

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

Alex Gourmet Deli Inc.,

Appellant,

v.

Case Number: C0184789

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 Alex Gourmet Deli Inc. (hereinafter “Alex Gourmet Deli” or “Appellant”) 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 Alex Gourmet Deli.

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 October 20, 2015, 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 February 2015 through July 2015. 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 October 21, 2015.

In a letter dated October 27, 2015 (sent via fax on October 26, 2015) the Appellant, through counsel, requested case information under the Freedom of Information Act (FOIA). The Appellant did not request a trafficking CMP under 7 CFR § 278.6(i).

The agency officially responded to the FOIA request in a letter dated November 19, 2015. The official FOIA response letter stated that the Appellant could appeal the FOIA response within 45 days. The Appellant, through counsel, filed a FOIA appeal on December 21, 2015. The appeal letter requested that the agency hold in abeyance any action against Alex Gourmet Deli pending a decision on the appeal.

In a letter dated May 9, 2017, the agency FOIA office requested that the Appellant confirm its continued interest in receiving any potentially responsive records. As of October 24, 2017, the FOIA office had not received a response from the Appellant and therefore administratively closed the appeal without prejudice in a letter dated November 7, 2017.

On November 9, 2017, the Retailer Operations Division received a fax from Appellant's new counsel stating that he thought he sent in a new letter of representation to the agency FOIA office, but admitted he could not find a record that it had been sent. The Retailer Operations Division then contacted the agency FOIA office and the FOIA appeal was reopened. On April 3, 2018, the Associate Administrator of the SNAP issued the agency's final decision on the FOIA appeal. The Retailer Operations Division then sent a letter dated April 10, 2018 granting the Appellant an additional ten (10) days to response to the original charge letter.

The Appellant, through counsel, submitted its response to the charges in a letter dated April 14, 2018. After reviewing the Appellant's contentions and the evidence in the case, the Retailer Operations Division issued a determination letter dated May 7, 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). 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 May 11, 2018, 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, 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). [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 February 2015 through July 2015. This involved the following transaction patterns which are trafficking indicators:

- **Charge Letter Attachment 1:** Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment lists nine (9) sets of 20 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 145 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, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- The Appellant denies that the store trafficked in SNAP benefits.

- The agency did not properly consider the basis for determination factors described in 7 CFR § 278.6(d). There were no specific violations conducted by individual personnel of the firm; there were no warnings; and there was no evidence of intent to violate the regulations.
- It is incumbent on the agency to evaluate the merits of this claim through investigation and not a predetermined standard of SNAP activity for this store type. In summary, the decision to permanently disqualify the business is not based on fact, and the conclusions reached are unfounded and arbitrary.
- The store is a large sized convenience/grocery/deli store. The store is at all times well stocked with a staple food inventory designed to accommodate low income customers. The store sells fruit, vegetables, rice, beans and pasta, milk, eggs, baby food, cereal, bread. The store sells deli meats and a vast array of sandwiches, selling a variety of cold cuts on rolls, subs and other bread which is among the best selling items. The store sells Enfamil at \$20.00 per small container, \$24.99 per mid-size container, and \$34.99 per large container. The store is located near numerous large multi-family apartment complexes, schools, churches and family homeless centers. The closest supermarket is a quarter-mile away.
- Regarding Charge Letter Attachment 1, the multiple transactions occurring within a short time period were all legitimate transactions and were not in exchange for cash. The store cannot control how customers choose to expend their benefits. Most of the store customers have to take multiple trips to the store as they do not have cars to transport their purchases. The fact there are multiple transactions are in no way indicative of trafficking and such transactions are not unusual. There is also no regulation against the store allowing multiple SNAP purchases in a short time frame. It is also not credible that the owner would jeopardize his business 5 U.S.C. § 552 (b)(6) & (b)(7)(C) over a six-month period.
- Regarding the excessively large transactions in Charge Letter Attachment 2, many of these purchases were made immediately after benefits were added to recipient SNAP accounts. As a result, the recipients use much of their balance in this store. These were due to large orders placed in advance and the average purchase 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is not unusual under these circumstances as the store customers may not want to go out in hot weather. The average amount of a transaction during the period in question 5 U.S.C. § 552 (b)(6) & (b)(7)(C) which proves that these transactions are legitimate. It is also not credible that the owner would jeopardize his business for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) over a six-month period.
- There are no similar authorized stores in the area. Customers don't want to go to superstores which are crowded with long lines and will instead go to grocery stores which are more convenient, open longer and competitively priced.
- There have been no previous violations or sanctions which is evidence of its continuous compliance with the law and training and supervision of the store employees. The owner would not jeopardize its business and livelihood by engaging in trafficking.
- The letter of charges relates to alleged instances which happened in 2015. The Statute of Limitations precludes the bringing of such charges after such a long period of time as it prejudices the owner who no longer has access to receipts, surveillance videos, or records due to the gap in time before charges were brought.

