

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

**Hessen Deli & Grocery Corp,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0201419**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the permanent disqualification of Hessen Deli & Grocery Corp. (Hessen Deli & Grocery or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), 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), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

**AUTHORITY**

7 USC § 2021 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 August 24, 2017, the Retailer Operations Division charged 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 January 2017 through June 2017. 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 Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant replied to the charges by fax on September 5, 2017. Appellant denied trafficking and explained the transactions were normal based on the unique circumstances of the store. Appellant provided purchase invoices and store photographs. Appellant requested a trafficking CMP in lieu of a permanent disqualification and stated that the store owner provided SNAP training to staff.

After considering the retailer's reply and the evidence, the Retailer Operations Division issued a determination letter dated September 26, 2017. The determination letter informed Appellant that it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that Appellant was not eligible for a trafficking CMP because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a postmarked October 6, 2017, Appellant appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted.

### **STANDARD OF REVIEW**

In appeals of adverse actions, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions 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.

### **CONTROLLING LAW**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) 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 § 271.2 states, in part, that, "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 § 271.2 defines trafficking as: "(1) 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 § 278.6(a) states, inter alia, 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 on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an *electronic benefit transfer system*, . . .” (emphasis added)

7 CFR § 278.6(b)(2)(ii) states, inter alia: “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(e)(1) reads, in part, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.”

7 CFR § 278.6(i) states, inter alia: “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**

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from January 2017 through June 2017. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were an unusual number of transactions ending in a same cent value.
- There were multiple transactions made from individual benefit accounts in unusually short time frames.
- There were excessively large purchase transactions made from recipient accounts.

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.

### **APPELLANT’S CONTENTIONS**

In its appeal request postmarked October 6, 2017, Appellant provided the following summarized contentions, in relevant part:

- Appellant has always been a rule abiding business and has always observed the rules and regulations of the SNAP.
- The transactions represent normal transactions for a large grocery store, and do not represent any irregular activity or trafficking.
- Appellant previously sent in receipts of purchases, photographs of the inside of the store, and signed training documentations.
- Appellant relies on the SNAP and would never jeopardize it for a minimal profit.
- The business would not survive a disqualification.
- Appellant request a CMP in lieu of a permanent disqualification.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced.

## **ANALYSIS AND FINDINGS**

### **Store Visit**

FNS authorized Hessen Deli & Grocery as a convenience store on October 21, 2016. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an April 18, 2017, store visit 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:

- Hessen Deli & Grocery is approximately 1200 square feet, with no additional food storage outside of public view.
- There were four shopping baskets but no shopping carts for customer use.
- There was one cash register and one point-of-sale device.
- The available checkout area space was limited and checkout occurred through a small window with an ice cream cooler in front.
- There were no meat/seafood specials or bundles that might sell for high prices.
- There was no fresh unprocessed meat, poultry, or fish.
- There was a deli area that, in addition to prepared food, sold a limited selection of cold cuts by the pound.
- There were a few packages of bacon and hot dogs.
- There was limited fresh produce including bananas, apples, lemons, oranges, limes, and onions.
- Dairy included milk, butter, cheese, ice cream, and yogurt.
- Other staple food items included eggs, juice, cereal, rice, and a selection of canned goods.

- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included alcohol, paper goods, cleaning products, and health and beauty aids.

The SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. Given the available inventory as noted above, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors.

### **Charge Letter Attachments**

Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

**Charge Letter Attachment 1. There were an unusual number of transactions ending in a same cents value.** During the review period, there were 200 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. When such patterns are unsupported by special pricing structures, they are a strong indicator of trafficking in SNAP benefits.

It is possible that some of the smaller transactions are the result of purchasing one same cent item and this could explain some of the lower dollar same cent transactions. The larger transactions cited in the charge letter would most likely consist of the purchase of several relatively inexpensive items and it is unlikely that these purchases would routinely total to an amount ending in same cents. SNAP transactions consisting of multiple products are more likely to result in a random statistical spread of ending cent **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Consequently, when many transactions end in a same cents amount and same dollar amount, it appears that these transaction amounts are contrived and in the absence of compelling evidence to the contrary, are suggestive of trafficking.

Appellant failed to provide a credible explanation for the same cent transactions listed on Charge Letter Attachment #1.

**Charge Letter Attachment 2. Multiple transactions were made from individual benefit accounts in unusually short time frames.** This attachment documents 30 sets of transactions conducted by 22 different households **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

Appellant explains that many families like to conduct separate transactions. A customer will make a personal purchase and then charge the items for another family member separately so they can get a separate invoice. Appellant also contends that customers who have completed their purchases may choose to make another purchase when they see fresh merchandise come

through the door. The transaction sets do not depict particularly rapid transactions back to back. In fact, not one of the 30 transactions sets 5 U.S.C. § 552 (b)(6) & (b)(7)(C)s. Thus, these transactions were not conducted during the same visit and therefore cannot be explained by household members shopping together and charging items separately or customers making additional purchases as the result of seeing newly delivered items.

The SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of Appellant's stock and facilities and are therefore indicative of trafficking. Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The photographs from the store visit offer no legitimate explanation as to why SNAP customers would routinely shop at Appellant multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale. In addition to the store's limited checkout space which is unsuitable for large transactions.

