

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

**Best & Tasty Deli Grocery Corp,**

**Appellant,**

**v.**

**Case Number: C0216018**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

The record supports that the Best & Tasty Deli Grocery Corp. (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). It is the decision of the USDA that there is sufficient evidence to support that the permanent disqualification of Appellant from participation as an authorized retail food store in the Program, as imposed by the Retailer Operations Division, (Retailer Operations) was appropriate.

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.6(a), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

**AUTHORITY**

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provide that a food retailer aggrieved by administrative action under § 278.1, § 278.6, or § 278.7 may file a written request for review of the administrative action with the Food and Nutrition Service (FNS).

**CASE CHRONOLOGY**

By Charge letter dated March 21, 2019, Retailer Operations informed the owner that it had compiled evidence that Appellant had violated the SNAP regulations based on electronic benefit transfer (EBT) transactions that established clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for the firm type. The sanction for trafficking is permanent disqualification. The owner responded to the Charge letter by letter dated March 29, 2019.

Retailer Operations issued a Determination letter dated April 24, 2019. This letter informed Appellant that it was permanently disqualified as a retail food store in accordance with Sections 278.6(c) and 278.6(e)(1) of the regulations. Retailer Operations considered Appellant's eligibility for a civil money penalty (CMP) according to Section 278.6(i) of the regulations, and found it was not eligible because insufficient evidence was submitted timely to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program to prevent violations.

By letter dated May 1, 2019, the owner appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated May 10, 2018.

### **STANDARD OF REVIEW**

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

### **CONTROLLING LAW AND REGULATIONS**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Sections 278.6(a) and (e)(1) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 CFR § 278.6(e)(1) states: "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined, in part, in 7 CFR § 271.2, as "the buying or selling of SNAP benefits for cash or consideration other than eligible food."

7 CFR § 271.2 states: "Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food products prepared for immediate consumption."

7 CFR § 278.6(a) states: "FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system."

7 CFR § 278.6(b)(2)(ii) states: "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 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).”

7 CFR § 278.6(i) states: “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.”

### **SUMMARY OF THE CHARGES**

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges were based on an analysis of SNAP transaction data during the period of June 2018 through November 2018. The patterns of transaction characteristics indicative of trafficking are:

1. There were an unusual number of transactions ending in a same cents value.
2. Multiple transactions made from individual benefit accounts within a set time period.
3. Excessively large transactions made from recipient accounts.

### **APPELLANT’S CONTENTIONS**

In reaching a decision, consideration has been given to all contentions, including any not referenced.

- I disagree with the decision. I offer a large variety of food items, deli, produce and other food products that are used for daily consumption. It can be very easy for a participant to expend a large or even all their benefits at this store.
- I sent the receipts for purchases of merchandise available for retail and I sent pictures of the inside of the store.
- My business would not survive disqualification from SNAP and may be forced to close, like the majority of the businesses in the area.
- I request again that a CMP is issued in lieu of permanent disqualification.

### **ANALYSIS AND FINDINGS**

Retailer Operations presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the Charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant during the review period. As patterns of unusual transactions appear across multiple Attachments the case of trafficking becomes more convincing.

**Attachment 1:** Listed are 2,384 transactions ending in a same cents value of 00. There were 5,165 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) during the review period. As such, 46% of the transactions in these amounts ended in 00 cents. Based on the store pricing information gathered during the onsite store visit, it is unlikely that items purchased together would routinely total to the same amount. Consequently, when a large number of transactions that end in a same cent amount are regularly conducted, in the absence of any compelling rationale to the contrary, it appears that these transaction amounts are contrived, and indicative of trafficking.

