

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

Mr. Deli & Convenience Inc.,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0247570

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 Mr. Deli & Convenience Inc. (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 November 3, 2021, 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 April 2021 through September 2021. 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).

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Appellant replied to the charges by e-mail on November 12, 2021. Appellant, through counsel, explained that a nearby store was disqualified from SNAP causing Appellant to have an increase in SNAP redemptions.

After considering the evidence and the retailer's reply, the Retailer Operations Division issued a determination letter dated December 14, 2021. 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.

In a letter dated December 24, 2021, Appellant, through counsel, 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 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.

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) 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 USC § 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 § 271.2 defines trafficking, in part, as:

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:

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 April 2021 through September 2021. This involved the following SNAP transaction patterns which are indicative of trafficking:

- Multiple transactions were made from the accounts of individual SNAP households within a set time period.
- The store conducted EBT transactions that were large based on the observed store characteristic and recorded food stock.

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 its December 24, 2021, administrative review request, Appellant provided the following summarized contentions, in relevant part:

- One of the households that conducted many of the very large transactions is a disabled single mother of four teenage daughters who has provided an affidavit.
- The review period coincides with vaccines became available and household experience new freedom after lockdowns.
- The increase in sales is partially due to the fact the a nearby deli was disqualified from SNAP.
- EBT sales have been quite consistent from 2019 through 2021 with a slight increase in summer 2021 when vaccines became available.
- It is cruel and unusual to punish Appellant for enjoying a modicum of financial improvement after a long lockdown.
- There is not one scintilla of specific evidence of trafficking.
- If the determination is not reversed, then Appellant request a reasonable CMP.

In support of its contentions, Appellant provided a household affidavit, an affidavit from owner requesting a CMP, and SNAP sales summaries.

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 Mr. Deli & Convenience Inc. as a convenience store on October 28, 2016. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a June 23, 2021, 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:

- Appellant is approximately 800 square feet.
- There were no shopping baskets and no shopping carts for customer use.
- There was one cash register and one point of sale (POS) device.
- There was no optical scanner.
- The checkout area was small with limited space to place items surround by a Plexiglas display cases.
- There was no fresh meat, poultry, or fish.
- There was some dell meat and cheese advertised by the pound and used for prepared food.
- There were some packages of hot dogs.

- Dairy included milk, cheese, butter, yogurt, and sour cream
- Fresh produce included mangoes, watermelon (2), ginger, bananas, potatoes, onions, lemons, lettuce, tomatoes, green peppers, and avocados.
- Other staple foods available for purchase were juice, eggs, bread, cereal, beans, rice, pasta, and a limited selection of canned goods.
- Appellant advertised the sale of prepared made to order sandwiches and cold cuts by the pound.
- There is a kitchen area that prepared hot food with a hot food menu.
- Much of the remaining stock consisted of accessory foods such as candy and carbonated and uncarbonated drinks.
- Ineligible items included lottery, tobacco, alcohol, cleaning products, paper products, and health and beauty aids.

The SNAP eligible food stocked by the store was generally of a low-dollar value consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items, and accessory food items. The highest priced items noted included on the day of the store visit was a olive oil - \$19.99; Mazola Oil - \$11.99; Carne Cecina - \$10.99; watermelon - \$10.00; lunchmeat - \$9.99 and \$5.99; and cheese - \$8.99. Given the available inventory, there was very little sign that the firm would be likely to have SNAP redemption patterns that differed significantly from those of similar-sized competitors, especially competitors that sell similar or identical food items.

Charge Letter Attachment

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 a set timeframe. This attachment documents 42 sets of transactions conducted by 13 households that total \$5,425.93 in SNAP benefits that meet the parameters of this scan. For example, between June 27 and June 29, one household conducted seven SNAP transactions at Appellant that total \$233.75 (transactions #89-95) in SNAP benefits. Another household conducted two transactions at Appellant totaling \$196.50 on September 3, 2021 (transactions #7 and #8). 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.

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 SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of Appellant's stock and facilities and are therefore indicative of trafficking. The photographs from the store visit offer no 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 or price advantage. The second and third transactions in each set are too large to consist of forgotten items.

The Retailer Operations Division compared Appellant to the two other nearby convenience stores. One of the other stores conducted no similar transaction sets and the other store conducted just six similar transaction sets while Appellant conducted 49 transaction sets. This begs the question why households would be more likely to conduct multiple larger dollar transactions at Appellant than at other similar nearby stores.

Appellant has not offered sufficient evidence to show that the transactions listed in Attachment 1 were legitimate purchases of eligible food.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 343 transactions as large as \$255.50, and that total \$19,006.23. Appellant's average SNAP transaction amount was 16% greater than the average for convenience stores in the County during the review period. Appellant had no shopping baskets or shopping carts. Appellant had no fresh meat. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar-sized competitors. Considering Appellant's offering of eligible food stock, these large dollar transactions are questionable and likely indicative of trafficking.

Given that the Appellant firm has a modest inventory of staple foods and other SNAP-eligible items, including snacks and drinks, and a limited stock of some higher priced items, it is likely that there would be an occasional instance where the transaction amount is high, perhaps exceeding \$40.00 or even \$50.00. As such, there may be some legitimate SNAP transactions among the transactions listed in Attachment 2. 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 six-month period calls into question the legitimacy of these transactions.

