

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

**843 Forest Foods & Bagels Inc,**

**Appellant,**

**v.**

**Case Number: C0202583**

**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 843 Forest Foods & Bagels Inc. 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 in its administration of the SNAP, when it imposed a permanent disqualification against 843 Forest Foods & Bagels Inc. (hereinafter referred to as 843 Forest Foods & Bagels or “Appellant.”)

**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 September 22, 2017, 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 March 2017 through August 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter 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 Appellant received the charge letter on September 25, 2017 as documented by a UPS delivery notice in the casefile.

The Appellant requested an extension of time to respond to the charges which was granted by the Retailer Operations Division in a letter dated October 2, 2017. However, the Retailer Operations Division noted that additional time to request a trafficking CMP under 7 CFR § 278.6(i) could not be granted.

The Appellant, through counsel, requested a second extension of time to respond to the charges which was granted by the Retailer Operations Division in a letter dated October 17, 2017. However, the Retailer Operations Division again noted that additional time to request a trafficking CMP under 7 CFR § 278.6(i) could not be granted.

The Appellant, through counsel, responded to the charges in a fax on October 19, 2017. The Appellant stated that the irregular transactions cited in the charge letter were generally due to the store offering specials on meat, a new terminal which did not always work, and the normal shopping habits of its SNAP clientele. The Appellant did not timely request a CMP in lieu of permanent disqualification under 7 CFR § 278.6(i).

After considering the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated October 23, 2017. The determination letter informed the Appellant 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 the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations. 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 November 2, 2017, the Appellant, through counsel, 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 § 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 states, in part:

***Trafficking** means...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 ...*

7 CFR § 271.2 states, in part:

*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 § 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 based on an analysis of electronic benefit transfer (EBT) transaction data from March 2017 through August 2017. This involved the following transaction patterns which are trafficking indicators:

- **Charge Letter Attachment 1:** There were an unusual number of transactions ending in a same cents value. This attachment lists 176 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**  
**5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

- **Charge Letter Attachment 2:** An excessive number of manual key entered EBT transactions were made from the store location. These transactions significantly exceeded the normal practice for stores in the state. The charge letter attachment lists 43 manually key entered transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).  
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 135 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 same cent value transactions are due to store specials such as a pound of ham or roast beef at \$20.00 or \$40.00. The Appellant has submitted images of sales flyers showing cold cut combo deals  
5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The manual key entries were due to a terminal that was not always working properly during the review period. This caused the store to make manual transactions if the card did not swipe correctly.
- The large transactions were all under 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and it is not unusual for some people to purchase their food needs for the week all at one time. The store cannot refuse a transaction if a SNAP recipient wants to make a large transaction.
- The store has a number of compliance policies in place as well as training procedures such as watching the USDA retailer training video and monthly lectures about what can and cannot be purchased with SNAP benefits. This is supported by four (4) notarized affidavits from store personnel. The Appellant has since made additional enhancements to its compliance policies and training program.
- The Retailer Operation Division's determination letter of October 23, 2017 was a form letter and did not specifically address the Appellant's contentions in response to the charge letter.

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 843 Forest Foods & Bagels for the SNAP on February 20, 2008. The owner signed the SNAP application for the store on January 30, 2008 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.

During the review period of March 2017 through August 2017, the Retailer Operations Division classified 843 Forest Foods & Bagels as a small grocery store.

### Store Visit Report

The case record documents that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an August 26, 2017 store visit conducted by an 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 store’s irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- 843 Forest Foods & Bagels is approximately 1,600 square feet in size. Outside signage listed the store name as “MILK N THINGS” and store personnel said that was the store’s actual name.
- The store had two (2) cash registers for grocery sales but only (1) point-of-sale device.
- The store used optical scanners at the checkout, but did not have a conveyor belt at the checkout.
- The store had no shopping carts and no handheld shopping baskets for customer use.
- Store personnel confirmed that there was no food stored outside of public view in a storage area and that no food was stored offsite.
- Food items generally had prices ending in x9 cents. The store did not have a special price structure s 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Store personnel confirmed that the store did not round prices up or down at the checkout.

