

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

**55th Deli Market Inc,**

**Appellant,**

**v.**

**Case Number: C0212663**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the permanent disqualification of 55<sup>th</sup> Deli Market Inc. (55th Deli Market or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), 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), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

**AUTHORITY**

7 USC § 2021 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 October 22, 2018, the Retailer Operations Division charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of April 2018 through September 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant replied to the charges by letter on October 30, 2018. Appellant denied trafficking and explained the transactions were normal based on the unique circumstances of the store. After considering the retailer's reply and the evidence, the Retailer Operations Division issued a determination letter dated November 28, 2018. The determination letter informed Appellant that it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that Appellant was not eligible for a trafficking CMP because 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.

By letter postmarked December 4, 2018, ownership appealed the Retailer Operations Division's determination and requested an administrative review.

### **STANDARD OF REVIEW**

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

### **CONTROLLING LAW**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) and (e)(1) 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 have engaged in trafficking SNAP benefits.

7 USC § 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 § 271.2 states, in part, that, eligible foods means:

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 § 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 § 278.6(a) states:

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

7 CFR § 278.6(e)(1) reads, in part:

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

7 CFR § 278.6(i) states, inter alia:

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 THE CHARGES

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from April 2018 through September 2018. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were an unusual number of transactions ending in a same cents value.
- There were multiple transactions made from individual benefit accounts in unusually short time frames.
- There were excessively large purchase transactions made from recipient accounts.

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

### **APPELLANT'S CONTENTIONS**

In its December 4, 2018, administrative review request, Appellant provided the following summarized contentions:

- Appellant cannot imagine how a bodega in its area can survive without accepting SNAP.
- Appellant is the only store in a four block radius and it has managed to survive over twelve years.
- It is Appellant's routine business practice to round down the final tally of all its sales to the nearest 99.
- This is done as psychological market ploy to appease the typical customer.
- A single household with several members will have a single EBT card and that explains the multiple transactions.
- There is a pattern and concerted effort to close every business that accepts EBT in the area.
- Appellant has done nothing wrong and is being wrongfully accused.
- Without EBT, Appellant will not be able to survive.

Appellant provided nine customer statements stating that Appellant rounds down transactions to 99 cents, various family members visit Appellant on any given day, and that the store has provided a valuable service to the community.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced.

### **ANALYSIS AND FINDINGS**

#### **Store Visit**

FNS authorized 55th Deli Market as a small grocery on January 2, 2018. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an August 10, 2018, store visit 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:

- 55th Deli Market is approximately 500 square feet with an additional 500 square feet of storage outside of public view.
- The checkout space is small and limited and occurs through a small window area surrounded by Plexiglas with an ice cream cooler in front.

- There were no shopping baskets and no shopping carts for customer use.
- There was one cash register and one point-of-sale device.
- There was no fresh meat, poultry, or fish
- There were no bulk packages or any advertised specials.
- There was limited fresh produce including two overly ripe bananas sitting on ice cream cooler by the checkout area. There was lettuce, tomatoes, green peppers, and lemons, in the deli case that were likely used for the prepared food items.
- There was a deli area that sold hot and prepared food as well as deli meat and cheese.
- There were hot dogs and bacon in the deli area.
- Dairy included milk, cheese, and butter.
- Frozen food included entrees, sausage, vegetables, juice, beef patties, and, fried chicken.
- Other staple foods available for purchase were eggs, juice, rice, bread, beans, cereal, pasta, and a limited selection of canned goods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included tobacco, health and beauty products, cleaning products, and paper products.

The SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. The highest priced items noted were frozen beef patties - \$11.99; frozen fried chicken - \$10.59; buffalo chicken -\$7.40, and cheese - \$6.99. 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 redemption patterns significantly different from similar-sized competitors.

