

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

**Puerto Nuevo Inc.
DBA La Espiga Bakery,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0216761

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a permanent disqualification of Puerto Nuevo Inc. DBA La Espiga Bakery (hereinafter “La Espiga Bakery” or “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against La Espiga Bakery.

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.”

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified based on an analysis of EBT transaction data from November 2018 through March 2019. This involved the following transaction patterns which are common trafficking indicators:

- There were multiple transactions made from one or more SNAP households within a short timeframe.

- There were multiple transactions made from the accounts of individual SNAP households within a set time period.
- The bulk of SNAP households' remaining benefits were depleted within short timeframes.
- The firm conducted EBT transactions that were large based on observed store characteristics and recorded food stock.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized La Espiga Bakery for SNAP participation on May 12, 2015. In a letter dated May 23, 2019, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred between the months of November 2018 and March 2019. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In a faxed letter dated June 3, 2019, the Appellant disputed the charges of trafficking and stated that the unusual transaction patterns were the result of extending credit to customers who requested it. According to the Appellant, the credit worked in the following way: The customer would swipe their EBT card for a certain amount, which apparently became a pre-paid store credit in which the customer could return to the store in subsequent days and shop on their available balance until it ran out. The Appellant stated that for each case, it produced a credit log. To support this claim, the Appellant submitted signed statements from nine different customers attesting to the credit program described above. Each statement included the customer's name and EBT card number.

In response to the Appellant's claim that it allowed credit accounts at the store, the Retailer Operations Division sent the firm a letter dated June 3, 2019. In this letter, the Appellant was asked to provide additional documentation to support its claim of credit accounts. The letter stated that the documentation must identify specific accounts along with corresponding dates and amounts. It should be noted that the practice of allowing SNAP households to purchase food items on credit is prohibited by regulation. If a firm is found to have committed credit account violations instead of trafficking, the firm would be subject to a one-year disqualification from SNAP in accordance with regulations at 7 CFR § 278.2(f).

In response to the agency's June 3 letter, the Appellant submitted six credit logs from the months of April and May 2019. Each of the logs listed a first name as well as the items purchased and the dates the items were obtained. Dollar amounts were only sporadically listed.

After analyzing the documentation provided by the Appellant and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated June 24, 2019. This letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance

with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but a CMP was not appropriate because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked July 5, 2019, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

7 U.S.C. § 2021(b)(3)(B) states, in part:

...[A] disqualification under subsection (a) shall be...permanent upon...the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards...

7 CFR § 278.6(a) states, in part:

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, [or] evidence obtained through a transaction report under an electronic benefit transfer system....

7 CFR § 278.6(e)(1)(i) states:

FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, in part:

Trafficking means: 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 § 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(b)(1) states, in part:

Any firm considered for disqualification...under paragraph (a) of this section...shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification.... The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter...

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(b)(2)(ii) states, in part:

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(b)(2)(iii) states:

If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such a penalty.

7 CFR § 278.6(i) states, in part:

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...

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- The firm acted in good faith and the Appellant requests a review of the disqualification determination.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced in this document.

ANALYSIS AND FINDINGS

The primary issue for consideration in a case based on suspicious SNAP redemption data is whether or not the Retailer Operations Division adequately established that the Appellant firm engaged in the violation of trafficking. In other words, did the Retailer Operations Division, through a preponderance of the evidence, establish that it is more likely true than not true that the irregular and unusual transactions cited in the charge letter were the result of trafficking?

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm's EBT transactions, but also information obtained during a March 26, 2019, store visit which was conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. The store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report and photographs documented the following store size, description, and characteristics:

- La Espiga Bakery is a small bakery (classified on agency records as "combination grocery/other"), approximately 700 square feet in size, operating in the city of Reno, Washoe County, Nevada.
- At the time of the contractor's visit, the firm did not have any shopping carts or baskets for customer use, which is not unusual for stores of this size. Customers shopping in such stores generally purchase only as much food as they can carry in their arms.
- The store visit photographs show one cash register for food purchases and agency records reflect the use of one EBT point-of-sale device.
- It appears that the firm does not use optical scanners to process transactions.
- The checkout area consists of a small countertop where items can be placed for purchase. The constricted checkout area is not suitable for conducting large or rapid transactions as there is very little space on the counter to place more than a few items at a time and little room for customers to maneuver with large amounts of groceries.
- The store's staple food stock does not appear sufficient to meet SNAP program eligibility requirements. Based on changes to SNAP eligibility rules effective January 17, 2018, including a clarification of accessory foods (see 7 CFR § 271.2 and § 278.1(b)(1)), it is

likely that this firm, with its heavy emphasis on accessory foods such as cakes, pastries, and snacks, would not meet eligibility requirements for ongoing SNAP authorization.