- There were no large bulk foods, international or specialty foods that might sell for a high price. There were no fresh meat/seafood bundles or large boxes of fresh fruit and vegetables for sale. According to store personnel, the four most expensive items were: a 20 pound bag of rice for \$18.99; cold cuts at \$14.99 per pound; 96 ounces of oil at \$11.79; and 1.5 quarts of ice cream at \$6.99.
- The checkout area consisted of a small countertop no more than two (2) feet by three (3) feet in size which was crowded with other items. There was also a large reach-in cooler in front of the counter. The very limited space for stacking food at the checkout area made it not conducive to conducting large transactions.

The inventory of food items at the time of the store visit was typical of a small grocery store with a limited to moderate selection of staple food stock. 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 store had a small deli section offering cold cuts and cheese by the pound. The store had a very limited selection of fresh fruits and vegetables. Accessory food items included, but were not limited to: coffee, tea, carbonated and non-carbonated drinks, condiments, and spices. The stocked ineligible items included tobacco products, alcohol, lottery tickets, paper goods, and household cleaning products. The store also sold SNAP ineligible prepared salads and made-to-order sandwiches not intended for home preparation and consumption.

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.

### **Same Cent Transactions**

During the review period, 843 Forest Foods & Bagels conducted 2,636 SNAP transactions. There were 643 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). T5 U.S.C. § 552 (b)(6) & (b)(7)(C). When such repetitive same cent patterns are not supported by special pricing structures they are an indicator of trafficking in SNAP benefits.

The Appellant states that the transactions cited in the charge letter are due to store specials such as a pound of ham or roast beef at \$20.00 or \$40.00. The four affidavits submitted by store personnel merely state that “the store runs many specials which are of a zero-cent price.” Regarding the Appellant’s contentions, the store visit report documents that most food prices at the store ended in typical retail food amounts such as 99 cents. This is confirmed by signage in the store offering cold cut specials, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

In a fax dated November 30, 2017, the Appellant submitted to the Retailer Operations Division images of what purports to be flyers for eight (8) cold cut combo deals priced in even dollar amounts 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Retailer Operations Division properly concluded that these plain black and white “flyers” do not appear to be actual promotional flyers that would be on display in the store and may have been specifically created as a result of the charge letter. These “flyers” do not match the style and color of actual flyers used in the store during the review period. Nor do they list the store name or address, the date of the specials, or any other evidence that would corroborate that these were actual verifiable flyers or prices during the review period. Therefore, this submission offers no probative value to the Appellant’s contentions.

Based on the store visit report, the Appellant’s food inventory contains almost exclusively inexpensive canned and packaged goods, single-serving food items and accessory foods with some deli meats, cheeses, bagels, fruits and vegetables. Due to the store’s mostly low cost foods, the larger dollar transactions cited in the charge letter would normally consist of multiple food products being purchased together in one transaction. It is implausible that several of these relatively inexpensive items purchased together would disproportionately result in total purchase prices 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Instead when SNAP customers buy multiple food items, resulting in higher dollar amounts, the total transaction amount is more likely to result in a more random statistical spread 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Consequently, when there are a disproportional amount of high dollar transactions that end in a same cents value, it appears that these transaction amounts are contrived and therefore, in the absence of any compelling rationale to the contrary, are a strong indicator that the firm is trafficking in SNAP benefits. A preponderance of the evidence indicates that the irregular transactions cited in Charge Letter Attachment 1 are more likely than not a result of the store trafficking in SNAP benefits.

### **Manual Key Entered Transactions**

Charge Letter Attachment 2 states that an excessive number of manual key entered EBT transactions were made from the store location. These transactions significantly exceeded the normal practice for stores in the state. The charge letter attachment lists 43 manually key entered transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

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 purchasing client account numbers and PINs in order to run manual trafficking transactions without the card being present.

The Appellant states that the manual key entries cited in the charge letter were due to a new terminal that was not working properly during the review period. The Retailer Operations Division determined that only one (1) terminal was used during the review period and a different terminal was only used beginning in September 2017 after the review period had ended. It is true that a malfunctioning terminal could cause a store to have more manual transactions. However, the store was conducting manual key entered transactions preceded and followed by swiped transactions, indicating that the EBT was functioning properly on those days.

