

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

**Agua Azul Deli Grocery Corp,**

**Appellant,**

**v.**

**Case Number: C0202632**

**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 Agua Azul Deli Grocery 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 in its administration of the SNAP, when it imposed a permanent disqualification against Agua Azul Deli Grocery 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 November 28, 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 charge letter was delivered via UPS on November 30, 2017.

The Appellant responded to the charge letter through a faxed document on December 11, 2017. Among other contentions, the Appellant generally stated that the irregular transaction patterns were due to: the store offering a variety of food including Caribbean products; the extension of credit to select customers; and the shopping habits of its customers. The Appellant also provided numerous purchase invoices to document the store's food inventory, pictures of store inventory, customer statements about credit accounts, and purported credit ledgers. Although the Appellant provided two (2) pages of purported employee training documents, the Appellant did not request a trafficking CMP.

After thoroughly considering the evidence in the case and the Appellant's contentions, the Retailer Operations Division issued a determination letter dated September 21, 2018. The determination letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and 7 CFR § 278.6(e)(1). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of 7 CFR § 278.6(i) 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 October 1, 2018, the Appellant requested an administrative review of the Retailer Operation Division's determination. The request for administrative review was granted.

### **STANDARD OF REVIEW**

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

### **CONTROLLING LAW AND REGULATIONS**

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

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

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

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

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

7 CFR § 278.6(e)(1)(i) states:

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

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

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

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

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

7 CFR § 278.6(a) states, in part:

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

7 CFR § 278.6(i) states, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.

7 CFR § 278.6(b)(2) states, in part:

- (ii) Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS

information and evidence as specified in § 278.6(i), that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). **This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).** [Emphasis added.]

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

### SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from 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. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- **Charge Letter Attachment 2:** Multiple consecutive purchase transactions were made too rapidly to be credible. This attachment lists 32 pairs of transactions totaling 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in which consecutive transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- **Charge Letter Attachment 3:** Multiple transactions were made from individual benefit accounts within a short time period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- **Charge Letter Attachment 4:** In a series of transactions, the majority or all of individual recipient benefits were exhausted in unusually short periods of time. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- **Charge Letter Attachment 5:** Excessively large purchase transactions were made from recipient accounts. 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 is located in a neighborhood with a large concentration of people of Caribbean descent. The store is stocked according to their needs and it carries many of the fruits, vegetables, meats, and goods that are the staples or their cultures. The store also carries the typical items found at most regular stores.
- In some cases, the SNAP benefits provided to a family were not enough to see them through the month. The store allowed these families to repay credit accounts with SNAP benefits when they became available.
- The Appellant has provided many pictures showing the stock available at the store. These are typical items that are purchased regularly throughout the day, every day,

and for this reason, the store has made the process more convenient for its customers by offering them at a set price. In addition, in the Dominican culture it is common to ask for discounts when they spend a large amount, and the store will often round up prices after discounting a few dollars.

- Many families share their SNAP benefits and like to keep track of their expenses. They do this by purchasing the items they need and then charging the items for other family member separately so as to obtain a separate invoice.
- The store has been in business for over 17 years and has never had a violation. The store has always followed the rules and regulations of the SNAP.
- The store provides quarterly training to its staff on SNAP rules and regulations.
- The Appellant has previously provided its food purchase invoices to document the variety of foods stocked and sold by the store.
- The store will likely have to close if its SNAP authorization is permanently withdrawn.

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 and Compliance History**

The Food & Nutrition Service (FNS) authorized Agua Azul Deli Grocery Corp. for the SNAP on August 3, 2000. During the review period of March 2017 through August 2017, the Retailer Operations Division classified the store as a medium grocery store.

Contrary to the Appellant's contention, the store has not always abided by the SNAP rules and regulations. The store was issued warning letters on May 23, 2002 and February 7, 2017 for SNAP violations. The Appellant also admits that the store accepts SNAP benefits as repayment on credit accounts for a select few customers which is a SNAP violation subject to a one-year disqualification. In addition, the Appellant store was twice subjected to a CMP for violations in the WIC Program in 2016 and 2017.