Contentions:

- I am enclosing our menu that shows many of our sandwiches and platters ending in .00, .50 and .75, that would make many purchase in the same cent value.
- There are many products sold by whole dollar amount such as 2 liters of soda for \$2.00 & \$2.50, Ramen Noodles 3 x \$1.00, apples and oranges for 65¢ and 75¢, juices and drinks at \$1.00 and \$2.00, in addition to snacks like cookies, cakes and chips that cost anywhere between \$1.00 and \$2.00.
- Our cold cuts that are usually requested by dollar amount, due to our large variety of hams, cheeses and other cold cuts, and sandwiches ranging in price from \$4.50 to \$5.50, a purchase of several different cold cuts or sandwiches can easily add up. We have many items in the store that cost \$.75, \$.75, 2 x \$5, 3 x \$1, 2 x \$1.25, so that purchases can easily end up in whole dollar amount.

Retailer Operations found that Appellant had foods priced in 00 cent ending values, and that these items purchased together might provide a valid explanation for the SNAP transactions in the lower dollar amounts. However, Retailer Operations determined that the patterns of same end cent values at the same dollar amounts occurring in larger dollar transactions were suspicious. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Retailer Operations deemed it unlikely that lower priced 00 end cent items would be purchased in quantities that would total to these larger amounts.

The onsite store report and photographs confirm that Appellant does not offer or promote grocery/meat bundles, deals, specials, or bulk items at the 00 end cent value. The store report states that Appellant does not have any shopping baskets or carts available for customer use in order to assemble large numbers of eligible items. Prepared hot foods are prevalent on the menus provided, and seen in the photos, including one of a steam table with a variety of hot items for sale. Hot foods are not eligible for purchase with SNAP benefits. SNAP ineligible items for sale at Appellant included tobacco products, mobile phones, phone cards, health and beauty aids, paper goods and cleaning products.

Appellant has the burden to provide relevant evidence to rebut the trafficking charges. Appellant provided some pricing information on menus and in its responses, however this was not deemed sufficient to support its contentions that it was not trafficking.

**Attachment 2:** Listed are 62 transactions in 26 sets conducted by 17 unique households (HHs). Multiple transactions within a set time period are a method stores use to avoid high dollar transactions, and are indicative of trafficking.

Contentions:

- As you can see from the pictures our store is well stocked. We also have two counter people at all times, so that when we are very busy, while we are attending one client with the EBT terminal, another employee is adding up the purchase of another customer with a calculator, so that once the terminal is available, they can process the client's purchase. In this manner, we process as many separate customers as quickly as possible. In fact, this is something we do on a daily basis, being that the store can be very busy during specific times of the day or month.
- There are many families that share their SNAP benefits with other family members, for example, one family member may receive their SNAP benefits on the 1<sup>st</sup> of the month, while another will receive their benefits on the 11<sup>th</sup>. A customer will make their personal purchases, and then charge the items for another family member separately, to obtain a separate invoice and then the other family member will reciprocate when they receive their benefits.
- In addition, a situation arises when a customer completes their purchases and a delivery arrives and the customer decides to make another purchase of the items that were delivered. Or, they make their purchases, leave, get home and realize that they have forgotten several items and return to complete their purchases. Please note that with the many individuals that live in the area, this occurs quite often.

The data shows there are at least 240 other authorized retailers within a one mile radius of Appellant, including: 109 convenience stores, four large grocery stores, 23 medium grocery stores, 79 small groceries, 14 supermarkets, and 11 super stores. The data supports that 65% of the HHs listed on this Attachment shopped at a large grocery, a supermarket, or super store within one day of making a transaction(s) at Appellant. Thus, recipients did use other authorized shopping options to transact SNAP benefits.

Retailer Operations determined that Appellant's transaction activity was unusual. Each single transaction in each set of transactions ranged from 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The average SNAP convenience store transaction in the state was \$8.49, and in Bronx County the average SNAP convenience store transaction amount was \$8.55. The transactions in Attachment 2 did not contain characteristics associated with a recipient possibly purchasing a forgotten item after checking-out, or households returning to purchase an item or two. In a portion of the flagged data sets, the second transaction amount or combined subsequent SNAP transaction amounts exceeded the initial transaction amount.

The data shows that Appellant had more multiple sets of transactions than convenience stores located within close proximity of Appellant. For example, Appellant had 26 flagged data sets, while one nearby convenience store had two flags, another store had 11 data sets flagged, and the third had six data sets flagged. Appellant's average SNAP transaction amount was 11% to 36% higher than the three nearby same type stores. 5 U.S.C. § 552 (b)(7)(E). Shopping patterns like this are suspicious and unusual.

