

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

Bello Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0210738

FINAL AGENCY DECISION

The record indicates that Bello Market (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). It is the decision of the USDA, 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 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 the implementing regulations at 7 CFR § 279.1, provide that a food retailer 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 17, 2018, Retailer Operations informed the owner 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 the firm type. The sanction for trafficking is permanent disqualification.

Appellant replied to the Charge letter by letter dated January 29, 2019. Retailer Operations issued a Determination letter dated March 25, 2019. This letter informed the owner that Appellant was permanently disqualified from the SNAP in accordance with Sections 278.6(c), and 278.6(e)(1), of the 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 regulations. The firm was deemed not eligible because insufficient evidence was submitted to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP regulations.

By letter dated April 7, 2019, the owner appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated April 24, 2019.

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 that 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 Section 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e)(1) establish the authority upon which a permanent disqualification may be imposed against a retail food store in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 CFR § 271.2 states: "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 ... 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) states: "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 the 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 transaction data during the period of April 2018 through September 2018. This involved two patterns of transactions indicative of trafficking:

1. Multiple transactions made from individual benefit accounts within a set time period.
2. Excessively large purchase transactions were made from recipient accounts.

APPELLANT’S CONTENTIONS

In reaching a decision, attention has been given to all contentions as presented by the owner, including any not specifically recapitulated here.

- I will accept a CMP and keep training the SNAP training program.
- I have been doing this store more than 10 years. All my customers like family.
- I am really telling the true, my customers bring all families keep buying buying big amount of purchase, Spam \$70, cone beef \$100, baby formulas and besides various items.
- Guam EBT spending style different like others.
- They buy one time grocery for one month living.
- I do not live cheat the conscience and like that in the future.

Three pages of signed documents regarding SNAP training were advanced.

ANALYSIS AND FINDINGS

Retailer Operations presented a case that Appellant trafficked SNAP benefits. As patterns of unusual transactions appear across multiple Attachments the case of trafficking becomes more convincing.

Attachment 1: Listed are 436 transactions in 136 sets of two or more transactions conducted by 41 different households (HHs).

According to the data, there are at least 11 authorized stores within a two mile radius of Appellant; including a supermarket and three super stores. The data shows that 88% of the HHs listed made a transaction(s) at a large grocery, supermarket or super store on the same day of making a transaction(s) at Appellant, and within two days, more than 97% of the HHs listed, made SNAP transactions at larger store types. Thus, the data supports that the recipients had access to, and did transact benefits at other authorized retailers.

5 U.S.C. § 552 (b)(7)(E). It had an average SNAP transaction dollar amount that was 26% higher than same type stores for the same time period. This is irregular.

The owner provided no evidence in support of his contentions. No itemized cash register tapes were advanced. No recipient affidavits were provided to attest to shopping patterns at the store. No business banking records or tax records were provided. No vendor invoices supporting the acquisition of eligible food inventory were provided.

Attachment 2: Listed are 357 transactions conducted by 88 different households.

5 U.S.C. § 552 (b)(7)(E).

The shopping histories in the record confirm that households that made SNAP transactions at Appellant also conducted transactions at large groceries, supermarkets and super stores. As such, recipients did use benefits at other authorized retailers. Retailer Operations' review of the store visit photographs revealed that there did not appear to be eligible foods at Appellant that could not be obtained at larger stores in the area.

The retailer provided no comprehensive price list of eligible foods at the store, citing the price of only a few items. The owner did not submit purchasing invoices to help confirm the volume of eligible stock to support Appellant's SNAP redemptions. No evidence was advanced to support the owner's denial of trafficking.

The burden to disprove trafficking rests with Appellant. While some transactions flagged may be legitimate exchanges of eligible foods for benefits, insufficient evidence was advanced to support this contention. Permanent disqualification is warranted on the first occasion of trafficking. An Appellant that seeks to set aside an Agency sanction must focus its probative efforts on providing evidence by a preponderance that the transaction activity cited is not due to SNAP benefit trafficking. Appellant has not met its burden.

CIVIL MONEY PENALTY

To be considered eligible for a CMP, a firm must establish by substantial evidence, its fulfillment of each of the criteria under 7 CFR § 278.6(i). The owner submitted three pages regarding alleged SNAP training, all dated in January 2019, after the date of the Charge letter.

Each statement included the company name, address, web links to USDA SNAP training resources, video/print checkboxes, date of attendance, date of employment, employee name, signature, and date, owner/operator name, signature, and date. Each copy states: “I confirm that I attended the training class listed above. I listened, read, and understood the training, and I understand that as an employee, it is my responsibility to abide by SNAP rules and requirements, in accordance with the USDA guidelines. If I have questions about the training, materials presented or SNAP rules and requirements, I understand it is my responsibility to seek clarification from store management.”

Retailer Operations determined that Appellant did not meet the requirements to qualify for a CMP in lieu of permanent disqualification. No documentation was submitted of a compliance policy or SNAP training documentation dated prior to the occurrence of the violations cited in the charge letter.

CONCLUSION

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 in SNAP benefits. Upon review of all of the evidence in this matter, it is determined that it more substantially supports a conclusion that the SNAP transaction activity at Appellant was due to SNAP benefit trafficking than to legitimate SNAP transactions for eligible foods. Thus, based on the discussion herein, the decision to impose a permanent disqualification against Appellant is sustained.

Appellant did not provide substantial documentation, as required by the cited regulation, for consideration for a CMP in lieu of permanent disqualification. The three one page statements were all dated after the Charge letter was issued, and did not substantiate that Appellant had a SNAP compliance policy or SNAP training in place prior to the charges. Thus, Retailer Operations properly denied a CMP according to the terms of Section 278.6(i) of the SNAP regulations.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008, and to 7 CFR § 279.7 of the regulations, with respect to applicable rights to judicial review of this decision. 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 owner resides or is engaged in business, or in any court of record having competent jurisdiction as to Guam. 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

June 4, 2019