

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

**530 Gelston Deli & Grocery,**

**Appellant,**

**v.**

**Case Number: C0207319**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of 530 Gelston Deli & Grocery as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against 530 Gelston Deli & Grocery.

**AUTHORITY**

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

**CASE CHRONOLOGY**

In a letter dated June 15, 2018, the 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 October 2017 through February 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated the Appellant had the right to respond to the charges within 10 days of receipt to provide explanations for the irregular SNAP transaction patterns. The letter also stated 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). The charge letter was delivered via UPS on June 18, 2018.

In two (2) faxed documents sent on June 28, 2018, the Appellant, through counsel, denied trafficking in SNAP benefits and also stated that the store did not accept SNAP benefits as repayment on credit accounts. The Appellant generally stated that the irregular transactions were normal customer transactions for the entire month. The Appellant requested a trafficking CMP but did not provide any supporting documentation to establish its eligibility under 7 CFR § 278.6(i).

After considering the evidence in the case, the Retailer Operations Division issued a determination letter dated July 3, 2018. The determination letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and 7 CFR § 278.6(e)(1). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of 7 CFR § 278.6(i). However, the Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked July 13, 2018, the Appellant requested an administrative review of the Retailer Operation Division's determination. The request for administrative review was granted.

### **STANDARD OF REVIEW**

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

### **CONTROLLING LAW AND REGULATIONS**

The controlling law in this matter is covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

7 U.S.C. § 2021(b)(3)(B) states, in part:

... a disqualification under subsection (a) shall be ... permanent upon ... the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards ...

7 CFR § 271.2 states that the definition of "coupon" includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

7 CFR § 278.6(e)(1)(i) states:

FNS shall ... disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 defines trafficking, in part, as:

The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone ....

7 CFR § 271.2 defines eligible food, in part, as:

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

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(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.

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). [Emphasis added.]

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

### SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from October 2017 through February 2018. This involved the following transaction patterns which are trafficking indicators:

- **Charge Letter Attachment 1:** In a series of transactions, the majority or all of individual recipient benefits were exhausted in unusually short periods of time. This attachment lists 42 sets of 43 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits.
- **Charge Letter Attachment 2:** An unusual number of manual key entered EBT transactions were made from the store location. This attachment lists 74 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The transaction amounts ranged up to a high of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.
- **Charge Letter Attachment 3:** Excessively large purchase transactions were made from recipient accounts. This attachment lists 114 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The transaction amounts ranged up to a high of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

### APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- There was no trafficking as defined by 271.2 of the SNAP regulations. Instead each of the transactions were normal customer transactions to purchase groceries for an entire month. All transactions cited in the charge letter were legitimate. The Appellant has provided a series of letters and affidavits from customers confirming their card number and transaction detail.
- No customers have made a complaint about the business. This investigation has been commenced based on an assumption of misfeasance based on "unusual transactions."
- The Appellant is a small business owner and an excessively large CMP will end his business operations. A reduced fine with a payment plan would allow the store to continue in business.

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

## ANALYSIS AND FINDINGS

### Authorization History

The Food & Nutrition Service (FNS) authorized 530 Gelston Deli & Grocery for the SNAP on July 1, 2011. During the review period of October 2017 through February 2018, the Retailer Operations Division classified the store as a small grocery store.

The owner signed the SNAP reauthorization application for the store on December 4, 2016 and acknowledged that the owner was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits for ineligible non-food items or as repayment on credit accounts.

### Store Visit Report

The case record documents that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a January 5, 2018 store visit conducted by an FNS contractor to observe the nature and scope of the store’s operation, stock and facilities. This information was then used to ascertain if there were justifiable explanations for the store’s irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- 530 Gelston Deli & Grocery is approximately 800 square feet in size.
- The store had no shopping carts and no handheld shopping baskets for customer use.
- The store had one (1) point-of-sale device and one register for grocery purchases.
- The store did not have an optical scanner or conveyor belts at the checkout.
- According to store personnel, the store did not take telephone orders or make deliveries.
- There were numerous empty and partially filled shelves within the store.
- There was dusty cans and packages indicating that the store did not have frequent turnover in inventory for these products.
- Frozen food had ice crystals on the packages indicating that the store did not have frequent turnover in inventory for these products.
- The store had several empty coolers and freezers.
- Store personnel confirmed that there was no food stored outside of view in a storage area or stored offsite. The store cashier confirmed that there was a small storage freezer but it only contained items for personal use.
- The store did not have any large bulk foods for sale. The store did not sell fresh meat bundles, seafood specials, and/or large fresh fruit and fresh vegetable boxes. The store did not sell any specialty or international food that would normally sell for a high price.
- The checkout area consisted of a small countertop with empty space of no more than two (2) feet by two (2) feet in size. The countertop was crowded with displays of gum, candy and other products. The very limited space for stacking food at the checkout area made it

not conducive to conducting large transactions.

