

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

**AK Gourmet Market Corp., DBA  
Stop 1 Deli,  
Appellant,**

**V**

**Retailer Operations Division,  
Respondent.**

**Case Number: C0247184**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to assess a civil money penalty against AK Gourmet Market Corp., DBA Stop 1 Deli (“Appellant”) in the amount of \$59,000 in lieu of a permanent disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

Additionally, in accord with the requirements at 7 CFR §278.1(b)(4), Appellant must post a collateral bond or irrevocable letter of credit in the amount of \$5,841.00 as a further condition for continued participation as an authorized retailer in SNAP.

**ISSUE**

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of Code of Federal Regulations (CFR) § 278.6(e)(5) and (f)(1) in its administration of SNAP when it assessed a civil money penalty in the amount of \$59,000 in lieu of a permanent disqualification against Appellant on October 4, 2021.

**AUTHORITY**

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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 16, 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 December 2020 through May 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).

In correspondence dated August 30, 2021, Appellant, through counsel, responded to the charge letter and generally stated that no violations of any SNAP rule or regulation took place and that the transactions complained of are the result of the Market's issuance of credit accounts to certain SNAP households. Additionally, the transactions at issue in the instant matter, as outlined in the three attachments to the Charge Letter, are all the result of the Market's practice of extending lines of credit to its SNAP customers. The Market is deserving of a civil monetary penalty (CMP) in lieu of any period of disqualification, as it has long had and continues to have a compliance and training policy and program in place to prevent trafficking and other violations of SNAP regulations.

Appellant, through counsel, further stated once a customer's SNAP benefits have been replenished, they will then return to the Market and not only pay for a new purchase, but also pay for the food that they have purchased on credit. This usually results in the type of transaction outlined in Attachment 1, but also Attachment 3. In correspondence dated September 14, 2021, Retailer Operations Division notified Appellant that the acceptance of SNAP benefits as payment for items sold to a household on credit is a violation of SNAP regulation at 278.2(f) and a firm that commits such violations shall be disqualified from participation for a period of one year. Appellant was informed that it must provide documentation to support that food items were purchased on credit as noted in the response provided on August 30, 2021, and that the documentation must identify specific accounts along with corresponding dates and amounts within the review period.

Appellant provided 18 pages of alleged credit account records, 20 pages of its compliance and policy program, 31 pages of Training Session Logs and signature pages, and Appellant's signed Affidavit.

After considering the retailer's reply and the evidence, the Retailer Operations Division issued a determination letter dated October 4, 2021. The determination letter informed Appellant that it was eligible for a trafficking CMP because Appellant submitted sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP. The determination letter stated that the monetary penalty of \$59,000 was due 30 calendar days from receipt of the determination letter.

By letter dated October 8, 2021, Appellant, through counsel, appealed the Retailer Operations Division's determination and requested an 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 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 § 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.”

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 ...*” (*Emphasis added*)

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

(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 a penalty.

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.”

## **SUMMARY OF CHARGES**

The charges on review were based on an analysis of SNAP electronic benefit transfer (EBT) transactions dated during the six-month period of December 2020 through May 2021. This involved three 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. The bulk of the households' remaining benefits were depleted within short time frames.
3. 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. We believe that the amount of the CMP was improperly calculated in addition to other errors.
2. We clearly see from the plain language of the statute, the maximum amount of a CMP issued by the Agency cannot exceed \$40,000.00 per single investigation, as the case in the instant matter.

Appellant, through counsel, did not provided any additional documentation or evidence in support of its position. 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 FNS originally authorized the business as a small grocery store on November 5, 2019. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a March 3, 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 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:

1. One cash register and two POS devices with a small counter area partially obstructed by other smaller items available for sale.
2. Estimated to be approximately 1250 square feet.
3. No shopping baskets or carts available for customers.
4. An optical scanner was available at checkout. No specialty registers present.

5. Store does not operate through a night window or plastic barrier with food stock behind the barrier.
6. No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
7. No unusual pricing structure such as ending most products with 00 cents and does not round transaction totals.
8. No food stored in an area outside of public view.
9. Store has storage freezers or coolers, but no food stored off site.
10. Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods, or vegetables.
11. Store takes telephone or online orders and does not offer delivery
12. Highest priced eligible food items were Mazola Oil (\$5.99), Folgers Coffee (\$6.50), Hellman's Mayonnaise (\$8.99), Carolina Rice (\$7.99), and Bertolli Olive Oil (\$10.99).
13. Store stocks a significant amount of non-food items such as but not limited to paper products, household products, tobacco products, health and beauty aids, gift items, mobile phones/phone cards and cleaning products.
14. Store stocks ample amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry, and fish products.
15. A kitchen/prepared food area with hot foods sold for onsite consumption.
16. A deli or prepared food section. Stock is not used in preparation of food.
17. 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.**

There were 222 sets of 564 SNAP transactions totaling \$29,365.34, completed by 117 different households, 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.

Appellant, through counsel, did not offer, with its review request, any explanation or related evidence in an attempt to clarify or justify the specific transactional behavior noted in the Attachment 1 of the charge letter but only contends that the amount of the CMP was improperly calculated.

