

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

**Narciso Espinal,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0201587**

**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 the permanent disqualification of Tavarez Grocery (Tavarez Grocery or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

**AUTHORITY**

7 USC § 2021 and the 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 August 28, 2017, the Retailer Operations Division charged

Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of February 2017 through July 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant, through counsel, replied to the charges by letter dated September 18, 2017. Appellant denied trafficking and explained that the transactions were normal based on the unique circumstances of the store. Appellant requested a CMP. After considering the evidence and the retailer's reply, the Retailer Operations Division issued a determination letter dated September 26, 2017. The determination letter informed Appellant that it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that Appellant was not eligible for a trafficking CMP because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

### **STANDARD OF REVIEW**

In appeals of adverse actions, the Appellant bears the burden of proving by a clear 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, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) and (e)(1) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 CFR § 271.2 states, in part, that, "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 § 271.2 defines trafficking as: "(1) 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(a) states, inter alia, that “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(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(e)(1) reads, in part, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.”

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.”

## **SUMMARY OF THE CHARGES**

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from February 2017 through July 2017. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were an unusual number of transactions ending in a same cents value.
- There were multiple transactions made from individual benefit accounts in unusually short time frames.
- There were excessively large purchase transactions made from recipient accounts .

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

## **APPELLANT'S CONTENTIONS**

In its October 2, 2017, administrative review request, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- Appellant does not believe that FNS produced sufficient evidence to establish the existence of any trafficking violations.
- FNS provides no evidence, data, or studies to suggest that receipts ending in the subject amounts are uncommon or indicative of trafficking.
- FNS has not presented evidence that all of Tavarez products 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The transactions could reasonably be the product of several items 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- FNS did not provide any evidence to support the claim that purchases in this range are excessive based on the average purchase profile for where the store is located.
- The ALERT data is meaningless without context and additional analysis.
- The transactions identified fit within the normal shopping habits of the store's average customer.

The preceding may represent only a brief summary of the Appellant's contentions presented 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.

## **ANALYSIS AND FINDINGS**

### **Store Visit**

FNS authorized Tavarez Grocery as a small grocery on July 26, 2000. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a May 1, 2017, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then 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:

- Tavarez Grocery is approximately 780 square feet, with no additional food storage outside of public view.

- There were no shopping baskets or shopping carts for customer use.
- There was one cash register and one point-of-sale device.
- The small check-out space was surrounded by a Plexiglas display with an ice cream cooler in front.
- There were no meat/seafood specials or bundles that might sell for high prices.
- There was no fresh unprocessed meat, poultry, or fish.
- There were two packages of bacon, six packages of hot dogs, and three partial loaves of deli meat in the deli case.
- There was limited fresh produce including bananas, onions, tomatoes, bags of mini carrots (2 bags), green peppers, and limes
- Dairy included milk, butter, cheese, yogurt, ice cream, and infant formula.
- The only frozen food was ice cream.
- Other staple foods available for purchase were eggs, juice, rice, bread, tortillas, beans, cereal, pasta, canned goods, and snack foods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- There was hot food and prepare food.
- Ineligible items included tobacco products, health and beauty aids, hot food, paper goods, and cleaning products.

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. Given the available inventory as noted above, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors.

## Charge Letter Attachments

Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

**Charge Letter Attachment 1. There were an unusual number of transactions ending in a same cents value.** During the review period, there were a total of 527 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. When such patterns are unsupported by special pricing structures, they are a strong indicator of trafficking in SNAP benefits.

Counsel reports that FNS does not know if the store prices most if its items ending **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and then these transactions could consist of

several items 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Photographs from the store visit show that the most of the visible prices end in 99 cents.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). There was no evidence advanced to support the contention that totals were rounded down.

It is possible that some of the smaller transactions are the result of purchasing one or some same cent items and this could explain some of the lower dollar same cent transactions. The larger transactions cited in the charge letter would most likely consist of the purchase of several relatively inexpensive items and it is unlikely that these purchases would routinely total to an amount

5 U.S.C. § 552 (b)(6) & (b)(7)(C). SNAP transactions consisting of multiple products are more likely to result in a random statistical spread

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Consequently, when many transactions end in a same cents amount and same dollar amount, it appears that these transaction amounts are contrived and therefore, in the absence of compelling evidence to the contrary, are suggestive of trafficking.

