

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

**Johnson Gourmet Deli & Grill, Inc,**

**Appellant,**

**v.**

**Office of Retailer Operations and  
Compliance,**

**Respondent.**

**Case Number: C0241037**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance (“ROC”) to impose a permanent disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) against Johnson Gourmet Deli & Grill, Inc. (“Appellant”).

**ISSUE**

The purpose of this review is to determine whether the ROC took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a Permanent Disqualification against Appellant on March 9, 2021.

**AUTHORITY**

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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 January 19, 2021, the ROC charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations. This charge was based on a series of SNAP transaction patterns that “establish clear and repetitive patterns of unusual, irregular, and inexplicable activity for your type of firm.” This letter of charges states: “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.” The letter also states that “. . . under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of a permanent disqualification of a firm for trafficking.”

Appellant replied to the ROC's charges in writing. The record reflects that the ROC received and considered the information provided prior to making a determination. The ROC determined that Appellant's contentions did not outweigh the evidence that the store was trafficking. Based on the preponderance of evidence, the ROC concluded that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

The ROC issued a determination letter dated March 9, 2021. This letter informed Appellant that it was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6 (c) and 278.6(e)(1) for trafficking violations. The letter also states the ROC considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. The ROC determined that Appellant was not eligible for the CMP because Appellant had not submitted sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

On March 17, 2021, Appellant appealed the ROC's determination and requested an administrative review of this action. The appeal was granted.

### STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

### CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented 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 in the event that personnel of the firm engaged in trafficking of SNAP benefits.

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

7 CFR § 278.6(a) 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) reads, 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(e)(1)(i) reads, in part:

FNS shall . . . . [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2.

Trafficking is defined in 7 CFR § 271.2, in part, as:

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 . . . .”

Also at 7 CFR § 271.2, eligible food is defined as:

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:

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.

### **SUMMARY OF CHARGES**

The charges under review were based on an analysis of SNAP Electronic Benefit Transfer (EBT) transaction data during the period from May 2020 through October 2020. This analysis identified the following patterns of SNAP transaction activity that indicate trafficking:

- Multiple transactions made from the same accounts in unusually short time frames; and,
- Unusually large transactions.

The attachments enclosed with the charge letter specify the questionable and unusual SNAP transactions indicative of trafficking which were conducted at Appellant during the review period.

### **APPELLANT'S CONTENTIONS**

Appellant's responses regarding this matter are essentially as follows:

- Some of the alleged transactions did not occur.
- The terminal numbers do not correspond with the terminal numbers of Appellant's current processor.
- Appellant denies the allegations.
- Appellant sells items in bulk.
- Appellant installed a Canon POS cash register in January 2021.
- This is Appellant's first issue with SNAP compliance. Appellant has operated for 12 years.
- No trafficking occurred during field inspections.
- FNS should consider 7 CFR § 278.6(d) before imposing a sanction. There is no evidence Appellant intended to violate the regulations, as required.
- Appellant is open twenty-four hours a day, seven days per week.
- Sixty percent of Appellant's business is from SNAP transactions and it is not credible that it would risk disqualification, particularly for the amounts identified in the attachments to the charge letter.
- Appellant staff have been trained in the proper handling of SNAP transactions.
- Disqualification would pose a hardship to participants who rely on the firm.
- Appellant requests a CMP. Appellant described its compliance program and policy.
- Appellant was not warned of the violations.
- Sanctioning Appellant without issuing a warning letter is denial of due process.
- The sanction is unjustified, inappropriate, cruel and unusual.
- Appellant's receipts justify the large transactions.