- The store should be considered for a CMP in lieu of a permanent disqualification as its disqualification would cause a hardship to the community. The owner has continuously trained its employees on the SNAP rules and regulations since it was authorized two (2) years ago.

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 Alex Gourmet Deli for the SNAP on February 27, 2013. During the review period of February 2015 through July 2015, the Retailer Operations Division classified the store as a convenience store.

The owner signed the SNAP application for the store on November 16, 2012 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 an April 28, 2015 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:

- Alex Gourmet Deli is approximately 400 square feet in size and operates out of a storefront in an urban residential 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.
- The store did not have any optical scanners and there was no conveyor belt at the checkout area.
- Store personnel confirmed that there was no storage area where food was kept out of public view. No food was stored at an offsite location.
- 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.

- There is no indication in the store visit report or photographs that the store takes telephone orders or provides delivery services.
- The store had dusty cans on the shelves which indicate that these products did not sell or turn over frequently due to low demand.
- The checkout area consisted of a small countertop on a wood and glass display case or credenza. The empty space for stacking purchases was approximately two (2) feet by three (3) feet. The display case contained mostly candy and gum. The open countertop was flanked by a box of straws and a lottery machine with lottery tickets for purchase. There were a couple of bananas along with a PIN pad sitting on the countertop. 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. Although the store sold infant formula it did not appear to sell these items in great quantities as there were only about 20 stocking units. These cans of infant formula were stored behind the counter on a lower shelf and were partially obscured by a black plastic shopping bag, boxes of chewing gum and packages of cigars.

The store had a small kitchen and deli section with large posted signs for breakfast, lunch and dinner sandwiches. There were no signs indicating that meats and cheeses were sold by the pound. Instead the store largely sold SNAP ineligible hot and cold prepared foods not intended for home preparation and consumption. There was only a very limited selection of individually sold fresh fruits at the deli section and these appeared to consist largely of a few tomatoes, cucumbers, and heads of lettuce. There were also only three (3) stocking units of eggs in the deli section. In summary, products from the deli section appeared to be used mostly in the kitchen to make SNAP ineligible prepared food.

The store also sold a large amount of inexpensive accessory food items such as snack foods, candy, coffee, tea, carbonated and non-carbonated drinks, condiments, and spices. In addition to prepared foods, the stocked ineligible items included tobacco, alcohol, lottery tickets, health and beauty products, paper goods, and household cleaning products.

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.

Basis of Determination

The Appellant contends that Retailer Operations Division did not properly apply the three factors under 7 CFR §278.6(d) before imposing a permanent disqualification on the firm. 7 CFR §278.6(d) states, in part, that in making a disqualification determination FNS shall **consider**:

- (1) The nature and scope of the violations committed by personnel of the firm,
- (2) Any prior action taken by FNS to warn the firm about the possibility that violations are occurring, and
- (3) Any other evidence that shows the firm's intent to violate the regulations.

However, the case record documents that the Retailer Operations Division did **consider** these factors in this case. Regarding the nature and scope of the violations, trafficking in SNAP benefits is a very serious violation and warrants a permanent disqualification on the first violation. 7 U.S.C. §2021(b)(3)(B) and 7 CFR §278.6(e)(1)(i) mandate that the penalty for trafficking is a permanent disqualification and does not provide for a lesser period of disqualification.

