

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

Anthony & Joseph Inc.,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0257218

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 (“ROC”) to impose a permanent disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) against Anthony & Joseph Inc. (“Appellant”).

ISSUE

The purpose of this review is to determine whether the ROC took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a Permanent Disqualification against Appellant on December 14, 2022.

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 September 29, 2022, the ROC charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations. This charge was based on a series of SNAP transaction patterns that “establish clear and repetitive patterns of unusual, irregular, and inexplicable activity for your type of firm.” This letter of charges states: “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.” The letter also states that “. . . under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of a permanent disqualification of a firm for trafficking.”

The record reflects that the ROC considered any information provided by Appellant prior to making a determination. The ROC determined that Appellant's contentions, if any, did not outweigh the evidence that the store was trafficking. Based on the preponderance of evidence, the ROC concluded that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

The ROC issued a determination letter dated December 14, 2022. This letter informed Appellant that it was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6 (c) and 278.6(e)(1) for trafficking violations. The letter also states the ROC considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. The ROC determined that Appellant was not eligible for the CMP because Appellant had not submitted sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

On December 19, 2022, Appellant appealed the ROC's determination and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented 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 in the event that personnel of the firm engaged in trafficking of SNAP benefits.

7 CFR § 278.6(a) states, in part:

FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an **electronic benefit transfer system** (Emphasis added.)

7 CFR § 278.6(a) states, in part:

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

7 CFR § 278.6(c) reads, in part:

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

7 CFR § 278.6(e)(1)(i) reads, in part:

FNS shall . . . [d]isqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

Trafficking is defined in 7 CFR § 271.2, 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

Also at 7 CFR § 271.2, eligible food is defined as:

Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption . . .

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

Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence.....that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).

7 CFR § 278.6(b)(2)(iii) states:

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

SUMMARY OF CHARGES

The charges under review were based on an analysis of SNAP Electronic Benefit Transfer (EBT) transaction data. This analysis identified the following patterns of SNAP transaction activity that indicate trafficking:

- A large number of transactions in repeated dollar values;
- An inordinate number of transactions ending in same-cents values;
- Consecutive transactions made too rapidly to be credible;
- Multiple transactions made from the same accounts in unusually short time frames;
- Transactions that depleted the majority or all of a recipient's monthly SNAP benefits made in unusually short timeframes;
- A large number of manual (key-entered) transactions; and,
- Unusually large transactions.

The attachments enclosed with the charge letter specify the questionable and unusual SNAP transactions indicative of trafficking which were conducted at Appellant during the review period.

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- It is a normal practice for the firm to end a transaction (SNAP, credit card, or cash) in the same-cents value of \$.00. The owner instructed all employees that when a transaction ends in less than \$.19 to bring it to \$.00, however some employees charge the \$.19 depending on the customer.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented and evidence submitted.

ANALYSIS AND FINDINGS

Regarding Appellant's denial of violations, this review examines the relevant information regarding the determination. Once the ROC establishes trafficking occurred, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that it did not engage in trafficking. If this is not demonstrated, the case will be sustained. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

Store Characteristics

In reaching a disqualification determination, the ROC considered information obtained during a May 8, 2012 store visit conducted by a USDA contractor to observe Appellant's operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report documented the store size, description, and characteristics. The report also described the store's checkout counter space area and noted the effect of any limitations of the available surface area on placing large purchases or processing more than one customer at a time.

There was no indication that SNAP households were inclined to visit the store regularly to purchase large quantities of grocery items. The available food was primarily of a low-dollar value and there was no hint that the firm sold items in bulk. Given the available inventory, there was no sign that Appellant would be likely to have SNAP redemption patterns that differed significantly from those of similarly-sized competitors.

Same-Dollar Values Transactions

An attachment to the charge letter documents large transactions made for repeated dollar values. These large transactions are also included in another attachment to the charge letter. There is insufficient evidence to support that the same-dollar transactions in this case constitute a different pattern of trafficking than those already documented.

OR

An attachment to the charge letter identifies large transactions made for repeated dollar values. 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 does not typically spike at specific amounts. Such unusual clustering around specific transaction amounts is indicative of trafficking.

(next paragraph is similar to same-cents paragraph)

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 Appellant's declaration that this activity reflected the acceptance of SNAP benefits in exchange for eligible food items. As 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.

