

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

38 Ave Deli And Grocery Inc #01,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0253239

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 a permanent disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against 38 Ave Deli And Grocery Inc #01 (hereinafter “38 Ave Deli And Grocery Inc #01” or “Appellant”) by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1)(i) in its administration of the SNAP, when it imposed a permanent disqualification against 38 Ave Deli And Grocery Inc #01.

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.

CASE CHRONOLOGY

In a letter dated August 9, 2022, the Retailer Operations Division informed the Appellant that 38 Ave Deli And Grocery Inc #01 was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270 –282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm." The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i). Per UPS confirmation of delivery, the charge letter was delivered to the Appellant at the store address of record on August 10, 2022.

In a response to the Retailer Operations Division of August 12, 2022, the Appellant, through counsel, replied to the letter of charges. In the response, the Appellant cited credit extension to SNAP customers as one of the explanations for the SNAP transactions documented in the charge letter. By letter of August 17, 2022, the Retailer Operations Division requested the submission of documentation to support the Appellant's credit extension contention. The Appellant was informed that it must submit the credit extension documentation within 10 calendar days of receipt of the August 17, 2022 letter. The record reflects that the Appellant, through counsel, submitted additional responses to the letter of charges on August 23, 2022 and September 19, 2022. The record reflects that the Retailer Operations Division received and considered each of the Appellant's responses prior to making a determination.

After considering the Appellant's responses and the evidence in the case, the Retailer Operations Division issued a determination letter dated January 31, 2023, informing the Appellant that 38 Ave Deli And Grocery Inc #01 was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations. The letter also stated that the Appellant was not eligible for a trafficking civil money penalty (CMP) in accordance with 7 CFR § 278.6(i) as the Appellant did not 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 an email correspondence of February 6, 2023, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. FNS granted the Appellant's request for administrative review by letter dated February 13, 2023. In an email correspondence of March 31, 2023, the Appellant, through counsel, submitted additional information in support of the request for administrative review.

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 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 covered 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. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

7 U.S.C. § 2021(b)(3)(B) states, inter alia:

... 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, 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 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(e)(1)(i) states:

Disqualify a firm permanently if: Personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, inter alia:

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 § 278.6(f)(1) states, inter alia:

A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

7 CFR § 278.6(i) states, inter alia:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 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 ...

7 CFR § 278.6(b)(2) states, inter alia:

(ii) 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 as specified in § 278.6(i), 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). [Emphasis added].

(iii) 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 penalty. [Emphasis added].

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from November 2021 through April 2022. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were a large number of transactions in repeated dollar values;
- 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 the households' remaining benefits were depleted within short timeframes; and
- There were EBT transactions conducted that are large based on the observed store characteristics 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 questionable transactions were the result of trafficking.

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the replies to the charge letter, in the administrative review request, and in subsequent correspondence, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant has been in business since 2017 and an authorized SNAP retailer since 2019.
- The Appellant and/or its employees have never violated any laws related to Section 271.2 and 278.6(e)(1).
- The Appellant's transactions are based on the sale of qualified merchandise.
- The Appellant holds itself as a fully functioning grocery store.
- Most of the Appellant's customers buy groceries for their entire household as would a customer at a grocery store.
- The Appellant extended store credit to SNAP customers who have been struggling to accommodate their needs even on government assistance. The Appellant refuses to allow struggling families to walk out of the store empty handed. While the transactions may appear large, they resulted from customers paying off credit accounts accumulated over time. The Appellant has always kept records of the credit log in order to guarantee that no illegal activities have taken place.
- The Appellant has never restricted customers' purchases since USDA policy has specifically stated that retailers are not allowed to limit or interfere with purchases of customers.
- Under page 8 of the manual "Respect Your SNAP Customers", store owners are not allowed to restrict the time or purchase amount of customers. By adhering to the rules found in the SNAP manual and published by USDA, the Appellant is abiding by the law by not questioning the large and/or frequent transactions.
- Many families request to separate their purchases to track their spending better.

