

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

Rodriguez Grocery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0218245

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 Grocery (hereinafter “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 Grocery.

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 November 2018 through April 2019. This involved the following transaction patterns which are common trafficking indicators:

- There were multiple transactions made from one or more SNAP households within a short timeframe.
- There were multiple transactions made from the accounts of individual SNAP households within a set time period.

- The firm conducted EBT transactions that were large based on observed store characteristics and recorded food stock.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Rodriguez Grocery for SNAP participation as a convenience store on August 21, 2007. In a letter dated June 5, 2019, 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 November 2018 and April 2019. 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 and supporting documentation submitted within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

According to tracking records, the charge letter was delivered to the firm on June 7, 2019. However, agency records show that the Appellant did not reply to the charges.

After 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 20, 2019. This 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 a CMP was not appropriate 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 25, 2019, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

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, in part:

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

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, in part:

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, in part:

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

7 CFR § 278.6(b)(1) states, in part:

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, in part:

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, in part:

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

7 CFR § 278.6(b)(2)(iii) states:

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

7 CFR § 278.6(i) states, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking ... if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program...

APPELLANT'S CONTENTIONS

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

- Appellant is requesting a waiver of the timeframe to answer the June 5, 2019, charge letter because the owner is an older person and does not understand English. The Appellant made a mistake by keeping the letter and then forgetting about it and failing to inform its accountant or someone else who understood English.
- The firm's customers rely on the business in order to get SNAP products for themselves and their families. If the firm is disqualified, the store will probably have to close down because without SNAP, the store will not sell enough to cover monthly expenses.
- Appellant did not participate in trafficking SNAP benefits.

In support of its contentions, the Appellant submitted 12 handwritten customer statements, all of which claim that they have never seen anything illegal happening at Rodriguez Grocery. The Appellant also submitted 20 photographs of the store's inventory and 31 inventory invoices and receipts from various vendors.

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 evidence and 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 May 21, 2019, 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 Grocery is a convenience store, approximately 2,300 square feet in size, operating in the city of Wilmington, New Castle County, Delaware.
- At the time of the contractor's visit, the firm had no shopping carts or shopping baskets for customer use, which is typical for stores of this size. Customers shopping in such stores generally purchase only as much food as they can carry in their arms.
- The store visit photographs show one cash register for food purchases and agency records reflect the use of one EBT point-of-sale terminal. The store does not appear to use an optical scanning device at the checkout counter.
- The store's staple food stock is sufficient for program eligibility in each of the four staple food categories, and the overall breadth of staple food inventory is typical of a convenience store or corner market.
- The report indicates that the store sells SNAP-eligible, non-staple accessory food items, such as carbonated and uncarbonated drinks, snacks, candy, and condiments. The store also includes a kitchen area where hot and cold sandwiches and small hot meals are prepared. Deli meat and cheeses are also available for purchase by the pound.
- The store also sells ineligible, nonfood items, including tobacco products, cleaning supplies, and other miscellaneous household merchandise.
- The checkout area consists of a small window through a Plexiglas barrier and a small countertop where items can be placed for purchase. In order to reach the checkout counter, customers must reach across a slide-top floor freezer. The constricted checkout area is not suitable for conducting large or rapid transactions as there is little space on the counter to place more than a few small items at a time and little room for customers to maneuver with large amounts of groceries.
- There is no indication from the store visit report that the firm has a special pricing structure. Most prices appear to end in 9, such as \$1.89, \$2.99, etc. The report also states that the firm does not round transaction totals up or down at checkout.
- There is no indication from the report that the firm has special food packages for sale, such as meat bundles, and no items appear to be sold in bulk. According to the report, the most expensive food items available for purchase included a 12.4-ounce container of infant formula for \$18.99; a 36-ounce can of coffee for \$14.99; a 1.1-quart container of

Pedialyte for \$7.99; and a 19.4-ounce box of cereal for \$5.49. Most items in the store appear to be priced at \$5.00 or less.