As to having two counter workers to process separate customers as quickly as possible, the data sets represent transactions by the same household, not separate households. As such, Retailer Operations found that the retailer's contention did not adequately explain the data in this

Attachment. No itemized cash register tapes to support SNAP eligible food sales at Appellant were provided. The owner provided no recipient statements regarding their shopping behavior at the store to support his contentions. No business tax records or state sales tax reports were advanced to counter the trafficking charge.

**Attachment 3:** Listed are 199 transactions conducted by 108 unique HHs, for amounts that exceed the average SNAP transaction amount, for the same store type in the same state, by three times or more. **5 U.S.C. § 552 (b)(7)(E)**. This is unusual.

Contentions:

- One of the major factors in excessively large transactions is that food prices are higher than ever and with the purchase of only a few items a large bill can be accrued. Egg and milk prices have gone up exponentially. Another is cold cuts, we only sell Boars Head Brand, and they are priced anywhere from \$4.99 to \$8.99 per pound.
- Please note that we have customers that make large purchases of baby formula. They can purchase several cases at a time, and is another reason why there are such large transactions.
- We make extensive daily and weekly purchases to maintain our foothold in the neighborhood, as you can see per the invoices enclosed.
- My business is situated in a very highly congested housing area. Apart from the many apartment buildings in the area, there is also the housing projects across the street which encompass several city blocks. Many of the residents of these buildings and projects are SNAP households and though there are several grocery stores in the general area, the ratio between stores and SNAP households can be extensive.
- I am aware of how reliant we are on SNAP business and would never jeopardize our standing for such a minimal profit. My business would not survive the disqualification.
- As you can see from the bank statements, we do a large volume of sales and our store depends on EBT redemptions.

The data supports that within one day of conducting a transaction(s) at Appellant, 58% of flagged households listed on this Attachment, made a SNAP transactions at a large grocery, supermarket or super store. The record supports that the store does not have an optical scanner or any shopping baskets or carts available for customer use. Non-eligible items for sale included: alcoholic beverages, tobacco products, cleaning products, lottery, mobile phones, phone cards, and health and beauty products. The menus and photos support that the firm sold hot foods. Hot food is not eligible for purchase with SNAP benefits.

The owner stated that customers make large purchases of baby formula, purchasing several cases at a time. The onsite store visit notes that there were ten plus units of formula at the time of the store visit. The photo in the record shows 15 individual cans of Enfamil and no cases on a bottom shelf by the check out. Families that qualify for SNAP generally qualify WIC, when there are infants and children in the household. Although the store is not WIC authorized, items such as baby formula are often purchased using WIC benefits at larger at supermarkets and super stores. It would be out of the ordinary for recipients to purchases cases of Enfamil from a convenience store using SNAP benefits when WIC authorized super stores and supermarkets are within walking distance of Appellant. There are two supermarkets and one super store with .20

miles or approximately a four minute walk from Appellant. Retailer Operations noted that five of the six households analyzed for their transactions frequented one of those nearby supermarkets that is WIC-authorized during the review period.

The owner provided vendor invoices for the relevant time frame. Retailer Operations analyzed the listing related to Enfamil products, and the three invoices included in evidence that were submitted. The 9/1/18 invoice shows one unit purchased 5 U.S.C. § 552 (b)(7)(E). The Enfamil website shows that this price is consistent for a wholesale case of 6 12.4 Oz cans. No cans or cases of Enfamil were found in the 11/3/18 and 11/17/18 invoice from 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Other invoices were not submitted as evidence to corroborate the listing advanced. Retailer Operations found that the owner did not submit sufficient evidence to show that Appellant acquired the inventory of baby formula to support the contention regarding the sale of several cases at a time.

