

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

Classic Deli Corp,

Appellant,

v.

Case Number: C0180645

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a permanent disqualification of Classic Deli Corp. (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Classic Deli 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.”

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified based on an analysis of EBT transaction data from December 2014 through February 2015. This involved the following transaction patterns which are common trafficking indicators:

- There were an unusual number of transactions ending in a same cents value.
- There were multiple transactions made from individual benefit accounts in unusually short timeframes.

- The majority or all of an individual recipient's SNAP benefits were exhausted in unusually short periods of time.
- Excessively large purchase transactions were made from recipient accounts.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Classic Deli Corp. for SNAP participation as a small grocery store on March 15, 2011. In a letter dated April 14, 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 between the months of December 2014 and February 2015. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In a letter dated April 22, 2015, the Appellant, through its original attorney, Melvin Greenwald, responded to the trafficking charges, vehemently denying that trafficking was occurring at the store. The Appellant provided a seven-page written response to the charges which outlined its contentions. The key points in the Appellant's response included the following:

- The transactions listed in the charge letter are not trafficking, but simply a reflection of the firm's normal business practices.
- The Appellant would not jeopardize its livelihood by engaging in illegal activity.
- The agency's use of EBT records as the sole basis for the charges is inadequate. It is not based on fact and the conclusions reached are unfounded and without merit.
- The agency's inconclusive and arbitrary decision to consider permanently disqualifying the firm will deprive the Appellant of its business and cause it to suffer irreparable injury and damage. Further, to base a decision on such an accusation is to deprive the vendor of due process.

In addition to its contentions related to the trafficking charges, the Appellant requested a large number of documents from the agency in a request made in accordance with the Freedom of Information Act (FOIA). It should be noted that the Retailer Operations Division withheld its determination on the case pending completion of the FOIA process.

On July 9, 2015, the agency completed its FOIA response and delivered it to Appellant's counsel. In a letter dated August 19, 2015, Appellant's counsel submitted an appeal of the agency's FOIA response.

Upon the death of Attorney Greenwald, the case was assumed by attorney Jess M. Berkowitz. On June 15, 2018, the FOIA appeal was completed by FNS and a written FOIA response was delivered to Appellant's new counsel on June 18, 2018. On that same date, June 18, Appellant's counsel received a letter from the Retailer Operations Division indicating that with the FOIA documents now in hand, the Appellant had 10 calendar days to submit any additional contentions in response to the April 14, 2015, charge letter. As best as can be determined, Appellant's new counsel did not offer any further response or contentions.

After reviewing the Appellant's original response to the charges and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated July 3, 2018. This letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the regulations, but determined that a CMP was not appropriate in this case 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 SNAP violations.

In a letter postmarked July 16, 2018, the Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

It should be noted that in its request for review Appellant's counsel took exception to a sentence found in the July 3, 2018, determination letter which states, "Consideration has been given to the information and evidence available to us relating to our letter of charges dated April 14, 2015, to which you did not reply" (emphasis added). The Appellant argued that FNS should vacate the determination "that the violations...occurred at my client's firm due to a failure to reply."

This review acknowledges that the phrase, "to which you did not reply," may be confusing because the Appellant, through its original counsel, did, in fact, make a timely response to the charges. However, this phrase, while perhaps misleading, was almost certainly intended as a reference to the fact that Appellant's counsel not offer any kind of reply after receiving the agency's response to the FOIA appeal on June 18, 2018.

After reviewing all documentation in this case, this review is satisfied that the Retailer Operations Division fully considered all contentions presented by the Appellant in its original response to the charge letter prior to making a disqualification determination. As such, this review finds the Appellant's request to vacate the determination to be without merit.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular,

7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

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

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

7 CFR § 278.6(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, [or] evidence obtained through a transaction report under an electronic benefit transfer system....

7 CFR § 278.6(e)(1)(i) states:

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

7 CFR § 271.2 states, in part:

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

7 CFR § 271.2 states, in part:

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

7 CFR § 278.6(b)(1) states, in part:

Any firm considered for disqualification...under paragraph (a) of this section...shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification.... The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter...

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under

paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(b)(2)(ii) states, in part:

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(b)(2)(iii) states:

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.