- Customers come in multiple times a day to purchase their household groceries.
- Additionally, with the ever-increasing inflation rate and severeness of COVID-19, customers have been coming into the Appellant much more frequently to buy daily groceries.
- Comparing to other grocery stores that have been raising their prices continuously, the Appellant aims to serve the community by keeping the prices low and competitive.
- The Appellant frequently runs promotional deals in the store. Cases of Gatorade and bundles of dairy products and vegetables are all popular deals that customers indulge in.
- The Appellant is located in populated area containing multiple neighborhoods for low-income families as well as elderly individuals.
- Many local families depend on public transportation to travel or often walk to the store.
- The Appellant requests the imposition of a hardship civil money penalty in lieu of a permanent SNAP disqualification as a SNAP disqualification would impose a significant hardship on area customers. The Appellant is located nearby several low-income neighborhoods with large families and elderly individuals. It also sits close to multiple public institutions such as schools and a community center. Students and their families frequently visit the Appellant for its convenience and the people from the community center rely on the Appellant for its convenience, affordability, and versatility. Many of them come in groups and purchase a large number of items in a short period of time.
- A permanent SNAP disqualification would impose a financial hardship on the Appellant.
- The Appellant has implemented an effective compliance program to prevent violations of the SNAP regulations Section 271.2 and meets the eligibility requirements for a CMP under Section 268.6(f)(1).
- The Appellant implemented a legitimate training program for its employees.
- The Appellant has implemented an effective compliance program to prevent violations of the SNAP regulations Section 271.2 and meets the eligibility requirements for a CMP under Section 268.6(e)(1).
- The Appellant has taken the time and effort to train and enforce the USDA EBT policies by utilizing a three-step training program that includes initial training (watch SNAP videos and read the USDA handbook), practice, and assessment. Besides the training program, the Appellant periodically retrains and reevaluated employees' knowledge responsibly.
- With regard to Criterion 1, since being authorized as a SNAP retailer, the owner has been active in ensuring full compliance with his employees and their obligations to FNS. A photocopied booklet is provided to each employee and issues and concerns regarding EBT processing are addressed as questions and issues arise. The Appellant's compliance policy states the following: (1) There is no exchange for cash for EBT card swipes; and (2) and only sell qualified EBT grocery items to your customers.
- The Appellant has a training policy in place for its employees. Using the url: [http://www.fns.usda.gov/sites/default/files/Retailer Training Guide.pdf](http://www.fns.usda.gov/sites/default/files/Retailer%20Training%20Guide.pdf), the Appellant has provided one-on-one instore training and a copy of the manual to all employees and store operators. The contents of the manual are discussed and reviewed with employees and partners of the business on a semi-annual basis. Each employee is reminded by the Appellant to never engage in the following: (a) Giving back cash in return for EBT purchases; (b) Disallowing sales to known friends of the card user if it appears as though the card user is outright paying for the groceries of a person that is not part of their household; and (c) Disallow sales on unqualified EBT items.
- With regard to 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 the violations cited in the charge letter.

- With regard to Criterion 3, the firm developed and instituted an effective training program as specified in Section 271.2. The training program implemented by the Appellant includes: A review of the FNS handbook with each new employee and instructions to call USDA or the store owner if employees have any questions.
- With regard to Criterion 4, firm ownership was not aware of, did not approve of, did not benefit from or was not in any way involved in the conduct or approval of the 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.

In support of these contentions, the Appellant, through counsel, submitted the following information for review:

- USDA FNS SNAP Retailer Notice dated August 3, 2022 (Note: No explanation was submitted by the Appellant for the submission of this document);
- Customer affidavits (12 total);
- Credit ledgers (9 pages total);
- Food stock photos (6 total);
- Affidavit of employee (1 hand-written page); and
- Affidavit of store owner (1 hand-written page).