Retailer Operations gave a 40% markup to the receipts advanced by the owner. The owner submitted enough invoice documentation to cover the SNAP redemptions for the review period. Although the retailer demonstrated he had inventory; sufficient inventory alone does not explain the suspicious patterns of SNAP transactions listed in the Charge letter. This is particularly the case since many of the items on the invoices were apparently for hot food preparation, and hot foods are not eligible for purchase with SNAP benefits. The invoices reinforced that Appellant was operating mainly as a takeout deli restaurant with a high volume of cold and hot prepared foods. As such, it would not likely be a beneficiary's main store for monthly food purchases for home preparation of staple foods. Retailer Operations determined that the store's inventory gave no indication that the firm would be likely to have SNAP redemption patterns that differ significantly from nearby, authorized similar store-typed competitors.

While some households may have conducted legitimate SNAP transactions at Appellant, insufficient evidence was presented to support this argument. The owner provided no itemized cash register tapes of SNAP sales for the review months. The pricing information advanced for a large number hot food items and the hot items noted in the store photos indicate that Appellant may have been selling hot foods in exchange for SNAP benefits, a regulatory violation. No federal business tax returns or actual state tax filings were provided. The business banking statements were submitted. These supported that Appellant had payment transactions with vendors. However, Retailer Operations did not find the banking information adequate to explain the transactions cited in the pattern Attachments to the Charge letter. Thus, the owner has not provided a preponderance of evidence that the transactions on the Attachments are for eligible foods rather than the result of trafficking.

The evidence that Appellant violated the SNAP regulations is furnished in the Charge letter Attachments. SNAP transaction data is provided to FNS via each State's EBT processor on a daily basis in a single layout and format that is standardized nationwide. The SNAP transactions are validated and loaded into a database for subsequent analysis. The USDA uses pre-defined criteria or patterns for potential fraud detection. Pre-formatted reports provide information on those stores and transactions meeting the pre-established criteria. The system provides a series of reports that compare a specific store's data to the average for its firm type or to user-selected comparison stores. While the system identifies a retailer for further investigation, the actual case

of trafficking is made by Retailer Operations staff on the basis that the transaction patterns cannot be explained based on the store size, layout, inventory, and other factors.

The regulations at 7 CFR §278.6(a), establish the authority upon which FNS may disqualify any authorized retail food store, and state: “Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through inconsistent redemption data (and) evidence obtained through a transaction report under an electronic benefit transfer system.” Therefore, that Retailer Operations used transaction data, in addition to an onsite store visit report, and an analysis of household shopping behavior, in rendering a finding that violations indicative of trafficking were occurring, is as valid a means of establishing facts as direct evidence obtained through an on-site investigation and the eye witnessing of trafficking.

With regard to the owner’s contention that the business will suffer financially if it is disqualified from SNAP, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to either the owner or the firm resulting from the imposition of such sanction. To excuse store ownership from an assessed administrative penalty based on a purported economic hardship would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

### **CIVIL MONEY PENALTY**

The regulations at 7 CFR Section 278.6(i) specify the criteria for a firm’s eligibility for a CMP in lieu of permanent disqualification for trafficking. The owner failed to submit substantial documentation to show that he met the four regulatory criteria to qualify for a CMP. Accordingly, Retailer Operations determined that Appellant was not eligible for a trafficking civil money penalty.

### **CONCLUSION**

Retailer Operations’ analysis of Appellant’s SNAP transaction data was the primary basis for its determination to permanently disqualify Appellant. The record also included onsite store photographs, an onsite inventory and store report, household shopping analyses and other reports that provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits.

Based on empirical data and in the absence of a preponderance of evidence presented by Appellant as to the legitimacy of the transactions, it is more likely that violations did occur as charged by Retailer Operations. The record confirms that Retailer Operations’ denial of a trafficking CMP was also proper per the applicable regulations. Therefore, the decision to impose a permanent disqualification against Appellant is sustained. This decision is effective 30 days after receipt of the decision.

## **RIGHTS AND REMEDIES**

Attention is called to Section 14 of the Food and Nutrition Act of 2008 and to 7 CFR § 279.7 of the regulations with respect to applicable rights to judicial review of this decision. 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 Appellant's owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this decision.

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

M. Viens  
Administrative Review Officer

June 17, 2019