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...

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant requests consideration of a civil money penalty in lieu of permanent disqualification.
- USDA has wrongfully concluded that the firm has engaged in trafficking activities. This erroneous conclusion was made solely on an analysis of records, with no additional investigation.
- Appellant owner vehemently denies that he or anyone involved with or employed by the business has engaged in such activities.
- FNS must consider Section 278.6(d) of the SNAP regulations before making a disqualification determination. Because there are no specific violations committed by personnel of the firm and because there has been no prior action by FNS to warn the firm about the possibility that violations are occurring, the only remaining basis for disqualification is other evidence that shows the firm's intent to violate the regulations. However, in this case, there is no evidence that shows the firm's intent to violate the regulations.
- The firm is open 24 hours a day, seven days a week. Because of its location, a substantial portion of its sales is due to its SNAP participation. EBT transactions in exchange for eligible items constitute approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of the firm's

sales, and provide the income necessary to keep the business profitable. The firm would not jeopardize this source of business and its livelihood by engaging in illegal activity.

- The store is staffed by up to four full-time employees, with one cash register and hand baskets. It is a large-sized grocery store/deli approximately 1,200 square feet in size.
- The Appellant has continuously trained and tested its employees concerning SNAP regulations from the time the store was authorized. During this time, the firm maintained an exemplary record. This unblemished record is evidence of the Appellant's continued compliance with the law and with its training and supervision of its employees.
- The store is well-stocked with eligible staple foods at all times. The vast majority of people who shop at the store are regular customers.
- With no evidence of intent to violate the regulations, and because there is no other basis to disqualify the firm from SNAP, FNS should instead subject the firm to a civil money penalty in lieu of disqualification because, in accordance with § 278.6(a), a disqualification would cause hardship to participating households. Appellant requests an immediate hearing to make this determination.
- The firm provides necessary food items to the community, which is comprised of many apartment complexes and houses with large families within a two-block radius of the store. The nearest supermarket is approximately a quarter of a mile away and closes early in the evening. The store is conveniently located to bus stops, the subway, and other businesses.
- There is a great need for families in the area to have access to basic food items like infant formula, milk, eggs, baby food, cereal, bread, juice, etc. at all hours of the day. The store also sells meat, fruits, vegetables, prepared foods, canned goods, frozen meats, and other cooking ingredients. It also sells snacks, drinks, desserts, candy, etc.
- Baby food items, such as Enfamil, which sells for \$19.99 per container, are expensive, but common items sold in volume in this store.
- The transactions listed in the charge letter are legitimate transactions that occur in the normal course of business.
- Regular customers often make telephone calls to the store to place large grocery orders and then personally pick up the orders and then purchase additional items. They cannot do this at a supermarket.
- Households buy items both on their way to and from schools, churches, and child care centers. Multiple transactions such as these are not unlawful. The firm's business model is designed to accommodate the needs of regular and repetitive customers.
- All transactions listed in the attachments are a legitimate result of the Appellant's business model, which has a right to make business judgments under the law without being accused and suspected of wrongful behavior. It is unconscionable that FNS can cause an owner to be permanently disqualified merely based on his business judgment without any other proof of wrongdoing.
- Attachment 1 (transactions with a same-cents value):
 - These are all legitimate transactions and none were ever in exchange for cash.
 - Many of these transactions resulted from rounded off a bill for a regular customer solely for their benefit in keeping track of the amounts left on their EBT cards.
- Attachment 2 (multiple transactions from the same household account):
 - These are all legitimate transactions and none were ever in exchange for cash.
 - EBT card usage is not within the control of the Appellant.