Same-Cents Transactions

An interesting characteristic of questionable transactions is that many of them end in a same-cents value. Sets of repeating digits are highly unorthodox and do not regularly occur in legitimate transactions; such transaction structuring is a common hallmark of trafficking activity. In the absence of any compelling rationale to the contrary, these patterns strongly indicate that the firm is trafficking in SNAP benefits.

An attachment to the charge letter documents transactions ending in same-cents values. A review of the store visit record indicates that the store did not promote any specials that could explain the pattern of large numbers of transactions ending in these values.

A number of households whose transactions were cited in other attachments to the charge letter also consistently made transactions that ended in same-cents values. Transactions appearing in more than one attachment to the charge letter are more suspicious as they display multiple patterns common to trafficking transactions.

IF NO \$9 OR MORE ANALYSIS IN ROC ANALYSIS DOC

There were a total of 1426 SNAP transactions that ended in even-dollar values, or “50” cents. They comprised 80 percent of the dollar value of SNAP transactions conducted by the firm during the review period.

PRICES IN STORE VISIT PHOTOS END IN \$.x9

The prices evident in the store visit documentation show a pricing structure typical of convenience stores, where items are often priced to end in “.x9” cents. With such a pricing structure, it is unlikely for transactions to naturally end in “50” cents or even-dollar values with the frequency they occurred during the review period. Even if many of Appellant’s prices were for even-dollar amounts, the purchase of even a single additional item that was not priced at an even-dollar amount would rule out an even-dollar transaction.

DELIBERATE ROUNDING

It is Appellant's contention that the inordinate number of transactions ending in same-cents values are due to the normal practice of the firm to end a transaction in the same-cents value of \$.00. Appellant contended it instructed all employees to round transactions ending in less than \$.19 down to \$.00 and added that some employees round down depending on the customer. The assertion that the firm rounds off transaction amounts is not supported by the evidence. Even if Appellant regularly rounded off transactions less than \$.19, this would not explain the high frequency of transactions that ended in \$.50.

RANDOM ROUNDING

Appellant contends that the inordinate number of transactions ending in same-cents values is the result of the owner sometimes rounding off prices on transactions. Unlike stores that regularly round off prices to build customer loyalty, it is unclear why the owner would round off prices in the apparently random manner contended by Appellant. As mentioned above, it is also

interesting that a number of the transactions the owner selected to round off also happen to have other characteristics common to trafficking transactions.

Patterns of transactions ending in same-cents 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 with identical cents values during the review period strains the credibility of Appellant's declaration that this activity reflected the acceptance of SNAP benefits in exchange for eligible food items. As Appellant has offered no rational explanation for why such patterns might exist, it is reasonable to conclude that these same-cents transactions are the result of trafficking.

Rapid Transactions

An attachment to the charge letter documents back-to-back transactions made in rapid order at the same terminal.

These transactions were conducted with implausible speed. Frequent and large transactions conducted quickly to purchase eligible foods at Appellant are highly unlikely given Appellant's low-dollar inventory and limited counter space. The firm does not maintain the logistical wherewithal required to rapidly process these transactions. The steps required to process a legitimate SNAP purchase include the following:

- 1) Waiting for the customer to load the items onto the counter space near the cash register. (Due to the large dollar amounts of the transactions and considering how many low-priced items it would take to reach the amounts listed in this attachment, it is unclear how customers, without the use of shopping carts or baskets, were able transport their items to the register and then out the door to waiting transportation);
- 2) Separating eligible items from ineligible items;
- 3) Manually entering the cost of each item;
- 4) If applicable, weighing any individual items sold by weight, such as fresh meat or fruits and vegetables;
- 5) Inputting manufacturers cents-off coupons, if applicable;
- 6) Bagging the items for carry out;
- 7) Handing the customer bagged items to make room for more food items on the counter;
- 8) Informing the customer of the totals (one for eligible foods and one for non-eligible items, if applicable);
- 9) Pressing the "SNAP transaction key" on the point-of-sale device;
- 10) Swiping the card;
- 11) Entering of the required PIN by the customer;
- 12) Entering the purchase amount by the cashier;
- 13) Confirming that the customer has a sufficient benefit balance;
- 14) Processing and approval of the transaction by the system;
- 15) Printing out cash register and EBT receipts;

- 16) Accepting an alternate form of payment for nonfood items and possibly handling cash and change; and,
- 17) Removing products from the checkout area so the next customer in line can begin another transaction.