The store owner signed the last SNAP reauthorization application for the store on February 16, 2010 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 September 5, 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:

- Agua Azul Deli Grocery Corp. is approximately 800 square feet in size.
- The store had no shopping carts and no handheld shopping baskets for customer use.
- The store had one (1) cash register and one (1) point-of-sale device.
- The store did not have an optical scanner or conveyor belts at the checkout.
- Store personnel confirmed that no food was stored in an area outside of public view 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 such as ending most product prices with 00 cents or 50 cents. Store personnel confirmed that the store did not round prices up or down at the checkout.
- The store did not sell food in bulk such as fresh meat bundles, fresh seafood specials, and/or fresh fruit and vegetable boxes.
- The checkout area consisted of a window opening surrounded by plastic shelving with a small countertop of no more than two (2) feet by three (3) feet in size. There was a cooler in front of the checkout window which further constricted space at the checkout. The very limited space for stacking food at the checkout area made it not conducive to conducting large transactions.

The SNAP eligible food stocked by the store consisted mainly of inexpensive canned and packaged goods with a limited to moderate amount of fresh meat and fresh produce typical of a medium sized grocery. While the firm may have carried some products tailored to a clientele with origins in the Caribbean, the majority of food carried by the store would be typical to that carried in any medium sized grocery store. The store sold a large amount of single-serving snack foods, ice cream, popsicles, potato chips, candy and other inexpensive accessory food items such as carbonated sodas, coffee, tea, condiments, and spices. The stocked ineligible items included tobacco products, alcohol, mobile phone accessories, health and beauty aids, paper goods and cleaning products. The store also had a kitchen where SNAP ineligible hot food was prepared. Food from the deli section was used in the kitchen for preparing hot food including made-to-order prepared sandwiches. Store personnel confirmed that the most expensive items sold by the store were a 3.52 pound can of Nido at \$24.99; a 20 pound bag of rice at \$13.99; two (2) pounds of salami at \$7.49; and a pound of cheese at \$6.49. These items did not appear to be available in large quantities to support bulk sales.

Given the available inventory as noted above, there is no indication from the store visit report that the store would be likely to have SNAP transaction patterns significantly different from similar-sized competitors offering similar food items.

## Credit Transactions

The Appellant states that the store accepted SNAP benefits as repayments on credit accounts for a few select households. 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 Appellant provided written statements from eight (8) alleged customers who said they had credit accounts at the store which they paid off with SNAP benefits. The Appellant also provided nine (9) pages from a purported credit ledger. These credit ledger pages only listed first names, dates, food items and prices. Only three (3) first names appearing in the credit ledgers appeared to match with a customer written statement. Even so, this evidence is insufficient to establish that the irregular transactions cited in the charge letter are due to the store accepted SNAP benefits as repayment on credit accounts. Even if all eight (8) purported customers paid off credit accounts at the store with SNAP benefits, that would still leave over 500 households cited in the charge letter whose irregular transaction patterns remain unexplained. It is more likely true than not true that the store was accepting SNAP benefits as repayment on credit accounts **and** was also trafficking in SNAP benefits.

## Same Cent Transactions

**5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Thus, over half of the store's larger dollar transactions ended in 00 or 50 cents despite the store having most food items priced at amounts ending in nine (9) cents. When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits.

There is no evidence that the store had a special pricing policy that would cause a disproportionate number of high dollar transactions to end in 00 cents or 50 cents. The store visit report documented that most items in the store had price amounts ending in nine (9) cents such as .49 and .99.

The Appellant states the store offers some popular food items at a set price and that purchases could easily add up to the same ending dollar value. The Appellant named three (3) plantains at \$1.00; bottles of water at \$1.00; ramen noodles at three (3) for a \$1.00; bags of chips at two (2) for a \$1.00; juices running .50 through \$4.00; sandwiches costing an average of \$4.00 on a roll and \$5.50 for a hero; and a variety of hams, cheeses and other cold cuts, that are usually ordered by dollar amount. However, due to their low dollar value, these items are unlikely to explain the many high dollar transactions, including those amounting to hundreds of dollars, cited in the charge letter.