- The firm is well stocked.
- Appellant has a deli where meats are sold by the pound.
- Appellant is conveniently located for SNAP participants. Appellant is located large apartment buildings, homeless shelters, a bus stop, and other businesses.
- Appellant sells expensive infant formula.
- Customers place large orders by phone which are picked up or delivered.
- Rapid transactions are because customers buy items to and from church and school.
- Appellant has no control over how SNAP participants spend their benefits.
- Customers allow others to use their EBT cards or use their cards for others.
- Many of Appellant's customers do not own vehicles and need to make multiple trips to transport purchases.
- Large purchase transactions are made soon after SNAP participants receive their benefits.
- Large transactions are because of customers making large advance orders.
- Participants bought in bulk to avoid making numerous trips in warm weather.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- Larger nearby stores are crowded and sell the same items for similar prices.
- The decisions are based totally on computer generated reports and erroneous statistical sampling.
- There is no proof of wrongdoing. The determination is arbitrary.
- Appellant was provided with only a sampling of its SNAP activity, and there is no explanation of why the patterns of unusual activity are indicative of trafficking.
- Disqualification would pose irreparable harm to Appellant.
- Appellant has been denied due process.
- The charge letter was issued last year. The statute of limitations precludes bringing charges after such a long period of time.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

In support of its contentions, Appellant provided the following documentation:

- Two pages of debit transactions at Appellant;
- Approximately ten pages of register receipts;
- Six letters from customers; and,
- Approximately 12 pages of invoices.

### **ANALYSIS AND FINDINGS**

Appellant denies the allegations. Appellant contends most of its business is from SNAP transactions and it is not credible that it would risk this, particularly for the amounts identified in the attachments to the charge letter. Regarding Appellant's denial of violations, this review examines the relevant information regarding the determination. Once the ROC establishes trafficking occurred, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that that it did not engage in trafficking. If this is

not demonstrated, the case will be sustained. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

Appellant contends it was provided with only a sampling of its SNAP activity, and there is no explanation of why the patterns of unusual activity are indicative of trafficking. Appellant is correct that the charge letter listed only the suspicious transactions. This letter sufficiently explained the charges, stating that the transactions “establish clear and repetitive patterns of unusual, irregular, and inexplicable activity for your type of firm.”

Appellant contends some of the alleged transactions did not occur, and the terminal numbers do not correspond with the terminal numbers of Appellant’s current processor. The terminal numbers associated with Appellant during the review were verified prior to the issuance of the charge letter. It is unclear why the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transaction did not appear on the statement provided by Appellant, however the processing of this EBT transaction was confirmed through the New York state administrative terminal.

### **Store Characteristics**

In reaching a disqualification determination, the ROC considered information obtained during an August 27, 2020 store visit conducted by a USDA contractor to observe Appellant’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 documented the following store size, description, and characteristics:

- Store size is approximately 2,600 square feet with 350 square feet of food storage outside of public view;
- Appellant is open 24 hours a day, seven days a week.
- Available inventory of SNAP-eligible food items showed stock composed predominantly of inexpensive items, which is typical of a convenience store;
- Two cash registers and two electronic SNAP terminal devices;
- Hand baskets;
- A deli counter;
- No shopping carts;
- Scanners;
- No conveyor belts;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers; and,
- No meat or seafood specials or bundles.

In addition, the store's checkout counter space areas were small and surrounded by plastic barriers allowing very little surface area to place large.

Appellant contends the store is well stocked. The store visit documentation supports the store is moderately stocked, typical of a convenience store. While the firm does have a deli which sells fresh meats by the pound, at the time of the store visit the store did not meet the minimum

stocking requirements for SNAP authorization. There was no indication that SNAP households were inclined to visit the store regularly to purchase large quantities of grocery items. The available food was primarily of a low-dollar value and there was no hint that the firm sold items in bulk. Given the available inventory, there was no sign that Appellant would be likely to have SNAP redemption patterns that differed significantly from those of similarly-sized competitors.

### **Repeat Transactions by the Same Household**

Attachment 1 to the charge letter documents the same household conducting back-to-back transactions in unusually short time frames. Violating stores may conduct multiple transactions from the same household account **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** to avoid the detection of single, high-dollar trafficking transactions. There are 83 repeat transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

Appellant maintains many of its customers do not own vehicles and need to make multiple trips to transport purchases. Appellant also argued participants bought in bulk to avoid making numerous trips in warm weather. These two contentions appear to contradict each other. The record reflects that customers conducting rapid, repetitive, and large transactions at Appellant frequently spent SNAP benefits at better-stocked and more competitively-priced grocery stores, sometimes on or about the same day they shopped at Appellant.

