimate purchases of eligible food items is provided. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited and to provide evidence that they are legitimate.

The Retailer Operations Division presented a case that the Appellant trafficked SNAP benefits. Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant store during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Repeat Transactions by the Same Household (Charge Letter Attachment 1)

This Charge Letter Attachment documents 15 sets of transactions (50 total transactions) **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits to meet the parameters of this scan. These transactions were completed by eight different SNAP households. Multiple transactions conducted by the same household account within a short period of time is a method which

violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

The Appellant has provided several contentions regarding the SNAP transactions documented in this Attachment, including a claim that customers purchase some products and then see or remember other products that they need and return quickly to purchase them. Some customers purchase products, leave, and then return to purchase something else as the Appellant is located close to them. Some customers are not aware of their EBT card balance. They choose several products and when they go to pay for them, they ask the cashiers to charge a part of the products first or the items that they believe are more necessary. They can then see the balance that they have left on the EBT card and complete their grocery purchases.

With regard to the Appellant's contentions, although it is not uncommon for customers to have more than one transaction per day and there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions noted in the Charge Letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of the Appellant's stock and facilities and are therefore, indicative of trafficking.

These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out, a household returning later in the day and making separate purchases, or of a household making a separate purchase to check their balance followed by another transaction as 14 of the 15 transaction sets **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The transaction sets also do not contain the characteristics of a household returning later in the day to purchase a forgotten item or two as all of the sets have subsequent transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, far more than the cost of a forgotten item or two.

The Appellant contends that the store sells basic products of the family basket including meats, seafood, cereals, vegetables, canned goods, fruits, bread, juices, etc. In support of its contentions, the Appellant provided FNS with eight (8) photos of its current food stock. However, the report and photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Los Compadres Market multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. The second, third, and subsequent transactions in each set are too large to consist of forgotten items. In addition to the store's limited checkout space which is unsuitable for large transactions, Los Compadres Market has no shopping carts and only two hand-held baskets available to customers for transporting food within the store.

The Appellant contends that the store is located in a very populated residential area. Many of the store's customers, who are neighbors, live less than two minutes from the firm. They regularly make their food purchases throughout the week or more days due to the proximity. In support of its contentions, the Appellant provided FNS with three (3) photos of the outside of the Appellant firm and the surrounding neighborhood. With regard to these contentions, it is recognized that

sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, there are 17 SNAP authorized retailers, including 1 supermarket and 2 super stores, located within a 1.0 mile radius of Los Compadres Market that can meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than Los Compadres Market and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store. These larger stores would offer a much greater quantity and variety of foods at lower prices than the Appellant firm and their proximity would make it unlikely that any SNAP recipient would consider the Appellant firm as their primary source for groceries.

The record indicates that SNAP customers who shopped at Los Compadres Market during the review period also shopped at other area grocery stores and, therefore, transportation to other stores is not an issue for these customers. Therefore, lack of access to other authorized stores (or the availability of other food stores) does not appear to be an explanation for the Appellant's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

5 U.S.C. § 552 (b)(7)(E).

Unfortunately, the Appellant has not provided any evidence to show that the transactions listed in Attachment 1 were legitimate purchases of eligible foods. The arguments presented by the Appellant hold little weight without some kind of evidence to substantiate its claims.

Excessively Large Transactions (Charge Letter Attachment 2)

This Charge Letter Attachment lists 62 SNAP transactions, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These large transaction amounts are not consistent with the store's observed characteristics and food inventory. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant contends that the store's prices are \$0.50 to \$35.00 per product. The Appellant sells basic products of the family basket including meats, seafood, cereals, vegetables, canned goods, fruits, bread, juices, etc. FNS believes that these transaction amounts are high according to the inventory of the store. Although this is a small business, the Appellant has a reasonable inventory to be able to sell the amounts referred to in the Charge Letter. In support of its contentions, the Appellant provided FNS with eight (8) photos of its current food stock.

With regard to the Appellant's contentions, the food stock and facilities of the Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at small grocery stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. The Appellant contends that the large transactions are not the result of trafficking of SNAP benefits. However, it is rare for a small grocery store such as Los Compadres Market to have purchases like those included in this Attachment to the Charge Letter. **5 U.S.C. § 552 (b)(7)(E).**

The FNS store visit report and photos of August 14, 2019 show that Los Compadres Market offers a moderate stock of SNAP eligible foods with no fresh or frozen meats, poultry, or

seafood, a limited variety and amount of fresh produce, and lacks an abundant depth and breadth of staple foods. The store visit inventory report and photos also show only a few expensive eligible foods in stock that would account for these large amounts as well as showing the store has limited checkout counter space and no shopping carts and only two hand-held baskets in which to transport the large number of items required to make up these large transaction amounts. Without a sufficient number of these, it is unlikely that such large dollar value transactions could be for actual food purchases and more likely they are trafficking.