- Many recipients allow others to use their card or they themselves use the card for other families. Other transactions were from households who live in close proximity to the store and visit the store regularly.
- Most of these customers do not own motor vehicles and as such, need to make multiple trips to transport their purchases in plastic shopping bags. Many do not have the capacity to carry heavy shopping bags through the street and up into their apartment buildings.
- This shopping behavior is the result of a business decision made by the Appellant to allow customers to purchase items in the store throughout the day and night. The Appellant is permitted under the law to make such decisions. The fact that there are multiple transactions on the same card is in no way indicative of trafficking, and such transactions are not unusual.
- Additionally, it is not credible to assert that the Appellant would risk permanent disqualification from SNAP for the sum of the transactions found in Attachment 2 and where it is unknown by FNS what portion, if any, of that amount was exchanged for cash.
- Attachment 3 (depletion of one's SNAP benefits in a short period of time):
 - Many of these transactions were conducted immediately after SNAP benefits were added to recipients' EBT cards. Accordingly, the recipients use much of the balance of their account in the Appellant store.
 - None of the transactions are indicative of trafficking and all are from well-established customers who shop for large families when their monthly allotment is added to the EBT card.
 - Additionally, it is not credible to assert that the Appellant would risk permanent disqualification from SNAP for the sum of the transactions found in Attachment 3 and where it is unknown by FNS what portion, if any, of that amount was exchanged for cash.
- Attachment 4 (excessively large transactions):
 - Many of these transactions were conducted immediately after SNAP benefits were added to recipients' EBT cards. Accordingly, the recipients use much of the balance of their account in the Appellant store.
 - None of the transactions are indicative of trafficking and all are from well-established customers who shop for large families when their monthly allotment is added to the EBT card.
 - The transactions resulted from well-established customers placing large orders over the phone and paying for the food when they arrived at the store.
 - If FNS averaged out the amount of the firm's transactions, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which is not unusual under these circumstances.
 - When winter temperatures are low, many customers only go outside when they need to and they buy in bulk to avoid having to make multiple trips in the cold weather. A customer's shopping habits should not be interpreted in a negative manner with an inference that trafficking has occurred.
 - While there are larger stores in the area, those supermarkets are not preferred by the residents, as they are crowded with long lines, selling the same items for

similar prices. There is nothing unusual about customers in New York City using a grocery store to buy their groceries. It is a cultural way of life.

- The transactions are nothing more than the expensive cost of goods in New York City, where all food items are costly.
- It is patently ridiculous that after years of participation in SNAP that this vendor would risk permanent disqualification for the mere sum found in Attachment 4. It is unknown by FNS what portion of that amount might have been exchanged for cash, if any.
- Nothing in the attachments reveals conclusively or even by a fair preponderance of the credible evidence that the Appellant exchanged SNAP benefits for cash. The Agency has not provided a basis for disqualification under § 278.6(d).
- It is ludicrous for FNS to refuse to allow a vendor to sell large containers of Enfamil without risking allegations of trafficking.
- FNS's use of EBT records in sole support of what it claims to be a serious unlawful activity is inadequate. It is not based on fact, and the conclusions reached are unfounded and without merit.
- A permanent disqualification based on this inadequate proof will deprive the Appellant of its business and cause irreparable injury and damage. The decision made by FNS is inconclusive and arbitrary. The EBT transactions should require a more careful review before making such a major decision based totally upon computer-generated reports which only create an unfounded inference and presumption of wrongdoing.
- Nothing was provided to the Appellant except a sampling of transactions that allegedly constitute unlawful activity. No specifics were set forth concerning the other transactions that occurred in the store. As such, the Appellant is not afforded the opportunity to fully answer and challenge the charge lodged against it. The charge letter is nothing more than an unsubstantiated general accusation. It has no merit; and to base a decision upon such an accusation is to deprive the Appellant of due process.
- There is no definitive factual allegation as to why the transactions listed are indicative of trafficking in the type of firm operated by the Appellant.
- It appears that the disqualification decision is based upon a predetermined standard of EBT activity for the type of firm owned by the Appellant. If this is the case, then a statistical sampling or survey has been used to erroneously determine that the normal transactions in the store significantly exceed the normal practice for the Appellant's type of firm.
- FNS has failed to specifically describe the type of firm operated by the Appellant and it has failed to investigate and reveal which of the precise transactions constitute trafficking activities. It would be expected and required in so serious a matter as this that FNS would investigate and evaluate the specific activities by the Appellant, which has an unblemished record in SNAP, before issuing a permanent disqualification.
- FNS has failed to establish intent, which is an essential element of the basis for its decision to permanently disqualify the Appellant from SNAP. A statistical analysis based on EBT transactions cannot be a basis for FNS to determine that the Appellant's intent was to violate the regulations.
- FNS should be investigating the individual cardholders to determine whether they are misusing and abusing their participation in SNAP. It is not the responsibility of the

Appellant to deny an EBT cardholder any services or to police violations or misuse by the cardholders.