- Staple foods available at the store include tortillas, rolls, milk, yogurt, beef, chicken, pork, and nuts. SNAP-eligible, non-staple accessory food items include carbonated and uncarbonated drinks, snacks, candy, and condiments, as well as cakes, pastries, pudding, doughnuts, muffins, cookies, etc. The store also sells a small number of ineligible, nonfood items, including personal care items and other miscellaneous household merchandise.
- The store also sells hot food items, such as sandwiches, which are available for immediate consumption. The firm has a small number of tables and chairs available for on-site dining.
- The most expensive food items for sale at the store include large cakes and pastries with fruit between \$76.00 and \$90.00 each. The store has approximately 15 different items (with or without fruit) selling for at least \$25.00. These appear to be special order products, as there were none on display at the time of the store visit.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a small bakery, where households normally purchase a limited number of items to complement their overall dietary needs. There was no indication that SNAP households would be inclined to regularly visit La Espiga Bakery to purchase large quantities of groceries, especially considering the minimal amount of staple food, the absence of shopping carts and baskets, and the availability of substantially larger SNAP-authorized stores in the area, including two superstores and four supermarkets within one mile of the firm. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of similar-sized competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: Multiple transactions were made from one or more SNAP households within a short timeframe. This attachment lists 61 sets of transactions (122 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits.

Considering the fact that this store has a very small checkout area, just one cash register, one EBT point-of-sale device, no optical scanner, and no conveyor belt, and considering the number of items that it would typically take to add up to the dollar amounts found in this attachment, it is unlikely that legitimate transactions could have occurred in such short periods of time.

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Attachment 1 is filled with similar examples.

Considering how long it takes for a typical clerk to process a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) without an optical scanner or conveyor belt, it seems highly unlikely that such large transactions could have legitimately occurred so soon after another customer's transaction.

The only explanation the Appellant has offered in this case is a claim that the firm allows customers to shop on credit. This contention will be addressed later in this document.

Charge Letter Attachment 2: Multiple transactions were made from the accounts of individual SNAP households within a set time period. This attachment lists 26 sets of transactions (57 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E).

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), an extraordinary amount for a small bakery store like La Espiga Bakery, which has no shopping carts or baskets and very limited staple food inventory. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Considering the amount of food it would take to add up to these transaction totals and considering the availability of much larger stores in the area, it seems very unlikely that SNAP customers would repeatedly visit La Espiga Bakery to make such large purchases. The Appellant did not offer any contentions related to Attachment 2 except to say that the unusual transactions were the result of the firm allowing credit accounts. This contention will be addressed below, but it is worth stating that such an argument makes no sense in connection with the transactions in Attachment 2. If a household were paying a credit account, it stands to reason that they would pay the entire amount in one transaction rather than in multiple transactions over a short period of time.

Charge Letter Attachment 3: In a series of transactions, the bulk of SNAP households' remaining benefits were depleted within short time frames. This attachment lists 101 sets of SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

It is not unusual for violating retailers to conduct trafficking transactions in which a household spends the vast majority of its allotment at one store in a short period of time or in a single transaction. A suspicion of trafficking is reinforced when these balance-depleting purchases occur in small stores such as La Espiga Bakery, where there is minimal overall inventory and no shopping carts or baskets to help facilitate large purchases. It makes little sense that a household would spend almost the entirety of its SNAP allotment in a single transaction or in a series of rapid transactions at this store.

Charge Letter Attachment 4: The store conducted EBT transactions that were large based on observed store characteristics and recorded food stock. This attachment lists 142 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with a bakery in Washoe County, Nevada. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a bakery in Washoe County was approximately \$21.00. But the average transaction in Attachment 4 is more than nine times larger than the average purchase amount for this store type.

Given that the Appellant firm does sell expensive special-order cakes and pastries, it is possible that there would be an occasional instance where the transaction amount is high, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As such, there may be some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 4. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly

from nearby, similar-sized competitors. The substantial number of high-dollar transactions in a five-month period calls into question the legitimacy of these transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering how many food items it would typically take to add up 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and considering that the firm does not have any shopping carts or baskets, and given the fact that there are much larger grocery stores in the area with substantially greater inventory and variety, this review finds it unlikely that every transaction in Attachment 4 is a legitimate purchase of eligible food.

