

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

Rodriguez Food Store, Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0197542

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a permanent disqualification of Rodriguez Food Store Inc. (hereinafter “Rodriguez Food Store” or “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Rodriguez Food Store.

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.”

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified based on an analysis of EBT transaction data from July 2016 through December 2016. This involved the following transaction patterns which are common trafficking indicators:

- There were multiple transactions made from individual household benefit accounts within unusually short timeframes.
- Excessively large purchase transactions were made from recipient accounts.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Rodriguez Food Store for SNAP participation as a convenience store on May 1, 2012. In a letter dated April 3, 2017, the 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 between the months of July 2016 and December 2016. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In a letter dated April 12, 2017, the Appellant responded to the charge letter, stating that the firm has never committed any trafficking violations. The Appellant argued that although it received a list of transactions, it did not understand what the list meant and asked the Retailer Operations Division for evidence that it had engaged in trafficking. The Appellant further argued that it has regular customers who purchase juice and other merchandise by the case. Finally, the Appellant stated that it would not agree to have its SNAP authorization revoked, nor would it agree to pay a monetary penalty for something it has not done.

In support of its response, the Appellant submitted more than 200 inventory purchase receipts for merchandise purchased by the firm during the review period.

After reviewing the Appellant's response and documentation and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated June 21, 2017. This determination letter informed the Appellant that it 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 the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but that a CMP was not appropriate in this case because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked June 26, 2017, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted. The Appellant sent additional contentions in a letter postmarked July 7, 2017.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 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, *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, [or] evidence obtained through a transaction report under an electronic benefit transfer system....***
[Emphasis added.]

7 CFR § 278.6(e)(1)(i) states:

FNS shall 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 § 271.2 states, *inter alia*:

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(b)(1) states, *inter alia*:

Any firm considered for disqualification ... under paragraph (a) of this section... shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification.... The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter...

7 CFR § 278.6(c) states, *inter alia*:

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) of this section, 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, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

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

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(i) states, *inter alia*:

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...

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant does not agree with the disqualification decision made by the Retailer Operations Division and requests further review.
- Appellant sent in all invoices to the Retailer Operations Division.
- Appellant has not violated the program.
- Although the SNAP income that the firm receives is estimated at a “meager” 5 U.S.C. § 552 (b)(6) & (b)(7)(C), it is income that the business depends on.
- The Retailer Operations Division never explained why the firm’s SNAP authorization was suspended.
- Appellant does not know about computers or patterns, but it knows that its transactions are valid and knows that it has not abused the program.
- Appellant has loyal customers that it may lose if the disqualification is upheld. Additionally, the Appellant’s livelihood and income will be impacted by such a disqualification.

The Appellant did not submit any additional evidence or documentation in support of its contentions beyond what it had already submitted to the Retailer Operations Division.

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The primary issue for consideration in a case based on suspicious SNAP redemption data is whether or not the Retailer Operations Division adequately established that the Appellant firm engaged in the violation of trafficking. In other words, did the Retailer Operations Division, through a preponderance of the evidence, establish that it is more likely true than not true that the irregular and unusual transactions cited in the charge letter were the result of trafficking?

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm’s EBT transactions, but also information obtained from a February 1, 2017 store visit which was conducted by an FNS contractor 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 the following store size, description, and characteristics:

- Rodriguez Food Store is a small convenience store/gas station, approximately 500 square feet in size, operating in a suburban commercial area of Belle Glade, Florida.
- At the time of the contractor's visit, the firm had no shopping carts or shopping baskets for customer use.
- The store visit photographs show one cash register and one EBT point-of-sale device.
- The store appears to use optical scanners to process transactions.
- The store's staple food stock is minimal in each of the four staple food categories. The store also sells SNAP-eligible, non-staple accessory food items, such as carbonated and uncarbonated drinks, snacks, candy, and condiments. Additionally, the store sells ineligible nonfood items, such as gasoline, alcoholic beverages, tobacco products, and other miscellaneous household merchandise.
- The store appears to have a few stacks of cases of soda, in quantities of both 12 and 24 cans per case. There are also several cases of beer stacked inside the store.
- The checkout area consists of a very small cluttered countertop (roughly 6 inches by 12 inches) where items can be placed to be rung up. The checkout area is not suitable for conducting large or rapid transactions as there is no conveyor belt to expedite the purchase and not enough space to place more than one or two small items at a time.
- There is no indication from the store visit report that the firm has a special pricing structure, although judging by the contractor's photographs, most items appear to end in 9, such \$1.19, \$1.69, \$2.89, etc.

The available inventory of SNAP-eligible food items at the time of the store visit showed stock that would be typical of a small convenience store. There was no indication that SNAP households would be inclined to regularly visit the store to purchase large quantities of grocery items, especially considering the extremely constricted checkout area and the absence of shopping carts and baskets. The available food was primarily of a low-dollar value and there was no hint that the firm sold any high-priced meat or seafood bundles or other bulk or specialty items.