The SNAP eligible food stocked by the store consisted mainly of inexpensive canned and packaged goods. The store also sold snack foods such as potato chips, pastries, and ice cream and other accessory food items such as carbonated and non-carbonated drinks, coffee, tea, condiments, and spices. The stocked ineligible items included alcohol, mobile phone accessories, automotive products, health and beauty products, paper goods, cleaning products, general houseware, gift items, party goods and souvenirs.

Store personnel confirmed that the most expensive items sold by the store was a 40 ounce bottle of honey at \$15.99; a 1.5 liter bottle of olive oil at \$14.99; a 7 ounce container of coffee at \$9.69 and an 18 ounce can of Ovaltine at \$7.99. However, the store did not appear to carry these items in large quantities or offer these items in bulk. Given the available inventory as noted above, there is no indication from the store visit report that the store would be likely to have SNAP transaction patterns significantly different from similar-sized competitors offering similar food items.

### **Trafficking Case Based on Irregular Transaction Patterns**

The Appellant states that the permanent disqualification decision was based on an erroneous assumption of misfeasance based on “unusual transactions.” With regard to this contention, FNS employs a computerized fraud detection tool to identify SNAP transactions that form patterns having characteristics indicative of trafficking. However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still analyze the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether the questionable transactions were, more likely than not, the result of trafficking.

The legality of this method is supported by 7 CFR §278.6(a) which states, *inter alia*, “FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation 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.]

### **Exhaustion of Benefits**

#### **5 U.S.C. § 552 (b)(7)(E)**

The Appellant states that these transactions were normal monthly purchase transactions for the store’s SNAP recipients. However, SNAP recipients do not normally exhaust or nearly exhaust their benefits in a single large transaction or through multiple transactions within a short period of time such as a single 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 a single day at one store. Depleting one's entire allotment in a single day, or in a single large transaction, leaving no benefits for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP households.

In addition, the Appellant does not explain how the store is conducting transactions that are many times higher than the average for a SNAP authorized Kings County small grocery store. Based on a preponderance of the evidence this irregular transaction pattern is more likely than not the result of trafficking in SNAP benefits.

### **Manual Key Entered Transactions**

#### **5 U.S.C. § 552 (b)(7)(E)**

Manual key entered transactions are normally used when a retailer is unable to complete a transaction by swiping an EBT card (for example, if the card has a damaged magnetic stripe). However, this is a rare occurrence and the vast majority of SNAP transactions use the swipe method. Therefore, a high number of manual key entered EBT transactions is an indication that a violating store is running transactions without the card being present.

#### **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**

Based on the analysis above, it is more likely true than not true that these patterns are a result of the firm trafficking in SNAP benefits.

### **Excessively Large Transactions**

SNAP households have no limit on the amount of eligible food they may purchase (subject to the remaining balance on the card). However, the SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of a small grocery store's stock and facilities and are thus indicative of trafficking.

#### **5 U.S.C. § 552 (b)(7)(E)**

Sometimes a store may have higher than normal SNAP transactions due to the lack of access to other SNAP authorized stores in the area. However, agency mapping systems show that there are 68 SNAP authorized stores within a one-mile radius of 530 Gelston Deli & Grocery including 13 medium grocery stores, three (3) large grocery stores, four (4) supermarkets, and 2 two (2) superstores. One of these superstores is located only 0.28 miles from the Appellant store. Therefore, a lack of access to other stores does not appear to explain the excessively large

transactions at 530 Gelston Deli & Grocery. A government report<sup>1</sup> on SNAP benefit redemption patterns revealed that households most often redeemed their benefits at supermarkets and superstores with only four (4) percent of all households never shopping in a supermarket or superstore. Thus, when a supermarket or superstore is available, it is highly unlikely that a SNAP recipient would conduct excessively large SNAP transactions at a small grocery store with a much more limited selection of staple foods.

Lastly, the case record documents that the Retailer Operations Division conducted a detailed analysis of four (4) households identified in the charge letter to analyze their shopping patterns at 530 Gelston Deli & Grocery compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at supermarkets and superstores. However, despite this access to better stocked stores, these sampled households often conducted excessively large transactions at 530 Gelston Deli & Grocery on the same day or within a few days of shopping at these other stores. It is highly unlikely that a small grocery store would have legitimate SNAP transactions comparable or larger than these SNAP authorized supermarkets and superstores with a superior selection and variety of staple foods.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts and shopping baskets support the Retailer Operations Division determination. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on a preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 3 are more likely than not the result of trafficking in SNAP benefits.

### **Credit Accounts**

The Appellant submitted six (6) signed statements from alleged store customers. Five (5) of these six (6) store customers indicate that they were paying the store by phone every month. However, the EBT card **must be present at the time of sale** and SNAP recipients cannot conduct a transaction over the phone. Under 7 CFR § 278.2(e) and 7 CFR § 278.2(f) retailers may not accept SNAP benefits before delivering the food and they may not be used to pay for food that has already been delivered on credit.

