

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

Baez Grocery Inc,

Appellant,

v.

Case Number: C0204389

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The record indicates that Baez Grocery Inc. (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retail food store in the SNAP, as imposed by the Retailer Operations Division (Retailer Operations), was appropriate.

ISSUE

The issue accepted for review is whether Retailer Operations 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 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS.”

CASE CHRONOLOGY

By Charge letter dated December 13, 2017, Retailer Operations informed the owners that FNS had compiled evidence that Appellant had violated the SNAP regulations based on analysis of electronic benefit transfer (EBT) transactions that “establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm.” The sanction for

trafficking is permanent disqualification. The record supports that Appellant did not reply to the Charge letter. Retailer Operations issued its Determination letter January 10, 2018. This letter informed the owners that Appellant was permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. Retailer Operations 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 firm was not eligible for the CMP because no evidence was submitted to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP per the regulations cited.

By letter dated January 17, 2018, the owners appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated January 24, 2018. Wholesale payment information was sent by cover letter dated January 31, 2018. Additional information dated February 27, 2018, was received by this office. Retailer Operations provided its assessment March 19, 2018.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving, by a preponderance of the evidence, that the administrative action 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 argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Parts 278.6(a) 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: "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: "FNS may disqualify any authorized retail food store ... from further participation in the program 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..."

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.” Trafficking is defined, in part, in 7 CFR § 271.2, as “the buying or selling of SNAP benefits for cash or consideration other than eligible food.”

7 CFR § 278.6(b)(2)(ii) states: “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(i) states: “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

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. The charges on review were based on an analysis of SNAP EBT data during the period of July 2017 through October 2017. This involved the following patterns of transactions indicative of trafficking:

1. Multiple transactions made from individual benefit accounts within unusually short time frames.
2. Excessively large purchase transactions made from recipient accounts.

APPELLANT’S CONTENTIONS

In reaching a decision, attention has been given to all contentions presented, including any not specifically recapitulated herein.

- Multiple transactions made in a short time frame is because there are two employees at the register preparing the customers’ groceries so they don’t take too much time at the register and to make the line speedy. Usually customers don’t like to wait too long so an employee is always ready to assist the customers.
- Two stores around my area had sold and they had no food stamp license or machine available and the customers closest to those stores came to my store.
- I am aware of the change in store volume but I did not do any violations that would jeopardize my food stamp license.
- We are aware of the USDA regulations and abide by them and the law.

A document titled “Ovi Provisions Corp.” and Popular Community Bank Statements with copies of checks were provided. The retailer provided a three page document titled “Tropical” and a

one page document titled “Goya.” The retailer provided copies of invoices for Christian & Christian LLC and Ovi Provisions, Corp. Invoices outside of the review months were submitted.

ANALYSIS AND FINDINGS

The evidence that Appellant violated the SNAP regulations is furnished with the Charge letter as Attachments. Government analyses of stores caught in trafficking violations during actual on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include those cited in the letter of charges. SNAP transaction data is provided to FNS via each state’s EBT processor on a daily basis in a layout and format that is standardized nationwide. The transactions are validated and loaded into a database for subsequent analysis. A USDA system scans all retailer SNAP transactions at the beginning of each month for the prior month. The system uses pre-defined criteria or patterns for potential fraud detection. Formatted reports provide information on those authorized stores and transactions meeting the pre-established criteria.

The system provides a series of spreadsheets and graphs that compare a specific store’s data to the average for its firm type or to user-selected comparison stores. In addition, the system utilizes mapping software which translates the location address information into geo-codes, and enables the user to map the locations of selected authorized stores and track transaction locations of recipients.

Attachment 1: Listed are 40 transactions in 18 sets of two or more transactions, conducted by 16 different households (HHs).

Data shows that within a one mile radius of Appellant there are 25 small grocery stores, two supermarkets, six medium grocery stores, one large grocery store and one super store. The data shows that 31% of the HHs flagged on this Attachment made SNAP transactions at a large grocery, supermarket or super store on the same day that they conducted transactions at Appellant. Within two days of a transaction at Appellant, 50% of the flagged households made a SNAP transaction at a large grocery, supermarket or super store. This supports that there are no lack of authorized stores for SNAP recipients to purchase eligible foods.

Given the shopping options for SNAP recipients in this area, it seems irregular that multiple SNAP expenditures for eligible foods were made in short periods at this store. The owner did not give the names of the sold stores, when the two stores in the area were sold, or when Appellant noticed a change in SNAP volume. According to the store visit report conducted on October 28, 2017, Appellant’s food stock and layout reveal no particular eligible items that would draw recipients. The record notes there is a comparable small grocery store 0.45 miles from Appellant that sells Hispanic foods such as Goya products.

The owners did not provide itemized cash register tapes to support the sale of SNAP foods. No recipient affidavits were advanced to support this shopping pattern at Appellant. Appellant bears the burden of proving by a preponderance of the evidence that the administrative action

should be reversed. Thus, the transactions have not been demonstrated by a preponderance of the evidence to be for eligible foods.

Attachment 2: Listed are 185 SNAP transactions made by 100 households **5 U.S.C. § 552 (b)(7)(E)**. **5 U.S.C. § 552 (b)(7)(E)**. Appellant had many more transactions hit this Attachment than did a nearby comparable small grocery.