ANALYSIS AND FINDINGS

SNAP Authorization

During the review period of November 2021 through April 2022, 38 Ave Deli And Grocery Inc #01 was classified as a convenience store. When the Appellant was authorized by FNS for participation in the SNAP on May 5, 2021, the owner signed a SNAP application for the store and acknowledged she was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible items.

Store Visit Observations

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a January 31, 2022 store visit conducted by a FNS contractor to observe the nature and scope of the firm’s operation, stock, and facilities. The available inventory of SNAP-eligible food at the time of the store visit showed food stock that would be typical of a convenience store, where households normally purchase a limited number of items. 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. This information obtained from the store visit was also 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:

- Approximately 550 square feet in size with no storage area outside of public view;
- Did not have storage coolers or freezers;
- No shopping carts and no hand-held baskets available for customer use;
- One small checkout counter area with limited check-out counter space;
- One cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- Did not have an optical scanner;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals;
- No meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers;
- Did not utilize an unusual pricing structure, such as prices ending in \$.xx9 or \$.xx00;
- Transaction totals were not rounded up or down at the checkout counter;
- Telephone and on-line orders were not taken and delivery was not offered;
- Did not stock a profusion of specialty or ethnic food items;
- Had dusty cans/packages;
- Firm was not a WIC Program vendor and did not sell infant formula;
- The six most expensive (i.e., costing \$5.00 and above) SNAP-eligible food items in stock were Café Bustelo at \$10.99 per 10 ounces (9 units in stock); Froot Loops cereal at \$5.99 per 1 pound (1 unit in stock); Ritz crackers at \$5.99 per 13.7 ounces (5 units in stock); Planters mixed nuts at \$5.99 per 10.3 ounces (6 units in stock); Berio olive oil at \$5.50 per 16.9 ounces (7 units in stock); and Goya extra virgin olive oil at \$5.49 per 8.5 ounces;
- No fresh or frozen meats, poultry, or seafood;
- Frozen food stock consisted of ice cream only;
- Did not have a kitchen and hot foods were not sold;
- Did not have a deli or prepared food section and deli meats and cheeses were not sold by the pound;
- Meat items included units of canned/potted meat, eggs, and canned fish;
- Firm did not meet the requirements for participation in the SNAP under Criterion A at the time of the store visit as dairy stock included milk (dairy and coconut varieties) only;
- Fresh produce stock consisted of a few (each) apples and oranges;
- Other staple foods available for purchase included such items as juice, nuts, pasta/ramen, rice, cereal, oatmeal, buns/rolls, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, condiments, cakes/pastries, sugar, and snack foods; and
- Ineligible nonfood items included health and beauty aids, household cleaning supplies, automotive supplies, clothing, household items, cell phone accessories, paper products, school/office supplies, and alcohol.

Charge Letter Attachments

On review, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed.

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. Based on this empirical data, and in the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the most likely explanation for “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges is trafficking. Transactions having such characteristics sometimes do have valid explanations that support that they were the result of legitimate purchases of eligible food items. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, the Retailer Operations Division determined that the Appellant’s contentions did not outweigh the evidence. The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Credit Extension

The Appellant contends that the store extended store credit to SNAP customers who have been struggling to accommodate their needs even on government assistance. While the transactions may appear large, they resulted from customers paying off credit accounts accumulated over time. The Appellant has always kept records of the credit log in order to guarantee that no illegal activities have taken place. In support thereof, the Appellant submitted nine pages of credit ledgers. 5 U.S.C. § 552 (b)(7)(E).

When a retailer claims it maintains credit accounts to explain 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 in an attempt to obtain a lesser penalty after committing more egregious violations such as 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.

FNS evaluated the credit extension documentation provided and properly determined that the information was insufficient to support the Appellant’s credit extension contention for the following reasons:

5 U.S.C. § 552 (b)(7)(E).

Therefore, while the firm may have, on a rare occasion, accepted SNAP benefits as repayment on credit accounts, the evidence submitted by the Appellant does not support its contention that the irregular SNAP transactions listed in the charge letter are due to repayment on credit accounts.