While such transactions may well be conducted in succession, performing these actions on large transactions cannot be done rapidly. The amount of time required is generally proportional to the dollar amount of the transaction; typically, the larger the dollar amount transacted the longer the time period between transactions. Limited counter space and a lack of shopping carts and baskets add additional time to transactions. Appellant processed very large orders considerably faster than supermarkets typically process them, yet it has only one small checkout counter, no optical scanner, and none of the logistical tools (such as conveyor belts, rotating bagging platforms or order separators) routinely used in rapid throughput operations.

As described above, the rapid processing of large transactions of eligible food items at Appellant is improbable. Yet, the questionable transaction data cited in the attachment reveals consecutive transactions involving large-dollar amounts occurring within a span of only a few minutes. It is highly unlikely that the rapid, multiple, large transactions described above involve solely the sale of eligible foods.

Repeat Transactions by the Same Household

An attachment to the charge letter documents the same household conducting back-to-back transactions in unusually short time frames. Violating stores may conduct multiple transactions from the same household account within a 24- or 48-hour period to avoid the detection of single, high-dollar trafficking transactions.

The Case Analysis Document shows households conducting rapid, repetitive, and large transactions at Appellant frequently spent SNAP benefits at better-stocked and more competitively-priced grocery stores, sometimes on or about the same day they shopped at Appellant.

The Case Analysis Document also identifies much larger stores with more reasonable prices located within one mile of Appellant. There is no basis for unusually high customer attraction to Appellant, there being no great price advantage, profusion of ethnic goods, or special or custom services rendered. Oddly, some SNAP households spent considerably less at the larger stores than at Appellant.

SEPARATE RECEIPT

Appellant argues that the back-to-back transactions are due to customers splitting transactions to receive separate receipts for each. A SNAP household is one that purchases and prepares meals together, so there would be no need to obtain a separate receipt. Households that purchase and prepare meals separately are considered separate households.

SHARING BENEFITS WITH OTHERS

Appellant contends the back-to-back transactions are due to customers sharing benefits with others. Appellant has offered no evidence whatsoever that SNAP households share their cards with other household members, relatives, or friends. Appellant has also not provided any explanation for why, if such behavior were occurring, these purchases would occur at Appellant rather than at nearby, larger stores. It is unlikely that a family relying on SNAP to supplement their nutritional needs would share these benefits with another family that purchases and prepares meals separately. An unsubstantiated argument such as this does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Customers sometimes forget an item or see something at the checkout and decide to purchase it after already having completed a transaction. In such instances, it is reasonable to expect the subsequent purchase would be for a nominal amount. This is because it is quite rare to find very expensive items positioned at the checkout area, especially in smaller stores. Also, forgotten goods purchased immediately after a prior transaction typically consist of only one or two items. However, the subsequent transactions exceeded any minor amount. In some cases, the amounts of subsequent transactions equaled or exceeded the preceding transaction total.

While there are legitimate reasons why a SNAP recipient might return to a convenience store in a short period of time, the examples in the attachment indicate a series of purchases that total to large amounts. SNAP benefits are intended to supplement the food budget for households whose net income is near or below the Federal Poverty Level. It is difficult to believe customers who must rely on SNAP benefits to make ends meet prefer to pay higher prices and spend considerable amounts of their benefits at a convenience store. Spending sizable portions of one's SNAP benefit allotment in a convenience store - when there are larger stores at which one also shops that carry more variety of foods at a lower cost - is unreasonable customer behavior. Moreover, households listed in this attachment conducted this strange shopping pattern of making substantial purchases at Appellant multiple times during the review period. Given the common practice of violating retailers breaking up large, suspicious transactions into multiple, smaller transactions to avoid detection, a firm's explanation and evidence for why these transactions are occurring in a 24- or 48-hour period in a convenience store should be both rational and compelling. Appellant's explanation is neither.

SNAP Benefit Depletions

An attachment to the charge letter documents the same household exhausting all or nearly all its benefits in rapid order. In some cases, SNAP customers depleted SNAP account balances to within pennies of a zero balance and/or depleted balances during the first week of the month. It is highly implausible that customers would desire, or be able, to regularly conduct large transactions that deplete balances to within pennies of a zero balance. The likelihood that these transactions were the result of the legitimate sale of only eligible foods only is extremely small.

A government report on SNAP shopping patterns¹ 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 typically takes 14 days to deplete 80 percent of one's benefits, and 21 days to deplete 90 percent. This report also revealed that households most often redeemed their benefits at supermarkets and supercenters, with only four percent of all households never shopping in a supermarket.

It is extremely doubtful that a SNAP household making a legitimate purchase would choose to spend a large portion of its monthly allotment at a convenience store with likely higher prices and substantially less inventory than what would be found at a supermarket or superstore. 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 a single day. Depleting a large portion of one's SNAP balance early in the benefit month, leaving little to purchase food for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP households.