The Appellant did not offer any specific contentions related to the transactions in Attachment 4 except to say that the transaction patterns were the result of the firm allowing credit accounts. This contention will be addressed below.

This review does not doubt that La Espiga Bakery sells eligible food items and conducts some legitimate SNAP business. But when SNAP transactions form patterns that are substantially different from similar-sized and similarly-stocked stores in the area, persuasive evidence from the Appellant is necessary to demonstrate that there is not something more, such as trafficking or other program violations, taking place. In an appeal of adverse action, the onus is on the Appellant to prove by a preponderance of the evidence that the administrative action should be reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that trafficking did not occur. Unfortunately, the Appellant has not met this standard.

It is the finding of this review that the attachments furnished with the charge letter adequately identify the irregular patterns of SNAP transactions which indicate that trafficking was likely taking place. The Appellant's contentions and evidence do not persuade this review otherwise.

Credit Accounts

The Appellant has claimed that the unusual transaction patterns were not due to trafficking, but rather due to the firm engaging in credit accounts. According to the Appellant, customers requested that they be allowed to establish credit accounts in which the EBT card is swiped and then the customers shop on the pre-paid credit until the balance becomes zero. The Appellant submitted nine customer statements to this effect and six credit account logs showing items obtained on credit, along with dates and occasional dollar amounts.

Unfortunately, the Appellant's explanation makes little sense to this review and the evidence provided is wholly insufficient in comparison to the overall breadth of unusual transactions. This review cannot comprehend why a customer would want to establish a pre-paid credit account at this store when the EBT card is already essentially a pre-paid credit source. A SNAP household is already allowed to shop with the available balance on the EBT card until the balance becomes zero. There is no reason why such a pre-paid SNAP credit account at La Espiga Bakery or any other store would be to the customer's advantage in any way. Are customers concerned that they will spend their benefits elsewhere and will not have enough money to shop at the bakery later? Is swiping the EBT card for each transaction more of a burden for the customer and the retailer than hand-writing credit logs?

It should be noted that the credit scheme described by the Appellant is also a violation of SNAP regulations at 7 CFR § 278.2(e), which state that “food retailers may not accept [SNAP benefits] before delivering the food, retain custody of any unspent [benefits], or in any way prevent an eligible household from using [benefits] in making purchases from other authorized firms.”

As for the customer statements and credit logs, these have little evidentiary value. Four of the nine customers who wrote statements did not have transactions during the review period and all six of the credit logs were dated after the end of the review period. The transactions in the charge letter involved 182 different households over a period of five months. Nine generic customer statements and six unusable credit logs do not account for the vast majority of transactions listed in the charge letter.

The Appellant’s explanations and evidence do not prove that credit accounts were taking place instead of trafficking. When a retailer claims that credit accounts are a reason for the irregular SNAP transactions and data patterns, FNS requires a level of detail regarding the legitimacy of the claim. This is because retailers have often made false admissions of credit accounts in an attempt to obtain a lesser one-year disqualification penalty instead of permanent disqualification for trafficking. Credit transactions must be accounted for with substantive evidence such as the dates credit was extended, to whom, for what amount, and for what items. Such proof should also correspond with the transactions identified in the letter of charges. The evidence provided by the Appellant falls far short of these expectations and is insufficient for this review to eliminate trafficking as the primary reason for the unusual transaction patterns identified in the charge letter.

Civil Money Penalty

As noted earlier, the Retailer Operations Division determined that the firm was not eligible for a civil money penalty in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and training program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a civil money penalty to be considered, a firm must not only notify FNS that it desires the agency to consider a CMP in lieu of permanent disqualification, but it must also submit appropriate documentation within designated timeframes. The case record shows that the Appellant did not request a trafficking CMP when it replied to the charge letter and there is no evidence that the Appellant submitted any documentation that would indicate that the firm had a compliance policy or training program of any kind.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

An analysis of the Appellant’s EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify La Espiga Bakery from SNAP participation. This data provided sufficient evidence for this review to conclude that the

questionable transactions and patterns listed in the charge letter were more likely than not the result of trafficking violations committed by the Appellant. Likewise, the Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

Based on a review of all available information in this case, the decision to impose a permanent disqualification against the Appellant, La Espiga Bakery, under the ownership of Carlos Camargo, is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

October 7, 2019