- Classic Deli Corp. only accepts SNAP benefits for eligible items and regularly refuses to engage in requests for cash in exchange for SNAP. It is active in its vigilance to prevent fraud, but cannot act as a policeman where the abuse is being perpetrated by the cardholder.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions and evidence presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The primary issue for consideration in a case based on suspicious SNAP redemption data is whether or not the Retailer Operations Division adequately established that the Appellant firm engaged in the violation of trafficking. In other words, did the Retailer Operations Division, through a preponderance of the evidence, establish that it is more likely true than not true that the irregular and unusual transactions cited in the charge letter were the result of trafficking?

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm's EBT transactions, but also information obtained during a February 12, 2015, store visit which was conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report and photographs documented the following store size, description, and characteristics:

- Classic Deli Corp. is a small grocery store, approximately 800 square feet in size, operating in Brooklyn, Kings County, New York.
- At the time of the contractor's visit, the firm did not have any shopping carts or hand-held shopping baskets for customer use, which is not unusual for stores of this size. Customers shopping in such stores generally purchase only as much food as they can carry in their arms.
- The store visit photographs show one cash register for food purchases and agency records reflect the use of one EBT point-of-sale device.
- It appears that the firm does not use optical scanners to process transactions.
- The store's staple food stock is sufficient in each of the four staple food categories.
- SNAP-eligible, non-staple accessory food items available at the store include carbonated and uncarbonated drinks, snacks, candy, and condiments. The store also sells ineligible, nonfood items, including tobacco products, personal care items, and other miscellaneous household merchandise.
- The store also sells hot and cold prepared foods, including hot or cold deli sandwiches, breakfast sandwiches, fresh salads, hot coffee, and dinner plates, such as chicken and rice

for \$5.99. The firm also sells sliced deli meat and cheese by the pound, but the prices for these items are not posted.

- There is no indication from the store visit report that the firm has a special pricing structure. From all indications, most prices appear to end in 9, such as \$0.99, \$1.79, \$3.99, etc.
- Among the notable items for sale at the store are cans of Enfamil and Similac infant formula, which are located behind the checkout register. It should be noted that the vast majority of SNAP households that contain infants and children under the age of five also participate in the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). It is uncommon for such households to purchase expensive cans of infant formula with their SNAP benefits; rather, they normally use WIC vouchers to make such purchases.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a small grocery store or corner market, where households normally purchase a limited number of items to complement their overall dietary needs. There was no indication that SNAP households would be inclined to regularly visit Classic Deli Corp. to purchase very large quantities of groceries, especially considering the absence of shopping carts and baskets and the availability of larger SNAP-authorized grocery stores in the area. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of nearby, similar-sized competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: There were an unusual number of transactions ending in a same cents value. This attachment lists 299 transactions ending in .00, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits, and 173 transactions ending in .50, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits. 5 U.S.C. § 552 (b)(7)(E). As noted earlier, the contractor's report shows that most prices end with a cents-value of 9. As such, the likelihood that so many transactions, which would logically consist of random items from the store's shelves, would so frequently and legitimately end in .00 or .50 is very low.

The Appellant argued that many of these transactions were the result of rounding off a transaction total to an even-dollar amount or to an amount ending in .50. According to the Appellant, this was done for regular customers to help them keep track of the amounts left on their EBT cards.

The Appellant's argument, however, is tenuous. A customer's remaining balance is listed at the bottom of every EBT transaction receipt where the customer can plainly see it. Thus, there is little rationale for rounding transaction totals at checkout. Furthermore, thousands of other transactions at the store did not end in even dollar amounts or .50 amounts. If the firm was concerned about helping customers keep track of their EBT balances, they would round up or down virtually all transactions at the store.

It should be noted that the Appellant did not provide any supporting evidence in either its response to the charge letter or in its request for administrative review. Assertions that the firm has not

violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the trafficking charges.