In the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

**Charge Letter Attachment 3: Excessively large purchase transactions were made from recipient accounts.** This attachment lists 524 SNAP transactions

a 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transaction amounts are not consistent with the store's inventory with no fresh meat and limited fresh produce. As noted previously, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors offering similar food items. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

Appellant claims that increased food costs have led to higher SNAP transactions. It is true that an increase in the cost of food can lead to higher SNAP transactions. However, if there were increases in food prices, this increase would also be reflected in the SNAP transactions of similar-sized competitor stores during the review period. This is not the case here. The Retailer Operations Division compared Appellant to one other convenience store and three small groceries located nearby. The Retailer Operations Division verified through store visit photographs that the comparison stores offer many of the same food products as the subject store including canned goods, snack items, grains, drinks, and inexpensive food products. During the review period, Appellant conducted more SNAP transactions compared to the other stores; had the highest SNAP redemption dollar value compared to the other four stores; and had a larger average SNAP transaction amount than the other stores.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). There were no special packages or prices that can justify these transaction amounts. Considering Appellant's eligible food stock, infrastructure, and proximity to larger, better stocked stores this is highly unlikely and likely indicative of trafficking.

The Retailer Operations Division also compared Appellant to the other convenience stores in the State. Appellant's average SNAP transaction amount was greater than the average for convenience stores in the state of New York. Appellant also had a larger SNAP redemption dollar value compared to the average for convenience stores in the State.

Appellant submitted photographs of its food stock to the Retailer Operations Division. In the photos, there was a room with large selection of beverages in cases that was not visible on the day of the store visit. The store visit report noted that there was no food stored out of public view. It is likely that this large selection of bulk sodas was for the purpose of responding to the charges and not typically sold in bulk. The remaining photographs were similar to the photos taken during the store visit and do not justify the large dollar transactions.

Sometimes a firm may have higher than average SNAP transactions amounts due to the lack of access to other SNAP authorized stores. However, the Retailer Operations Division determined that within a one-mile radius of Appellant, there are 120 other convenience stores, 99 small groceries, 42 medium groceries, five large groceries, 19 supermarkets, and eight super stores. It is not plausible that the firm's customers would regularly purchase large amounts of merchandise at Appellant when larger, better stocked stores are readily available and in the vicinity of the Appellant firm.

The Retailer Operations Division determined that there were 248 households that conducted the transactions listed in the charge letter. Of these 248 households, 159 households shopped at supermarkets and or super stores within one day of shopping at Appellant during the review period. The Retailer Operations Division examined four households identified in the charge letter to analyze their shopping patterns at Hessen Deli & Grocery compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at supermarkets and super stores. However, despite this access to better stocked stores, each of the four households conducted excessively large transactions at Hessen Deli & Grocery **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of shopping at a supermarket or super store. Based on the large transactions conducted at supermarkets and super stores, it is clear that these households do not depend on Appellant for their major food item needs. There is no legitimate reason why households would conduct large transactions at Appellant when these household had just visited or planned to visit larger stores with a better selection of staple foods including fresh meat and produce and likely better prices.

In summary, Appellant's layout, business structure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. 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 to legitimize 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.

## **Invoices**

Appellant submitted 125 pages of invoices to document its inventory to support the high SNAP redemption amounts. The Retailer Operations Division analyzed the invoices. Invoices that were undated, did not have a vendor name, and were not legible were excluded from the analysis. The Retailer Operations Division determined that 20% of sales were possibly attributable to non-SNAP transactions. Given a 40%, 60% and even a generous 75% markup, the Retailer Operations Division determined that Appellant did have sufficient food purchases to justify its total monthly SNAP redemptions.

However, even if the invoices and store photos did show that the store purchased sufficient food inventory to account for the firm's SNAP redemption volume, sufficient inventory alone does not explain the suspicious patterns of SNAP transactions such as rapid and consecutive transactions by individuals during the same store visit or in a single day.

## **Rule Abiding Business**

Appellant contends that it has always been a rule abiding business and Appellant has always observed the rules and regulations of the SNAP program and under no circumstances would it violate them. A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. There is no provision in the Act, regulations, or agency policy that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

## **Economic Hardship**

Appellant states that the business will not survive a SNAP disqualification. It is recognized that economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations or internal agency policy directives for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty.

To excuse ownership from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the 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, Appellant's contention that the firm will incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposition.



## CIVIL MONEY PENALTY

The record shows that Appellant timely requested consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i). Appellant provided two documents showing that training was conducted on July 6, 2016, and November 17, 2016.

The criteria for a trafficking civil money penalty in lieu of disqualification is established under 7 CFR § 278.6(i) which reads, inter alia:

“In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in § 278.6(i)(1); and

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in § 278.6(i)(2); and

Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm . . .”

The Retailer Operations Division determined that Appellant did not provide **substantial** evidence that it as required by 7 CFR § 278.6(i) to establish that the firm had an effective personnel training program in place. For example:

- There is no documentation of any of Appellant’s employees’ dates of employment.
- There is no contemporary documentary evidence that all employees were provided SNAP compliance training on their initial hire date.
- There is no indication that quizzes or tests were conducted to insure that the employees understood any training that was provided to them.

In the absence of any such documentation, a civil money penalty was not imposed in lieu of permanent disqualification by the Retailer Operations Division. The record is clear that Appellant did not submit sufficient evidence to establish that Appellant had an effective compliance program and policy in effect prior to the violations. Therefore, the Retailer

Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

### **CONCLUSION**

The Retailer Operations Division's analysis of Appellant's EBT 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. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did occur as charged by the Retailer Operations Division. The determination to impose a permanent disqualification against Appellant is sustained.

The Retailer Operations Division 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 was deemed correct and proper.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

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

Mary Kate Karagiorgos  
Administrative Review Officer

February 5, 2018