Manual Transactions

An attachment to the charge letter documents a significant number of EBT manual (key-entered) transactions made at Appellant. The rate of manual transactions for high dollar amounts was much higher than for SNAP transactions overall.

Appellant contends that the transactions contained in this attachment are due to card failure. While some of these transactions may be due to card failure, a number of these transactions reflect instances in which cards that were key-entered for one transaction were later swiped during subsequent transactions, demonstrating that the cards were not malfunctioning. (When new cards are issued, the last few numbers are changed; thus, these instances do not involve new cards).

The ROC also compared Appellant with five other convenience stores in the area. Appellant had the highest percentage of manually key-entered transactions of all these stores.

Large Transactions

The food stock and facilities of 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. It is rare for a convenience store such as Appellant's to have purchases like those included in an attachment to the charge letter.

¹U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program*, by Laura Castner and Juliette Henke. Project officer: Anita Singh, Alexandria, VA: February 2011.

Additionally, many of the charge letter transactions arrive at, or cluster around, certain dollar amounts in \$5 increments. Households typically shop to obtain a certain mix of food items, irrespective of the total cost (other than to remain within allotment balances), and do not strive to achieve a particular total. The purchase amount of eligible food items typically approximates a random total. In contrast, firms facilitating trafficking tend to concentrate transactions at particular dollar amounts. In the absence of any compelling rationale to the contrary, the pattern of clustering transactions around certain dollar levels is implausible and indicative of transaction structuring and SNAP-benefit trafficking.

The Case Analysis Document indicates these transactions significantly exceed the county's average SNAP transaction. As previously stated, Appellant has a limited food stock typical of a convenience store and does not have any features that would induce people to spend substantially more than the typical convenience store purchase amount.

Appellant's large transactions during the review period were also much more frequent than those of similar stores in the state.

Additionally, the Case Analysis Document contains a comparison of Appellant's redemption activity during the analysis period to SNAP-authorized convenience stores located nearby. Appellant's SNAP redemptions during the analysis period were substantially larger than that of the nearby comparable firms.

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 superstore. 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. 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. Appellant failed to provide convincing evidence to establish the legitimacy of these excessively large transactions, such as itemized cash register receipts. 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.

Credit Accounts

Appellant maintains that one of the reasons for the large transactions is that credit is extended to loyal customers, and their tabs are paid in full when they receive their SNAP benefits. In support

of this assertion, Appellant provided credit ledger pages that Appellant contends support the use of credit accounts at Appellant. Many of the credit entries listed were unpersuasive for a variety of reasons: they did not include the full name or other information that would allow identification of the customer; they fell outside of the review period; they did not include a list of items purchased or included items that are not eligible for purchase with SNAP benefits; and, they lacked dates of purchases and/or payoff amounts and dates. The analysis of these credit ledgers does not support Appellant's contention.

CREDIT ACCOUNT PATTERNS

Lastly, the Appellant claims that these transaction patterns may reflect an initial repayment on a credit account followed by an eligible food purchase. However, most of the transactions cited in the charge letter occurred several or more hours apart. In addition, the pattern of a credit repayment followed by a legitimate food purchase is likely to consist of a large initial transaction followed by a much smaller transaction. This pattern is not present in these suspicious transactions.

In its May 17, 2012 letter, the ROC requested additional information from Appellant to support the contention that credit was extended to customers, but no additional evidence was provided.

When a retailer attempts to refute charges of trafficking by claiming it maintains credit accounts, the retailer must provide adequate proof that credit accounts existed at the time the suspicious transactions occurred so that the ROC can compare such proof with transactions outlined in the letter of charges. This is because it is not uncommon for retailers to make false admissions of credit in an attempt to obtain a lesser penalty after committing the more egregious violation of trafficking. Without substantial documentation that credit was extended to SNAP customers, it is impossible to compare against any specific transactions outlined in the letter of charges dated September 29, 2022, or substantiate that such transactions were indeed the result of credit account repayments.

Credit repayments also do not explain why SNAP households made several large dollar transactions over one- or two-day periods adding up to hundreds of dollars.