Transactions in Repeated Dollar Values (Charge Letter Attachment 1)

This charge letter Attachment documents 66 transactions with repeated dollar values of \$39.xx totaling \$2,620.65; 60 transactions with repeated dollar values of \$40.xx totaling \$2,411.63; 51 transactions with repeated dollar values of \$59.xx totaling \$3,043.28; 51 transactions with repeated dollar values of \$79.xx totaling \$4,063.48; 65 transactions with repeated dollar values of \$98.xx totaling \$6,410.16; and 86 transactions with repeated dollar values of \$99.xx totaling \$8,588.02. Typically, the frequency of transactions peak at the average for that store type. Thereafter, the frequency of store transactions gradually decreases as the amounts in the transactions increases. The

frequency of transactions do not typically spike at specific amounts. Such unusual clustering around specific transaction amounts is indicative of trafficking.

5 U.S.C. § 552 (b)(7)(E). Based on the contractor visit, the store does not have packaged items nor does it offer large quantities of individual foods in bulk, foods sold by the case, or grocery package deals offered at a discounted rate that can result in the same repeated dollar values by random customers. As such, it is implausible that these 379 transactions resulted in the same six dollar values by different customers. Consequently, the occurrence of these repeated transactions is greater than the expected average transaction frequency for the dollar amounts. Therefore, in the absence of any compelling rationale to the contrary, it appears that these transaction amounts are contrived and are indicative of trafficking.

5 U.S.C. § 552 (b)(7)(E).

Patterns of transactions spiking at particular dollar amounts indicate that SNAP transaction amounts are contrived. Random data, which legitimate transaction activity approximates, is extremely difficult to produce intentionally; it is very difficult to avoid repetitive patterns when attempting to create the appearance of normal, near-random transactions. That various customers each repeatedly had totals around certain dollar amounts during the review period strains the credibility of the Appellant's declaration that this activity reflected the acceptance of SNAP benefits in exchange for eligible food items. As the Appellant has offered no rational explanation for why such patterns might exist, it is reasonable to conclude that these same dollar value transactions are the result of trafficking.

Multiple Transactions from One or More Households (Charge Letter Attachment 2)

There are 210 total SNAP transactions (105 transaction sets) totaling \$8,978.20 that meet the parameters of this scan. Each transaction set was completed from 23 seconds to 1 minute 56 seconds. These types of rapid transactions at a firm with only one register, one EBT POS device, and limited counter space are indicative of trafficking in EBT benefits.

It is reasonable to expect the subsequent purchase to be for a nominal amount because it is quite rare to find very expensive items positioned at the checkout area, especially in smaller stores like the Appellant. However, in the majority of the Exhibits, the subsequent transaction was for amounts that exceed any nominal, afterthought purchase. In 104 of the 105 transaction sets, the amounts of the subsequent transactions equaled or exceeded the preceding transaction amount. Additionally, while it is possible that customers shop together, it is improbable that they would use just one card if they were both SNAP recipients. If forgotten items are not added into the total, it is implausible that they would merely swipe the EBT card a second time to include those items without totaling them, which would take more than a few seconds to complete the entire transaction. However, many of the violations listed in this Attachment followed a transaction by a different household. The second transaction in 34 of the 104 sets of transactions were conducted by a household different from that which made the first transaction in each set. These transactions cannot be explained by customers visiting the store multiple times a day for a number of reasons, as the same household would have completed both transactions in each set.

Moreover, it may be possible to conduct rapid transactions for SNAP recipients who may have one or two small inexpensive items; however, given that there were no promotional, special, significant

bulk or package deals offered or advertised, it is unlikely that the transaction in this Attachment are legitimate SNAP transactions. The firm's checkout counter area offered minimal surface space on which to place items for large purchases and it did not offer equipment required for rapid processing of large amounts of eligible food items. It also precluded the processing of more than one customer at a time, as there is only one register and one EBT POS device.