The available inventory of SNAP-eligible food at the time of the contractor's visit showed stock that would be typical of a convenience store or small corner market, where households normally purchase a limited number of items to supplement their overall dietary needs. There was no indication that SNAP households would be inclined to regularly visit Rodriguez Grocery to purchase large quantities of groceries, especially considering the absence of shopping carts and baskets and the availability of much larger grocery stores in the area, including two supermarkets and a superstore within a half-mile radius of Rodriguez Grocery. 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 its competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: Multiple transactions were made from one or more SNAP households within a short timeframe. This attachment lists 21 sets of transactions (42 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits.

Considering the fact that this store has a very small checkout area, just one cash register, one EBT point-of-sale device, no optical scanner, and no conveyor belt, and considering the number of items that it would typically take to add up to the dollar amounts found in this attachment, it is unlikely that legitimate transactions could have occurred in such short periods of time.

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). A similar incident occurred on 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The next day, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Attachment 1 is filled with similar examples.

5 U.S.C. § 552 (b)(7)(E), it seems highly unlikely that such large transactions could have legitimately occurred so soon after another customer's transaction.

In short, it does not seem to be logistically possible for the households in Attachment 1 and the store's cashier to have conducted the following action steps in the limited timeframes listed:

- Transport a large number of food items by hand to the checkout area without the benefit of a shopping cart or basket;
- Place each item on the very limited counter space for processing;
- Separate food items from nonfood items;
- Manually enter the price of each item into the cash register;
- Bag the merchandise and move it off the counter space area; and
- Process the sale on the EBT point-of-sale terminal mere seconds after the completion of a separate household's transaction.

The Appellant has offered no explanation for these transaction patterns and has provided no evidence to verify that the specific transactions in the charge letter were legitimate purchases of eligible food. Such evidence might have included itemized cash register receipts to prove what transpired at the point of sale. Without such evidence and because the transaction patterns in Attachment 1 are so unusual in comparison to other stores in the area, it is reasonable to conclude that the transactions in Attachment 1 were likely due to trafficking.

Charge Letter Attachment 2: Multiple transactions were made from the accounts of individual SNAP households within a set time period. This attachment lists 25 sets of transactions (52 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E).

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), an extraordinary amount for a convenience store with no shopping carts or baskets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Repetitive visits to a convenience store resulting in very large transaction totals are often an indication of trafficking, particularly when there are larger, better stocked stores nearby, as is the case here.

Charge Letter Attachment 3: The store conducted EBT transactions that were large based on observed store characteristics and recorded food stock. This attachment lists 189 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 Delaware. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a convenience store in Delaware was \$8.15. In New Castle County, the average was even lower, at just \$8.03 per transaction. But the average transaction in Attachment 3 is more than 11 times larger than the average purchase amount for this store type.

Given that the Appellant firm does have a moderate inventory of staple foods, including deli meats and cheeses, it is likely that there would be an occasional instance where the transaction amount is high, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As such, there may be some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 3. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from nearby, similar-sized competitors. The substantial number of high-dollar transactions in a six-month period calls into question the legitimacy of these transactions.

Attachment 3 lists 15 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) during the review period, including a high of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering how many food items it would typically take to add up 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and considering that the firm does not have any shopping carts or baskets, and given the fact that there are much larger grocery stores in the area with substantially greater inventory and variety, this review finds it unlikely that every transaction in Attachment 3 is a legitimate purchase of eligible food.

In an effort to demonstrate that the firm was not engaged in trafficking, the Appellant submitted a number of photographs, inventory invoices, and customer statements. This section will address these documents.

Photographs: The Appellant submitted 20 photographs of the firm's inventory and the large menu board advertising hot and cold prepared foods. While the photographs are undated, they were likely taken by the Appellant after it received the charge letter. It is noted that the Appellant's photos are very similar to the photographs taken by the FNS contractor during the store inspection on May 21, 2019. The photos merely show that the firm has an adequate inventory of SNAP-eligible foods, but they offer no actual evidence that trafficking was not taking place.

