

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

**Peguero Grand Grocery Corp,**

**Appellant,**

**v.**

**Case Number: C0205600**

**Retailer Operations Division,**

**Respondent.**

**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 Peguero Grand Grocery Corp. (Peguero Grand 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 February 8, 2018, 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 June 2017 through November 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 replied to the charges by letter on February

20, 2018. Appellant denied trafficking and explained the transactions were normal due to the unique circumstances of the store. Appellant requested a CMP.

After considering the retailer's reply and the evidence, the Retailer Operations Division issued a determination letter dated February 13, 2018. 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.

By letter postmarked March 3, 2018, ownership appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted.

### 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 June 2017 through November 2017. This involved the following SNAP transaction patterns which are indicative of trafficking:

- 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 Appellant’s March 1, 2018, administrative review request and subsequent correspondence postmarked April 2, 2018, Appellant provided the following summarized contentions, in relevant part:

- Appellant is conveniently located close to Section 8 housing and is open early and late hours.
- Appellant understands the way SNAP regulations and procedures work.
- Appellant has always followed SNAP guidance.
- Appellant would face a hardship if its SNAP authorization is revoked.
- Appellant is located near many shelters and therefore many customers shop three or four times a day due to its location.
- There are many large and multiple transactions because many customers live nearby and find it troublesome to travel a distance to the supermarket.
- Clients purchase the following products daily: rice - \$4.99, Fideos Goya - \$2.29; Olive Oil - \$6.99, milk - \$3.49, cargo corn - \$2.49, Café Bustelo - \$4.00, Goya sauce - \$1.49, cereal - \$4.99, and meat \$20.00 or \$30.00.

- Customers can purchase - 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in one transaction.
- Customers return to store to purchase items that they may be missing, which will be more than 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- Appellant makes a personal commitment with its employees to study and follow the EBT regulations.
- Appellant has taken all measures necessary to assure that the store is following all SNAP regulations.
- Appellant has hired new staff that are trained to not commit SNAP violations when accepting SNAP.
- All new employees must complete training within one month of hire.
- Appellant stated that it attached its compliance policy.
- All managers and employees are trained according to the SNAP material on the FNS website.
- Appellant stated that it attached its developed and effective personal training program and Appellant has translated all material.
- Owner was not aware of the employee actions at the time of the violations.
- The owner is not always present.
- Appellant provided documentation to show that staff has been notified that any employee that is found to be conducting SNAP violations is subject to termination.
- Appellant had no intentions to ever violate any SNAP rules or regulations.

In support of its contentions, Appellant submitted the following documents:

- March 8, 2018, administrative review acknowledgement letter;
- Appellant's reply to the charges;
- 52 pages of invoices and receipts;
- Contract with a company called Reach Club that respond to the SNAP on behalf of client;
- Civil money penalty regulations;
- Two affidavits acknowledging compliance training;
- Training evaluation forms for two employees indicating training was conducted in March 2018 and December 2017; and
- List of eight customers with a statement that Appellant is open late and allows them to purchase food to cook late dinners for their families and that the loss of EBT would greatly affect families.

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 Peguero Grand Grocery as a small grocery on February 6, 2014. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division

considered information obtained during a December 28, 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:

- Peguero Grand Grocery is approximately 800 square feet.
- There was no shopping baskets or shopping carts for customer use.
- The checkout area was small and surrounded by a Plexiglas wall with items stacked on both sides of the window opening and an ice cream freezer directly in front of the cash register.
- The store does not offer any promotional specials, packaged, or bulk items.
- There was no fresh meat or poultry.
- There was deli meat, bacon, and four packages of fish.
- There was no limited fresh produce including potatoes, onions, plantains, and two squash.
- Dairy included milk, yogurt, butter, cheese, and infant formula.
- Other staple food items included bread, cereal, pasta, rice, eggs, and a selection of canned goods.
- There was a deli counter that had meat and cheese for sale by the pound as well as prepared foods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included include alcohol, lottery, tobacco products, health and beauty aids, paper products, pet food, and cleaning products.
- There were some empty shelves and sparse stocking of products in some areas.