Given the available inventory, there was very little sign that the firm would be likely to have SNAP redemption patterns that differed significantly from those of similar-sized competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment lists 24 sets of transactions (53 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The 5 U.S.C. § 552 (b)(6) & (b)(7)(C), an extraordinary amount for a diminutive convenience store/gas station selling little more than snack foods, drinks, and low-priced staple food items.

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Considering the limited staple food stock in the Appellant store and the availability of much larger stores with greater inventory in the area, it makes little sense that SNAP households would spend so much of their benefit allotment in such a repetitive manner at a minimally-stocked convenience store.

The only argument offered by the Appellant is that its customers purchase juice and other merchandise by the case. While this may be true, it seems very unlikely that households would repeatedly return to a tiny convenience store in short periods of time to purchase cases of juice, soda, or water. A 12-pack of 12-ounce soda cans typically costs around \$6.00 or even \$7.00. A 24-pack might cost twice that. Considering the number of cases required to reach transactions for **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** or more (and then do this multiple times), this review finds it extremely unlikely that these transactions are legitimate purchases of eligible food.

It should be noted that SNAP regulations do not govern or mandate the manner in which a household spends its benefit allotment, including how many times or how frequently a household may use its EBT card at a particular store or how large a transaction can be. However, the transactions noted in the charge letter attachments are questionable not because they exceed any limits for use, but because they display patterns of use that are inconsistent with the store's documented physical characteristics and food inventory. It should be further noted that the transactions identified in the charge letter are not marginally abnormal, but decidedly so, especially in comparison with other nearby SNAP-authorized stores. This review does not contend that repetitive or large EBT transactions are overtly suspicious when they occur on an occasional or intermittent basis, but when such transactions form questionable patterns on a consistent basis over a substantial period of time, such activity is considered highly irregular, and a firm's intent to comply with program regulations is called into question.

Unfortunately, the Appellant has offered no evidence to prove that the transactions listed in Attachment 1 were legitimate purchases of eligible food. Such evidence could have included itemized cash register receipts or other documentation to show that trafficking was not occurring.

Given the common practice of violating retailers breaking up large, suspicious transactions into multiple, somewhat smaller transactions to avoid detection, a firm's explanation for why these repetitive SNAP transactions are occurring in a small convenience store should be both rational and compelling. The Appellant's contentions in this regard are neither.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 250 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These large transactions are not consistent with a convenience store in the state of Florida. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a convenience store in Florida was \$6.95. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

Given that the Appellant firm does have a small inventory of staple foods as well as some eligible accessory foods, such as soft drinks and snacks, including a few cases of soda and other drinks, it is probable that there would be an occasional purchase where the transaction amount is high, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. However, as noted earlier, there is no evidence that the

firm would be likely to have SNAP redemption patterns that differ considerably from similar-sized competitors, especially considering the absence of shopping carts and shopping baskets and the severely constricted checkout area. The substantial number of high-dollar purchases in a six-month period calls into question the legitimacy of these transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). As noted earlier, the firm's pricing structure indicates that most items end in 9. Therefore, it is implausible that so many large transactions, which do not include sales tax, would end in an even-dollar amount.

Considering the fact that the store sells primarily low-priced merchandise, and considering how many items it would take to add up to nearly 5 U.S.C. § 552 (b)(6) & (b)(7)(C), it is not believable that the firm's customers would carry large amounts of merchandise around the store without the benefit of shopping carts or baskets, especially since larger, better stocked stores are in the vicinity of the Appellant firm. According to agency records there are at least 25 comparable or larger stores located within a two-mile radius of Rodriguez Food Store, including two supermarkets and one large grocery store.

Unfortunately, the Appellant has not offered a specific argument to counter the agency's position with regard to the transactions listed in Attachment 2. It is noted that the Appellant did provide a large number of inventory invoices from the review period. This review concedes that these invoices appear to prove that the firm had sufficient inventory to account for its total SNAP redemptions during the review period. However, the Appellant offered no evidence, such as itemized cash register receipts or accounting documentation to prove that the specific transactions listed in Attachment 2 were legitimate purchases of eligible food, or to show how much of its inventory was purchased by SNAP customers compared with that which was purchased by credit card or cash-paying customers. Without such evidence, this review has little option but to conclude that the unusually large transactions in Attachment 2 were more likely than not the result of trafficking.

Stores caught in trafficking violations, both during onsite investigations and in EBT analysis cases, consistently display particular characteristics or patterns. These patterns often include frequent, large transactions that cannot be supported by the retailer's inventory, store type, and structure. It is the conclusion of this review that Rodriguez Food Store, with its limited and primarily low-dollar inventory, lack of shopping carts and baskets, and its constricted checkout area cannot support the large numbers of high-dollar transactions identified in Attachment 2. Therefore, the most logical explanation for such transactions is trafficking.