Appellant asserted larger nearby stores are crowded and sell the same items for similar or more expensive prices. Appellant did not provide any evidence to support this implausible argument that Appellant, a convenience store, carries as wide a variety of goods as nearby much larger stores for equal or lower prices.

Appellant asserted it is conveniently located for SNAP participants, is located near large apartment buildings, homeless shelters, a bus stop, and other businesses. The Case Analysis Document identifies much larger stores with more reasonable prices located within one mile of Appellant, including a superstore located .09 miles from Appellant. There is no basis for unusually high customer attraction to Appellant, there being no great price advantage, profusion of ethnic goods, or special or custom services rendered. Oddly, some SNAP households spent considerably less at the larger stores than at Appellant.

Appellant asserts that customers allow others to use their EBT cards or use their cards for others. Appellant has offered no evidence whatsoever that SNAP households share their cards with other household members, relatives, or friends. Appellant has also not provided any explanation for why, if such behavior was occurring, these purchases would occur at Appellant rather than at nearby, larger stores. It is unlikely that a family relying on SNAP to supplement their nutritional needs would share these benefits with another family that purchases and prepares meals separately. An unsubstantiated argument such as this does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

The following examples from the ROC's Case Analysis Document show households shopped at better stocked firms on or about the same day as conducting large transactions at Appellant:

5 U.S.C. § 552 (b)(7)(E).

5 U.S.C. § 552 (b)(7)(E).

5 U.S.C. § 552 (b)(7)(E).

Appellant contends rapid transactions are because customers buy items to and from church and school. While there are legitimate reasons why a SNAP recipient might return to a convenience store in a short period of time, the examples in Attachment 2 indicate a series of purchases that total to large amounts. SNAP benefits are intended to supplement the food budget for households whose net income is near or below the Federal Poverty Level. It is difficult to believe customers who must rely on SNAP benefits to make ends meet prefer to pay higher prices and spend considerable amounts of their benefits at a convenience store. Spending sizable portions of one's SNAP benefit allotment in a convenience store - when there are larger stores at which one also shops that carry more variety of foods at a lower cost - is unreasonable customer behavior. Moreover, households listed in this attachment conducted this strange shopping pattern of making substantial purchases at Appellant multiple times during the review period. Given the common practice of violating retailers breaking up large, suspicious transactions into multiple, smaller transactions to avoid detection, a firm's explanation and evidence for why these transactions are occurring 5 U.S.C. § 552 (b)(7)(E) in a convenience store should be both rational and compelling. Appellant's explanation is neither.

### **Large Transactions**

5 U.S.C. § 552 (b)(7)(E). The food stock and facilities of Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at convenience stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. It is rare for a convenience store such as Appellant's to have purchases like those included in Attachment 2 to the charge letter. This attachment cites 405 EBT transactions during the six-month period of investigation 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(7)(E).

Appellant insists large transactions are because customers making large advance orders by phone which are picked up or delivered. The store visit documentation supports that the retailer stated it does take phone orders and make deliveries. Appellant provided no documentation in support of the contention that these are large orders. There was no evidence from the store visit which supported this contention, such as a delivery vehicle or a refrigerator/freezer area behind the counter where large pre-orders could be stored.

Based on the store layout, infrastructure, and available inventory, it is not credible that the Appellant would so frequently conduct large transactions closely resembling those typically found at a supermarket or superstore. It is not plausible that the firm's customers would regularly carry very large amounts of merchandise around the store without the benefit of shopping carts,



especially since larger, better-stocked stores are readily available and in the vicinity of the Appellant firm. Appellant is not set up to process high-dollar transactions, as indicated by its lack of equipment to facilitate large transactions and limited counter space. There are no legitimate bases for SNAP customers' unusual attraction to the firm such as a superior selection of staple foods, price advantages, package specials, bulk or promotional items, an extensive variety of otherwise unavailable ethnic food items. Appellant failed to provide convincing evidence to establish the legitimacy of these excessively large transactions, such as itemized cash register receipts. Based on all of these factors discussed in this section, the large volume of transactions for high-dollar amounts is unlikely to indicate a pattern of legitimate food purchases.