The highest priced items were Enfamil infant formula - \$19.99, deli meat- \$8.99 per pound, rice - \$8.99, and cheese - \$6.99 per pound. The SNAP eligible food stocked by the store was generally of a low dollar value with the exception of infant formula, 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. Multiple transactions were made from individual benefit accounts in unusually short time frames.** This attachment documents 25 sets of transactions conducted by 19 households **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits that meet the parameters of this scan. 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.

Appellant explains that customers shop at the store three or four times a day because they are located near a shelter. However, the Retailer Operations Division also determined that the nearby shelter is actually closer to other authorized stores including a supermarket. In addition, it seems unlikely that shelter residents would make large transactions when they are unable to store or cook their food.

Appellant also contends that customers find it very troublesome to travel a distance to the supermarket. There is a SNAP authorized supermarket located within a 0.06 mile radius from Appellant. The Retailer Operations Division determined that households that are conducting rapid, repetitive, and large transactions at Appellant are frequently shopping at better-stocked and more competitively-priced grocery stores, sometimes on or about the same day they shopped at Appellant. Based on the shopping patterns of these SNAP customers, transportation to other stores did not appear to be an issue and customers do not appear to rely on Appellant for all of its grocery needs.

The SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but because they display characteristics of use inconsistent with the nature and extent of Appellant's stock and facilities and are therefore indicative of trafficking. 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 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 significant bulk items for sale. The transactions are too large to consist of a forgotten item or two. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Appellant is a small grocery.

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 2: Excessively large purchase transactions were made from recipient accounts.** This attachment lists 241 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The substantial number of high dollar purchases calls into question the legitimacy of these transactions.

These transactions are suspicious not because they exceed a certain amount but because they display characteristics of use inconsistent with the nature and extent of the store's stock and facilities and are therefore indicative of trafficking. The store photographs indicate that the store has no shopping baskets or carts, no fresh meat, and limited fresh produce. There is no compelling reason for customers to consider Peguero Grand Grocery as a first choice destination to fulfill large purchases of food, or to make cumulative purchases **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** resulting in large amounts.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). There did not appear to be special packages or promotions that would result in these transactions totals. Consequently, when many transactions amount to the same total, it appears that these transaction amounts are contrived and in the absence of compelling evidence to the contrary, are suggestive of trafficking.

The Retailer Operations Division compared Appellant to other small groceries in New York as well as small groceries specifically in Bronx County. Appellant had a larger average SNAP transaction dollar amount as well as a greater total SNAP redemption dollar amount than the average for small groceries in the State and the county. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering Appellant's eligible food stock, infrastructure, and proximity to larger, better stocked stores this is highly unlikely and likely indicative of trafficking.

The Retailer Operations Division compared Appellant to three nearby small groceries. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant also had a larger average SNAP transaction amount than the other three stores. The transaction patterns of Appellant noted in the Charge Letter also exceed the other authorized stores, as seen on the table. The Retailer Operations Division considered this an indicator of trafficking.

#### 5 U.S.C. § 552 (b)(7)(E)

Appellant explained that customers are not always able to go to a supermarket. It is true that 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 there are 365 other authorized stores within a one-mile radius of Appellant, including 121 convenience stores, 33 combination stores, 121 other small groceries, 45 medium groceries, 11 large groceries, 25 supermarkets, and nine super stores. There is a super store located .32 miles from Appellant and a supermarket located 0.06 miles from Appellant. The Retailer Operations Division determined that there is a large grocery that is open long hours and two other better stocked stores that are open 24 hours per day.

The Retailer Operations Division analyzed the shopping patterns of five households identified in the charge letter. All of these households had access to, and shopped at supermarkets and super stores. However, despite this access to better stocked stores, each of the five households conducted excessively large transactions at Peguero Grand Grocery 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of shopping at a supermarket or super store. It is unlikely that 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.