The Appellant also states that its customers of Dominican origin will commonly ask for discounts when they spend a large amount, and the store will often round up prices after discounting a few dollars. However, store personnel stated during the store visit that the store did not round prices up or down at the checkout.

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 and a limited to moderate amount of fresh meat and produce. 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 in one transaction. It is implausible that several of these relatively inexpensive items purchased together would disproportionately result in total purchase prices ending in 00 cents or 50 cents. 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 of ending cent ranges from 00 to 99 cents.

Consequently, when there are a disproportional amount of 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.

### **Multiple Transactions made too Rapidly to be Credible**

Charge Letter Attachment 2 lists 32 pairs of transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits in which consecutive transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The second transaction in each set was a large dollar transaction which greatly exceeded the average SNAP transaction at a medium grocery store in New York. Rapid and consecutive transactions conducted at a store without the technology and infrastructure to process such transactions are a trafficking indicator.

The Appellant contends that due to the constant foot traffic in the store, if there are a lot of customers making purchases, the clerks will usually add up purchases with a calculator before being processed through the EBT terminals so transactions do not take time and are processed faster. However, these second transactions were for large dollar amounts which likely would have required the use of shopping carts and shopping baskets to bring to the register. As noted in the store visit report, the store did not have any shopping carts or baskets. In addition, the space within the store was very constricted, especially at the checkout counter. Therefore, the Appellant's contention is not credible.

The average SNAP transaction for a medium grocery store in New York County during the review period was \$12.55. However, all of the rapid transaction pairs at Agua Azul Deli Grocery Corp. had a second high dollar transaction amount **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The Retailer Operations Division considered this to be a strong trafficking indicator because the second purchase items would have to be transported to the limited checkout area, keyed at the register, a card swiped, a PIN entered, an approval indicated and a receipt printed. This process



would also include several items being bagged and removed from the counter before the next transactions could be initiated. As the checkout and counter space is very limited, it is unlikely that the store could process such large food purchases in such a short time frame. The fact that the store did not have an optical scanner would increase the amount of time it would take to check-out as prices would have to be determined for the merchandise and then entered in the register before the item could be bagged.

Despite the store's limitations in counter space and technology, it was rapidly processing consecutive SNAP transactions which included an excessively large transaction atypical of a SNAP medium grocery store in New York. 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.

### **Multiple Transactions by the Same Household within a Short 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 medium grocery store's stock and facilities and are thus indicative of trafficking.

Violating stores often conduct multiple split transactions from the same household account as a method to avoid the detection of single high dollar transactions that cannot be supported by the retailer's food inventory and infrastructure. Charge Letter Attachment 3 lists 30 sets of 63 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 supermarket or superstore SNAP transaction in New York during the review period. It is not credible that a medium grocery store would have suspicious SNAP transactions greater than a supermarket or superstore. It is even less likely that these excessively large transactions would be conducted multiple times by the same household during a short time period.

The Appellant contends that many families share their SNAP benefits and like to keep track of their expenses. Allegedly, they do this by purchasing the items they need and then charging the items for other family member separately so as to obtain a separate invoice. However, the Appellant offers no evidence to support this claim. 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 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.

In addition, the Appellant states that a customer may have just finished making a purchase just in time to see fresh merchandise come in and they may decide to make another purchase. Although this may happen occasionally, it is unlikely that this would be a routine occurrence. A customer may occasionally forget an item or two and make another purchase, but this would typically be a

lower dollar purchase consistent with typical purchases made at a medium grocery store. Lastly, most of the household transactions cited in the charge letter are spread **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and do not fit the Appellant's explanation.

The store visit pictures show that is unlikely that SNAP customers would want to shop at this store multiple times during a short time frame, or purchase such a large volume of items. In addition, the store's small checkout area and very 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. 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.

### **Exhaustion of Benefits**

Charge Letter Attachment 4 lists 88 sets of 100 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in which SNAP benefits were exhausted or nearly exhausted in a short time frame. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The Appellant does not explain this irregular transaction pattern.