The store visit report and photos also indicate that there were no signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals, no evidence of meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices, and no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers. There is no evidence of a price advantage or custom or special services rendered at the subject store that are not offered at other authorized SNAP stores in the area. The four most expensive items documented during the store visit were Milagroso rice at \$26.59 per 50 pounds; Carolina rice at \$14.99 per 20 pounds; various brands of rice at \$11.99 per 20 pounds; and Mazola vegetable oil at \$11.99 per one gallon. In addition, there were only a few units of each of these foods in stock. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar sized competitors. These large transaction amounts are also not consistent with the Appellant store's inventory.

The average SNAP transaction included in this Attachment **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The large transactions documented in this Attachment are not consistent with a small grocery store in Providence County, Rhode Island. During the review period, the average transaction amount for a small grocery store in Providence County was \$12.78. The average transaction in Attachment 2 is more than seven (7) times larger than the average purchase amount for this store type. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar sized competitors. These large transaction amounts are also not consistent with the Appellant store's inventory. Most of the food products in Los Compadres Market consisted of accessory food items such as snack foods, candy, and drinks and inexpensive staple foods such as canned and packaged goods.

While the Appellant firm may be located in a neighborhood with households that qualify for SNAP benefits, these factors are not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not displayed in other similarly stocked stores. If specific household needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would also present themselves at nearby firms as well. But this is simply not the case.

As noted previously, there are 17 SNAP authorized retailers, including 1 supermarket and 2 super stores, located within a 1.0 mile radius of Los Compadres Market that can meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than Los Compadres Market and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store. These larger stores would offer a much greater quantity and variety of foods at lower prices than the Appellant firm and their proximity would

make it unlikely that any SNAP recipient would consider the Appellant firm as their primary source for groceries.

An analysis of the shopping patterns for all of the SNAP households listed in this Attachment shows that the majority of the households shopping at Los Compadres Market have access to transportation and that all are regularly shopping at a variety of larger stores, including super stores and/or supermarkets, located nearby and at several miles distance from the Appellant's location. While Los Compadres Market does offer some staple food items, SNAP recipients are already shopping at other larger SNAP retailers located in proximity to the Appellant's business offering a greater quantity and variety of products, including fresh meats/seafood and produce, at lower prices.

5 U.S.C. § 552 (b)(7)(E).

Based on the discussion above and in the absence of credible evidence 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. Nevertheless, transactions having such characteristics do sometimes have valid explanations that support that they were the result of legitimate purchases of eligible food items, and this is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, however, the Retailer Operations determined that the Appellant's contentions did not outweigh the evidence. Assertions that the firm has not violated program regulations, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding those of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts and a sufficient number of hand-held baskets support the Retailer Operations Division's determination. It is not plausible that the store's customers are carrying large amounts of food around the store without the benefit of shopping carts and/or hand-held baskets. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on the preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 2 are more likely than not the result of trafficking in SNAP benefits.

CIVIL MONEY PENALTY

As previously indicated, the October 2, 2019 Determination Letter advised the Appellant of the ineligibility for consideration for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations. The letter of charges dated September 17, 2019 advised the Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The regulations specify that such documentation must, in part, establish that there was an effective compliance policy and training program and that both were in effect and implemented prior to the occurrence of violations. The letter indicates that no information was provided by the Appellant for consideration; therefore, on review the Retailer

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

CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record, upon which charges of violations are based, together with observations made during the store visit and an analysis of customer shopping behaviors, provide substantial evidence that questionable transactions during the focus period have characteristics and display patterns that are not consistent with legitimate sales of eligible food to SNAP benefit customers at a store of this type, size and makeup. Rather, the characteristics are indicative of illegal trafficking in program benefits. The Appellant's contentions do not outweigh this evidence.

The record has yielded no indication of error or discrepancy in the reported findings by the Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. 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. Therefore, the decision to impose a permanent disqualification from participation in the SNAP against Los Compadres Market is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, FNS is 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

January 9, 2020