Without a reasonable explanation or compelling evidence to demonstrate that the transactions in Attachment 1 were legitimate purchases of eligible food, this review has little option but to conclude that the transactions listed in Attachment 1 were likely due to trafficking violations.

Charge Letter Attachment 2: Multiple transactions were made from individual benefit accounts in unusually short timeframes. This attachment lists 78 sets of transactions (175 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E).

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C), an extraordinary amount for a small corner store like Classic Deli Corp., which has no shopping carts or baskets and few expensive food items. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Considering the amount of food it would take to add up to these transaction totals, and considering that the firm has no shopping carts or baskets, it seems very unlikely that these could be legitimate transactions.

The Appellant has made a number of contentions related to Attachment 2, including the argument that EBT card usage is not within the control of the Appellant. The Appellant claims that many recipients allow others to use their card or they themselves use the card for other families. The Appellant also claims that most customers in the area do not own motor vehicles and as such, need to make multiple trips to transport their purchases. Finally, the Appellant argues that it is permitted to make business decisions which allow customers to shop at the store throughout the day and night, and states that the firm would not risk permanent disqualification for the sum of the transactions found in Attachment 2.

As with the contentions for Attachment 1, the Appellant has offered no evidence to support its claims. Anecdotal explanations without supporting documentation do little to convince this review that the transactions in Attachment 2 were legitimate purchases. It should be made clear that SNAP regulations do not provide limitations on the number of transactions that can be made by SNAP households or how large the individual transactions can be. However, the transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display patterns of use that are inconsistent with the store's documented physical characteristics and in comparison with similar stores in the area. It should be further noted that the transactions identified in the charge letter are not marginally abnormal, but decidedly so. This review does not contend that the EBT transactions detailed in the charge letter are overtly suspicious when they occur on an occasional or intermittent basis. But when such transactions form repetitive and questionable patterns on a consistent basis over a substantial period of time, such activity is considered highly irregular, and a firm's intent to comply with program regulations is called into question.

Because the Appellant has offered little explanation beyond conjecture and has submitted no evidence to support its claims, it is reasonable for this review to conclude that trafficking was a likely cause of the transaction patterns listed in this attachment.

Charge Letter Attachment 3: In a series of transactions, the majority or all of an individual recipient's benefits were exhausted in unusually short periods of time. This attachment lists 25 sets of SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

5 U.S.C. § 552 (b)(7)(E). It makes little sense that a household would spend almost the entirety of its SNAP allotment in a single transaction or in a series of rapid transactions at this store.

For example, **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

The Appellant contends that many of the transactions in Attachment 3 were conducted shortly after SNAP benefits were added to recipients' EBT cards. Accordingly, the recipients spent much of their allotment in the Appellant store. Additionally, the Appellant argues that the transactions are from well-established customers who shop for large families when their monthly allotment is added to the EBT card. Finally, as it did in Attachment 2, the Appellant argues that it would not risk permanent disqualification for just a few thousand dollars.

While it is possible, even likely, that some customers spend large portions of their monthly allotment in a short period of time immediately after receiving their benefits, the question of why they would do so at a small store such as Classic Deli Corp. remains unanswered, particularly when much larger stores with greater variety are available in the area and when spending all of one's benefits at once is well outside of normal shopping patterns.

A 2011 government report on SNAP shopping patterns indicates that on average, after the first day of benefit issuance, approximately 80 percent of a household's allotment remains unspent. Even after seven days, 40 percent of benefits still remain unspent. It typically takes about two weeks to deplete 80 percent of one's benefits, and three weeks to deplete 90 percent.¹ Depleting a large portion of one's SNAP balance in a very short period of time, especially at a small store with no shopping carts or baskets, thereby leaving little or no benefits for the rest of the month, is inconsistent with normal shopping behavior of SNAP benefit households.

Unfortunately, the Appellant has not offered any evidence to go along with its contentions. Such evidence might have included itemized cash register receipts to help prove that the transactions were legitimate purchases of eligible food. The transactions listed in this attachment are highly unusual, especially in comparison with nearby similar-sized stores. Without compelling evidence to demonstrate that the transactions were valid, it is reasonable for this review to conclude that that they were likely the result of trafficking violations.

