

**U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review Branch  
Alexandria, VA 22302**

**Blue Nile Market LLC,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0199255**

**FINAL AGENCY DECISION**

The record indicates that Blue Nile Market LLC (Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). It is the decision of the USDA that there is sufficient evidence to support a finding that the permanent disqualification from participation in the SNAP as an authorized retail food store, 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 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**

By Charge letter dated June 28, 2017, Retailer Operations informed the owners that it had compiled evidence that Appellant had violated the SNAP regulations based on electronic benefit transfer (EBT) transactions that “establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm.” The sanction for trafficking is permanent

disqualification. The record shows that Appellant replied to the Charge letter July 6, 2017 and September 13, 2017.

Retailer Operations issued a Determination letter dated September 27, 2017. This letter informed Appellant that it was permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. Retailer Operations considered Appellant's eligibility for a civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. Appellant was not eligible for the CMP because insufficient evidence was submitted timely to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP per the regulations cited.

By letter dated October 6, 2017, the owners, via counsel, appealed Retailer Operations' determination and requested administrative review. The appeal was granted by letter dated October 12, 2017. Counsel provided additional information by letter dated November 7, 2017.

### **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 which 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 in part: "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 on review were based on an analysis of SNAP EBT transaction data during the period of December 2016 through March 2017. This involved four patterns of EBT transaction characteristics which are indicative of trafficking:

1. There were an unusual number of transactions ending in a same cents value.
2. Multiple transactions made from individual benefit accounts within unusually short time frames.
3. The majority or all of individual recipient benefits were exhausted in unusually short periods of time.
4. Excessively large purchase transactions were made from recipient accounts.

### **APPELLANT’S CONTENTIONS**

The following may represent a brief summary of the contentions however, in reaching a decision attention has been given to all contentions presented, including any not specifically recapitulated.

- I deny your allegations of trafficking.
- The decision was arbitrary and capricious. The Department has failed to identify guidelines or definitions in connection with the claims set forth. There are insufficient facts to support the claims of trafficking.
- There is nothing set forth which support the charge of trafficking. The customers are refugee immigrants from rural areas of Africa. Historically they enjoyed very limited access to shopping resources.
- Most customers shopped for a household on a monthly basis and they continued with these practices after relocating to the United States.

- The Department failed to include the factual basis for its determination and ignored Blue Nile's responses and credible explanation.

## 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:** This Attachment lists 387 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. When compared to two nearby small groceries and two medium groceries, Appellant had 504 transactions on this Attachment versus zero at three stores, and 161 at the other.

**5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. When there are a disproportionate number of transactions that end in same cents values it appears that these amounts are contrived. In the absence of compelling evidence to the contrary, these transactions are indicative of trafficking.

Contentions:

- The majority of the transactions listed **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** appears the household purchased lamb.
- There is no sales tax applied to the purchase of meat.
- The Department has made no effort to compare the sample transactions with the total volume of business conducted by the store.

The owners provided vendor invoices and receipts in support of their inventory.

**5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Therefore, these invoices were not analyzed. Some lamb legs were apparently acquired from a vendor, but the dates are not seen or are outside of the review period. No purchases of whole lambs appear on the vendor invoices.

**5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Thus, the invoice evidence does not support that Appellant stocked sufficient eligible food to meet its SNAP redemptions.

No pricing information was advanced other than the range of prices for a whole lamb and some items' prices that can be seen on the store photos. The photos show mostly low cost items such as bags of spices for \$1.99, pitted dates for \$5.99, rice for \$17.99, sugar wafers for \$1.99 and a can of Nestle Nido for \$5.99. No customer affidavits were provided to support that prices at Appellant **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** due to the purchase of lambs.

**Attachment 2:** This Attachment lists 94 transactions in 46 sets of two or more transactions, conducted by 32 different households **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

**5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. When compared to the four stores located within a 2.24 mile radius, Appellant had the highest number of data sets meeting the parameters of this Attachment.

Contention:

- It is not uncommon for customers to visit our store multiple times in short periods of time.

According to the record there at least five comparable or better-stocked authorized stores within a one mile radius of Appellant including: one small grocery, one supermarket and three super stores. The data shows that 16 of the 32 households flagged at Appellant made a SNAP transaction at a large grocery, a supermarket or a super store on the same day they conducted a transaction at Appellant; within two days, 26 HHs 5 U.S.C. § 552 (b)(6) & (b)(7)(C), conducted transactions at larger stores. Thus, households flagged on this Attachment did access other larger stores to meet their grocery needs.

Insufficient evidence was presented to support that these households conducted legitimate short time transactions at Appellant. The owners provided insufficient vendor invoices of eligible items acquired during the review period to support Appellant's SNAP redemptions. No federal or state tax submissions, and no banking records were provided to support that no trafficking was occurring at Appellant. No comprehensive price list of eligible foods was advanced, and no itemized cash register tapes were provided for the review months. No customer affidavits were advanced. Thus, the owners have not provided a preponderance of evidence that the transactions on this Attachment are for eligible foods

**Attachment 3:** Listed are 68 single and data set transactions, conducted by 35 different households. A household's depletion or near depletion of its benefit allotment in one or a few transactions, leaving a small amount, if any benefits, for the rest of the month, is inconsistent with the normal shopping behavior of SNAP benefit households. Therefore, transactions in which SNAP benefits are exhausted in unusually short periods of time are indicative of trafficking.

Contentions:

- Culturally, the customers resided in extremely remote areas. They traveled to small cities or towns on a monthly basis to purchase food. The customers continued with these practices after relocating to the United States.
- The majority or all of individual recipient benefits were exhausted in unusually short periods of time was due to the purchase of whole/half lambs priced at \$250-\$350.