In its reply to the charges, Counsel reasoned that the number of these transactions is meaningless without knowing the number of transactions it is being compared to. The case record shows that these transactions are 48% of the total transactions that fit the criteria for this scan. Given this context, these transactions are highly unusual.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant failed to provide a credible explanation for the same cent transactions listed on Charge Letter Attachment #1.

**Charge Letter Attachment 2. Multiple transactions were made from individual benefit accounts in unusually short time frames.** This attachment documents 42 sets of transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 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 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 Appellant's stock and facilities and are therefore indicative of trafficking. The photographs from the store visit offer no legitimate explanation as to why SNAP customers would routinely shop at Appellant multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, or profusion of large packages. Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The second and third transactions in each set are too large to consist of a forgotten item or two. Each of the transactions listed is much larger than the average SNAP transaction amount for a small grocery in the State.

Appellant explains that some of the customers use their benefits to do bulk shopping at or near the time they receive SNAP funds. The evidence from the store visit does not support that Appellant had the inventory for households to be able to purchase significant items in bulk to last for weeks or a month. Moreover, a government report on SNAP shopping patterns<sup>1</sup> indicates that on average SNAP households have less than one-quarter of their benefits left by the middle of the month. On the day the issuance was distributed, the average household redeemed more than a fifth of its benefit. By the first week, the average household had redeemed over half of its benefit, and by the second week, over three-quarters of it. Households redeemed about an additional 10 percent of benefits by the end of the third week (exhausting 90 percent of benefits) and ultimately redeemed 97 percent of their monthly benefits by the end of the day before receiving their next issuance. Therefore, transactions in which SNAP benefits are exhausted in one or a few transactions during a short period of time are suggestive of trafficking.

The Retailer Operations Division determined that clients shopping at Tavaréz Grocery are also shopping at area supermarkets and super stores that offer a larger quantity and variety of eligible food items for better prices. Based on these shopping patterns, transportation to other stores is not an issue for these EBT customers.

In the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

**Charge Letter Attachment 3: Excessively large purchase transactions were made from recipient accounts.** This attachment lists 279 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These large transaction amounts are not consistent with the store's inventory with no fresh meat and limited fresh produce. As noted previously, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors offering similar food items. Appellant did not have any shopping carts or shopping baskets and checkout occurred on a small cluttered counter space. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

**5 U.S.C. § 552 (b)(7)(E).**

During the review period, Appellant conducted more SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. There were no special packages or promotions that would result in a significant number of transactions in this dollar range. Considering Appellant's eligible food stock, infrastructure, and proximity to larger, better stocked stores, the Retailer Operations Division determined that this is highly unlikely and likely indicative of trafficking.

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<sup>1</sup> Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program, Mathematica Policy Research, by Laura Castner and Juliette Henke, for the U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, February 2011.

Sometimes a firm may have higher than average SNAP transactions amounts due to the lack of access to other SNAP authorized stores. However, the Retailer Operations Division determined that are 81 authorized firms are located within a one-mile radius of Appellant, including 25 other small groceries, five medium groceries, three supermarkets, and three super stores. It is not plausible that the firm's customers would regularly purchase large amounts of merchandise at Appellant when larger, better stocked stores are readily available and in the vicinity of the Appellant firm.

Counsel stated in its reply to the charges that a purchase 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for groceries for a household of 5 people is not unreasonable and does not create the inference of trafficking. Counsel stated that if households receive large amount of benefits for their household size, then these transaction would not be unusual. However, these transactions are questionable regardless of the household size due to the store's inventory. Moreover, given that these households are shopping at larger stores that have fresh meat and a greater selection of produce, it is questionable that a household is transacting 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for groceries at Appellant.