One of the customer statements explicitly states that the customer was using SNAP benefits for food purchased on credit. The SNAP regulation at 7 CFR § 278.6(e)(4)(ii) states that a firm shall be disqualified for one year if it accepts SNAP benefits as repayment on credit accounts. The case record documents that the Retailer Operations Division contacted the Appellant's counsel to inquire whether the store was accepting SNAP benefits on credit. The Appellant's counsel denied both verbally and in writing that the firm was accepting SNAP benefits to repay credit accounts. Counsel informed the Retailer Operations Division that the customer statements to that

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<sup>1</sup> "Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program," report prepared by Mathematica Policy Research for the Food and Nutrition Service, February 2011.



effect was not the result of the firm offering credit but rather customers who didn't have a good grasp of the English language.

Because violating retailers often make false admissions of credit in an attempt to obtain a lesser penalty after committing more egregious violations such as trafficking, credit transactions must be accounted for with substantive evidence such as the dates credit was extended, to whom, for what amount, and for what items. The Appellant has not provided such evidence and denies that the firm engaged in such a practice. In conclusion, there is insufficient evidence to support that the irregular SNAP transactions cited in the charge letter are due to repayments on credit accounts.

### **Lesser Penalty or Fine**

The Appellant requests a reduced fine in lieu of a permanent disqualification or a large CMP. Regarding this contention, trafficking in SNAP benefits is an extremely serious violation and both 7 U.S.C. §2021(b)(3)(B) and 7 CFR §278.6(e)(1)(i) state that a first time violation warrants a permanent disqualification. This review does not have the authority to grant a lesser penalty or fine.

### **CIVIL MONEY PENALTY**

The Appellant timely requested consideration for a trafficking CMP in lieu of a permanent disqualification. However, the Appellant did not timely submit documentation and evidence of its eligibility for a trafficking CMP. SNAP regulations at 7 CFR § 278.6(b)(2)(iii) states that “if a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking **and submit documentation and evidence of its eligibility within the 10 days** specified in § 278.6(b)(1), the firm **shall not be eligible** for such a penalty.” [Emphasis added.]

The criteria for a trafficking CMP in lieu of disqualification is defined under 7 CFR § 278.6(i) which reads, in part:

In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by **substantial** evidence its fulfillment of each of the following criteria:

Criterion 1. The firm shall have developed an **effective** compliance policy as specified in §278.6(i)(1); and

Criterion 2. The firm **shall establish** that both its **compliance policy and program were in operation** at the location where the violation(s) occurred **prior to the occurrence of violations** cited in the charge letter sent to the firm; and

Criterion 3. The firm had developed and instituted an **effective** personnel training program as specified in §278.6(i)(2); and

Criterion 4. **Firm ownership** was not aware of, did not approve, **did not benefit from**, or was not in any way involved in the conduct or approval of trafficking violations; or it

is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm .... [Emphasis added.]

Regarding compliance policy standards, 7 CFR 278.6(i)(1) further states, in part:

As specified in Criterion 1 above, in determining whether a firm has established an effective policy to prevent violations, **FNS shall consider written and dated statements** of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with this part 278 of current [SNAP] regulations .... As required by Criterion 2, **such policy statements shall be considered only if documentation is supplied** which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation. In addition, in evaluating the effectiveness of the firm's policy and program to ensure FSP compliance and to prevent FSP violations, FNS may consider the following:

- (i) Documentation reflecting the development and/or operation of a policy to terminate the employment of any firm employee found violating FSP regulations;
- (ii) Documentation of the development and/or continued operation of firm policy and procedures resulting in appropriate corrective action following complaints of FSP violations or irregularities committed by firm personnel;
- (iii) Documentation of the development and/or continued operation of procedures for internal review of firm employees' compliance with FSP regulations .... [Emphasis added.]

Regarding training program standards, 7 CFR 278.6(i)(2) further states, in part:

A firm which seeks a civil money penalty in lieu of a permanent disqualification **shall document its training activity** by submitting to FNS its dated training curricula and records of dates training sessions were conducted; a record of dates of employment of firm personnel; and contemporaneous documentation of the participation of the violating employee(s) in initial and any follow-up training held prior to the violation(s). [Emphasis added.]

In conclusion, the Appellant merely provided unsupported statements without documentation that it had a compliance policy and training program in effect prior to the violations. Therefore, the Retailer Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

## CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify the retailer. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. 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.

In the absence of any reasonable explanations for such transaction patterns, 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. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did in fact occur as determined by the Retailer Operations Division. Based on the discussion above, the decision to impose a permanent disqualification against 530 Gelston Deli & Grocery, Appellant, is sustained.

### **RIGHTS AND REMEDIES**

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

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

RONALD C. GWINN  
Administrative Review Officer

September 26, 2018