Charge Letter Attachment 4: Excessively large purchase transactions were made from recipient accounts. This attachment lists 503 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C).** These large transactions are not consistent with other small grocery stores in the state of New York. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a small grocery store in New

¹ See U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program*, by Laura Castner and Juliette Henke. Project officer: Anita Singh, Alexandria, VA: February 2011.

York was \$12.24. In Kings County, the average was even lower, at \$12.10 per transaction. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Given that the Appellant firm has a moderate inventory of staple foods and other SNAP-eligible foods, it is probable that there would be an occasional purchase where the transaction amount is high, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As such, there may well be some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 4. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from nearby, similar-sized competitors, especially considering the absence of shopping carts and baskets. The substantial number of high-dollar transactions in a three-month period calls into question the legitimacy of these transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering how many low-priced food items it would typically take to add up 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and considering that the store does not have any shopping carts or baskets, and given the fact that there are much larger grocery stores in the area with substantially greater inventory and variety, this review finds it unlikely that SNAP households would legitimately choose to spend large portions of their benefit allotments at a small store such as Classic Deli Corp.

It is also unusual that so many large transactions take place very late at night. For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Of course, there is no prohibition against shopping in the middle of the night, but it is highly irregular for most SNAP customers to make very large purchases at such hours. The Appellant has argued that the nearest supermarket closes early in the evening, but that is simply not true. According to agency records, there is a large grocery store located .33 miles from Classic Deli Corp. This store is also open 24 hours a day, seven days a week. A superstore located .34 miles from the Appellant store is open from 7:00 a.m. to midnight. So it is difficult for this review to imagine why a SNAP customer would choose a small store with no shopping carts or baskets to make a purchase for at least 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when a large grocery store or superstore is readily available in the area. Such stores would also have shopping carts to help transport large amounts of food.

With regard to the transactions in Attachment 4, the Appellant has again argued that SNAP recipients receive their benefits and then choose to spend most of them at the Appellant store. The Appellant claims that the transactions are all from well-established customers who shop for large families. Further, the Appellant claims that some customers place large orders over the phone and then pay for the food when they arrived at the store. The Appellant additionally claims that when winter temperatures are low, many customers only venture outside when necessary and they buy in bulk to avoid having to make multiple trips in the cold weather. The Appellant also argues that even though there are larger stores in the area, those supermarkets are not preferred by local residents, as they are crowded with long lines and sell the same items for similar prices. According to the Appellant, there is nothing unusual about customers in New York City using smaller grocery store to buy their groceries; it is a cultural way of life. Finally, the Appellant argues that goods are expensive in New York City and the transactions in Attachment 4 are simply a reflection of those costs.

Unfortunately, the Appellant has not offered a single piece of evidence to support its contentions or to prove that the transactions listed in Attachment 4 were legitimate purchases of eligible food. For example, the Appellant argues that it would be ludicrous for FNS to refuse to allow a firm to sell large containers of Enfamil without risking allegations of trafficking. Unfortunately, the Appellant has not submitted any evidence to show that Enfamil was a commonly purchased item by its SNAP customers. As stated earlier, most SNAP households with infants use WIC benefits to purchase infant formula rather than SNAP.

Additionally, there is no evidence to support the Appellant's assertion that customers shop less frequently in the winter or its claim that the firm regularly takes phone orders for groceries. There is no signage at the store or any other indicator to suggest that this service is even offered. The Appellant's failure or refusal to submit any evidence to support its claims in this case leaves this review with little option but to sustain the agency's disqualification action.

It should be reiterated that regulations do not limit the amount of benefits that can be spent in a single transaction. However, the firm has not been charged with exceeding any spending limitations. Rather, the patterns of spending that take place at the Appellant firm are highly irregular in comparison to other area stores. When such unusual patterns exist over a period of several months, suspicions of Program violations are aroused.

It is the finding of this review that the attachments furnished with the charge letter adequately identify the irregular patterns of SNAP transactions which indicate that trafficking was likely taking place. The transactions listed in the charge letter are highly unusual and substantially different from comparable stores in the area. Based on these and other factors, such as the store's physical characteristics and inventory, the case of trafficking is convincing.