Consideration of Factors for a Sanction

Appellant stated that FNS should consider the factors listed in 7 CFR § 278.6(d) before imposing a sanction: the nature and scope of the violations; whether the firm was warned violations were occurring; and any evidence of intent to violate the regulations. This argument is based on an incorrect understanding of the regulations. The severity of the penalties, set forth in the subsequent paragraph 7 CFR § 278.6(e), are based on the factors listed in 7 CFR § 278.6(d). For example, permitting the sale of cigarettes with SNAP benefits results in a three-year disqualification, but this becomes five years if the firm had been previously warned. Other sanctions consider intent, such as whether false information on an application was "knowingly submitted" or whether the sale of nonfood items was "the firm's practice" (which carries a three-year disqualification) rather than "due to carelessness or poor supervision" (which results in a

six-month disqualification). Trafficking is the most serious violation, and a single instance carries the penalty of permanent disqualification.

No Control Over Benefit Use

Appellant insists that it has no control over how and when SNAP customers spend their benefits. In truth, SNAP households have no limits on the number of times they may use their SNAP cards or how much eligible food they may purchase. The SNAP transactions of Appellant are questionable not because they exceed any limits for use. Rather, they display characteristics not typically found at convenience stores and are indicative of trafficking.

Similarly, Appellant declares that it has no control over when a card does not swipe correctly and needs to be keyed in manually. There is no limit on the number of manual key entries that a SNAP retailer can perform. The manual key entries of Appellant are not questionable because they exceed any particular limits, but because they too display signs of trafficking discussed previously.

Expensive Offerings

Appellant asserts it sells expensive items which explain the large purchases. The evidence does not support this contention. During the store visit, none of these items identified by Appellant were on display as being available for sale. In addition, there were no posted prices for these items. The store clerk identified the most expensive items at Appellant, which were then recorded and photographed by the store reviewer. None of these items Appellant now alleges it sells were identified by the store clerk.

The store review report also documented that the firm did not have meat or seafood specials or bundles.

Appellant did not provide any receipts or invoices in support of its contentions.

While there may have been occasions when Appellant sold expensive items, based on the low price of these items relative to the large transactions, evidence from the store visit, and lack of corroborating receipts or invoices, it is more likely true than not true that the sale of expensive items does not explain the large SNAP transactions that occurred at Appellant. Trafficking is a more likely explanation for the unusual and irregular pattern of high-dollar transactions.

Appellant's Responsibilities

Appellant insists that the owner has not received any training from the SNAP program. Appellant also contends the owner was unaware of the credit accounts; when the owner learned of them, the employee responsible for permitting these credit accounts was terminated. When ownership signed the FNS application to become an authorized SNAP retailer, this included a

certification and confirmation that the owner(s) 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 document include maintaining credit accounts and trafficking. Regardless of whom the ownership of a store may choose to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions.

No Applicable Mitigating Factors

This review is limited to considering the circumstances at the time the Office of Retailer Operations and Compliance’s decision was made. It is not within this review’s scope to consider actions that Appellant may have taken subsequent to this decision to begin to comply with program requirements. There is no provision in SNAP regulations for reducing an administrative penalty on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, Appellant’s contention that the owner will ensure violations do not reoccur in the future does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant asserts that this is the first time there has been an issue related to SNAP and that it did not receive prior warnings. A record of program participation with no documented previous violations, however, does not constitute valid grounds for mitigating the impact of the present serious determination of trafficking.

To require Appellant to receive a warning of violations before administrative action can be taken would render the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA virtually meaningless.

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 non-managerial 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.

Receipts

Appellant provided register receipts to support the validity of its transactions. However, the register receipts provided by Appellant contain unusual characteristics that call into question the legitimacy of these receipts. The register receipts do not explain the questionable transactions at Appellant.

Invoices

Appellant submitted invoices to establish that the store purchased enough inventory to support the total of its SNAP sales. However, the invoices are insufficient to demonstrate this. Many of the invoices provided did not include Appellant's name or the supplier's name, were outside of the review period, did not include a list of items purchased or included items that are not eligible for purchase with SNAP benefits. The SNAP-eligible inventory included in the invoices from the review period totaled approximately \$50,319. Assuming the typical mark up for SNAP-eligible items by a convenience store of 40%, this amount of inventory would support \$70,446 in SNAP transaction activity. However, the total of SNAP transactions during the review period was much higher than this amount. This also does not account for any non-SNAP purchases of food items at Appellant. In sum, the invoices do not explain the questionable transactions at Appellant.

INVOICES UNCLEAR (no analysis)

Appellant submitted invoices to establish that the store purchased enough inventory to support the total of its SNAP sales. However, the invoices are insufficient to demonstrate this. There is not enough information to determine whether they account for the sum of Appellant's SNAP and non-SNAP transaction activity. While the overall dollar amount of SNAP activity is relevant, the charge letter did not cite as evidence Appellant's SNAP sales total. Rather, the ROC identified a series of different suspicious transaction patterns.