The Appellant states that the owner was not warned of any violations prior to the issuance of the charge letter. Regarding this contention, the SNAP regulations do not require the Retailer Operations Division to give prior warnings before issuing a charge letter for trafficking. SNAP regulations at 7 CFR §278.6(e)(7) states that FNS will “send the firm a warning letter if violations **are too limited** to warrant a disqualification.” [Emphasis added.] Trafficking transactions are not considered to be “violations that are too limited to warrant a disqualification.”

Although the Appellant contends that FNS did not show that the store intended to violate any SNAP regulations, the violation of trafficking in SNAP benefits does not require an element of intent on the part of the violator. Therefore, whether or not the Appellant store owners or its employees intended to violate SNAP regulations or benefit from such violations is irrelevant in this case.

Trafficking Case Based on Irregular Transaction Patterns

The Appellant states that the charges are merely based on a predetermined standard of SNAP activity for this type of firm without any onsite investigation. With regard to these contentions, FNS employs a computerized fraud detection tool to identify SNAP transactions that form patterns having characteristics indicative of trafficking. However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still analyze the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether the questionable transactions were, more likely than not, the result of trafficking.

The legality of this method is supported by 7 CFR §278.6(a) which states, 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.]

Multiple Transactions by the Same Household within a Short Time Period

The Appellant correctly states that there is no regulation against conducting multiple transactions from the same household in a short time period. It is true that 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.

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

The Appellant states that most of the store customers have to take multiple trips to the store as they do not have cars to transport their purchases. Regarding this contention, while it may be true that walking customers may have to make more than one trip to the store, it is unlikely that these individual purchases would amount to an average greater than that of a New York grocery store, supermarket or superstore. In addition, the store visit photographs show there is no room to stack large amounts of food at the checkout area because of the limited space for conducting transactions. The store also does not have shopping carts or shopping baskets that would allow a customer to transport their purchases within the store.

The Appellant states that the alleged violations are *de minimis* transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C) over six (6) months. Regarding this contention, it is not unusual for violating firms to conduct largely legitimate transactions while also conducting trafficking transactions with a smaller number of trusted households. To state that only a limited number of households may have conducted irregular and abnormal SNAP transactions does not offer an explanation for the transactions cited in the charge letter. In the absence of a credible explanation for the irregular transaction patterns, the most likely explanation is that they are a result of the Appellant firm trafficking in SNAP benefits.

In summary, the store visit pictures show that is unlikely that SNAP customers would shop at Alex Gourmet Deli purchasing 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

The Appellant correctly states that there is no regulation restricting the amount of SNAP benefits that may be used in a 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 convenience store's stock and facilities and are thus indicative of trafficking.

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

The substantial number of high dollar purchases atypical of a SNAP authorized convenience 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 contends that most of these purchases were made immediately after benefits were added to recipient SNAP accounts. As a result, the recipients use much of their balance in this store. It is true that SNAP recipients tend to shop earlier in the month after receiving their benefits; however, this still does not explain why Alex Gourmet Deli would have excessively large SNAP transactions great exceeding those of its competitor stores. If these patterns at Alex Gourmet Deli were due to recipients shopping as soon as the benefits became available, then other stores would exhibit the same patterns.

The Appellant states that the transactions cited in Charge Letter Attachment 2 were due to large orders placed in advance and that purchases **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** is not unusual under these circumstances as the store customers may not want to go out in hot weather. Since the review period is February 2015 through July 2015, it is doubtful that store customers were avoiding hot weather. There is also no indication in the store visit report or photographs that the store was taking telephone orders or offering delivery services during the review period.

The Appellant states that the alleged violations are *de minimis* transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** over six (6) months. Regarding this contention, it is not unusual for violating firms to conduct largely legitimate transactions while also conducting trafficking transactions with a smaller number of trusted households. To state that only a limited number of households may have conducted irregular and abnormal SNAP transactions does not offer an explanation for the transactions cited in the charge letter. In the absence of a credible explanation for the irregular transaction patterns, the most likely explanation is that they are a result of the Appellant firm trafficking in SNAP benefits.