### **Charge Letter Attachments**

Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

**Charge Letter Attachment 1. There were an unusual number of transactions ending in a same cents value.** During the review period, there were 289 transactions ending in a same cents value that meet the parameters of this attachment. When such patterns are unsupported by special pricing structures, they are a strong indicator of trafficking in SNAP benefits. The store visit report that was completed with the cooperation of the store manager indicated that typically prices ended in 9 cents. It is possible that some of the smaller transactions are the result of purchasing some same cent items and this could explain some of the lower dollar same cent transactions. However, the larger transactions cited in the charge letter would most likely consist of the purchase of several relatively inexpensive items and it is unlikely that these purchases would routinely total to an amount ending in same cents. Consequently, when many transactions end in a same cents amount, it appears that these transaction amounts are contrived and in the absence of compelling evidence to the contrary, are suggestive of trafficking.

Appellant's response indicates that it rounds down to 99 cents. However, the charge letter refers to transactions that end in 00 and 50 cents. Appellant may have meant that it rounds down to the nearest dollar or half dollar. However, it is clear that not all of Appellant's transactions end in 50 or 00 cents. Approximately 22% of the transactions that met the parameters of this scan end 50 or 00 cents. In addition, the store owner was present on the day of the store visit and did not indicate that there were any rounding down policies in place or other specials or promotions. Thus, the evidence does not support that rounding to these amounts is a practice for most of Appellant's transactions.

Appellant failed to provide a credible explanation for the same cent transactions listed on Charge Letter Attachment #1.

**Charge Letter Attachment 2. Multiple transactions were made from individual benefit accounts in unusually short time frames.** This attachment documents 25 sets of transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits that meet the parameters of this scan. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

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 Appellant's stock and facilities and are therefore indicative of trafficking. Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Appellant multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale. Appellant is not set up to provide for all of one's food needs and lacks an abundant depth and breadth of staple foods. The second and third transactions in each set are too large to consist of forgotten items.

Appellant explains that households share their EBT card and that explains the multiple transactions from household accounts. The Retailer Operations Division reviewed the transaction history of four of the households that conducted transactions listed on this Charge Letter Attachment and none of these four households conducted similar transaction sets at the other stores where they also conducted SNAP transactions. In addition, the Retailer Operations Division compared Appellant to six nearby small groceries. Appellant conducted 25 transaction sets that met the parameters of this scan, whereas the other six stores conducted 1, 5, 0, 6, 2, and 3 similar transactions sets. Appellant's explanation does not address why this transaction pattern occurs much more frequently at Appellant than at other nearby similar stores.

Appellant has not offered any evidence to show that the transactions listed in Charge Letter Attachment #2 were legitimate purchases of eligible food.

**Charge Letter Attachment 3: Excessively large purchase transactions were made from recipient accounts.** This attachment lists 175 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

These large transaction amounts are questionable because they are not consistent with the store's inventory with no fresh meat and limited fresh produce. The SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, and snack foods. The frequency of high-dollar purchases in a six-month period calls into question the legitimacy of these transactions.

The Retailer Operations Division compared Appellant to six nearby small groceries. Appellant's average SNAP transaction amount was greater than the average transaction dollar amount for the other six stores. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The store does not stock fresh meats, sell bulk foods, or offer specials which might account for these transactions. As such, the Retailer Operations Division considered this an indicator of trafficking considering Appellant's eligible food stock, infrastructure, and proximity to larger, better stocked stores.

Appellant explains that is the only local bodega that accepts EBT. Appellant has a deli counter and the two closest small groceries located with a 0.2 miles from Appellant have similar stock and deli counters. The Retailer Operations Division determined that within a one-mile radius of Appellant there were 52 other small groceries, four medium groceries, two large groceries, three supermarkets, and three super stores. Thus, households who shop at Appellant have access to and do shop at large grocery stores, supermarkets and super stores, among all other types of authorized stores. Appellant did no sell any ethnic specialty foods.