Based on the above analysis, it is the determination of this review that Rodriguez Food Store likely trafficked in SNAP benefits during the review period. The attachments furnished with the charge letter adequately identify the irregular patterns of SNAP transactions which indicate that trafficking was likely taking place. Conversely, the Appellant has failed to provide a rational explanation as to why such patterns might exist. As there are multiple unexplained patterns of irregular transactions, the case of trafficking is convincing.

Lack of Explanation by the Retailer Operations Division

The Appellant has argued that the Retailer Operations Division never explained why its SNAP authorization was suspended. However, this review does not agree. The April 3, 2017, charge letter clearly outlines the specific transactions that that agency deemed questionable and identified the reasons why they were suspicious. The June 21, 2017, determination letter then explained that the Retailer Operations Division considered the Appellant's explanations and documentation before deciding that trafficking likely occurred at the store. Implied in the determination letter is a conclusion that the evidence or response by the Appellant was either not credible or was insufficient to prove that trafficking had not taken place.

While the explanation in the determination letter may not have been as comprehensive as the Appellant wishes, this review cannot find any negligence on the part of the Retailer Operations Division as to the manner in which it explained its disqualification decision.

Trafficking Case based on EBT Data

The Appellant has argued that it does not know about computers or patterns, but knows that its transactions during the review period were valid.

With regard to this contention, this review acknowledges that a conclusion of trafficking cannot be drawn from EBT data alone, nor would it be possible to do so in a case based primarily on inconsistent redemption data or transaction data under an EBT system. It is noted that FNS employs a computerized fraud detection tool to identify EBT transactions that form patterns having characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. The Retailer Operations Division must still analyze the transaction data and patterns with other factors, such as observations from a store visit, an analysis of customer shopping behavior, and a comparison with similar stores in the area, and then render a determination as to whether or not the questionable transactions were, more likely than not, the result of trafficking.

The legality of this method is identified in 7 CFR § 278.6(a) which 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" [Emphasis added.]

Prior to a disqualification determination, the accused firm is given an opportunity to reply to the charges and provide any information it deems appropriate in justifying as legitimate the transaction activity detailed in the charge letter.

It should be noted that this reviewer has thoroughly examined the documentation and information provided by the Retailer Operations Division and found no evidence to suggest that

the agency simply churned out numerical data and declared it to be trafficking. From all indications, the Retailer Operations Division obtained the EBT data, found it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough investigation before concluding that trafficking was likely occurring.

It is important to restate that the Appellant has offered no evidence, such as itemized cash register receipts or other accounting records, to prove that the specific transactions identified in the charge letter attachments were legitimate purchases of eligible food. Assertions of innocence, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissing or reversing the current charges of violations or for mitigating their impact.

Hardship to Appellant

The Appellant has stated that the SNAP income which the firm receives, however small, is income that the business depends on. The Appellant further argues that it has loyal customers that it may lose if the disqualification is upheld. Additionally, the Appellant's livelihood and income will be impacted by such a disqualification.

With regard to these contentions, Federal statute at 7 U.S.C. § 2021(b)(3)(B) makes it clear that disqualification for trafficking shall be permanent, even on the first occasion. It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty.

To allow store ownership to be excused from being assessed administrative penalties based on a purported economic hardship to the store's ownership or to the firm itself would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with Program regulations, but also to those retailers who have been disqualified from the Program in the past for similar violations.

Therefore, the Appellant's contention that the firm may incur economic hardship based on the assessment of an administrative sanction does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Civil Money Penalty

As noted earlier, the Retailer Operations Division determined that the firm was not eligible for a civil money penalty in lieu of permanent disqualification because it did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and training program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a civil money penalty to be considered, a firm must not only notify FNS that it desires the agency to consider a CMP in lieu of permanent disqualification, but it must also submit appropriate documentation within designated timeframes. Based on a review of the case record, there is no evidence that the Appellant requested a CMP in lieu of disqualification when it responded to the charge letter. The Appellant also made no mention of a trafficking CMP nor submitted any documentation to support its eligibility of a CMP in its request for administrative review.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii), a civil money penalty in lieu of permanent disqualification for trafficking cannot be granted in this case.

CONCLUSION

An analysis of the Appellant's EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify Rodriguez Food Store from SNAP participation. This data provided sufficient evidence for this review to conclude that the questionable transactions and patterns listed in the charge letter were more likely than not the result of trafficking violations committed by the Appellant.

Based on a review of all available information in this case, it is the determination of this review that the Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed. As such, the decision to impose a permanent disqualification against the Appellant, Rodriguez Food Store, under the ownership of Carlos A. Rodriguez, is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 the 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.

JON YORGASON
Administrative Review Officer

December 15, 2017