

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

**Rodriguez Mini Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0200283**

**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<sup>1</sup> was properly imposed against Rodriguez Mini Market (hereinafter “Rodriguez Mini Market” and/or “Appellant”) and its owner 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 Rodriguez Mini Market in a letter dated August 1, 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.

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<sup>1</sup> 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 July 6, 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, through counsel, both verbally and in writing and that those responses were duly considered by the Retailer Operations Division. Following that due consideration to the letter of charges, 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 August 1, 2017, documented to have been delivered to Appellant on August 2, 2017.

The determination letter also stated 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 any 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 August 7, 2017, received in the offices of the Administrative Review Branch on August 14, 2017, Appellant, through counsel, 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”)<sup>2</sup>, 7 U.S.C. § 2021 and promulgated through regulation under Title

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<sup>2</sup> 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.

7 of the Code of Federal Regulations (CFR),<sup>3</sup> 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.

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(e)(1)(i) states, *inter alia*:

*“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 ... 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(a) states, *inter alia*:

*“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, *inter alia*:

*“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...”*

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<sup>3</sup> 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](https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl)

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).**”* [Emphasis added]

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 of the Program.**”* [Emphasis added]

### SUMMARY OF THE CHARGES

The Retailer Operations Division materials and the charge letter dated July 6, 2017, reveal that charges were based on an analysis of EBT SNAP benefit transaction data during the six (6) month period of October 2016 through March 2017 and involved two (2) patterns of EBT transaction characteristics indicative of trafficking as follow:

- Attachment #1 lists multiple SNAP EBT transactions made from individual benefit accounts in unusually short timeframes.
- Attachment #2 lists excessively large purchase transactions made from the accounts of SNAP recipients.

### APPELLANT’S CONTENTIONS

In the letter dated August 7, counsel, on behalf of Appellant, requested review of the permanent disqualification; requesting 30 days to provide evidence regarding efforts to implement a plan to deal with the Agency concerns. Further, the letter indicates it is understood that the only concerns revolved around there being several transactions during a particular day. Appellant requested records or information relied upon to reach the conclusion to permanently disqualify Rodriguez Mini Market. The request for records was understood to represent a Freedom of Information Act (FOIA) request; therefore it was forwarded to the Agency’s FOIA Officer for response. The record shows that the FOIA request was fulfilled on September 29, 2017. Neither Counsel, nor Appellant, has provided further materials or information for consideration.

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 May 16, 2017. The May 16, 2017 visit was authorized by the self-identified "owner" and resulted in materials reflecting observations made during the store visit which describe the nature and scope of Appellant's operation, as well as the stock and facilities.

Appellant is reported to be open seven (7) days per week from 7:00AM until 10:00PM on Monday through Friday; from 8:00AM until 10:00PM on Saturday; and, from 9:00AM until 8:00PM on Sunday; reported by store personnel to be operating out of a commercial space of approximately 1100 square feet at street level of what appears to second story housing. The material indicates that Appellant operation includes two (2) center displays, separated by narrow aisles as seen in the store photographs and described by the Retailer Operations Division. No out of public view storage was declared or identified in either the store visit certified photographs or the sketch of the store layout.

**Photo # 8 - Storefront**



The store visit materials describe Rodriguez Mini Market as a small grocery store; 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 be enclosed in a Plexiglas area; with the space for placement of products presented for purchase further hampered by merchandise displays on the checkout counter and a novelty ice cream freezer positioned in front of the checkout window.



**Photo #5 – Checkout Window**



**Photo #29 – Checkout Window**



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. There is no identifiable area for staging and packaging items presented for purchase.

**The record indicates that Appellant redeems both SNAP and WIC (Special Supplemental Nutrition Program for Women, Infants, and Children) benefits having been authorized in both programs since 2011.**

Appellant's operation includes a deli advertising cold and hot made-to-order sandwiches/hoagies together with hot breakfast sandwiches, burgers; and, meat/cheese sold by weight.



