

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

627 Garden Gourmet Deli Corp,

Appellant,

v.

Case Number: C0210011

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 627 Garden Gourmet Deli Corp. 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 627 Garden Gourmet Deli Corp.

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 July 12, 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 December 2017 through May 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 to the Appellant by UPS on July 13, 2017.

The Appellant responded to the charge letter in a faxed document of 426 pages on July 23, 2017. The document contained a typed response to the charge letter, invoices, credit statements, credit ledgers, inventory pictures, and three (3) pages of signed training certifications. The Appellant generally stated that the irregular transaction patterns identified in the charge letter were due to normal customer shopping habits; however, the Appellant also stated that it accepted SNAP benefits as repayment on credit accounts for certain select households. The Appellant also timely requested a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i).

As a result of the credit account claim, the Retailer Operations Division sent a letter dated July 25, 2018 requesting proof of credit account payments. The letter requested the identification of specific accounts along with corresponding dates and amounts. In response, on August 3, 2018, the Appellant faxed a copy of three (3) pages of alleged credit ledgers.

After considering the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated August 22, 2018. The 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). 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 September 4, 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, would 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\(b\)\(1\)](#).

SUMMARY OF CHARGES

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

- **Charge Letter Attachment 1:** Multiple transactions were made from individual benefit accounts in a set time frame. This attachment lists 17 sets of 41 transactions [5 U.S.C. § 552 \(b\)\(6\) & \(b\)\(7\)\(C\)](#) in SNAP benefits. [5 U.S.C. § 552 \(b\)\(6\) & \(b\)\(7\)\(C\)](#).
- **Charge Letter Attachment 2:** Excessively large purchase transactions were made from recipient accounts. This attachment lists 359 SNAP transactions [5 U.S.C. § 552 \(b\)\(6\) & \(b\)\(7\)\(C\)](#). [5 U.S.C. § 552 \(b\)\(6\) & \(b\)\(7\)\(C\)](#).

APPELLANT'S CONTENTIONS

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

- The store has been in operation for seven (7) years and has maintained a good record with no violations on any of their licenses.
- In response to Charge Letter Attachment 1, there are many families that share their SNAP benefits with other family members. For example, one family member may receive their SNAP benefits on the 1st of the month, while another will receive their benefits on the 11th. A customer will make their personal charges and then charge the items for another family member separately, to obtain a separate invoice. The other family will reciprocate when they receive their benefits. If the store is busy, they add up purchases with a calculator then process the EBT terminal, so transactions do not take a lot of time to be processed.
- In addition, there are customers that receive in store credit that they repay once they receive their monthly benefits. These customers will pay off their balance; they then will make another purchase for their home.

- There was one instance where there were multiple transactions from one account for the same amount. The store was having problems with their machine at that time. The additional transaction amounts were refunded.
- In response to Charge Letter Attachment 2, the store offers a variety of food products, a variety of groceries, deli and produce that a customer will need to sustain their family. The store makes extensive daily and weekly purchases to maintain their customers in the neighborhood, as can be seen by the many invoices enclosed.
- Food prices are higher than ever and only a few items are needed to accrue a large bill. The store sells large amounts of Enfamil baby formula at \$19.99 per can, large 20 lb. bags of rice at \$14.99, a gallon of Mazola oil at \$11.99. The store has individual bags of vegetables that can be added to any salad for \$0.75 per topping, broccoli \$1.29 per bunch, potatoes 2 for a \$1.00, cold cuts (meats) \$9.99 lb. and cheeses \$7.99 lb.
- In addition, due to the in store credit given to some customers, many of large purchases correspond to the repayment of these credit transactions for food given on credit. These are the accumulation of several smaller transactions given throughout the month that they repay once they receive their benefits. When they repay them, they will then make their monthly purchases, with many of them spending their benefits as soon as they are received. Several letters from their customers, including their bills detailing the purchases of foods bought, confirms that credit given to them. One trusted customer is frequently given credit **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.
- The store would never jeopardize its standing for such a minimal profit. The business will not survive a permanent disqualification and may be forced to close.
- The store requests a trafficking CMP in lieu of a permanent disqualification. The store has provided signed documentation after training sessions were conducted on SNAP rules and regulations.

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

FNS authorized 627 Garden Gourmet Deli Corp. for the SNAP on October 24, 2011. During the review period of December 2017 through May 2018, the Retailer Operations Division classified the store as a convenience store.

