

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

Brito Deli & Grocery Corp,

Appellant,

v.

Case Number: C0205553

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The record indicates that Brito Deli & Grocery Corp. (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 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 January 30, 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. The record supports that Appellant replied to the Charge letter February 8, 2018.

Retailer Operations issued its Determination letter February 22, 2018, that 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 for a CMP 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 per the regulations cited.

By letter dated February 23, 2018, the owner appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated March 5, 2018. The owner submitted additional information under cover letter dated March 19, 2018, which was forwarded to Retailer Operations for review.

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: "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 § 278.2(f) states: "Food stamp benefits shall not be accepted by an authorized retail food store in payment for items sold to a household on credit. A firm that commits such violations shall be disqualified from participation in the Food Stamp Program for a period of one year."

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 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 November 2017. The patterns of transactions indicative of trafficking were:

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

- EBT does not only benefit our business but the community around our business.
- We understand how the regulations work and how small delis work inner city.
- Processing SNAP transactions is a privilege and all regulations have been followed.
- We make a personal commitment to study and follow the SNAP regulations with the employees.
- We have provided updated signs in English and Spanish with all the most important regulations from the EBT program and these are visible next to the EBT processing terminal.
- Many households are not always able to go the supermarket anytime they need food products because they are not open late. Also, the store is the only grocery that accepts EBT within a 2-3 block radius.

- If under present circumstances the SNAP authority considers a CMP instead of a permanent disqualification of our business, we ask for an opportunity to complete any and all requirements. We are looking to fulfill any requirements or CMP in order to continue offering EBT program to our clients.
- FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm subject to a disqualification is selling a substantial variety of staple food items, and the firm's disqualification would cause a hardship to SNAP households. This type of CMP is applicable because we are close to Section 8 housing.

The owner advanced: copies of shift and store sales reports dated in July and August 2017 and January 2018; vendor receipts; 5 U.S.C. § 552 (b)(6) & (b)(7)(C); photos of SNAP posters; one page "SNAP What Can I buy?"; one page SNAP EBT Do's and Don'ts for Cashiers"; a printout of a map showing Housing Authority locations and a homeless shelter; a photo of a nearby shelter; a listing of 12 households with a statement that they shop at the store late at night because it is convenient and safely located; and owner affidavits dated and notarized February 2 and March 2, 2018. Also provided were two employee affidavits attesting to training, two employee training evaluation forms, and one page regarding the four criteria for a civil money penalty.

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 single 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. The system enables the user to map the locations of selected authorized stores and track transaction locations of recipients. Retailer Operations staff use the analysis of SNAP transaction data to evaluate the type and extent of potential program violations.

Attachment 1: Listed are 176 transactions in 77 sets of two or more transactions, conducted by 48 different households (HHs).

Contentions:

- Many customers come and purchase different products sold in our grocery store more than three or four times a day due to the fact that we are located closer to a New York City shelter. This is especially common within the hours beginning and ending the school day.

- Many customers find it troublesome to travel a distance to the supermarket.
- A regular customer can buy 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in one transaction and people come in to get little things when they cook and they usually come back, buy anything they may be missing.
- Many of these multiple transactions coincide with the beginning and end of the school days.

Data shows that within a one mile radius of Appellant there are 32 other authorized stores including medium and large groceries, supermarkets, and super stores. This includes three supermarkets that are located within a .25 mile radius. The data shows that 50% 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, 77% of the HHs flagged made a SNAP transaction at a large grocery, supermarket or super store. This supports that there is no lack of authorized store options 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 record supports that in January 2017, USDA issued an official warning letter to the owner as a result on an onsite investigation. Based on this investigation, the USDA determined that the firm had accepted SNAP benefits in exchange for two common ineligible nonfood items during a store visit. USDA warned Appellant that the acceptance of SNAP benefits for nonfood items was in violation of Section 278.2(a) of the regulations. Thus, Appellant has been previously warned of SNAP violative activity at the firm.

Retailer Operations determined that many of the data sets do not appear to correspond with the beginning or end of the school day. In addition, many of the transactions do not appear to have occurred late at night as contended. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This calls into question the veracity of the statement that customers come to the store when they need food during the late night hours when supermarkets and super stores are not open.