Photo #6 – Deli Area



Photo #25 – Deli Menu



Photo #21 – Deli Menu & Meat by Weight Info

The inventory at the time of the May 16, 2017 store visit includes varieties in each of the four (4) staple food groups as follows:

- Six (6) varieties of dairy products with more than 20 units identified in each of the varieties. Notably there are more than 20 units of infant formula identified which are typically purchased using WIC benefits instead of SNAP. The only “frozen” foods identified in the store visit materials were novelty ice cream and buckets of open ice cream which appears to be for sale by the scoop or cup.

- Seventeen (17) varieties of fruits and vegetables with the majority (12) in units of 20 or more. The majority of the inventory in the fruits and vegetables category is noted to be canned or pre-packaged items with limited fresh/frozen/refrigerated items such as fruit juices, apples, bananas, citrus, onions, greens, peppers, potatoes and avocados.
- Nine (9) varieties of breads and cereals were identified with six (6) of those available in units of 20 or more. The only fresh/frozen/refrigerated items identified in this category include bread and cakes/muffins. The store visit material indicates that the bread shown in inventory is also used in the deli to prepare made-to-order sandwiches.
- Seven (7) varieties of meat/poultry/fish staple foods are identified in the store visit materials with deli meats and eggs listed as fresh/frozen/refrigerated. The inventory appears to include a substantial supply of canned meat and fish. The deli meats shown in the deli case are understood to be both sold by weight and used in the preparation of hot and cold foods as described in the menu boards positioned above the deli area.

The store visit materials indicate that the most expensive SNAP eligible items sold @ Appellant include Similac formula priced @ \$17.99; bacon priced @ \$6.99 per pound; an eight-ounce can of coffee priced @ \$6.99; and ice-cream by the pint @ \$5.99.

Non-SNAP products and services offered at Appellant include tobacco products, mobile phones/cards; automobile products; health and beauty aids, paper goods, cleaning products; minimal clothing (socks/belts); and an ATM and Western Union money transfer service.

### **Charge Letter Attachment Analysis:**

The data reflected in the letter of charges dated July 6, 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 **multiple SNAP EBT transactions made from individual benefit accounts in unusually short timeframes** and includes 71 transactions; grouped in 26 sets; where 13 households redeemed SNAP benefits in sets of two (2) to four (4) transactions; 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Retailer Operations Division documents that completing multiple transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is a method used by some stores to avoid high dollar transactions that cannot be supported and are indicative of trafficking; the materials in review did not evidence any reason why SNAP customers would consider Appellant as its first choice food destination for large orders or multiple purchases.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These totals are highly unusual with such frequency given that the store visit materials identified no expensive items priced to support the dollar and quarter dollar totals. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

**Retailer Operations Division documents that the households with repeated same day transactions also conducted SNAP transactions at other larger, better stocked, SNAP authorized firms either preceding or following the multiple transactions at Appellant; and, that some households appeared to consistently expend a majority of their benefits at Appellant despite there being full-line supermarkets and superstores within one-half mile of Appellant.**

Appellant provides that as a neighborhood grocery store it is routine for customers to return several times throughout the day to make purchases. Counsel provides that he spent the better part of a day at Appellant and it was personally observed that customers returned multiple times that day. In reply to the Retailer Operations Division counsel, on behalf of Appellant, indicates in the July 21, 2017 letter that the essence of being a neighborhood store is its availability to customers for the purchase of breakfast, lunch, dinner, and the purchase of sundries as needed.

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 #1 materials, from the inventory identified at the store visit to support the transaction amounts or the transaction sets as listed.

**Attachment #2:** Represents **excessively large purchase transactions made from the accounts of SNAP recipients** with 170 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Retailer Operations Division indicates that the average small grocery store transaction in the State of Pennsylvania in the focus period was \$10.00. The average transaction at Appellant in the same period was less than the average in the State. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant did not provide any mention of the Attachment #2 to the July 6, 2017 letter of charges.

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 May 16, 2017 visit, revealed that the most expensive SNAP eligible items sold @ Appellant include Similac formula @ \$17.99; bacon priced @ \$6.99 per pound; canned coffee priced @ \$6.99 for an eight (8) ounce can; and pints of ice cream priced @ \$5.99.