In an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that trafficking did not occur. Unfortunately, the Appellant has not offered any evidence and its anecdotal contentions do not sufficiently address the specific transactions listed in the charge letter. Therefore, it is the conclusion of this review that the transactions in the charge letter were, more likely than not, the result of trafficking violations committed by the Appellant.

Trafficking Case based on EBT Data

One of the chief arguments by the Appellant relates to USDA's use of a fraud detection system known as ALERT. The Appellant contends that USDA's conclusion of trafficking was made solely on an analysis of EBT transaction records, with no additional investigation. It claims that such use of EBT records is inadequate to reach conclusions that violations have occurred. Further, the Appellant argues that a permanent disqualification based on inadequate proof will deprive the Appellant of its business and cause irreparable injury and damage. The Appellant believes that such a decision made by FNS is both inconclusive and arbitrary.

The Appellant additionally complains that the charge letter lacks specificity and that a general accusation of trafficking based on a sampling of transactions is unsubstantiated and deprives the

Appellant of due process. From the Appellant's perspective, the disqualification decision is likely based upon a predetermined standard of EBT activity for the type of firm owned by the Appellant.

Finally, the Appellant states that FNS has failed to specifically identify which of the transactions listed in the charge letter constitute trafficking activities. The Appellant argues that FNS should be required to investigate and evaluate the specific activities by the Appellant before issuing a permanent disqualification.

With regard to these contentions, this review acknowledges that a conclusion of trafficking cannot be drawn from EBT data alone, nor would it be possible to do so in a case based primarily on inconsistent redemption data. It is noted that USDA employs a computerized fraud detection tool to identify EBT transactions that form patterns having characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. FNS's Retailer Operations Division must still analyze the transaction data and patterns with other factors, such as observations from a store visit, an analysis of customer shopping behavior, and a comparison with similar stores in the area, and then render a determination as to whether or not the questionable transactions were, more likely than not, the result of trafficking. The legality of this method is identified in 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, [or] evidence obtained through a transaction report under an electronic benefit transfer system**" [Emphasis added.]

Prior to a disqualification determination, the accused firm is given ample opportunity to reply to the charges and provide any information it deems appropriate in justifying as legitimate the transaction activity detailed in the charge letter.

It should be noted that this reviewer has thoroughly examined the documentation and information provided by the Retailer Operations Division and has found no evidence to suggest that the agency simply manufactured numerical data and declared it to be trafficking. From all indications, the Retailer Operations Division obtained the EBT data, found it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough analysis before concluding that trafficking was likely occurring.

It is important to restate here that in an appeal of adverse action, the onus is on the Appellant to prove by a preponderance of the evidence that the administrative action should be reversed. Despite being given a specific list of questionable transactions, the Appellant has chosen to offer no evidence of any kind, such as itemized cash register receipts or inventory records, to prove that the specific transactions listed in the charge letter were legitimate purchases of eligible food.

It is the finding of this review, therefore, that the decision made by the Retailer Operations Division was neither arbitrary nor unsubstantiated. There is also no evidence whatsoever that the firm's due process rights have been violated. As such, the Appellant's contentions in regard to

the agency's use of EBT data provide no basis for dismissing the charges or for mitigating the penalty imposed.

Consideration of 7 CFR § 278.6(d)

SNAP regulations at 7 CFR § 278.6(d) state the following:

(d) Basis for determination. The FNS regional office making a disqualification or penalty determination 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.

The Appellant, through counsel, has argued that FNS must consider this regulation before disqualifying a store. It claims that because there were no specific violations committed by personnel of the firm and because there have not been any prior actions by FNS to warn the firm about the possibility that violations were occurring, the only remaining basis for disqualification is evidence that shows the firm's intent to violate the regulations. However, in this case, the Appellant claims that there is no evidence that shows the firm's intent to violate the regulations. According to the Appellant, nothing in the charge letter attachments reveals conclusively or even by a "fair preponderance of the credible evidence" that the Appellant exchanged SNAP benefits for cash. Therefore, the Appellant believes that the agency has not provided a basis for disqualification under § 278.6(d).