5 U.S.C. § 552 (b)(7)(E).

While such transactions may well be done in succession, performing these processes on large transactions generally are not done rapidly. The amount of time required is largely proportional to the dollar amount of the transaction; typically, the larger the dollar amount transacted the longer the time period between transactions. The Appellant firm processed orders considerably faster than supermarkets typically process them, yet the firm has only one small checkout counter, one cash register and one EBT POS device, and none of the logistical tools such as optical scanners or conveyor belts, rotating bagging platforms or order separators that are routinely used in rapid throughput operations. As the Appellant has offered no rational explanation or supporting documentation for why such patterns might exist, it is reasonable to conclude that the SNAP transactions included in this charge letter Attachment are the result of trafficking.

Repeat Transactions by the Same Household (Charge Letter Attachment 3)

This charge letter Attachment documents 272 sets of transactions (732 total transactions) that total \$46,084.96 in SNAP benefits to meet the parameters of this scan. These transactions were conducted by 119 different SNAP households. 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.

5 U.S.C. § 552 (b)(7)(E).

The Appellant contends that customers come in multiple times a day to purchase their household groceries. Additionally, with the ever-increasing inflation rate and severeness of COVID-19, customers have been coming into the Appellant much more frequently to buy daily groceries.

Although it is not uncommon for customers to have more than one transaction per day and there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, 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 the Appellant's stock and facilities and are therefore, indicative of trafficking.

Although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefit allotment in just one or two days, especially from a convenience store like the Appellant firm that has a limited food stock, very little fresh produce stock, no fresh or frozen meats, poultry, or seafood, and no frozen food stock other than ice cream. The store visit observations indicate that the subject firm is a convenience store without unique food stock, floor plan, or other characteristics. The Appellant's transaction activity is unusual as every transaction in each set of transactions range from \$20.00 to \$211.00 and the average convenience store transaction in 5 U.S.C. § 552 (b)(6) & (b)(7)(C) during the review period was 5

U.S.C. § 552 (b)(7)(E) and 5 U.S.C. § 552 (b)(7)(E) for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) County. The second, third, and subsequent transactions in each set are too large to consist of forgotten items.

The store visit report, which was completed in collaboration with and signed by a store employee, and store visit photos as well as the stock photos provided by the Appellant offer no explanation as to why SNAP customers would routinely shop at 38 Ave Deli And Grocery Inc #01 multiple times during a short period or purchase such a large volume of items, there being no great variety or advertisements of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. The SNAP-eligible food stocked by the store was generally of a low dollar value, consisting mainly of inexpensive canned and packaged goods, drinks, snack foods, single-serving food items and accessory food items. The food stock photos provided by the Appellant show a larger quantity and variety of stock than was observed during the store visit. It is likely that this additional store stock was acquired after the receipt of the charge letter in an attempt to explain the suspicious transactions and patterns noted in the charge letter. It is important to note that even “well stocked” stores will sometimes engage in trafficking, so the food stock shown in the Appellant’s photos provides no definitive explanation for the suspicious transactions and patterns noted in the charge letter.

In addition, the store visit report and photos indicate that there was only one cash register and one EBT POS device for use in ringing-up SNAP transactions, one checkout counter with limited check-out counter space, no shopping baskets or carts available to customers for transporting food within the store, and no optical scanners or conveyor belts to expedite high dollar or rapid consecutive purchases. The store visit observations also indicate that the firm offered no special or custom services to customers, such as on-line or telephone orders and/or delivery services, or a profusion of specialty or ethnic goods which would entice SNAP customers to utilize the subject store over other area authorized retail stores. No evidence was advanced supporting the Appellant’s claim that it offers foods at lower and/or more competitive prices than other area retailers.

