

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

**37th Ave Grocery Deli Inc,**

**Appellant,**

**v.**

**Case Number: C0204325**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the USDA that the record indicates that 37th Ave Grocery Deli Inc. (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the program, as initially imposed by the Retailer Operations Division was appropriate.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against 37th Ave Grocery Deli Inc. by letter dated February 27, 2018.

**AUTHORITY**

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provide that “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS.”

**CASE CHRONOLOGY**

In a letter dated January 4, 2018, Retailer Operations Division charged the 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 March 2017 through August 2017. 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 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).

In correspondence dated January 18, 2018, Retailer Operations Division informed Appellant that the time to respond to the letter of charges dated January 4, 2018 has been extended to January 29, 2018. Appellant was also informed that the time to request a civil money penalty in lieu of permanent disqualification and to provide the documentation to support such a request has not been extended. In addition, correspondence dated January 18, 2018; Retailer Operations Division informed Appellant that the acceptance of SNAP benefits as payment for items sold to a household on credit is a violation of SNAP regulation 278.2(f). A firm that commits such violations shall be disqualified from participation for a period of one year. Appellant was asked to provide documentation to support that food items were purchased on credit as noted in the telephone response provided on January 17, 2018, and the documentation must identify specific accounts along with corresponding dates and amounts. The documentation must be provided within 10 calendar days of receipt of this letter.

In a facsimile dated January 19, 2018, Appellant through representation, responded to the charge letter and generally stated that it was asking for the possibility of a leaner penalty. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** understands now that what he felt was helping customers lead him to a violation of SNAP benefits. Please take consideration that this is his first offense. He is aware now that customers must pay at the time of purchase and not to extend any kind of credit to customers which is what lead to all the times the benefit card was swiped for payment. Appellant, through representation, did not provide any evidence or documentation to support its claim that the SNAP transactions in the charge letter were as a result of credit accounts.

After giving consideration to the Appellant's reply and evidence of the case, Retailer Operations Division issued a determination letter dated February 27, 2018. This letter informed ownership that they were permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also states that Retailer Operations considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, Retailer Operations Division determined that Appellant was not eligible for the CMP because it failed to submit sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated February 28, 2018, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted.

### **STANDARD OF REVIEW**

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

## CONTROLLING LAW

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 CFR § 278.6(a) states, in part 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 1977, 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) reads, in part, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.” Trafficking is defined, in part, in 7 CFR § 271.2, as “the buying or selling of SNAP benefits for cash or consideration other than eligible food.”

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

7 CFR § 278.6(b)(2)(ii) states, in part, that: “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(i) states, in part: “FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking...if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.”

## SUMMARY OF THE CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from March 2017 through August 2017. This involved the following transaction patterns which are trafficking indicators:

1. An unusual number of transactions ended in a same cents value.
2. Multiple transactions were made from individual benefit accounts in unusually short time frames.
3. Excessively large purchase transactions were made from recipient accounts.

The first issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the identified irregular and questionable transactions were the result of trafficking in SNAP benefits.

### **APPELLANT'S CONTENTIONS**

In its response to the charge letter and in its request for administrative review, Appellant made the following summarized contentions, in relevant part:

1. I understand the violation that has been made, but I am kindly asking for the possibility of a more lenient penalty of a one year disqualification as opposed to permanently.
2. We have corrected the mistake that occurred and have taken important measures so that this situation will never happen again.

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 authorized the business as a convenience store on July 24, 2008. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a July 11, 2017, store visit to the business conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- One cash register and two POS device with a small counter area partially obstructed by other smaller items available for sale.
- Estimated to be approximately 1000 square feet.
- No shopping baskets or carts available for customers.
- No adding machines or optical scanners were available at checkout. No specialty registers present.
- Store does not operate through a night window or plastic barrier with food stock behind the barrier.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- No unusual pricing structure such as ending most products with 00 cents and does not round transaction totals.
- No food stored in an area outside of public view
- Store has storage freezers or coolers but no food stored off site.
- Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
- Store does not take telephone or online orders and does not offer delivery

- Highest priced eligible food items were Enfamil ProSoy (\$21.99), Enfamil Gentlease (\$29.99), Similac Advance (29.99) and Enfamil (\$29.99). (Appellant is an authorized WIC Vendor)
- Store stocks a significant amount of non-food items such as but not limited to tobacco products, alcohol products, lottery tickets, mobile phones, health and beauty aids, paper goods, cleaning products and housewares.
- Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products. No fresh fruits or produce, no fresh meat or poultry. Most meats are canned, packaged or frozen.
- A kitchen/prepared food area with hot foods sold for onsite consumption. Microwave available.
- A deli or prepared food section with prepared/made to order sandwiches. Prices posted for meats/cheeses. Stock is not used in preparation of food.
- 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 – An unusual number of transactions ended in a same cents value.**

There were 17 SNAP transactions that met the parameters of this attachment. When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits.