No signed individual recipient affidavits were advanced to support this shopping pattern at Appellant. The owner did advance 12 names, addresses, telephone numbers and 11 partial EBT numbers of recipients with a statement that Appellant “is open late allowing us to access to purchase food products in order to cook late night dinner for our families. Otherwise causing us to walk further and through a more dangerous area to reach other accepting delis.” The same statement was used for all recipients’ and further states: “Brito Deli Grocery conveniently and safely located at any time of day and night as much for kids as for adults and elderly.” One name was repeated, and of the 11 remaining names Retailer Operations found that only three of these households could be verified as having flagged transactions at Appellant during the review period. Even if these three recipients were conducting only eligible food purchases at Appellant, a large number of households and transactions were not explained by this list of recipients.

Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. Appellant provided no federal or sales tax records in support of its contentions. The owner did not provide itemized cash register tapes to support

that SNAP benefits were used to acquire eligible foods. Thus, the transactions have not been demonstrated by a preponderance of the evidence to be for SNAP foods.

Attachment 2: Listed are 335 SNAP transactions made by 143 households **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. 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 73% of the households flagged 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, 86% 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 HHs flagged.

5 U.S.C. § 552 (b)(7)(E)

Contentions:

- Some items typically purchased include: rice \$4.99, fideos \$2.29, oil \$6.99, milk \$3.49, corn \$2.49, coffee \$4.00, sauce \$1.49 and cereal \$4.99.

Retailer Operations found it suspicious that the number of transactions on this Attachment fell after the onsite store visit on November 17, 2017. The firm had 75 transactions hit this Attachment in October and the number dropped to 54 hits in November. Notably, only two of the 54 hits occurred after the store visit date. The month of December, Appellant had only six transactions hit the parameters of the Attachment. Since it is doubtful that the store's inventory or pricing structure changed between October and December, Retailer Operations found this drop off in flagged transactions to be an indicator that trafficking was occurring during the review period.

The owner did provide vendor invoices to support his inventory for August 2017 and January 2018. Retailer Operations did not analyze the January invoices as they were outside of the review period. Retailer Operations found the invoices difficult to read as many were copied poorly, overlapping, or folded over. The record supports that Retailer Operations attempted to telephone the owner but never got an answer. Retailer Operations also emailed the owner and requested better and complete invoices, but did not receive a response.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). As such, inadequate documentation of vendor inventory of eligible foods was provided to support the SNAP redemptions.

Retailer Operations analyzed the shift reports advanced by the owner and found that they shed no light on the transactions cited in the Charge letter. The EBT receipts provided are not useful in that they simply confirm the SNAP transaction totals which are already available to FNS and are the basis for the transactions listed on the Attachments. Two copies of itemized receipts were provided for August 2017, but there was no indication that SNAP benefits were used on these low dollar transactions; cash is noted. Apart for the two 2017 receipts, no itemized cash register receipts corresponding to SNAP purchases were provided that would show what items were transacted and support that the transactions listed on the Attachments were for eligible foods.

No federal business tax forms were provided, nor were bank statements advanced. The list of customers attested that the store was open late. The individuals did not sign statements that they acquired eligible foods at Appellant that would corroborate the Attachment patterns. The retailer's explanations and advanced information are not sufficient by a 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 insufficient evidence within the regulatory time frame that it met the requirements to qualify for a trafficking CMP in lieu of permanent disqualification.

The owner requested a hardship CMP in lieu of disqualification noting that Appellant is located near homeless shelters and Section 8 housing. However, a hardship CMP is not appropriate where trafficking is charged. The applicable regulation is found at 7 CFR § 278.6(i).

CONCLUSION

Retailer Operations' 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. Retailer Operations used computer printouts of transaction data and other reports, in addition to a store visit report and an analysis of household shopping behavior in rendering a finding that violations indicative of trafficking occurred. 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 sufficient documentation as required by the regulations to be eligible for a trafficking CMP in lieu of permanent disqualification. Thus, Retailer Operations properly denied a CMP according to the terms of the 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 owner resides or is 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

April 19, 2018