A government report on SNAP shopping patterns indicates that after the first day of benefit issuance, on average, 80 percent of a household's allotment remains unspent. Even after seven days, 40 percent of benefits still remain unspent. It takes two weeks to deplete 80 percent of one's benefits, and three weeks to deplete 90 percent. Although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefits in a single day at one store. Depleting one's entire allotment in a single day, or in a single large transaction, leaving no benefits for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP households.

In addition, the Appellant does not explain how the store is conducting transactions that are many times higher than a SNAP authorized New York supermarket or superstore. Based on a preponderance of the evidence this irregular transaction pattern is more likely than not the 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 limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of a medium grocery store's stock and facilities and are thus indicative of trafficking.

Charge Letter Attachment 5 cites 431 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(7)(E)**. Even the smallest transactions cited in the charge letter had an amount

which is three or four times higher than the average SNAP purchase amount for a New York medium grocery store.

The substantial number of high dollar purchases atypical of a SNAP authorized medium grocery store calls into question the legitimacy of these transactions. As noted previously, 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 offering similar food items.

The Appellant states that basic food prices are higher than ever and with just a few items a customer can accrue a significant amount of sales. The Appellant states that large juices are from \$1.99 to \$5.99, a gallon of milk is priced at \$3.89, a pound of ham averages \$6.99, eggs \$2.49, cheese \$6.99 per pound, 20 lbs. of rice \$12.99. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Regarding this contention, if food prices are higher than before this would also impact other nearby SNAP authorized stores; however, the other competitor stores in the area do not exhibit the same type of irregular transaction patterns. SNAP customers in an urban area also shop at many different stores and would be unlikely to make food purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at a store with no shopping carts or shopping baskets.

The Appellant states that there are very few businesses in the area that are redeeming SNAP benefits either due to businesses having closed, are in the process of applying or have some type of business or ownership changes, and due to this, the Appellant store's redemption of SNAP benefits has increased significantly. It is true that 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 within a one (1) mile radius of Agua Azul Deli Grocery Corp. there are 21 other medium grocery stores, five (5) large grocery stores, eight (8) supermarkets and nine (9) superstores all of which are SNAP authorized. Both a SNAP authorized supermarket and a superstore are only 0.17 miles away from the Appellant store. Therefore, the Appellant's store's excessively high SNAP transactions are not due to a lack of authorized stores in the area.

Lastly, the case record 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 Agua Azul Deli Grocery Corp. compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at supermarkets and superstores. However, despite this access to better stocked stores, these sampled households often conducted excessively large transactions at Agua Azul Deli Grocery Corp. on the same day or within a few days of shopping at these larger stores. It is highly unlikely that a medium grocery store would have legitimate SNAP transactions comparable or larger than these SNAP authorized supermarkets and superstores with a better selection and variety of food items at likely better prices.

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

### **Purchase Invoices**

The Appellant submitted numerous purchase invoices in an attempt to show that it had sufficient food inventory to support its SNAP redemptions during the review period. The Retailer Operations Division determined that many of the invoices did not have a vendor names, contact information or were otherwise unreadable. The record reflects that the Retailer Operations Division attempted to contact the store owner to resolve some of these issues; however, when calling the store, someone twice hung up after the Retailer Operations Division employee identified herself and the owner did not respond to an e-mail that was delivered as documented by a return receipt in the casefile. 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.

### **Hardship to Firm**

The Appellant states that a permanent disqualification will likely cause the store to close. 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 ownership personally or the firm resulting from the imposition of such penalty. To allow store ownership 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.

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 may 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 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)(iii) states that "if a firm fails to request

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

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. The Appellant did provide two (2) pages of purported employee training documents for October 3, 2016 and March 3, 2017. But this is not the type of substantial evidence required by the regulations.

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.]

It would also be very difficult for the Appellant to contend that it had an **effective** SNAP compliance policy and training program when it admits the store was offering food on credit to its customers and accepting SNAP benefits as repayment on credit accounts in violation of SNAP regulations. 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 Agua Azul Deli Grocery 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

February 21, 2019