The Retailer Operations Division compared Appellant to two nearby convenience stores with similar inventory and found that Appellant conducted more SNAP transactions, had a larger SNAP redemption dollar value, and had a larger average SNAP transaction amount than the other two stores. The Retailer Operations Division also determined that Appellant's transaction patterns exceeded the other stores. The data from these nearby stores show that the transaction patterns at the Appellant firm were unusual and likely indicative of possible trafficking violations.

Store	Attachment 1 Pattern	Attachment 2 Pattern
Appellant	42	343
Store #1	6	52
Store #2	0	56

Sometimes a firm may have higher than average SNAP transaction amounts due to the lack of access to other SNAP authorized stores. Within a one-mile radius, there are 62 other authorized convenience stores, 27 small groceries, 17 medium groceries, five large groceries, seven supermarkets, and seven super stores. The Retailer Operations Division reviewed the transaction activity of three households that conducted some of the flagged transactions. Each of these

households conducted SNAP transactions at a super store or supermarket within one day of its flagged transaction at Appellant. For example, on June 15, 2021, Household #1 transacted \$255.50 in SNAP benefits at Appellant and then transacted \$235.02 at a supermarket the following day, June 16, 2021. Between June 24, and June 26, 2021, Household #2 conducted eight SNAP transactions at Appellant that total \$223.75 while conducting one transaction at a supermarket that totaled \$29.63. Similarly on April 25, 2021, Household #3 transacted \$22.06 at a super store and then transacted \$71.25 at Appellant on the following day, April 26, 2021. The evidence supports that these households had access to transportation within a short time frame of their unusual large transactions at Appellant. It is questionable as to why households would conduct large transactions at Appellant, when these households had just visited or planned to visit larger stores with a selection of fresh meat and produce and likely better prices.

Household Affidavit

Appellant explains that a disabled single mother of four teenagers conducted many of the questionable larger dollar transactions. This household submitted an affidavit stating that she does not drive because of her disability, and it is difficult to get to supermarkets that are further away. The household's transactions were reviewed, and this household also conducted SNAP transactions at ten other stores during the review period including three different supermarkets and two super stores. Appellant only conducted flagged transactions at Appellant, a total of 49, and one other convenience store located more than 12 miles from Appellant, where it conducted 20 SNAP transactions and seven of which were flagged as questionable. On May 5, 2022, this household transacted \$455.50 at a super store and then thirty minutes later transacted \$135.50 at Appellant. Even with the customer statement, this household's transactions remain questionable and there is no evidence to show that only eligible food items were purchased from Appellant.

Disqualification of a Nearby Store and COVID Vaccine

Appellant contends that a nearby store was disqualified and therefore Appellant's redemptions have increased. It is true that a store located 0.05 miles from Appellant was disqualified from SNAP. It is also true that this could potentially result in increased SNAP redemptions overall and an increased number of transactions. Similarly, Appellant contends that since households were beginning to be vaccinated customers were back to regular shopping after long COVID lockdowns. However, a store's increased foot traffic, whether from a nearby store losing SNAP authorization or the lifting of COVID lockdowns, does not adequately explain larger than average SNAP transactions and multiple large dollar transactions in a short time period.

Lesser Penalty

Appellant contends that the penalty is too severe. Trafficking is always considered to be the "most serious" of SNAP violations. Trafficking in SNAP benefits is an extremely serious violation and both 7 USC § 2021(b)(3)(B) and 7 CFR § 278.6(e)(1)(i) state that even a first-time violation warrants a permanent disqualification. Such disqualification shall result from a finding of a violation based on 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. "

Evidence

In the present case, the data presented in the Attachments is based on the SNAP EBT transactions conducted at the Appellant firm during the review period. FNS employs a computerized fraud detection tool to identify EBT transactions that form patterns having characteristics indicative of trafficking. However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still conduct an extensive analysis of the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether the questionable transactions were, more likely than not, the result of trafficking.

The legality of this method is supported by 7 CFR §278.6(a) which states, *inter alia*, “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 based on 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.]

The documentation and evidence provided by the Retailer Operations Division was thoroughly examined. From all indications, the Retailer Operations Division obtained the EBT data (provided by ALERT), found it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough investigation before concluding that trafficking was likely occurring.

Appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed and 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 offered no evidence to prove that the transactions listed in the charge letter were legitimate purchases of eligible food. 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.

CIVIL MONEY PENALTY

In the charge letter, Retailer Operations 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, *inter alia*:

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”

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. SNAP regulations at 7 CFR § 278.6(b)(2)(iii) states that “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.” [Emphasis added.]

With its administrative review request, Appellant requested a CMP in lieu of a permanent disqualification. Counsel submitted an affidavit from the owner outlining its request for a CMP. However, the affidavit essentially acknowledges that Appellant did not implement an effective policy and training program to prevent violations. It is also important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is limited to what circumstances existed at the time that was the basis of the Retailer Operations Division’s action. Moreover, the timeframe for providing this documentation cannot be extended. Even if a timely request had been submitted, Appellant would 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.

Thus, the determination by the Retailer Operations Division that Appellant did not meet the standards for a trafficking CMP under 7 CFR §278.6(i) 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 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’s determination 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 is also sustained.

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 owners 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, 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

May 18, 2022