### **Invoice Analysis**

Appellant submitted invoices for the eligible food items it purchased during the review period to support its SNAP redemptions. Each of the invoices was analyzed. Invoices that were dated outside of the review period were excluded. The Retailer Operations Division included all other invoices in total in favor to Appellant, even though there were non-food items listed. The Retailer Operations Division determined that the submitted invoices do not support the firm’s SNAP redemptions during the review period. The large dollar transactions remain questionable even if there was sufficient food inventory to support such transactions when consideration is made of there being no fresh unprocessed meat and limited fresh produce, a large inventory of low-dollar value snack food and beverages, a greater variety of food at lower prices at other stores which many customers also shop, no shopping baskets or shopping carts, and little counter space to place food for purchase for checkout. There does not appear to be anything that would reasonably attract SNAP households to shop at Appellant and spend substantial amounts of their SNAP benefits.

### **Customer List**

Appellant provided a one page document with the names of eight customers along with their phone number, address, and last four digits of their EBT card. The statement stated that the loss of EBT authorization would affect families in the neighborhood because the firm is open late and conveniently located. It also stated that they can shop there safely any time of the day and night rather than walking through more dangerous areas. Utilizing the names and addresses provided on these statements, the Retailer Operations Division searched the New York SNAP redemption system to identify these households and review their SNAP transaction history. Three out of the ten households did not conduct any of the transactions listed on the Charge Letter Attachments. Two of the households each conducted one transaction listed in the Charge Letter Attachments. Five of the households conducted several transactions at Appellant during the review period. However, the statement from these households is not sufficient evidence that each of their transactions were for eligible food items only.

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. Appellant did not provide any compelling justifications for the transactions listed on the charge letter attachments. 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.

### **Economic Hardship**

Appellant states that it will be a hardship if it is permanently disqualified. It is recognized that economic hardship is a likely consequence whenever a store is disqualified from participation in



SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To excuse ownership from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that the firm will incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposition.

### **Household Hardship**

Appellant submitted a statement that explains that customers would greatly be affected if Appellant is disqualified. As indicated, the Retailer Operations Division determined that there are 365 other SNAP authorized stores within a one mile radius of Appellant. Moreover, where there is a hardship to SNAP households, FNS may impose a hardship CMP on a firm in lieu of a disqualification where there is a lack of authorized stores in the area. However, the regulations at 7 CFR §278.6(f)(1) clearly state that "a civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a permanent disqualification." Because the Retailer Operations Division has taken action to permanently disqualify Appellant's firm, a hardship CMP in lieu of disqualification cannot be granted.

### **Intent**

Appellant contends it did not intend to violate any rules. However, the definition of trafficking contained in the SNAP regulations at 7 CFR § 271.2 does not require an element of intent on the part of the violator. Therefore, whether or not the Appellant firm or its employees intended to violate SNAP regulations is irrelevant.

## **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). Appellant was informed that it would need to provide both the request and supporting evidence within 10 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 civil money penalty in lieu of disqualification is defined under 7 CFR §278.6(i) which reads, in part:

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 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 ....

Appellant stated that it provided its compliance policy, its training program, and documentation to show that staff has been notified that any employee that is found to be conducting SNAP violations is subject to termination. This information was not included with Appellant's response to the charges. In fact, the record shows that a woman called from the Appellant firm stating that she was unaware that it needed to provide this type of documentation when the store replied to the charges.

Appellant did submit documentation to show that it conducted training in March 2018 and December 2017. However, these alleged training sessions occurred after review period.

The Retailer Operations Division determined that Appellant fell short of the regulatory standard for a trafficking CMP as it did not provide **substantial** evidence that it met all four criteria required by 7 CFR § 278.6(i). Appellant did not submit any documentary evidence to show that a training program existed prior to the violations. The Retailer Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained.

## 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. Under review, the denial of a trafficking CMP was deemed correct and proper.

## **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 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.

Mary Kate Karagiorgos  
Administrative Review Officer

June 7, 2018