Inventory Invoices: The Appellant submitted 31 inventory purchase invoices and receipts from a variety of vendors, such as Restaurant Depot, Jetro Cash & Carry, Hy-Point Farms, Goya, Hershey's Ice Cream, J & L Poultry Ranch, etc. Of the 31 invoices provided, 30 were dated in June and July 2019, which is one to two months after the end of the review period. As such, they cannot be considered, as they do not represent inventory conditions at the store between the months of November 2018 and April 2019. The only invoice from the review period was one from Goya dated April 23, 2019, for 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This single receipt clearly does not give a complete picture of the firm's inventory or sales during the review period. Accordingly, this review finds that the firm's inventory records are of little evidentiary value.

Customer Statements: The Appellant submitted 12 handwritten customer statements supporting the Appellant's claim that it was not engaged in trafficking. None of the statements specifically identify the signers as SNAP households, but all claim that they have never seen anything illegal happening at Rodriguez Grocery. Unfortunately, such documentation is unconvincing. Customers engaging in trafficking violations are unlikely to admit to such conduct, and experience has shown that customer declarations and affidavits routinely attest to irregular transactions being legitimate even when there is strong evidence indicating otherwise.

This review does not doubt that Rodriguez Grocery sells eligible food items and conducts some legitimate SNAP business. But when SNAP transactions form patterns that are substantially different from similar-sized and similarly-stocked stores in the area, persuasive evidence from the Appellant is necessary to demonstrate that there is not something more, such as trafficking or other program violations, taking place. In an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that trafficking did not occur. Unfortunately, the Appellant has not meet this standard.

It is the finding of this review, therefore, that the attachments furnished with the charge letter adequately identify the irregular patterns of SNAP transactions which indicate that trafficking was likely taking place and the Appellant's contentions and evidence do not persuade this review otherwise.

Request for Extension of Time to Reply to Charges

In his request for administrative review, the Appellant owner requested a waiver of the timeframe to answer the June 5 charge letter because he is an older person and does not understand English. According to the owner, he made a mistake by keeping the charge letter and then forgetting about it and failing to inform his accountant or someone else who understood English.

It should be noted that after receiving the June 20 determination letter but before submitting a request for administrative review, the Appellant appears to have sent a fax to the Retailer Operations Division. This occurred on June 24, 2019. It was in this fax that the Appellant first requested a waiver of the time to submit a reply to the charge letter. Unfortunately, such a waiver cannot be granted, particularly since a disqualification determination has already been made. However, any retailer that disagrees with a determination has the option to submit a request for administrative review and provide contentions and evidence to support the request. In this case, the Appellant submitted a request for review as well as documentation that it wanted considered. As such, it is the finding of this review that the Appellant has been fully and appropriately afforded due process in accordance with SNAP regulations.

Hardship to Appellant and SNAP Recipients

The Appellant has stated that its customers rely on Rodriguez Grocery to get SNAP-eligible products for themselves and their families. This contention implies that SNAP households will experience hardship if the firm's disqualification is upheld. Additionally, the Appellant claims that if the firm is disqualified, the store will likely have to close because without SNAP, the store will not sell enough to cover its monthly expenses.

With regard to the contention that customers will experience hardship if the firm is disqualified, it is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and a household is forced to use its benefits elsewhere. Regulations at 7 CFR § 278.6(f) do allow, in some circumstances, for a civil money penalty to be imposed in lieu of disqualification when there is an absence of other SNAP-authorized retailers in the area. However, the regulations are clear that a CMP for hardship to SNAP households may not be imposed in lieu of permanent disqualification for trafficking.

As for the contention that the firm will suffer financially if the disqualification is upheld, 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 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 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 SNAP in the past for similar violations.

Therefore, the Appellant's contentions regarding hardship do not provide a valid basis for dismissing the charges or modifying the penalty imposed.

Civil Money Penalty

As noted earlier, the Retailer Operations Division determined that the Appellant firm was not eligible for a civil money penalty in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that it 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 trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate documentation within designated timeframes. The case record shows that the Appellant did not reply to the charge letter within the required timeframe and there is no evidence that the Appellant submitted any documentation that would indicate that the firm had a compliance policy or training program of any kind.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option 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 Grocery 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. Likewise, the Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

Based on a review of all available information in this case, the decision to impose a permanent disqualification against the Appellant, Rodriguez Grocery, under the ownership of Ramon 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

October 2, 2019