The owner signed the SNAP application for the store on October 31, 2011 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 as repayment on credit accounts or in exchange for ineligible items.

Store Visit Report

The case record documents that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a December 21, 2017 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:

- 627 Garden Gourmet Deli Corp. is approximately 1,000 square feet in size and operates out of a storefront in an urban area.
- The store had no shopping carts and no handheld shopping baskets for customer use.
- The store had one (1) cash register and one (1) point-of-sale device for grocery purchases.
- The store did not have any optical scanners and there was no conveyor belt at the checkout area.
- The aisles were narrow and compact.
- There were no large bulk foods, expensive international or specialty foods that might sell for a high price. There were no fresh meat/poultry/seafood bundles or large boxes of fresh fruit and vegetables for sale. The store had no signs advertising bulk purchase deals. The store sold infant formula but only had two (2) stocking units.
- There was a small storage area of approximately 50 square feet containing excess beverages that was outside of public view, but there was no food stored offsite according to store personnel.
- The checkout area consisted of a small window opening and countertop surrounded by a wood and glass barrier. The small countertop was cluttered with a display of what appeared to be beef jerky (or some other type of snack food) and a small bunch of bananas. The very limited space for stacking food at the checkout area made it not conducive to conducting large transactions.

The SNAP eligible staple food stocked by the store consisted mainly of inexpensive canned and packaged goods. There was a more limited selection of fresh fruits and vegetables and deli meat and cheese by the pound. The store had a kitchen and deli section with large posted signs for SNAP ineligible hot, heated and cold prepared food not intended for home preparation and consumption. As noted, the store also sold meat and cheese by the pound but these products also appear to have been utilized in the kitchen for the prepared food.

The store also sold a large amount of inexpensive accessory food items such as snack foods, ice cream, candy, potato chips, coffee, tea, carbonated and non-carbonated drinks, condiments, and

spices. In addition to prepared foods, the stocked ineligible items included tobacco, mobile phone accessories, health and beauty products, paper goods, and household cleaning products. Store personnel confirmed that the most expensive food items sold by the store was a 12.5 ounce can of Enfamil at \$19.99; a pound of lunchmeat at \$8.99; a pound of cheese at \$6.99, and a cold sandwich at \$5.00. It should be noted that cold prepared sandwiches are ineligible for purchase with SNAP benefits. The store only carried two (2) stocking units of Enfamil.

Given the available inventory and store layout 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.

Credit Accounts

The Appellant claims that at least some of the transactions cited in the charge letter were repayments on credit accounts. As evidence, the Appellant provided ten (10) customer statements claiming that they had repaid credit accounts with SNAP benefits. In addition, the Appellant provided credit ledgers/slips for four (4) households that show the dates that credit was extended and the items purchased. In total, the Appellant provided information on eleven (11) customers who were allegedly extended credit.

When a retailer claims it maintains credit accounts to explain irregular SNAP transactions and data patterns, FNS requires a level of detail regarding the legitimacy of the claim. This is because retailers have often made 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 case record documents that the Retailer Operations Division conducted an extensive review of the documents submitted by the Appellant. The customer statements were reviewed against the actual transaction history, and these statements appeared lacking or contradictory to what the actual transactions revealed. For example, one (1) customer did not actually conduct any transactions at the store during the review period. Another customer claimed to exclusively shop at the Appellant store but was in reality conducting transactions at supermarkets and superstores. Of the four (4) households for which credit ledgers/slips were provided, three (3) had sufficient SNAP benefits on their cards on the days they were allegedly extended credit. One (1) household allegedly had been extended credit 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in March and April but only had transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) during April, May and June 2018. These and other discrepancies caused the Retailer Operations Division to properly question the legitimacy of the information provided by the Appellant.

However, even if one were to accept the Appellant's evidence that some households had repaid credit accounts with SNAP benefits, the evidence submitted only accounts for ten (10) households out of 175 different households cited in the charge letter. Therefore, the Retailer Operations Division properly determined that there is insufficient evidence to support the

Appellant's claim that the irregular transaction patterns cited in the charge letter were due to repayments of credit accounts with SNAP benefits.

