

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

**Farmers Deli Grocery,**

**Appellant,**

**v.**

**Case Number: C0167770**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the USDA that the record indicates that Farmers Deli Grocery (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the program, as initially imposed by the Retailer Operations Division was appropriate.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Farmers Deli Grocery by letter dated May 7, 2018.

**AUTHORITY**

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provide that “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS.”

**CASE CHRONOLOGY**

In a letter dated March 11, 2014, Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of September 2013 through February 2014. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

In a facsimile dated March 20, 2014, Appellant, through counsel, informed Retailer Operations Division that it was submitting an FOIA request and would provide a response to the charge letter once the documentation was provided. Appellant, through counsel, stated that there were numerous churches as well as community based programs in the immediate area of the business that purchased meat items in bulk. In a facsimile dated April 10, 2018, Appellant, through counsel, requested the SNAP household recipient information within the EBT Case Analysis as well as the deliberative portion of the Analysis under 5 U.S.C. § 522(b)(5). Counsel stated that a statistical review alone is an insufficient basis to find violations of the Federal Guidelines and Rules pertaining to the SNAP program. The record reflects that the FOIA Request was fulfilled and Counsel received all information and documentation that could be released in accordance with 5 U.S.C. § 552.

Appellant's counsel received the requested FOIA documentation however no response to the charge letter was received. After giving consideration to the Appellant's failure to reply and evidence of the case, Retailer Operations Division issued a determination letter dated May 11, 2018. This letter informed ownership that they were permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also states that Retailer Operations considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, Retailer Operations Division determined that Appellant was not eligible for the CMP because it failed to submit sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated May 15, 2018, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted.

### **STANDARD OF REVIEW**

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

### **CONTROLLING LAW**

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

7 CFR § 278.6(a) states, in part that, "FNS may disqualify any authorized retail food store...from further participation in the program if the firm fails to comply with the Food and Nutrition Act of 1977, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations,

inconsistent redemption data, **evidence obtained through a transaction report under an electronic benefit transfer system...**” (*Emphasis added*)

7 CFR § 278.6(e)(1) reads, in part, “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 that, “Eligible foods mean: 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)(2)(ii) states, in part, that: “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, 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.”

### **SUMMARY OF THE CHARGES**

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from September 2013 through February 2014. This involved the following transaction patterns which are trafficking indicators:

1. Excessively large purchase transactions were made from recipient accounts.

The first issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the identified irregular and questionable transactions were the result of trafficking in SNAP benefits.

### **APPELLANT’S CONTENTIONS**

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

- The basis for this review is that Farmers Deli has not been provided an adequate response to the FOIA request.
- The deli indicates that it does sell bulk meat items.
- The owner indicated that there were numerous churches as well as community based programs that did business with this establishment. Multiple turkeys were purchased by a church for Thanksgiving dinner during the year in question.

- It is imperative that the identity of the SNAP recipients be provided to Farmers Deli. Due process requires that necessary information such as the identity of recipients of SNAP benefits be provided to entities accused of improper trafficking conduct.

No additional information or documentation was provided during this review. The preceding may represent a brief summary of Appellant's contentions in this matter however, in reaching a decision, full attention has been given to all contentions presented, including any not specifically recapitulated or referenced herein.

## **ANALYSIS AND FINDINGS**

The FNS authorized the business as a small grocery store on January 15, 2009. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a September 27, 2013, store visit to the business conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- One cash registers and one POS device with a small counter area partially obstructed by other smaller items available for sale.
- Estimated to be approximately 850 square feet.
- No shopping baskets or carts available for customers.
- No adding machines or optical scanners were available at checkout. No specialty registers present.
- Store does not operate through a night window or plastic barrier with food stock behind the barrier.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- No unusual pricing structure such as ending most products with 00 cents and does not round transaction totals.
- No food stored in an area outside of public view and no food stored off site.
- Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
- Store stocks a significant amount of non-food items such as but not limited to paper products, household products, tobacco products, alcohol products, pet products and lottery tickets.
- Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products. No fresh fruits or produce, no fresh meat or poultry. Most meats are canned, packaged or frozen.
- Shelves were sparsely stocked and some stock contained a layer of dust.
- A kitchen/prepared food area with hot foods sold. A prominent menu board is displayed.
- A deli or prepared food section. Stock is not used in preparation of food.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.

The second issue for consideration is whether Retailer Operations Division has presented a convincing case that Appellant likely trafficked in 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's store during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

**Attachment 1 of the Charge letter - Excessively large purchase transactions were made from recipient accounts.**

There were 346 SNAP transactions that met the parameters of this attachment. Based on the results of the contracted store visit, the large transaction amounts are not consistent with the store's inventory of low priced foods. The firm does not offer food in bulk or any ethnic or specialty foods that sell for a high price. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

Appellant, through counsel, contends that that deli indicates that it sells meat in bulk and there were numerous churches as well as community based programs that did business with the store. Multiple turkeys were purchased by a church for Thanksgiving dinner during the year in question. With regard to these contentions, and as previously stated, the store visit documentation and photographs shows that the store does not offer food in bulk and does not offer any ethnic or specialty foods that sell for a high price. Although churches and community programs may account for some of the transactions it is unlikely that they would account for a large percentage of the 345 transactions cited in the charge letter.