As to whether or not co-shopping and/or sharing of SNAP cards actually affected the Appellant firm during the review period, this argument is little more than conjecture. The Appellant has provided no evidence to show that co-shopping and/or sharing of SNAP cards is particularly common among SNAP recipients in 5 U.S.C. § 552 (b)(6) & (b)(7)(C). If co-shopping and/or sharing of SNAP cards truly impacted 38 Ave Deli And Grocery Inc #01 as the Appellant suggests, it would stand to reason that co-shopping and/or sharing of SNAP cards would affect other nearby firms as well. This would manifest itself in comparable firms having similar transaction patterns – multiple transactions from the same household in a short period of time. But this is simply not the case.

The Appellant contends that many local families depend on public transportation to travel or often walk to the store. It is recognized that sometimes a firm may have unusual transaction patterns due to a recipient’s lack of access to other SNAP authorized stores. However, during the review period there were 22 SNAP authorized retailers located within a 0.5 mile radius of 38 Ave Deli And Grocery Inc #01, including 1 super store, 2 supermarkets, 5 medium grocery stores, 2 small grocery stores, 2 combination grocery/other stores, and 10 other convenience stores, that could meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than 38 Ave Deli And Grocery Inc #01 and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store.

In addition, the record indicates that SNAP customers who shopped at 38 Ave Deli And Grocery Inc #01 during the review period also shopped at other area grocery stores and, therefore, transportation

to other stores is not an issue for these customers. Therefore, lack of access to other authorized stores or the availability of other food stores does not appear to be an explanation for the Appellant's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

The Appellant has not provided any evidence to show that the transactions listed in this Attachment were legitimate purchases of eligible foods and not the result of trafficking of SNAP benefits. The arguments presented by the Appellant hold little weight without some kind of evidence to substantiate its claims. The Appellant has the burden to provide relevant evidence to rebut the trafficking charges. This burden has not been met.

Bulk of SNAP Benefits Exhausted (Charge Letter Attachment 4)

This charge letter Attachment documents 162 suspicious transaction sets (448 total transactions) which ranged from \$72.98 to \$425.14 and totaled \$20,232.95. These transactions were conducted by 74 different SNAP households. Depleting the household's entire allotment in one or a few transactions, or within one or two days, leaving little or no benefits for the rest of the month is inconsistent with the normal shopping behaviors of SNAP benefit households.

Although many households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefit allotment in only a few transactions or in a single day. Depleting one's entire allotment in one or two days or in a single day, especially in a convenience store with limited stock, leaving no benefits for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP households. Rather, large single transactions, or multiple and high cumulative transactions which diminish balances over a short period of time soon after benefit issuance, are indicative of SNAP benefit trafficking and attempts to diminish attention to signs of the same.

5 U.S.C. § 552 (b)(7)(E).

A review of the store visit report, which was signed by and completed in cooperation with a store employee, as well as the stock photos indicate that 38 Ave Deli And Grocery Inc #01 offers a limited stock of SNAP-eligible foods with no fresh or frozen meats, poultry, or seafood, no frozen food stock other than ice cream, very little fresh produce stock, and has a lack of an abundant depth and breadth of staple foods. The store's inventory contained almost exclusively inexpensive single-serving prepared food items and accessory foods. The store visit inventory report and photos also show only a few expensive eligible foods in stock that would account for these large amounts, no signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, specials such as buy one food item and get one for free, and grocery package deals, no evidence of meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices, and no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers.

The Appellant did not provide any compelling justification or evidence as to why SNAP households are spending the majority or all of their SNAP benefits in short periods of time at 38 Ave Deli And Grocery Inc #01 or evidence that all of the irregular transactions cited in this charge letter Attachment were for eligible food items only. Based on the analysis above and 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.

Excessively Large Purchase Transactions (Charge Letter Attachment 5)

This charge letter Attachment documents 1,181 SNAP transactions, as large as \$211.00, that total \$83,158.11. These large transaction amounts are not consistent with the store's observed characteristics and food inventory. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant contends that it holds itself as a fully functioning grocery store. Most of the Appellant's customers buy groceries for their entire household as would a customer at a grocery store. The Appellant frequently runs promotional deals in the store. Cases of Gatorade and bundles of dairy products and vegetables are all popular deals that customers indulge in.