Multiple Transactions by the Same Household within a Set Time Period

SNAP households have no limit on the number of times they may use their SNAP cards or how much eligible food they may purchase. 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 convenience store's stock and facilities and are thus indicative of trafficking.

The Appellant states there was one instance where, due to an error, there were multiple transactions from one account for the same amount. These are transactions 1-2-3 listed in the charge letter. The store was having problems with their machine at that time. The Retailer Operations Division determined that the transaction amounts conducted in error were refunded to the household and accepted the Appellant's explanation on this transaction set.

Excluding transactions 1-2-3, Charge Letter Attachment 1 lists 16 sets of 38 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E)**. In fact, this average SNAP transaction is much larger than the average SNAP transaction at a New York supermarket or superstore during the review period. It is not credible that a convenience store with a limited selection of inexpensive staple foods would have suspicious SNAP transactions much greater than a supermarket and a superstore. It is even less likely that these excessively large transactions would be conducted multiple times by the same household during a set time period.

The Appellant states there are many families that share their SNAP benefits with other family members. A customer will make their personal purchase, and then charge the items for another family member separately, to obtain a separate invoice and then the other family member will reciprocate when they receive their benefits. However, the Appellant offers no evidence to support this. A SNAP household is one that purchases and prepares meals together so there would no need to obtain a separate receipt. Households that purchase and prepare meals separately are considered separate households. It is also 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. While another household member may utilize the card and make a separate purchase, it is unlikely that these additional purchases would consist of large dollar transactions atypical of a SNAP authorized convenience store in Bronx County.

The Appellant states that some of the larger purchases in the charge letter are the result of accepting SNAP benefits as repayment on credit accounts. If this were true, the first transaction in a series of transactions would typically be much larger than the following transactions. The following transactions would then be more likely to match the average transaction for a convenience store in Bronx County. However, in Charge Letter Attachment 1, all of the transactions are much larger than the average for a Bronx County convenience store. In many of the transaction sets, the first transaction is smaller than or similar to the following transactions.

Therefore, it does not appear that credit transactions explain the irregular transactions cited in Charge Letter Attachment 1.

In conclusion, the store visit pictures show that is unlikely that SNAP customers would shop at the store and purchase such a large volume of items multiple times during a short time frame. In addition, the store's small checkout area and limited counter space makes it unsuitable for conducting large transactions. The store also had no shopping carts or shopping baskets for transporting food within the store which would be required for the large dollar transactions.

Based on the analysis above, and in the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of 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 regulatory limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of a convenience store's stock and facilities and are thus indicative of trafficking.

Charge Letter Attachment 2 cites 359 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(7)(E)**. This average transaction is also greater than the average SNAP purchase for a supermarket or superstore in New York during the review period. Even the smallest transactions cited in the charge letter had an amount which is three (3) or four (4) times higher than the average SNAP purchase amount for a Bronx County convenience store.

The Appellant states that some of the large transactions were due to the store accepting SNAP benefits as repayment on credit accounts. As noted above, there were some issues and inconsistencies with the documentation submitted by the Appellant. However, even if one were to accept the Appellant's evidence that some households had repaid credit accounts with SNAP benefits, the evidence submitted only accounts for ten (10) households out of 175 different households cited in the charge letter. Therefore, the Retailer Operations Division properly determined that there is insufficient evidence to support the Appellant's claim that the irregular transaction patterns cited in the charge letter were due to repayments of credit accounts with SNAP benefits. Although, the Appellant may have conducted some credit transactions, the vast majority of the transactions cited in Charge Letter Attachment 2 remain unexplained.

The Appellant states that food prices are higher than ever and only a few items are needed to accrue a large bill. According to the Appellant, the store sells large amounts of Enfamil baby formula at \$19.99 per can, large 20 lb. bags of rice at \$14.99, and a gallon of Mazola oil at \$11.99. Regarding the Appellant's contentions, it may be true that food prices are higher, but this would also hold true for other stores as well. However, nearby competitor stores with comparable stock did not have these patterns of excessively large transactions. Concerning the

store prices, the store visit contractor interviewed store personnel regarding the most expensive items sold by the store. Although the store had Enfamil for sale, it carried only two (2) stocking units. The store visit pictures did not show any 20-pound bags of rice and gallons of Mazola Oil and store personnel did not mention these items when asked to provide the most expensive items sold by the store.