**Attachment 2 of the Charge Letter – The bulk of the households’ remaining benefits were depleted within short time frames.**

This attachment lists 50 sets of 98 totaling \$5,693.98 in SNAP benefits in which individual recipient benefits were exhausted or nearly exhausted. Based on known store characteristics, as well as information gathered regarding specific households in this case, these transactions, in which a household's remaining benefits were depleted in short timeframes, do not appear to be supported and are thus indicative of trafficking. Studies of historical transaction data shows that SNAP recipients do not normally exhaust their benefits in one or two transactions on the same day. A government report on SNAP shopping patterns indicates that after the first day of benefit issuance, on average, 80 percent of a household’s allotment remains unspent. Even after seven days, 40 percent of benefits still remain unspent. It takes two weeks to deplete 80 percent of one’s benefits, and three weeks to deplete 90 percent. 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 benefits in only a few transactions or in a single day. Depleting one’s entire allotment in one or two days, or in a single large transaction, leaving no benefits for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP benefit households.

Appellant, through counsel, did not offer, with its review request, any explanation or related evidence in an attempt to clarify or justify the specific transactional behavior noted in the Attachment 2 of the charge letter but only contends that the amount of the CMP was improperly calculated.

**Attachment 3 of the Charge letter - Your store conducted EBT transactions that are large based on the observed store characteristics and recorded food stock.**

There were 856 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. The record reflects that during the review period Appellant conducted transactions that were up to 475 percent higher than the national average for this store type in both State and County averages.

Appellant, through counsel, did not offer, with its review request, any explanation or related evidence in an attempt to clarify or justify the specific transactional behavior noted in the Attachment 3 of the charge letter but only contends that the amount of the CMP was improperly calculated.

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 New York County area of New York. This is another strong trafficking indicator.

Based on this empirical data, and in the absence of sufficient evidence as to the legitimacy of such transactions, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation. In this case, ownership did not provide sufficient evidence to legitimize Appellant’s transaction data as outlined in the Attachments. Retailer Operations Division determined that Appellant’s contentions did not outweigh the evidence that the store was trafficking and concluded, through a preponderance of evidence, that trafficking is the most probable explanation for the questionable transactions in the Charge letter.

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.

The purpose of the administrative review process is to ensure that firms aggrieved by Retailer Operations Division’s 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’s 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

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR § 278.6(i). Appellant was informed that it would need to provide both the request and supporting evidence within ten 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. Appellant requested consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i). The Retailer Operations Division determined that Appellant met the criteria for a trafficking CMP.

Appellant, through counsel, contends that the amount of the CMP was calculated incorrectly. With regard to this contention, Regulations at 7 CFR § 278.6(j) outline the steps for calculating the CMP amount. The CMP is based on the store's SNAP redemptions during the 12 months immediately prior to the firm being charged with program violations. **Modifications to the CMP may occur only when there is an error in calculation or when the CMP exceeds the statutory limit.** The calculation of the CMP in this case is as follows:

Month	Total SNAP Redemptions	Month	Total SNAP Redemptions
July 2021	\$82,998.66	January 2021	\$45,705.02
June 2021	\$85,562.22	December 2020	\$44,909.00
May 2021	\$72,467.10	November 2020	\$44,573.73
April 2021	\$60,666.73	October 2020	\$49,571.07
March 2021	\$56,016.63	September 2020	\$49,615.84
February 2021	\$54,769.87	August 2020	\$54,032.70

Recalculation of Trafficking CMP Date of Charge Letter: August 16, 2021	
	Admin. Review Recalculation (8/2020 – 7/2021)
Step 1: Cumulative Redemptions for the 12-Month Period Preceding the issuance of the letter of charges.	\$700,888.57
Step 2: Determine the Firm's Avg. Monthly Redemptions (AMR) (Rounded)	\$58,407.00
Step 3: Multiply AMR by .10 (Rounded)	\$5,841.00
Step 4: CMP Multiplier used	60
Previous Offense Multiplier	1
Initial Trafficking CMP Calculated Total	\$350,460.00
Maximum Penalty (for trafficking violations after 5/7/2010)	\$59,000.00
Trafficking CMP to be Assessed	\$59,000.00

In this case, the calculated CMP of \$350,460.00 is more than the agency sanction limit of \$59,000.00. The total penalty imposed is the lesser of these two amounts. Based on the



information above, it is the determination of this review that a CMP in the amount of \$59,000.00 was properly assessed in this matter. Accordingly, a modification to the CMP is not appropriate. Whether or not the firm can afford such a penalty is not a consideration under the regulations.

### **CONCLUSION**

Based on the discussion above, the determination by the Retailer Operations Division to assess a civil money penalty against Appellant of \$59,000.00 in lieu of a permanent disqualification from participating as an authorized retailer in SNAP is sustained. In accordance with regulations at 7 CFR § 279.5(f), the determination of this review shall become effective 30 days after receipt of the decision.

If the penalty is not paid within 30 calendar days, the permanent disqualification for trafficking shall be imposed. Appellant was also advised in the letter of determination dated October 4, 2021, of the allowable methods of payment, the appropriate contacts for discussion regarding that payment, and of the requirement at 7 CFR §278.1(b)(4) to post a collateral bond or irrevocable letter of credit in the amount of \$5,841.00 as a further condition for continued participation as an authorized retailer in SNAP.

### **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.

Monique Brooks  
ADMINISTRATIVE REVIEW OFFICER

December 15, 2022