Appellant, through counsel, did not provide any documentation as evidence of its contentions that the transactions are as a result of churches and community programs making bulk purchases of turkeys. Additionally there is nothing in the store visit documentation or photographs to indicate that meat, other than lunch meats, are sold in bulk to SNAP recipients or to other organizations. Moreover, store visit photographs show that Appellant prepared hot foods that contained meat products however those meats did not appear to be for sale in an uncooked state. No invoices or purchase receipts were provided and Appellant's store also does not appear to have the capacity to store large amounts of turkeys or other meat products in bulk.

It is important to note that the record reflects that there are three supermarkets and a superstore located less than one mile from appellant. There would be little reason for churches and community centers to shop at Appellant's store when there were larger better stocked stores with seemingly better pricing and selections available; especially when Appellant's store is minimally stocked selling mostly lunch meats and hot foods. Canned goods are carried in minimal quantities and there was minimal fresh product and dairy products. No fresh meats were documented as being stocked or sold at the store.

Based on the above analysis, the Retailer Operations presented a convincing case that the Farmers Deli Grocery trafficked in SNAP benefits which the Appellant failed to adequately rebut. The attachments furnished with the charge letter identify the irregular patterns of SNAP transactions which indicate that trafficking was taking place at the firm during the review period.

As there is more than one pattern of trafficking, a determination that the Appellant firm engaged in trafficking becomes more convincing.

Appellant, through counsel, contends that the basis for the review is that Farmers Deli has not been provided an adequate response to the FOIA request and that it is imperative that the identity of the SNAP recipients be provided. Due process requires that necessary information such as the identity of recipients of SNAP benefits be provided to entities accused of improper trafficking conduct. With regard to these contentions, Appellant's counsel was provided all documentation as authorized to be released in accordance with 5 U.S.C. § 552.

In correspondence dated March 14, 2018, Counsel was informed that Exemption 6 and Exemption 7(C) to the individual household information within the EBT Case Analysis was being withheld. Exemption 6 allows the government to withhold information regarding individuals in personnel, medical, and similar files when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy" and where such privacy interests outweigh any public interest that would be advanced by disclosure. Courts have broadly construed "similar" files to include files that contain information identifying a particular person. The identities of SNAP recipients, as well as any information that could assist in the discovery of their identities, such as household account numbers, fall squarely within the meaning of "similar files."

It is therefore noted that the agency cannot reveal the identity of SNAP households due to regulatory disclosure provisions preventing the sharing of such information; it is also reiterated that the burden of proof rests upon Appellant. Additionally, 7 CFR §278.6(b) of the SNAP regulations provides that upon charging a firm with SNAP violations, the letter informing the firm of the charges "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." The letter was ultimately delivered on March 12, 2014 and presumably signed for by the Appellant. The record also reflects that Appellant, through counsel, submitted a FOIA request, which was completed, and offered an explanation that numerous churches as well as community based programs in the immediate area purchased meat in bulk from Appellant's store however; no direct response was provided to the charge letter. After considering the evidence of the case and Appellant's failure to reply, the Retailer Operations Division determined that a permanent disqualification was warranted. The action was not arbitrary or capricious as it followed the agency's due process procedures which are two-fold in nature.

First, the retailer is afforded an opportunity to reply to the charges as specified by the Retailer Operations Division; Appellant, through counsel, has availed itself of this first aspect of the due process procedures in the form of a FOIA request even though it failed to reply to the charge letter. The second level of due process involves an administrative review, of which Appellant, through counsel, has likewise availed itself and in the process of which Appellant was granted an additional three (3) weeks within which additional information may be provided in support of the request for review. The purpose of the administrative review process is to ensure that firms aggrieved by FNS's adverse actions have the opportunity to have their position fairly considered by an impartial reviewing authority prior to that adverse action becoming final. Appellant has been duly given, and has taken, the opportunity to present to USDA through the administrative

review process whatever evidence and information it deems as pertinent in support of its position that the Retailer Operations Division's adverse action should be reversed.

## **Summary**

The transaction data and overall firm record convincingly demonstrate repetitive patterns of unusual, irregular, and inexplicable SNAP activity for this type of firm indicative of trafficking. Once Retailer Operations Division established a convincing case against Appellant, ownership 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 matter asserted is more likely to be true than not true. If this is not demonstrated, the case is to be sustained.

As noted, 7 CFR § 278.6(a) states that 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 inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Retailer Operations has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns identified in the charge letter, the lack of food inventory necessary to support the firm's SNAP redemptions as observed and recorded during the onsite visit, the lack of purchase invoices of foods to cover SNAP redemption totals for the review months, the lack of adequate explanations for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant, and the irregular SNAP transaction data of Appellant as compared to other convenience stores in the State.

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Therefore, based on this empirical data, and in the absence of evidence for the legitimacy for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the unusual, irregular, and inexplicable transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation. While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence in the record.

The owner has not provided sufficient evidence to rebut the convincing case that Appellant most likely trafficked in SNAP benefits. As such, the SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have trafficked, which is that FNS shall disqualify the firm permanently.

## **CIVIL MONEY PENALTY**

The Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i) even though it was informed of the right to do so in the charge letter dated March 11, 2014. Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program *prior* to the violations. Therefore, the Retailer Operations Division' decision, not to impose a trafficking CMP in lieu of disqualification, is sustained as appropriate pursuant to 7 CFR § 278.6(i).

## **CONCLUSION**

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Farmers Deli Grocery. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Therefore, based on a review of all the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged by Retailer Operations Division. Based on the discussion above, the determination to impose a permanent disqualification against Farmers Deli Grocery is sustained.

## **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act (FOIA), 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.

Monique Brooks  
Administrative Review Officer

August 27, 2018