

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

**413 Brooklyn Deli & Grill Corp.,
Appellant,**

V.

**Retailer Operations Division,
Respondent.**

Case Number: C0244879

FINAL AGENCY DECISION

It is the decision of the USDA that the record indicates that 413 Brooklyn Deli & Grill Corp., (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the program, 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(c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant by letter dated July 29, 2021.

AUTHORITY

7 U.S.C. § 2023 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

By charge letter dated May 19, 2021, Retailer Operations Division informed ownership that Appellant was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 271 – § 278, based on EBT benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm." The charge letter stated, in relevant part, that “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.”

In email correspondence dated June 1, 2021, Appellant, through counsel, requested an extension in which to respond to the charge letter. In correspondence dated June 1, 2021, Retailer Operations Division granted Appellant an extension to June 25, 2021, in which to respond to the

May 19, 2021, charge letter. Appellant was informed that the time to request a civil money penalty in lieu of permanent disqualification and to provide the documentation to support such a request had not been extended. In subsequent correspondence dated June 25, 2021, Appellant, through counsel, replied to the charge letter and generally stated that the transactions listed in the charge letter are not, in this case, the result of trafficking in SNAP benefits but instead are the result of the store's business operations, business environment, SNAP household demographics and shopping habits, and the store's inventory. The store's inventory was more than adequate to account for the transactions set out in the charge letter.

Many of the households that shop at my client's business are African American and Hispanic and these households have different shopping patterns than the "average" SNAP household and for brevity, the presence of these household populations increase the likelihood of these scans to occur. The store is located near a Hostel with a bus stop on the opposite corner. The presence of these facilities has a direct impact on how the store's customers shop, either because of the identity of the participants, or the convenience of the store. Appellant, through counsel provided copies of the New York 2018 Profile of SNAP Households in District 7, the Pearson Correlation Coefficient Calculator, and the 2017 Fiscal year Benefit Redemption Patterns in the SNAP Final Report.

Retailer Operations Division gave consideration to the Appellant's reply, through counsel, and evidence of the case, and issued a determination letter dated July 29, 2021. This letter informed Appellant that it was permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also stated that Retailer Operations Division considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, Retailer Operations Division determined that Appellant was not eligible for the CMP because it failed to submit sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated August 3, 2021, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) (c) and (e)(1)(i) 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 § 278.6(a) states, *inter alia*, that “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(c) reads, in part, “*Review of Evidence*. 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) ...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...”

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 § 271.2 states in part that, “Eligible foods mean: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption.”

SUMMARY OF CHARGES

The charges on review were based on an analysis of SNAP electronic benefit transfer (EBT) transactions dated during the five-month period of November 2020 through March 2021. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from the accounts of individual SNAP households within a set time period.
2. Your store conducted EBT transactions that are large based on the observed store characteristics and recorded food stock.

The first 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

The Appellant, through counsel, made the following summarized contentions in its response to the permanent disqualification letter issued by Retailer Operations Division, and its request for administrative review, in relevant part:

1. A significant portion of 413 Brooklyn Deli & Corp's clients are EBT participants and accordingly, the vast majority of the store's offerings are qualified items under the EBT regulations.
2. Previous Administrative Review Branch Decisions Quoted.
3. From a causation standpoint, it is important to consider the store's size, inventory, and operations. The store's inventory is sufficient to account for the transactions in Attachment 1. The store's inventory greatly exceeds those around it and has a greater quality and variety than your average convenience store.
4. The transactions in Scan F attachment of the charge letter are not trafficking they are supported by the substantial inventory of the store and are reasonably explained by co-shopping, the store's pricing structure, and reliance on the store as a primary grocer.

In support of its position during the review process, Appellant, through counsel, provided a copy of the 2016 Grocery Shopping Trends report, a copy of the Pearson Correlation Coefficient Calculator, a copy of the 2017 Benefit Redemption patterns in the SNAP Report, a copy of the April 2016 cover story "Know Your Core, Protect Your Core" by Angela Hanson, a copy of the 2018 Profile of SNAP Households for New York Congressional District 7, and a copy of the November 2016 USDA Report of Foods Typically Purchased by Supplemental Nutrition Assistance Program (SNAP) Households.

The preceding may represent a brief summary of Appellant's contentions in this matter however, in reaching a decision, full attention has been given to all contentions presented, including any not specifically recapitulated or referenced herein.

ANALYSIS AND FINDINGS

The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a February 19, 2021, store visit to the business 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 EBT transactions at Appellant that formed patterns indicative of trafficking. The firm review summary documented the following store size, description, and characteristics:

- One cash register and one POS device with a small counter area partially obstructed by other smaller items available for sale.
- Estimated to be approximately 1400 square feet.
- No shopping baskets or carts available for customers.
- No adding machines or optical scanners were available at checkout. No specialty registers present.
- Store operates through a night window or plastic barrier with food stock behind the barrier.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- Store pricing structure is marked as unusual ending in x9 values but does not round transaction totals.