However, the food stock and facilities of the Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at convenience stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. The Appellant contends that the large transactions are not the result of trafficking of SNAP benefits. However, it is rare for a convenience store such as 38 Ave Deli And Grocery Inc #01 to have purchases like those included in this Attachment to the charge letter.

The store visit observations indicate that the Appellant is a convenience store which measures approximately 550 square feet in size with no storage area outside of public view and does not have storage coolers or freezers. The stock of SNAP-eligible foods is limited with no fresh or frozen meats, poultry, or seafood, no frozen food stock other than ice cream, very little fresh produce stock, and has a lack of an abundant depth and breadth of staple foods. In addition, the store did not meet the requirements for participation in the SNAP under Criterion A at the time of the store visit as dairy stock included milk (dairy and coconut varieties) only. The Appellant's meat stock was also limited including units of canned/potted meat, eggs, and canned fish only. In addition, the store had dusty cans/packages indicating that these items are not sold on a regular or consistent basis.

The FNS store visit report, which was completed in collaboration with and signed by a store employee, as well as the store visit photos indicate that there were no signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, specials such as buy one food item and get one for free, and grocery package deals, no evidence of meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices, and no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers. In addition, the firm offered no special or custom services to customers, such as on-line or telephone orders and/or delivery services, or a profusion of specialty or ethnic goods which would entice SNAP customers to utilize the subject store over other area authorized retail stores.

The store visit observations also indicate that there were only a few expensive eligible foods in stock, the majority of which were in limited quantities, that would account for these large amounts. Specifically, the six most expensive (i.e., costing \$5.00 and above) SNAP-eligible food items in stock were Café Bustelo at \$10.99 per 10 ounces (9 units in stock); Froot Loops cereal at \$5.99 per 1 pound (1 unit in stock); Ritz crackers at \$5.99 per 13.7 ounces (5 units in stock); Planters mixed nuts at \$5.99 per 10.3 ounces (6 units in stock); Berio olive oil at \$5.50 per 16.9 ounces (7 units in stock); and Goya extra virgin olive oil at \$5.49 per 8.5 ounces.

While there is no definition in the SNAP regulations for an excessively large purchase or transaction, FNS makes its determination based on the store type, characteristics and stocked inventory. The burden is on the Appellant to prove transactions FNS identified as large for the store type (in this case, a convenience store) are for legitimate purchases. According to the store visit, the subject store did not have inventory to support the numerous large transactions. 5 U.S.C. § 552 (b)(7)(E).

While the Appellant firm may be located in an area with households that qualify for SNAP benefits and near schools and a community center, these factors are not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not displayed in other similarly stocked stores. If specific household needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would also present themselves at nearby firms as well. But this is simply not the case.

The Appellant submitted for review 12 customer affidavits/statements to establish that the transactions in the charge letter were legitimate purchases of eligible food; 5 U.S.C. § 552 (b)(7)(E). As such, the submitted customer statements are not found to be more persuasive of legitimate SNAP transactions for eligible foods.

5 U.S.C. § 552 (b)(7)(E).

With regard to the owner and employee affidavits provided by Appellant which purport to establish that questionable transactions were legitimate and that no trafficking occurred, the truth of such declarations can neither be confirmed nor denied. Although such affidavits may be sworn to and notarized, that does not mean that they are necessarily truthful. One would not expect store owners and employees to admit that questionable transactions were not legitimate, were it really so. On the contrary, one would expect that any owner and employee affidavit provided would attest to questionable transactions being legitimate.