In addition, manual transactions at the store occurred more often when the store was processing high dollar transactions. This cannot be explained by an alleged malfunctioning terminal. During the review period, 843 Forest Foods & Bagels processed 2,636 SNAP transactions. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

It is true that sometimes a recipient's card may be damaged or malfunctioning. However, the Retailer Operations Division determined that some of the households cited in the charge letter had manual key entered transactions at 843 Forest Foods & Bagels but successfully swiped their EBT cards, before or after, at other SNAP authorized retailers on the same day or consecutive days. It is known that these recipients did not get a new card issued because the card number did not change. If a new card had been issued between the time of the manual key-entered transaction at the Appellant store and a swiped transaction at another store, the card number would have changed.

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. The store or its employees are more likely than not purchasing account numbers and PIN numbers and running transactions without the card being present.

### **Excessively Large Transactions**

The Appellant states that the store cannot refuse a transaction if a SNAP recipient wants to make a large purchase. It is true that 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.

Charge Letter Attachment 3 cites 135 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E).

The Appellant states that the large dollar transactions are not unusual when compared to all of the store's transactions. However, this contention does not explain the irregular transactions cited in the charge letter. It is not unusual for violating firms to conduct largely legitimate transactions while also conducting a smaller number of trafficking transactions with a few trusted households.

Sometimes a store may have higher than normal SNAP transactions due to the lack of other SNAP authorized stores in the area. However, the Retailer Operations Division determined that there were 24 comparable or larger SNAP authorized stores within a one-mile radius of 843 Forest Foods & Bagels. This includes two (2) supermarkets that are located 0.68 miles and 0.94 miles from the Appellant store. A government report on SNAP benefit redemption patterns<sup>1</sup> 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 limited to moderate selection of staple foods like 843 Forest Foods & Bagels.

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 843 Forest Foods & Bagels compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at supermarkets and/or superstores. However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at 843 Forest Foods & Bagels often **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, of shopping at supermarkets and superstores. It is highly unlikely that a small grocery store with a limited to moderate selection of staple foods would have legitimate SNAP transactions comparable to transactions conducted at larger and better stocked stores.

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 support the Retailer Operations Division determination. It is not plausible that the store's customers are carrying large amounts of food around the store with no shopping carts. 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

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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.

Letter Attachment 3 are more likely than not the result of trafficking in SNAP benefits.

### **Sufficiency of Determination Letter**

The Appellant objects that the permanent disqualification letter dated October 23, 2017 was a form letter and did not specifically address the explanations provided by the Appellant in response to the charge letter. Regarding this contention, the Retailer Operations Division commonly utilizes a form determination letter. There is no requirement in the statute or SNAP regulations that the determination letter must address the contentions raised by the Appellant in response to the charge letter. However, a review of the casefile documents that the Retailer Operations Division thoroughly reviewed the evidence in the case and all contentions and explanations provided by the Appellant before issuing the determination letter. Therefore, the Appellant's contention that the determination letter was a form letter does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Corrective Action**

The Appellant states that it has instituted enhancements to its existing SNAP compliance program including additional mandatory monthly meetings to check into the store operations involving the SNAP. With regard to this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is limited to what circumstances existed at the time that was the basis of the Retailer Operations Division's action. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that a store may begin to comply with program requirements.

In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations. Therefore, the Appellant's contention that corrective action has taken place does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **CIVIL MONEY PENALTY**

The Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i) even though it was informed of the right to do so in the charge letter. SNAP regulations at 7 CFR § 278.6(b)(2)(ii) and (iii) mandate that both the trafficking CMP request and

supporting documentation and evidence must be submitted within ten (10) days of the receipt of the charge letter. Therefore, the Appellant is not eligible for a trafficking CMP.

The Appellant states that the store did not request a trafficking CMP and does not understand why it was referenced in the determination letter. This is because an assessment of a retailer's eligibility for a trafficking CMP is always included in the determination letter, even if it was not requested. In addition, the Appellant made several contentions regarding the store's compliance policy and training program. The only relevance that a store's alleged compliance policies and training program has is related to the store's eligibility for a trafficking CMP. Thus, this was further reason for the determination letter's reference to the Appellant's ineligibility for a trafficking CMP.

In conclusion, even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program prior to the violations under 7 CFR 278.6(i)(1). 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 843 Forest Foods & Bagels Inc., 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

February 1, 2018