No customer affidavits were presented to support the shopping pattern described.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The onsite store visit photographs do not show any slaughtered whole lambs for purchase at the time of the store visit. Furthermore, Retailer Operations found that the vendor invoices did not indicate any lamb was purchased during the review period. Absent more evidence, the owners have not adequately addressed this Attachment.

**Attachment 4:** This Attachment lists 337 transactions conducted by 132 different households 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The transactions listed are for amounts that exceed the average transaction amount for the same store type in the same state 5 U.S.C. § 552 (b)(7)(E). 5 U.S.C. § 552 (b)(7)(E). This is irregular.

Contentions:

- Many of these families are large in number and tend to purchase large amounts of meat.
- We are well known in the community for providing whole and half lambs. We serve a large number of refugees, lamb is their preferred meat. We are one of the few markets who provide this type of meat in bulk.
- The purchase of one lamb, which costs anywhere from \$250-\$350 might feed a family for an entire month and we are one of few markets that provide this type of meat in bulk.
- The excessively large purchase transactions made from recipient accounts are related to the purchase of whole lambs.
- There is no definition of excessively large, and there are no guidelines which would provide a standard.
- One owner opened a business called Halal Meat Market Live Sheep Farmer. He maintained a herd of sheep and goats to provide fresh meat to his community of refugees.

As noted, the invoices of eligible food stock were dated largely outside of the review months, and as such did not support the volume of SNAP redemptions for the review time frame. The vendor invoices submitted by Appellant do not reveal any lamb was purchased during the review period. If one owner is providing Appellant's sheep and goat inventory, insufficient evidence of such has been provided. Also, live animals are not permitted to be exchanged for SNAP benefits.

Retailer Operations found it suspicious that subsequent to receipt of the Charge letter, Appellant's SNAP redemptions in July 2017 fell **5 U.S.C. § 552 (b)(7)(E)** from redemptions in June 2017. If Appellant were operating in accordance with the regulations, such a precipitous fall would not be likely. This data indicated a firm becoming cautious of USDA oversight and making attempts to curtail their violative activity.

A shopping analysis shows that recipients who frequented Appellant also shopped at larger stores, yet spent high dollar amounts at Appellant. No recipient affidavits were advanced to support the contentions that HHs sought Appellant for lambs or that these HHs had unique shopping patterns. The charged owners were given the opportunity to provide evidence of the legitimacy of the transactions listed. The owners provided some explanations as to why the transactions listed were legitimate and while these may be valid, they failed to provide sufficient supporting evidence.

SNAP authorization is an administrative privilege, granted upon proof of eligibility and continued proof of compliance with the governing laws and regulations. The USDA has the obligation to safeguard the public's trust and financial interests. The agency labors to do so by operating the program in accord with the statute enacted and the regulations promulgated to implement the provisions thereof. As such, contentions that the agency has not proven its case are largely irrelevant, and an ineffective means by which to demonstrate that Appellant has not engaged in violative activity.

An Appellant who seeks to set aside an agency sanction must focus its probative efforts on providing evidence by a preponderance that the transaction activity at issue is in fact not due to SNAP benefit trafficking. Since permanent disqualification is warranted on the first

occasion of trafficking, it is Appellant's burden to raise material issues of fact as to the Attachment transactions set forth as suspicious. While due process is honored, the agency is not burdened with proving to Appellant's satisfaction that FNS has correctly imposed the sanction at issue. Assertions that the firm has not violated program rules, by themselves and without a preponderance of supporting evidence, do not constitute valid grounds for dismissal of the current charges of violations or mitigate their impact. Rather it is Appellant's burden to demonstrate that it has not engaged in SNAP benefit trafficking by presenting a preponderance of evidence of same. This burden has not been met.

Counsel contends there is no proof or evidence 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 EBT transactions are validated and loaded into a database for subsequent analysis. USDA has a system that scans all retailer transactions at the beginning of each month for the prior month. The system 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 spreadsheets and graphs that compare a specific store's data to the average for its firm type or to user-selected comparison stores.

The system utilizes mapping software which translates the location address information into geo-codes and enables the user to map the locations of selected authorized stores and track recipient transaction locations. While the system identifies a retailer for further investigation, the actual case of trafficking is made by retailer compliance staff on the basis that the transaction patterns cannot be explained based on the store size, layout, inventory, and other factors. Users are also able to supplement and/or confirm their analytic documentation by accessing the applicable state's EBT processors' administrative systems through web access to the applicable state system. Therefore, that Retailer Operations used computer printouts of transaction data and other reports, in addition to onsite store visit information 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 onsite investigation and the eye witnessing of trafficking.

### **CIVIL MONEY PENALTY**

Retailer Operations determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations. These regulations specify the criteria for a firm's eligibility for a CMP in lieu of permanent disqualification for trafficking. The owners did not submit documentation to prove that Appellant met the trafficking CMP requirements as stipulated in the regulations. The criteria listed are, as a whole, specifically identified as a minimum standard that firms must meet in order to be eligible for such a penalty. Accordingly, Retailer Operations determined that Appellant did not qualify for a civil money penalty in lieu of a permanent disqualification.

## **CONCLUSION**

Retailer Operations' analysis of Appellant's SNAP transaction record was the primary basis for its determination to permanently disqualify Appellant. This data 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 compelling evidence for the legitimacy for the Attachment patterns cited, by a preponderance of the evidence, it is more likely true than not true that violations did occur as charged by Retailer Operations. Therefore, the decision to impose a permanent disqualification against Appellant is sustained.

Retailer Operations also determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations. Under review, the denial of a trafficking CMP is sustained.

## **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 and to Section 279.7 of the regulations (7 CFR § 279.7) with respect to applicable rights 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 the Appellant's owners 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, 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

November 28, 2017