Based on the store layout, infrastructure, and available inventory, it is not credible that the Appellant would so frequently conduct large transactions closely resembling those typically found at a supermarket or super store. It is not plausible that the firm's customers would regularly carry very large amounts of merchandise around the store without the benefit of shopping carts, especially since larger, better-stocked stores are readily available and in the vicinity of the Appellant firm. The Appellant is not set up to process high-dollar transactions, as indicated by its lack of equipment to facilitate large transactions and limited counter space. There are no legitimate bases for SNAP customers' unusual attraction to the firm such as a superior selection of staple foods, price advantages, package specials, bulk or promotional items, an extensive variety of otherwise unavailable ethnic food items, or special services rendered. The Appellant failed to provide convincing evidence to establish the legitimacy of these excessively large transactions, 5 U.S.C. § 552 (b)(7)(E). Based on all of these factors discussed in this section, the large volume of transactions for high-dollar amounts is unlikely to indicate a pattern of legitimate food purchases.

Neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be extremely serious, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a nonmanagerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification "shall be

permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store." In keeping with this legislative mandate, § 278.6(e)(1)(i) of the SNAP regulations states that FNS must disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved.

USDA employs a computerized fraud detection tool to identify EBT transactions that form patterns that have characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. The Retailer Operations Division analyzes the transaction data and patterns along with other documentation such as, information from the onsite store visit report including photographs of stock and the store layout, an analysis of recipient shopping behavior, and comparisons with similar store types in local area, to render a determination as to whether or not the questionable transaction patterns were, more likely than not, the result of trafficking. The regulations at 7 CFR § 278.6(a) state 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, and that 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.

Customer Hardship

The Appellant requests consideration for a hardship civil money penalty in lieu of a permanent SNAP disqualification as a permanent SNAP disqualification would impose a significant hardship on area customers.

7 CFR § 278.6(f) of the SNAP regulations provides for civil money penalty assessments in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs. However, this regulation also sets forth the following specific exception to such assessments there under: "A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification". Therefore, since this case involves a permanent disqualification action, the civil money penalty provision is not applicable to the present case.

Financial Hardship

With regard to the Appellant's contention that a SNAP disqualification would impose a financial hardship on the firm, there is no provision in the SNAP regulations or internal agency policy directives for 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 allow store ownership from being excused 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, the Appellant's contention that the firm may 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 imposed.

CIVIL MONEY PENALTY

In the August 9, 2022 charge letter the Appellant was informed by the Retailer Operations Division that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000 in lieu of permanent disqualification of a firm for trafficking. Per Section 278.6(i) of the SNAP regulations, four criteria must be met in order to be considered for a trafficking civil money penalty. If requesting a trafficking CMP, an Appellant must meet each of the four criteria listed and provide the documentation as specified within ten days of the Appellant's receipt of their charge letter.

If the Appellant's request for a trafficking CMP and the required documentation are not submitted on time, it will lose its right for any further consideration for a trafficking CMP. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) 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, the firm shall not be eligible for such a penalty". The regulations do not provide the agency discretion to extend the time within which documentation and evidence in support of a trafficking civil money penalty may be submitted.

In the August 12, 2022 response to the letter of charges and in the February 6, 2023 request for administrative review, the Appellant, through counsel, requested consideration for the imposition of a trafficking civil money penalty in lieu of permanent disqualification. The Appellant contends that the firm implemented a legitimate training program for its employees and an effective compliance program to prevent violations of the SNAP prior to the occurrence of the SNAP violations.

However, the record supports that the Appellant did not submit timely substantial evidence, as required by the regulations, to meet the criteria for a trafficking CMP in lieu of permanent disqualification. Therefore, the Retailer Operations Division's decision not to impose a civil money penalty in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record, upon which charges of violations are based, together with observations made during the store visit and an analysis of customer shopping behaviors, provide substantial evidence that questionable transactions during the focus period have characteristics and display patterns that are not consistent with legitimate sales of eligible food to SNAP benefit customers at a store of this type, size and makeup. Rather, the characteristics are indicative of illegal trafficking in program benefits. The Appellant's contentions do not outweigh this evidence.

The record has yielded no indication of error or discrepancy in the reported findings by the Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Therefore, the decision to impose a permanent disqualification from participation in the SNAP against 38 Ave Deli And Grocery Inc #01 is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (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, FNS is 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

April 19, 2023