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

The Appellant claims that customers don't want to go to superstores which are crowded with long lines and will instead go to grocery stores which are more convenient, open longer and competitively priced. However, 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 limited selection of staple foods like Alex Gourmet Deli. Agency mapping systems show that, during the review

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

period, there were 106 SNAP authorized stores located within a half-mile radius of Alex Gourmet Deli. Among these SNAP authorized stores were four (4) large grocery stores, six (6) supermarkets and two (2) superstores. One of the supermarkets was only 0.01 miles away (immediately across the street) from Alex Gourmet Deli. All of these stores would have had a larger selection of staple food including fresh meat, poultry and fish and fresh produce.

The case record also documents that the Retailer Operations Division conducted a detailed analysis of three (3) households identified in the charge letter to analyze their shopping patterns at Alex Gourmet Deli 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 Alex Gourmet Deli on the same day or within a few days of shopping at these larger stores. It is highly unlikely that a convenience store with limited staple foods would have legitimate SNAP transactions comparable or larger than these SNAP authorized supermarkets and 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.

Lack of Prior Violations

The Appellant states it has a clean record and has never been charged or sanctioned for a SNAP violation in the past. With regard to this contention, a record of participation in the SNAP with no previously documented instance of violations 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.

Owner Responsibility

The Appellant also states that the store owner would not jeopardize its business and livelihood by engaging in trafficking. That may or may not be true. It is possible that the owner was not aware of the violations occurring at this store. Nevertheless, a preponderance of the evidence supports the finding of the Retailer Operations Division that personnel at Alex Gourmet Deli engaged in trafficking transactions based on the irregular transaction patterns cited in the charge letter. Even if the owner was not involved in the violations, it cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. Regardless of whom the owner of a store may utilize to handle store business, the owner is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow

store owners to disclaim accountability for the acts of persons whom the owner chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA

Statute of Limitations

The Appellant states that the letter of charges relates to alleged instances which happened in 2015. According to the Appellant, the statute of limitations precludes the bringing of such charges after such a long period of time as it prejudices the owner who no longer has access to receipts, surveillance videos, or records due to the gap in time before charges were brought.

Regarding these contentions, it is unclear what particular statute of limitations the Appellant believes applies to this case. In any event, the Appellant is not correct in saying there was a large gap in time before the charges were brought. The charge letter was issued on October 20, 2015 and delivered on October 21, 2015 just a few months after the review period. It was the Appellant's counsel who requested that all agency action be delayed until the FOIA appeal was decided. Under these circumstances, it is unlikely that the Appellant's case was unfairly burdened or prejudiced as it knew that the store was charged with trafficking as of October 21, 2015 and could have preserved any records it felt necessary for its defense.

Hardship to Community

The Appellant indicates that the local SNAP community will suffer a hardship if the store is permanently disqualified. Regarding this contention, there is no provision in SNAP law or regulations that would negate, waive or reduce a permanent disqualification for trafficking due to a purported hardship to SNAP customers.

Where there is a hardship to SNAP households due to a lack of authorized stores in the area, FNS may impose a hardship CMP on a firm in lieu of a less than permanent disqualification. However, the regulations at 7 CFR § 278.6(f)(1) clearly state that "a civil money penalty for hardship to SNAP households may not be imposed in lieu of a **permanent** disqualification." [Emphasis added.] Because the Retailer Operations Division has taken action to permanently disqualify the Appellant firm, a hardship CMP in lieu of disqualification cannot be granted.

TRAFFICKING CIVIL MONEY PENALTY

In its administrative review request, the Appellant claims that the store owner has continuously trained its employees on the SNAP rules and regulations since it was authorized two (2) years ago. However, 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. The SNAP regulation at 7 CFR § 278.6(b)(2)(ii) mandates that a request for a trafficking CMP along with supporting documentation shall be submitted within ten (10) days of receipt of the charge letter.

The SNAP regulation at 7 CFR § 278.6(b)(2)(iii) also states, in part, 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 ... 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. Therefore, the Retailer Operations Division’s decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

The Retailer Operations Division’s analysis of the Appellant’s EBT transaction record was the primary basis for its determination to permanently disqualify the retailer. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges.

In the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did in fact occur as determined by the Retailer Operations Division. Based on the discussion above, the decision to impose a permanent disqualification against Alex Gourmet Deli 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

July 17, 2018