INVOICES SUFFICIENT

The invoices are sufficient to demonstrate that Appellant purchased enough inventory to support the amounts of its SNAP transactions. Still, there is not enough information to determine whether they account for the sum of Appellant's SNAP and non-SNAP transaction activity. While the overall dollar amount of SNAP activity is relevant, the charge letter did not cite as evidence Appellant's SNAP sales total. Rather, the ROC identified a series of different suspicious transaction patterns.

Infant Formula

Appellant contends that high transaction amounts are due in part to selling expensive infant formula. It would be unusual for a SNAP household to purchase baby formula with SNAP

benefits, as households who participate in SNAP are eligible to participate in the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). WIC has a more lenient income threshold for participation—and a higher participation rate of eligible participants—than SNAP. WIC provides participants with vouchers for baby formula as well as other staple items, such as orange juice and cereal.

As Appellant is a WIC retailer,

WIC participants would likely purchase all their infant formula, as well as other expensive staple goods, with their WIC benefits.

INFANT FORMULA RECEIPTS SUSPICIOUS

Appellant provided two receipts of purchase for two of the higher transactions which show the purchase of 12 and 19 cans of infant formula, respectively. While these receipts may legitimately explain two of the suspicious transactions, it is odd that these receipts show that each individual can of formula was rung up separately when Appellant stated its price for a case (6 cans) of formula was \$101.94. If Appellant did sell infant formula by the case, it is curious that the formula was not charged by the case.

Customer Statements

With regard to customer statements provided by the Appellant that purport to establish that the transactions in the charge letter were legitimate purchases of eligible food, the truth of such statements cannot be verified. Written affidavits or declarations, by themselves and without supporting documentation relative to the specific transactions in question, offer little to no insight into the actions that occurred between the customer and the store clerk at the point of sale. Unsubstantiated statements are insufficient to rebut the trafficking determination.

No Undue Hardship to Appellant

Appellant maintains that disqualification would pose an extreme hardship to the firm. Economic hardship is a likely consequence whenever a store is permanently disqualified from SNAP participation. However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from such a penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship to the firm would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity to competing stores and other participating retailers who are complying fully with program regulations, and also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that it will incur economic hardship due to an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the imposed penalty.

No Undue Hardship to SNAP Participants

Appellant asserts that disqualification would be a hardship to SNAP households who rely on the store. Some degree of inconvenience to SNAP benefit users is inherent in the disqualification from SNAP of any participating food store, since the normal shopping pattern of such SNAP participants may be changed due to the disqualification. Section 278.6(f)(1) of SNAP regulations provides for Civil Money Penalty (CMP) assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP households because of the unavailability of a comparable participating retail food store in the area to meet their needs. However, this regulation also sets forth the following specific exception: “A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.” Because the matter at hand involves a permanent disqualification, this CMP provision is not applicable.

Evidence of Trafficking

Appellant argues there is no evidence or proof of trafficking. As previously stated, 7 CFR § 278.6(a) states, in part:

FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, **evidence obtained through a transaction report under an electronic benefit transfer system** . . . (Emphasis added.)

FNS employs a computerized fraud detection tool to identify EBT transactions that form patterns having characteristics indicative of trafficking. This tool does not determine that trafficking has occurred. The ROC must still analyze the transaction patterns, along with other information such as store visit observations, customer shopping patterns, and comparative data from nearby stores. Only then does the ROC conclude whether questionable transactions were, more likely than not, the result of trafficking. Transactions with these patterns sometimes have valid explanations that support the idea they were the result of legitimate purchases of eligible food items, which is why opportunities are given to charged retailers to explain the questionable transactions cited. In this case, based on the suspicious patterns displayed and the other supporting evidence in the file - and in the absence of any reasonable explanations for such transaction patterns - the preponderance of the evidence supports that the “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges are the result of trafficking.

No Denial of Due Process

Appellant contends that it has been denied due process. In this regard, the permanent disqualification of Appellant by the ROC is neither a criminal nor a civil action, but rather an administrative action imposed against the firm as a result of trafficking violations.

FNS's due process procedures include two levels of review. First, the retailer is afforded an opportunity to reply to the charges leveled by the ROC. The regulations at 7 CFR § 278.6(c) state:

in the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section . . . the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

After the determination letter is issued, the second level of due process involves an administrative review.