The record confirms that SNAP households were not dependent on Appellant to meet their food needs as there are other authorized stores nearby. Data shows that 55% of the 100 households flagged at Appellant on this Attachment made a transaction at a large grocery, super store or a supermarket within one day of conducting a transaction(s) at Appellant. Within three days of a transaction(s) at Appellant, 68% of the households, made a SNAP transaction at a large grocery, supermarket or a super store. This is an indicator that access to larger retailers was not an impediment to the majority of the HHs flagged.

The owner provided a two page document from Ovi Provisions Corp. that sells meats, cold cuts, fish and seafood, frozen foods, dairy, beverages, prepared frozen foods and frozen vegetables, spices, paper products, towels, and is a distributor of Dart containers and restaurant supplies. Dates of March 3, 2017 to January 26, 2018 are listed. Retailer Operations reviewed the information and determined that for the review period of July 2017 to October 2017, invoices **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The document advanced did not indicate a description of the products purchased. Retailer Operations could not distinguish if food or non-food items were purchased. Appellant did not provide the actual invoices from Ovi for the review period.

The owner provided Popular Community Bank Statements with copies of checks. The written response stated Appellant has many monthly purchases towards the store inventory that is constantly selling. Retailer Operations determined that the checks noted as “Wholesale,” “Wholesaler,” or “Goya” totaled **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** for the review months. The checks did not indicate if food or non-food items were purchased.

The Tropical document listed dates of January 2017 to December 5, 2017. The second table listed dates of January 17, 2017 to December 5, 2017. A third table listed: invoices total, credits total, and total paid. Retailer Operations analyzed the information for the review period of July 2017 to October 2017, which totaled **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Retailer Operations could not distinguish if food or non-food items were purchased. Appellant did not provide the actual invoices from Tropical for the review period.

The Goya document listed the year, month, and amount for 2016 and 2017. Retailer Operations reviewed the information for the Charge letter months and the amounts totaled **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The document did not indicate a description of the product(s) purchased and the actual invoices were not provided. The Goya document data did not match to the previously received Popular Community Bank Statement information for Goya Foods which showed a total of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

The retailer provided invoices from Christian & Christian LLC, Jetro's Only & Official Delivery Company. Jetro Cash and Carry offers groceries, frozen and refrigerated foods, produce, health and beauty care, cigarettes, small wares, full range of restaurant supplies (food and non-food) mostly by the case. Retailer Operations evaluated the Christian & Christian LLC invoices and determined that for the review months there were 869 cases for a total of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The product description was not detailed. The Christian & Christian LLC invoice data did not match to the previously received Popular Community Bank Statement total of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Retailer Operations added the average markup of 40% and estimated that the Ovi Provisions Corp. invoices would support 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in food stock for the review period. SNAP redemptions for the review period were 5 U.S.C. § 552 (b)(6) & (b)(7)(C). While Appellant may have stocked sufficient inventory of eligible foods, Retailer Operations did not find the evidence presented adequately detailed to support this claim as Appellant only provided actual invoices for Ovi Provisions Corp.

The owner did not provide a copy of his prices of eligible foods or his sale markup, and no itemized cash register tapes were advanced to support the owner's contention that these transactions were for eligible foods. No federal business taxes or state sales tax records were advanced. The retailer's explanations are not sufficient by preponderance of the evidence to support that Appellant's transactions are more likely than not legitimate.

CIVIL MONEY PENALTY

To be considered eligible for a CMP in lieu of permanent disqualification for trafficking, a firm must establish by substantial evidence its fulfillment of the criteria as listed at 7 CFR § 278.6(i). The criteria are, as a whole, specifically identified as a minimum standard that firms must meet in order to be eligible for such a penalty. Given these considerations, it is clear that the statute and the applicable regulation allow no flexibility below the level of this standard. Appellant produced no evidence that it met the requirements to qualify for a trafficking CMP in lieu of permanent disqualification.

CONCLUSION

An Appellant who seeks to set aside an agency sanction action must provide evidence by a preponderance that the transaction activity at issue is in fact not due to SNAP benefit trafficking. Since permanent disqualification is warranted on the first occasion of trafficking, it is Appellant's burden to raise material issues of fact as to each of the transactions set forth as suspicious by FNS. This burden has not been met.

Retailer Operations' analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. Retailer Operations used computer printouts of transaction data and other reports, in addition to store visit observations and an analysis of

household shopping behavior in rendering a finding that violations indicative of trafficking occurred. These are as valid a means of establishing facts as direct evidence obtained through an on-site investigation and the eye witnessing of trafficking. The evidence supports that it is more likely true than not true that program violations did occur at Appellant. Thus, based on the discussion herein, the decision to impose a permanent disqualification against Appellant is sustained.

Appellant did not provide any documentation as required by the regulations for consideration for a trafficking CMP in lieu of permanent disqualification. Thus, Retailer Operations properly denied a CMP according to the terms of Section 278.6(i) of the SNAP regulations.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008, and Section 279.7 of the regulations (7 CFR § 279.7) discuss the applicable rights to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which 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.

M. Viens
Administrative Review Officer

March 23, 2018