With regard to these contentions, the record clearly shows that the Retailer Operations Division properly considered the elements of § 278.6(d). The case record indicates that the Retailer Operations Division evaluated the firm's history with SNAP compliance (no prior violations were found) and determined that due to the seriousness of the allegations, a warning was not appropriate in this case. USDA is under no obligation to warn retailers when trafficking violations are occurring. The law is clear that when serious violations, such as trafficking, occur, permanent disqualification is the required penalty, even on the first occasion, as noted in 7 U.S.C. § 2021(b)(3)(B).

As to the element of "intent," this review acknowledges that a conclusion regarding one's intention to violate the regulations is difficult to draw from EBT data alone. However, the preponderance of evidence in this case most assuredly leans in the agency's favor. The highly unusual patterns of transactions over an extended period of time, particularly in comparison to similar stores in the area, strongly suggest that intentional violations of SNAP regulations were taking place. Conversely, the Appellant has not offered a single piece of evidence to counter the allegations against it. As noted earlier, in an appeal of an administrative action, the onus is on the Appellant to prove by a preponderance of the evidence that the administrative action should be reversed. The Appellant has clearly not met this standard. It should perhaps also be noted that the definition of trafficking contained in SNAP regulations at 7 CFR § 271.2 does not require an element of intent on the part of the violator.

It is the determination of this review, therefore, that the Retailer Operations Division appropriately considered the provisions of 7 CFR § 278.6(d) and that the Appellant's contentions in this regard do not provide a basis for dismissing the charges or for mitigating the penalty imposed.

Hardship to Appellant and SNAP Recipients

The Appellant, through counsel, has stated that in lieu of disqualification FNS should subject the firm to a civil money penalty because a disqualification would cause hardship to participating households. In support of this alternative penalty the Appellant claims that there are no other similar retailers in the immediate area and argues that the firm, which is conveniently located near schools, churches, family shelters, other businesses, and public transportation, provides necessary items to the community.

The Appellant further claims that because of its location, a substantial portion of its sales is due to its participation in SNAP. According to the Appellant, approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of the firm's sales are from EBT transactions. These transactions provide the income necessary to keep the business profitable. The Appellant argues that it is "patently ridiculous" that the firm would risk permanent disqualification, and therefore its livelihood, for the minimal amounts of money listed in the charge letter attachments. According to the Appellant, permanent disqualification will deprive the owner of his business and cause him to sustain irreparable injury and damage.

With regard to the contention that the community would experience hardship if the firm was disqualified, it is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and a household is forced to use its benefits elsewhere. Regulations at 7 CFR § 278.6(f) do allow, in some circumstances, for a civil money penalty to be imposed in lieu of disqualification when there is an absence of other SNAP-authorized retailers in the area. However, the regulations are clear that a CMP for hardship to SNAP households may not be imposed in lieu of permanent disqualification for trafficking.

As for the assertion that SNAP benefits are a significant part of the Appellant firm's business and the contention that the firm would suffer financially if the disqualification were to be upheld, Federal statute at 7 U.S.C. § 2021(b)(3)(B) makes it clear that disqualification for trafficking shall be permanent, even on the first occasion. 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 on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty.

To allow store ownership to be excused from being assessed administrative penalties based on a purported economic hardship to the store's ownership or to the firm itself would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of 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, the Appellant's contentions that the community will be adversely affected and that the firm may incur economic hardship based on the assessment of a disqualification do not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Civil Money Penalty

As noted earlier, the Retailer Operations Division determined that the Appellant firm was not eligible for a civil money penalty in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and training program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a civil money penalty to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate documentation within designated timeframes. The case record shows that the Appellant did not request a civil money penalty when it originally replied to the charge letter and there is no evidence that the Appellant submitted any documentation that would indicate that the firm had a compliance policy or training program of any kind.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

An analysis of the Appellant's EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify Classic Deli Corp. from SNAP participation. This data provided sufficient evidence for this review to conclude that the questionable transactions and patterns listed in the charge letter were more likely than not the result of trafficking violations committed by the Appellant. Likewise, the Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

Based on a review of all available information and evidence in this case, the decision to impose a permanent disqualification against the Appellant, Classic Deli Corp., under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

February 7, 2019