The Retailer Operations Division examined five households identified in the charge letter to analyze their shopping patterns at 55th Deli Market compared to their shopping patterns at other SNAP authorized stores. However, despite this access to better stocked stores, each of the other households conducted excessively large transactions at 55th Deli Market within a short time of shopping at a supermarket or super store. It is questionable as to why households would conduct large transactions at Appellant, when these households had just visited or planned to visit larger stores with a better selection of fresh meat and produce and likely better prices. The inventory and layout at 55th Deli Market Corp does not support these transactions. The firm has limited staple foods, does not sell fresh meat, with no shopping baskets or carts, and has minimal counter space. There is no compelling reason for customers to consider 55th Deli Market, as a first choice destination to fulfill large purchases of food.

In summary, Appellant's layout, business structure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. 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 to legitimize 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.

## **Customer Statements**

Appellant submitted nine customer statements describing that they shop frequently at Appellant; they never noticed anything improper; various family members use the card at multiple times during the day; and that the household is familiar with the store's policy of rounding down transaction to 99 cents. Again, it is important to note that the transactions in question did not end in 99 cents but 00 and 50 cents. The transaction history of each of these households was reviewed. Three out of the nine household did not conduct any SNAP transactions at Appellant during the review period. The other six households did conduct SNAP transactions at Appellant. Each of these six household shopped at several other authorized retailers. Three of the other six households did conduct transactions listed on Charge Letter Attachment #2. However, these households did not conduct any transactions that met the parameters of this scan at the several other stores that it conducted SNAP transactions. Thus, these transaction are still questionable as to why multiple family members use the household EBT for large transactions only at Appellant. These customer statements are not sufficient evidence that the questionable transactions were for eligible food items only.

Each of the households indicate that Appellant provides a necessary service implying that it would be hardship if Appellant was permanently disqualified. As indicated previously, the Retailer Operations Division determined that within a one-mile radius of Appellant there were 68 other comparable or larger authorized retailers. Moreover, where there is a hardship to SNAP households, FNS may impose a hardship CMP on a firm in lieu of a disqualification where there is a lack of authorized stores in the area. However, 7 CFR § 278.6(f)(1) clearly states that "a civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a permanent disqualification." Because the Retailer Operations Division has taken action to permanently disqualify Appellant's firm, a hardship CMP in lieu of disqualification cannot be granted.

## **Economic Hardship**

Appellant states that it cannot imagine how a bodega in its area can survive without accepting SNAP since it's the means of payment for most purchases. It is recognized that economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty.

To excuse ownership from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that the firm will incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposition.



## Evidence

The transactions reports are derived from the ALERT system, 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 conduct an extensive analysis of 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.]

The documentation and evidence provided by the Retailer Operations Division was thoroughly examined. From all indications, the Retailer Operations Division obtained the EBT data (provided by ALERT), found it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough investigation before concluding that trafficking was likely occurring.

Appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed and that the transactions detailed in the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. Appellant offered no relevant evidence to prove that the transactions listed in the charge letter were legitimate purchases of eligible food. In the absence of compelling information or documentation weighed in comparison to the evidence provided by the Retailer Operations Division, the evidence weighs in favor of the Retailer Operations Division’s determination that SNAP-benefit trafficking substantially produced the transaction activity at issue in the present case.

## CIVIL MONEY PENALTY

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR § 278.6(i). Appellant was informed that it would need to provide both the request and supporting evidence within ten calendar days of receiving the charge letter and that no extension of time could be granted for making the request or for providing the required evidence. Appellant did not 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.

Even if a timely request had been submitted, 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 compliance policy to prevent SNAP 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 Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. 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 occur as charged by the Retailer Operations Division. The determination to impose a permanent disqualification against Appellant is sustained.

The Retailer Operations Division also determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations. Under review, the denial of a trafficking CMP was deemed correct and proper.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. If a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant's owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

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

MARY KATE KARAGIORGOS  
Administrative Review Officer

May 14, 2019