Though the number of transactions in this Attachment are not significant given the review period consisted of six-months, visible store pricing, captured during the contracted store visit, supports a pricing structure 5 U.S.C. § 552 (b)(6) & (b)(7)(C) . The store visit documentation indicates that Appellant does not have a special pricing structure that would account for the percentage of transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C)s. When there are an irregular amount of transactions ending in same cent value it appears the transactions are contrived and absent any compelling rationale to the contrary it is a strong indicator of trafficking. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant, through representation, 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 therefore, based on the analysis above and in the absence of any compelling evidence to the contrary, the irregular and unusual transaction pattern cited in the charge letter is unlikely and a strong indicator of trafficking in SNAP benefits.

**Attachment 2 of the Charge letter - Multiple transactions were made from individual benefit accounts in unusually short time frames.**

There were 11 sets of 25 SNAP transactions that met the parameters of this attachment. Multiple transactions conducted by the same household account within a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) 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's food stock consists mainly of low priced food items. There was no specialty or ethnic foods nor any foods that sold in large packages or bulk. There were no hand baskets or shopping carts in which to help customers facilitate large purchases. Appellant's stock and structure does not adequately justify multiple transactions being made in the time frames listed in this Attachment.

Appellant, through representation, did not deny the charges and 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 Attachment 2 of the charge letter therefore, based on the analysis above and in the absence of any compelling evidence to the contrary, the irregular and unusual transaction pattern cited in the charge letter is unlikely and a strong indicator of trafficking in SNAP benefits.

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

In conclusion, it is therefore more likely true than not true that the irregular transactions cited in the charge letter Attachment 2 are due to trafficking in SNAP benefits.

**Attachment 3 of the Charge letter - Excessively large purchase transactions were made from recipient accounts.**

There were 120 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.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant, through representation, 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 therefore, based on the analysis above and in the absence of

any compelling evidence to the contrary, the irregular and unusual transaction pattern cited in the charge letter is unlikely and a strong indicator of trafficking in SNAP benefits.

Based on the above analysis, the Retailer Operations Division presented a convincing case that the 37th Ave Grocery Deli Inc. trafficked in SNAP benefits which the Appellant failed to adequately rebut. The attachments furnished with the charge letter identify the irregular patterns of SNAP transactions which indicate that trafficking was taking place at the firm during the review period. As there is more than one pattern of trafficking, a determination that the Appellant firm engaged in trafficking becomes more convincing.

## **Conclusion**

With regard to Appellant's contentions, through representation, it is important to clarify for the record, that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. That is, the earlier decision was either correct or incorrect at the time it was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that a store may now begin to comply with program requirements. This review is limited to what circumstances were at the basis of the Retailer Operations Division's action. Therefore, Appellant's contentions, that it has corrected the mistake that occurred and have taken important measures so that the situation will never happen again, though they may be valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Moreover, 7 CFR § 278.6(e)(1)(i) states in relevant part: "FNS shall take action... against any firm determined to have violated the Act or regulations. For the purposes of assigning a period of disqualification, a warning letter shall not be considered to be a sanction. A civil money penalty and a disqualification shall be considered sanctions for such purposes. The FNS... shall (1) Disqualify a firm **permanently** if: (i) Personnel of the firm have trafficked as defined in §271.2..." [Emphasis added]

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 a convincing case against Appellant, ownership bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. If this is not demonstrated, the case is to be sustained.

As noted, 7 CFR § 278.6(a) states that FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Retailer Operations has presented a convincing case that Appellant has likely trafficked in SNAP

benefits. This is evidenced by: the suspicious patterns identified in the charge letter, the lack of food inventory necessary to support the firm's SNAP redemptions as observed and recorded during the onsite visit, the lack of purchase invoices of foods to cover SNAP redemption totals for the review months, the lack of adequate explanations for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant, and the irregular SNAP transaction data of Appellant as compared to other convenience stores in the State.

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. Therefore, based on this empirical data, and in the absence of evidence for the legitimacy for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the unusual, irregular, and inexplicable transactions and patters cited in the letter of charges evidence trafficking as the most likely explanation. While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence in the record.

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

### **CIVIL MONEY PENALTY**

The Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i) even though it was informed of the right to do so in the charge letter dated September 28, 2017. Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program *prior* to the violations. Therefore, the Retailer Operations Division' decision, not to impose a trafficking CMP in lieu of disqualification, is sustained as appropriate pursuant to 7 CFR § 278.6(i).

### **CONCLUSION**

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify 37th Ave Grocery Deli Inc. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Therefore, based on a review of all the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged by Retailer Operations Division. Based on the discussion above, the determination to impose a permanent disqualification against 37th Ave Grocery Deli Inc. is sustained.



## **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act (FOIA), we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

Monique Brooks  
Administrative Review Officer

June 13, 2018