The Retailer Operations Division examined three households identified in the charge letter to analyze their shopping patterns at Tavaréz Grocery compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at supermarkets and super stores. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). There is no legitimate reason why households would conduct large transactions at Appellant when these households had just visited or planned to visit larger stores with a better selection of staple foods including fresh meat and produce and likely better prices.

In summary, Appellant's layout, business structure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Therefore, based on this empirical data, and in the absence of evidence to legitimize 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.

## **Evidence**

Counsel contends that there is no evidence that the firm committed trafficking violations. Counsel also contends that the ALERT data is meaningless without context and additional analysis. The ALERT system is a computerized fraud detection tool to identify SNAP 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 conduct an extensive analysis of the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether the questionable transactions were, more likely than not, the result of trafficking. Lastly, Appellant is always given a chance to explain the specific transaction patterns before the determination letter is issued and during the administrative review.

The legality of this method is supported by 7 CFR §278.6(a) which 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.]

The documentation and evidence provided by the Retailer Operations Division was thoroughly examined and there is no evidence to suggest that the decision was based solely on the ALERT data. From all indications, the Retailer Operations Division obtained the EBT data (provided by ALERT), 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. Appellant’s implication that the Retailer Operations Division simply charged a store with trafficking violations simply because it was listed on some computerized reports is unfounded.

As previously noted, Appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed. Appellant must provide a preponderance of evidence that the transactions detailed in the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. In the absence of compelling information or documentation weighed in comparison to the evidence provided by the Retailer Operations Division, the evidence weighs in favor of the Retailer Operations Division’s determination that SNAP-benefit trafficking substantially produced the transaction activity at issue in the present case.

### **CIVIL MONEY PENALTY**

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR §278.6(i) in lieu of a permanent disqualification. Appellant was informed that it would need to provide both the request and supporting evidence within ten calendar days of receiving the charge letter and that no extension of time could be granted for making the request or for

providing the required evidence.

The criteria for a trafficking CMP in lieu of permanent disqualification is defined under 7 CFR §278.6(i) which reads, *inter alia*:

*In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by **substantial evidence** [emphasis added] its fulfillment of each of the following criteria:*

*Criterion 1. The firm shall have developed an effective compliance policy as specified in §278.6(i)(1); and*

*Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and*

*Criterion 3. The firm had developed and instituted an effective personnel training program as specified in §278.6(i)(2); and*

*Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm ....*

In its response to the charge letter, Appellant, through counsel, contends that it had an effective compliance policy and training program to prevent program violations in place prior to the violations. Counsel also reported that ownership was not aware of, did not approve, did not benefit from, and was not involved in the trafficking violations.

The Retailer Operations Division determined that Appellant was not eligible for a CMP because it failed to submit substantial information to establish that the firm had an effective personnel training program compliance policy in place prior to the SNAP violations to qualify for a trafficking CMP under 7 CFR § 278.6(i). The Retailer Operations Division determined that Appellant's narrative explanation was not substantial evidence that Appellant met all four criteria required by 7 CFR § 278.6(i). For example:

- There is no documentation of any of Appellant's employees' dates of employment or dates when the training was conducted.
- There is no contemporary documentary evidence that all employees

were provided SNAP compliance training on their initial hire date or when any other alleged training occurred prior to the violations.

- There is no contemporary documentary evidence that employees were required to watch the FNS training video.
- There is no contemporary evidence of training agendas, training logs, signed training certificates or other evidence of employee training.
- There is no indication that quizzes or tests were conducted to insure that the employees understood any training that was provided to them.
- There is no documentation of what materials were used to conduct the training.

In the absence of any such documentation, a civil money penalty was not imposed in lieu of permanent disqualification by the Retailer Operations Division. The record is clear that Appellant did not submit sufficient evidence to establish that Appellant had an effective compliance program and policy in effect *prior* to the violations. Therefore, the Retailer Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

## **CONCLUSION**

The Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did occur as charged by the Retailer Operations Division. The determination to impose a permanent disqualification against Appellant is sustained.

The Retailer Operations Division also determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations. The denial of a trafficking CMP is also sustained.

## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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's owners 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, 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.

MARY KATE KARAGIORGOS  
Administrative Review Officer

January 30, 2018