- Food is stored in an area outside of public view that is approximately 200 square feet in size containing non-staple food items.
- Store has storage freezers or coolers and no food stored off site.
- Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods, or vegetables.
- Store does not take telephone or online orders and does not offer delivery
- Highest priced eligible food items were Cheerios (\$7.99), Pound of Cheese (\$7.50), Haagen-Dazs Ice Cream (\$6.00), Pound of Lunch Meat (\$8.00), Pound of Pastrami (\$9.00) and Dunkin Donuts Coffee (\$9.99).
- Store stocks a significant amount of non-food items such as but not limited to paper products, household products, tobacco products, automotive products, health and beauty aids, gift items, mobile phones/phone cards alcohol and cleaning products.
- Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry, and fish products. No fresh fruits or produce, no fresh meat or poultry. Most meats are canned, packaged, or frozen.
- Store has a kitchen/prepared food area
- A deli or prepared food section with hot foods sold for onsite consumption with a prominent menu board displayed containing Deluxe Combos, Salads, Side Orders, Cold Cuts, Sandwiches, Platters, and other Breakfast items. Store inventory is used for the preparation of these items.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.

The second issue for consideration is whether Retailer Operations Division has presented a convincing case that Appellant likely trafficked in SNAP benefits. Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant's store during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

Attachment 1 of the Charge letter – Multiple transactions were made from the accounts of individual SNAP households within a set time-period.

During the review period there were 46 sets of 107 SNAP transactions that met the parameters of this attachment. Multiple transactions conducted by the same household account within a set time period is a method which violating stores use to avoid the detection of single high dollar transactions that cannot be supported by the retailer's inventory and structure. The record reflects that there are 202 traditional retailers within a one-mile radius of Appellant's store which is considerably more than stated in Appellant's contention. Though all retailers are different and not created equal in their business models and practices that fact does not, in and of itself, justify the unusual, irregular, and inexplicable SNAP transactions as cited in the charge letter. The record reflects that Appellant's store was compared to three other comparable stores within a .30-mile radius of Appellant's store and reflects that Appellant's transaction activity stood out as very unusual given the store's characteristics and available stock.

Appellant, through counsel, contends that it has crafted its product selection to meet SNAP provisions and household needs, however, based on the contracted store visit, there did not

appear to be any unique or otherwise unavailable SNAP eligible staple foods stocked in Appellant's store. There also was no documentation or receipts provided to corroborate this contention.

Appellant, through counsel, contends that a significant portion of Appellant's clients are SNAP participants. Regarding this contention, though Appellant may have a number of SNAP participants who utilize their SNAP benefits at its store, no documentation or proof has been provided to corroborate this contention. While Appellant carries SNAP eligible food stock, it is important to note that it also carries many ineligible items such as hot foods, tobacco products, alcohol, automotive products, health and beauty aids, paper goods and cleaning products which cannot be legally purchased using SNAP benefits. If Appellant crafted its products selection to meet SNAP provisions, then it's reasonable to think that its ineligible product stock would be significantly less than annotated during the store visit and staple food inventory would be significantly greater. Again, there was no documented evidence provided in regard to staple food stock or client status.

Moreover, no invoices were submitted to validate that staple food items are sold and replenished frequently. It is noted that outside of Appellant's statement, through counsel, regarding the shopping habits of its SNAP customers, no evidence has been submitted to support these statements. FNS acknowledges the statistical data quoted from the various reports submitted however it is important to note that the data in those reports is based on studies conducted in random areas of the country and do not specifically address the transaction patterns cited in the charge letter for the Appellant. Appellant, through counsel, contends that all of these transactions are the result of the store's business practices, inventory, customer co-shopping, purchasing preferences and the habits of the SNAP clientele. Regarding these contentions, the record reflects that many of Appellant's statements, through counsel, in regard to the causation of the SNAP transactions cited in the charge letter, were not corroborated with evidence to the same that specifically speak to Appellant's transaction patterns during the review period.

Appellant, through counsel, did not provide any additional documentation to support its various claims to justify the SNAP transactions cited in this Attachment. Based on the analysis above and Appellant's failure to adequately show that all of the transaction sets were as a result of legitimate SNAP purchases, a conclusion can be drawn, through a preponderance of evidence that the "unusual, irregular, and inexplicable" transaction patterns cited in Attachment 1 evidence trafficking as the most likely explanation.

Attachment 2 of the Charge letter - Your store conducted EBT transactions that are large based on the observed store characteristics and recorded food stock.

During the review period, there were 160 SNAP transactions that met the parameters of this attachment. Based on the results of the contracted store visit, the large transaction amounts are not consistent with the store's inventory of low-priced foods. The firm does not offer food in bulk or any ethnic or specialty foods that sell for a high price. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions. Transactions in this Attachment range from \$50.03 to \$120.08.