Appellant availed itself of this option and in the process of which Appellant was granted 21 days to provide additional information in support of the request for review. Appellant took advantage of this opportunity and provided additional information.

The purpose of the administrative review process is to ensure that a firm aggrieved by FNS's adverse actions has the opportunity for their position to be fairly considered by an impartial reviewing authority prior to that adverse action becoming final. Through the administrative review process, Appellant has been duly given, and has taken, the opportunity to present any evidence and information it deemed as pertinent in support of its position that the ROC's adverse action should be reversed. All evidence and information that Appellant presented to the ROC, as well as any such information submitted subsequently, have now been considered in this administrative review prior to rendering the final agency decision. The firm provided no additional records during the administrative review that would establish that the suspicious transactions were legitimate purchases. The record does not indicate any departure from established procedures with regard to Appellant's right to a fair and thorough review. Appellant has exercised its opportunity to reply

to the charge letter and its administrative review rights. By doing so, it has availed itself of the full complement of the agency's statutory obligations with regard to due process.

Summary

The ROC determined that Appellant likely trafficked in SNAP benefits. The charges of violations were based on the ROC's assessment that substantial evidence exists that the questionable transactions occurring during the review period displayed patterns inconsistent with legitimate sales of eligible food to SNAP participants. The evidence the ROC considered in support of its determination included:

- The irregular SNAP transaction data of Appellant as compared to similar stores;

- Observations made during a store visit by a USDA contractor, including the inadequacy of the firm's staple food stock to support such large transactions;
- The availability and characteristics of other SNAP-authorized stores located close to Appellant; and,
- Shopping behaviors of Appellant's customers.

The transaction data and overall firm record demonstrate the patterns of unusual, irregular, and inexplicable SNAP activity for this firm is likely the result of trafficking.

Upon review, Appellant failed to prove by a preponderance of the evidence that the administrative action should be reversed. Appellant provided inadequate explanations for the suspicious transactions and insufficient evidence to legitimize its transaction data. It has not convincingly rebutted the ROC's determination that Appellant most likely trafficked in SNAP benefits. 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 must disqualify the firm permanently.

CIVIL MONEY PENALTY

NO CMP REQUEST

For a firm to have the opportunity to be considered for a civil money penalty (CMP), it must request that FNS consider a CMP in lieu of permanent disqualification and submit supporting documentation within ten days of receipt of the charge letter. Appellant was advised of these provisions in the charge letter of September 29, 2022. The regulations specify that such supporting documentation must demonstrate that the firm had established and implemented an effective SNAP compliance policy and training program prior to the occurrence of violations. A review of the administrative record indicates Appellant did not, at any time, request a CMP. Appellant also did not submit any documentation to support its eligibility for this alternative sanction, before or after the deadline.

In the absence of a request for a CMP and any supporting documentation, a CMP was not assessed by the ROC. According to the requirements stated in 7 CFR § 278.6(b)(1), § 278.6(b)(2)(ii and iii), and § 278.6(i), Appellant is not eligible for a CMP in lieu of a permanent disqualification from participation as an authorized retailer in SNAP. The determination by the Office of Retailer Operations and Compliance to deny Appellant a civil money penalty is sustained.

CMP REQUEST

Appellant requested a civil money penalty (CMP) contending that it had established and implemented an effective compliance policy and program to prevent SNAP violations. According to 7 CFR § 278.6(i) of the SNAP regulations, FNS may impose a CMP in lieu of permanent disqualification for trafficking.

UNTIMELY SUBMISSION OF SUPPORTING DOCS

For an Appellant's request for a CMP to be considered, the regulations at 7 CFR § 278.6(b)(2) require that Appellant submit supporting documentation within ten days of receipt of the charge letter. Appellant was advised of this provision in the charge letter of September 29, 2022. A review of the administrative record indicates Appellant did not submit documentation to support its eligibility for this alternative sanction by this deadline.

7 CFR § 278.6(i) sets forth the eligibility requirements for a CMP:

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 Section 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 Section 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; or it is 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 Appellant's contention that it is eligible for a CMP, it

described its compliance policy and training program.

provided its store policy, training program, agreement between store and employees, and a cashier's reminder.

In this regard, the various statements made

In this regard, the various documentation provided

by Appellant is not “substantial evidence” that fulfills each of the four criteria of 7 CFR § 278.6(i), demonstrating “that the firm had established and implemented an effective compliance policy and program to prevent violations.”

Appellant did not submit any signed employee agreements.