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, the Retailer Operations Division determined that during the review period there were 186 SNAP authorized stores located within a 0.75 mile radius of 627 Garden Gourmet Deli Corp. These included a superstore located 0.12 miles away and four (4) supermarkets within a ½ mile. A government report¹ 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 convenience store with a more limited selection of staple foods.

The case record also documents that the Retailer Operations Division conducted a detailed analysis of five (5) households identified in the charge letter to analyze their shopping patterns at 627 Garden Gourmet Deli Corp. compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at superstores. However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at 627 Garden Gourmet Deli Corp. on the same day or within a day of shopping at a superstore. It is highly unlikely that a convenience store with limited staple foods would have legitimate SNAP transactions comparable or larger than these SNAP authorized superstores.

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 2 are more likely than not the result of trafficking in SNAP benefits.

Purchase Invoices

The Appellant submitted its food purchase invoices from the review period in an attempt to show it had sufficient food inventory to support its SNAP redemptions. The owner supplied approximately 378 pages of invoices that covered all six months of the review period. Given the volume of supplied invoices, the Retailer Operations Division selected two months (January 2018 and February 2018) for an extensive analysis. The majority of invoices and purchase receipts, other than duplicates, were used in the calculations and a mark-up of 40 percent and 50

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

percent was used. Assuming that the store also had credit card and cash sales of food of approximately 20 percent, the analysis indicated that the store's SNAP redemptions exceeded its estimated gross retail sales. Thus, the store likely did not have sufficient food stock to justify its SNAP redemptions for the months reviewed. However, it should be noted that even if the store had sufficient inventory to support its SNAP redemptions, this would still not explain the irregular transaction patterns cited in the charge letter. It is not unusual for violating stores to conduct largely legitimate SNAP transactions while conducting a smaller number of trafficking transactions with a few trusted households.

Lack of Prior Violations

The Appellant indicates it has operated the store for seven (7) years without any prior violations. However, this does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges. 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.

Hardship to the Business

The Appellant states that the business will likely have to close if it is permanently disqualified from the SNAP. With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in the 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 either the owner personally or the firm resulting from the imposition of such penalty. To allow stores to be excused from assessed administrative penalties based on a purported economic hardship would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

CIVIL MONEY PENALTY

The Appellant timely requested consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i). However, the Retailer Operations Division correctly determined that there is insufficient evidence to demonstrate that the firm had established and implemented an **effective** SNAP compliance policy and program prior to the violations. The Appellant submitted three (3) copies of a purported semi-annual training certification statement signed by the owner and two (2) store employees in February 2017, August 2017 and February 2018. 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). FNS shall consider a training program **effective** if it meets or is otherwise equivalent to the following standards:

- (i) Training for all managers and employees whose work brings them into contact with SNAP benefits or who are assigned to a location where SNAP benefits

are accepted, handled or processed **shall be conducted within one month of the institution of the compliance policy** under Criterion 1 above. Employees hired subsequent to the institution of the compliance policy **shall be trained within one month of employment**. All employees shall be trained periodically thereafter;

- (ii) Training shall be designed to **establish a level of competence that assures compliance with Program requirements** as included in this part 278;
- (iii) Written materials, which may include FNS publications and program regulations that are available to all authorized firms, are used in the training program. Training materials shall clearly state that the following acts are prohibited and are in violation of the Food and Nutrition Act of 2008 and regulations: the exchange of food coupons, ATP cards or other program access devices for cash; and, in exchange for coupons, the sale of firearms, ammunition, explosives or controlled substances, as the term is defined in section 802 of title 21, United States Code. [Emphasis added.]

Although the Appellant provided some minimal evidence that it provided SNAP training to a couple of store employees prior to the violations, the evidence provided did not rise to the level of substantial evidence necessary to establish its eligibility for a trafficking CMP. For example, the Appellant did not provide any evidence of its written compliance policy as described at 7 CFR 278.6(i)(1) The Appellant also did not establish the effectiveness of its training program as described at 7 CFR 278.6(i)(2). It should be noted that it is also difficult for the Appellant to contend that it had an **effective** SNAP compliance policy and program when it alleges it was offering food on credit to its customers and accepting SNAP benefits as repayment on credit accounts in violation of SNAP regulations without knowing that was a violation. In conclusion, 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 627 Garden Gourmet Deli Corp., 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

November 1, 2018