With regard to Appellant's contention, through counsel, that many of the households that shop at 413 Brooklyn Deli Grill Corp are African American and Hispanic and based on Counsel's reasoning. Upon review, the U.S. Census records cited by counsel, would contradict this statement as 42.7 percent of the people within the subject firm's zip code are White American; opposed to the 24.3 percent African American and 29.1 percent Hispanic or Latino Americans. Counsel has not provided any documentation to support the number of households that visit the firm that are African American/ Hispanic or the number of households in the charge letter that were African American/Hispanic; nor is this information available to the Agency through the State Administrative terminals.

As previously mentioned, regarding Appellant's contention, through counsel, in terms of co-shopping as a partial cause for the SNAP transactions cited in the charge letter, counsel has provided no evidence to support this phenomenon amongst SNAP recipients, in New York, NY or as Appellant's store. The reports provided by counsel are based on data gathered through a survey design whereby the researcher gathered data from 2,061 online respondents in the U.S. and conducted one-on-one interviews with 10 consumers from five (5) two-shopper households located in another State. This information, though may be valid in a different context, does not apply to Appellant's firm and cannot justify the SNAP transactions as cited in the charge letter. No other documented proof was provided to corroborate this contention.

Retailer Operations also conducted an analysis of the shopping habits of three of the households identified in the charge letter. This analysis concluded that these households also shopped at other area grocery stores including full-line supermarkets and superstores that offer a much larger quantity and variety of eligible food items for likely better prices either on the same day or within days of visiting Appellant's firm. This again indicates that lack of access to other stores is not at issue. However, despite this access to large supermarkets and superstores, these households consistently conducted much higher transactions at the Appellant firm than at better stocked supermarkets/superstores in and around the Kings County area of New York. This is another strong trafficking indicator.

Confirmation Bias

Appellant, through counsel, contends that confirmation bias likely exists. With regard to this contention, the purpose of this review is to give full and fair consideration to all evidence provided by both Retailer Operations Division and Appellant. The tendency to seek confirming evidence to both the sanctions and contentions, as presented during the administrative review, does not, in and of itself, violate the norms of effective and deductive reasoning. As previously stated, 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

Case Law Citations/Previous ARB Cases

It is important to note that this administrative review is based on the specific circumstances of this case as documented by materials provided by Appellant and the Office of Retailer Operations and Compliance. This administrative review decision does not establish policy or

supersede federal law or regulations, it is limited to whether the Retailer Operations Division appropriately followed the Food and Nutrition Act of 2008, as amended, and the regulations and agency policy promulgated under the act. Therefore, any application or reference to a supposed judicial precedent would best be addressed in a judicial review.

The transaction data and overall firm record convincingly demonstrate repetitive patterns of unusual, irregular, and inexplicable SNAP activity for this type of firm indicative of trafficking. Once Retailer Operations Division established the convincing case against Appellant, ownership 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 matter asserted is more likely to be true than not true. If this is not demonstrated, the case is to be sustained.

As noted, 7 CFR § 278.6(a) states 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 inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Retailer Operations Division has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns in two attachments of EBT transaction data, the inadequacy of the firm's eligible food stock as observed and recorded during the onsite visit to support such large transactions, the lack of evidence of invoices of food in inventory to cover Appellant's reasoning for the SNAP transaction totals for the review months, the lack proof and/or explanation for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant, and the irregular SNAP transaction data of Appellant as compared to other convenience grocery stores in the State.

Generally, stores caught in trafficking violations consistently display particular characteristic transaction patterns including those cited in the charge letter and, in the absence of evidence for the legitimacy of such transaction patterns, based on information submitted by the Appellant and a comparison of the store's characteristics and available stock to the transaction patterns cited in the charge letter, a conclusion can be drawn through a preponderance of evidence that the unusual, irregular, and inexplicable transactions and patterns evidence trafficking as the most likely explanation. While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence in the record.

The purpose of the administrative review process is to ensure that firms aggrieved by Retailer Operations Division' adverse actions have the opportunity to have their position fairly considered by an impartial review authority prior to that adverse action becoming final. Appellant has been duly given and has taken the opportunity to present to USDA through the administrative review process whatever evidence and information it deemed pertinent in support of its position that Retailer Operations Division' adverse action should be reversed. Therefore,

any evidence and information that Appellant presented to Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to Appellant's right to a fair and thorough review.

Ownership has not provided sufficient evidence to rebut the convincing case that Appellant most likely trafficked in SNAP benefits. As such, the SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have trafficked, which is that FNS shall disqualify the firm permanently.

CIVIL MONEY PENALTY

The Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i) even though it was informed of the right to do so in the charge letter dated April 22, 2019. Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program prior to the violations. Therefore, the Retailer Operations Division's decision, not to impose a trafficking CMP in lieu of disqualification, is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify 413 Brooklyn Deli & Grill Corp., from participation in the SNAP. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Therefore, based on a review of all the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged by Retailer Operations Division. Based on the discussion herein, the determination to impose a permanent disqualification against 413 Brooklyn Deli & Grill Corp., is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right 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 you 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 (FOIA), 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.

Monique Brooks
ADMINISTRATIVE REVIEW OFFICER

June 13, 2008