None of these documents have employee signatures or dates of when this training allegedly occurred.

There is no documentary evidence that employees received these documents.

There is no contemporaneous documentation that could verify this compliance policy and training program were in effect prior to the trafficking. The documentation provided could have simply been created subsequent to the firm being charged.

The standards of eligibility for a trafficking CMP are high. They require substantial proof that a compliance policy and program was established and implemented prior to the occurrence of violations. These standards exist to thwart attempts to falsely present compliance policies and programs that were not actually implemented prior to violations. As Appellant did not provide the required supporting documentation, the ROC did not assess a CMP. According to the requirements stated in 7 CFR § 278.6(b)(1), § 278.6(b)(2)(ii and iii), and § 278.6(i), Appellant is not eligible for a CMP in lieu of a permanent disqualification from participation as an authorized retailer in SNAP. The determination by the Office of Retailer Operations and Compliance to deny Appellant a civil money penalty is sustained.

DETAILED EXAMINATION of CMP SUBMISSION

The regulations at 7 CFR § 278.6(i) specify the criteria for a firm’s eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. Together, the criteria listed are specifically identified as the minimum standard that firms must meet in order to be eligible for such a penalty. Given these considerations, the statute and the regulations allow no flexibility below the level of this stated standard. The record reflects that Appellant’s reply to the charge letter fell short of this standard since Appellant did not provide the following:

- Written and dated documentation that reflect a commitment to ensure that the firm is operated in a manner consistent with SNAP regulations;
- Documentation of the development and/or operation of a policy to terminate violating employees;
- Documentation of development and/or operation of policy and procedures to implement corrective action in response to complaints of violations;
- Documentation of development and/or operation of procedures providing for internal review of employees’ compliance;

- Documentary evidence that establishes that the firm’s compliance policy and program were in operation prior to the occurrence of the violations at issue;
- Documentation of dated training curricula and dates of training sessions prior to the violations;
- Records of dates of employment of all firm personnel;
- Contemporaneous documentation illustrating that violating personnel participated in initial and follow-up training prior to violations;
- Documentation to demonstrate a training program that meets or is otherwise equivalent to the following standards:
 - Training for all who work in the store within one month of implementing the compliance policy documented in Criterion 1;
 - Training for any subsequently hired employees within one month of hiring and trained periodically thereafter;
 - Training that is designed to establish a level of competence that assures compliance;
 - Written materials, which may include FNS publications and regulations, are used in the training programs;
 - Materials that clearly state that acceptance of SNAP benefits in exchange for cash, firearms, ammunition, explosives, or controlled substances are prohibited and in violation of the statute and regulations; and,
- Sufficient evidence to support the contention that ownership or management was not aware of, did not approve, and did not benefit from or was not involved in trafficking.

In short, the various documentation provided by Appellant is not “substantial evidence” that fulfills each of the four criteria of 7 CFR § 278.6(i). As a result, Appellant failed to demonstrate “that the firm had established and implemented an effective compliance policy and program to prevent violations.”

The standards of eligibility for a trafficking CMP are high. They require substantial proof that a compliance policy and program was established and implemented prior to the occurrence of violations. These standards exist to thwart attempts to falsely present compliance policies and programs that were not actually implemented prior to violations. Although these standards are high, they are required by the regulations and Appellant must be held to them during the course of this review.

The size of a firm, or its number of personnel, is not a consideration in determining eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. It might require significant effort to develop and maintain a compliance policy and program. Yet, even substantial effort does not lessen the consequences if the firm fails to meet the requirements. As noted, the criteria for eligibility for a civil money penalty in lieu of permanent disqualification are clearly stated as minimum standards below which eligibility is precluded.

As Appellant did not provide the required supporting documentation, the ROC did not assess a CMP. According to the requirements stated in 7 CFR § 278.6(b)(1), § 278.6(b)(2)(ii and iii), and § 278.6(i), Appellant is not eligible for a CMP in lieu of a permanent disqualification from participation as an authorized retailer in SNAP. The determination by the Office of Retailer Operations and Compliance to deny Appellant a civil money penalty is sustained.

CONCLUSION

The record has yielded no indication of error in the finding by the Office of Retailer Operations and Compliance that Appellant trafficked in SNAP benefits. A review of the evidence supports that it is more likely true than not true that program violations occurred as charged. Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against Anthony & Joseph Inc. from participating as an authorized retailer in SNAP is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

RICH PROULX
ADMINISTRATIVE REVIEW OFFICER

May 1, 2023