As indicated above Appellant is authorized to redeem WIC benefits which consist of prescribed foods supporting the health and development of infants and toddlers. Commonly SNAP participants are also eligible for WIC benefits and it is unusual and unreasonable for SNAP/WIC participants to use their SNAP benefits for the purchase of infant formula which is a primary benefit of participation in WIC.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The pricing of merchandise in numbers ending in 9 identified in the store visit report make the totals 5 U.S.C. § 552 (b)(6) & (b)(7)(C) questionable in a State where no tax is charged on grocery purchases therefore totals would be the simple sum of the items purchased.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Curiously there are four (4) other instances on page 1 of Attachment #2 where the same household records spending the exact same amount in different months. Absent identification of bundles or packages of inexpensive or moderately priced merchandise it is suspicious that totals result in similar amounts for the same household with such regularity.

### **Comparison/Competitor Store Information:**

Retailer Operations Division documents that the subject firm is located in an area that is well served by SNAP authorized retailers including one (1) superstore; one (1) supermarket; two (2) medium grocery stores; 28 competitor small grocery stores; three (3) convenience stores; and two (2) combination other stores such as drugstores or dollar stores.

Comparison of the average number of transactions and the average transaction amounts for Rodriguez Mini Market and the six (6) closest competitor small grocery stores reveals that the SNAP redemption volume for each of the comparison stores is significantly lower than that of Appellant; and, the average transaction amount is higher than each of the comparison stores.

Notably Appellant has suspicious transactions significantly more in number than those of the competitor small grocery stores for which no explanation is offered.

Table 1 below provides an overview of a comparison between Appellant, the State average, and the six (6) closest small grocery stores.

5 U.S.C. § 552 (b)(7)(E)

## Household Analysis:

An analysis was completed of the SNAP transactions of five (5) households identified in the attachment materials to the letter of charges. The analysis reveals that each of the households analyzed conducted numerous suspicious transactions at Appellant, clearly distinct from the patterns for the same households at alternative shopping venues as described by the Retailer Operations Division.

For example:

- 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

5 U.S.C. § 552 (b)(7)(E)

- The second household conducted multiple transactions at Rodriguez Mini Market during the months reviewed and some of these multiple transactions were conducted prior to or after shopping at a superstore or supermarket.  
5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Although this household live close to Rodriguez Mini Market, the transaction history reveals that this household conducted transactions at seven (7) different stores during the review period including a supermarket located .14 of a mile from Rodriguez Mini Market. It was also noted that this household conducted a transaction at a small grocery store located 1.68 miles from Rodriguez Mini Market and a convenience store located 3.18 miles from Rodriguez Mini Market. There are several authorized superstores and supermarkets within a one (1) mile, a two (2) mile, and a three (3) mile radius of Appellant.

- Household #3 conducted large and multiple transactions at Rodriguez Mini Market prior to conducting transactions at superstores and supermarkets.  
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 household's residence is reported to be closer to a small grocery store which is comparable to Rodriguez Mini Market; however, they recorded 21 SNAP transactions at Rodriguez Mini Market. The household also recorded 18 SNAP transactions during the review period at a superstore bringing into question why the household conducted large and/or multiple transactions at Rodriguez Mini Market prior to shopping at a super store or supermarket.

## **Denial of Charges:**

Appellant provides that no trafficking has been committed asserting that the nature of a neighborhood store positions it to have repeated daily transactions. No owner or customer affidavits were advanced for consideration to support the denial of trafficking.

Therefore, absence evidence in support of the contention, the contention cannot be used to mitigate or reverse the current charges in review.

## **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 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 August 1, 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 July 6, 2017 advised Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The record documents that no request for a civil money penalty in lieu of disqualification was made by Appellant, either verbally or in writing. Additionally no materials were provided for consideration that Appellant met the four criteria qualifying for the alternative sanction.

Appellant did not provide:

- Written and dated documentation that showed a commitment to ensuring that the firm was operated in a manner consistent with SNAP regulations;
- Documentation of the development of a policy to terminate violating employees;
- No documentation of the development of procedures for internal review of employee compliance with SNAP regulations; and,
- No documentation of procedures or policy addressing corrective action if violations were identified.

Therefore, 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 Rodriguez 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

December 12, 2017