### **SNAP Benefit Depletions**

Appellant contends that large purchase transactions are made soon after SNAP participants receive their benefits, and that SNAP participants with large transactions used most of their benefits at Appellant. A government report on SNAP shopping patterns<sup>1</sup> indicates that after the first day of benefit issuance, on average, 80 percent of a household's allotment remains unspent. Even after seven days, 40 percent of benefits still remain unspent. It typically takes 14 days to deplete 80 percent of one's benefits, and 21 days to deplete 90 percent. This report also revealed that households most often redeemed their benefits at supermarkets and supercenters, with only four percent of all households never shopping in a supermarket.

It is extremely doubtful that a SNAP household making a legitimate purchase would choose to spend a large portion of its monthly allotment at a convenience store with likely higher prices and substantially less inventory than what would be found at a supermarket or superstore. Although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefits in only a few transactions or a single day. Depleting a large portion of one's SNAP balance early in the benefit month, leaving little to purchase food for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP households.

### **No Control Over Benefit Use**

Appellant insists that it has no control over how and when SNAP customers spend their benefits. In truth, SNAP households have no limits on the number of times they may use their SNAP cards or how much eligible food they may purchase. The SNAP transactions of Appellant are questionable not because they exceed any limits for use. Rather, they display characteristics not typically found at convenience stores and are indicative of trafficking.

### **Expensive Offerings**

Appellant asserts it sells items in bulk which explain the large purchases. The evidence does not support this contention. Appellant did not specify which items it sells in bulk. The store clerk

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<sup>1</sup>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.

identified the four most expensive items at Appellant, which were then recorded and photographed by the store reviewer. These items ranged in price from \$5.49 to \$6.99.

While there may have been occasions when Appellant sold expensive items, based on the low price of these items relative to the large transactions and evidence from the store visit, it is more likely true than not true that the sale of expensive items does not explain the large SNAP transactions that occurred at Appellant. Trafficking is a more likely explanation for the unusual and irregular pattern of high-dollar transactions.

### **No Applicable Mitigating Factors**

This review is limited to considering the circumstances at the time the Office of Retailer Operations and Compliance's decision was made. It is not within this review's scope to consider actions that Appellant may have taken subsequent to this decision to begin to comply with program requirements. There is no provision in SNAP regulations for reducing an administrative penalty on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, Appellant's purchase of a new POS system does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant stated that FNS should consider 7 CFR § 278.6(d) before imposing a sanction: the nature and scope of the violations; whether the firm was warned violations were occurring; and, any evidence of intent to violate the regulations. Appellant argues there is no evidence that Appellant intended to violate the regulations, which is required to impose a sanction. This argument is based on an incorrect understanding of the regulations. The severity of the penalties, set forth in the subsequent paragraph 7 CFR § 278.6(e), are based on the factors listed in 7 CFR § 278.6(d). For example, permitting the sale of cigarettes with SNAP benefits results in a three-year disqualification, but this becomes five years if the firm had been previously warned. Other sanctions consider intent, such as whether false information on an application was "knowingly submitted" or whether the sale of nonfood items were "the firm's practice" (which carries a three-year disqualification) rather than "due to carelessness or poor supervision" (which results in a six-month disqualification). However, in this case, the ROC determined the firm engaged in trafficking.

Appellant asserts that this is the first time there has been an issue related to SNAP and that it did not receive prior warnings. Appellant argues that sanctioning the firm without issuing a warning letter is denial of due process. A record of program participation with no documented previous violations, however, does not constitute valid grounds for mitigating the impact of the present serious determination of trafficking. To require Appellant to receive a warning of violations before administrative action can be taken would render the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA virtually meaningless.

Neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be extremely serious, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-

managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store.” In keeping with this legislative mandate, § 278.6(e)(1)(i) of the SNAP regulations states that FNS must disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved.

## **Receipts**

Appellant provided ~10 pages of register receipts to support the validity of its transactions, however all of these receipts were after the review period. The register receipts do not explain the questionable transactions at Appellant.

## **Invoices**

Appellant submitted approximately 12 pages of invoices to establish that the store purchased enough inventory to support the total of its SNAP sales. However, the invoices are insufficient to demonstrate this. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Assuming the typical mark up for SNAP-eligible items by a convenience store of 71%<sup>2</sup>, this amount of inventory would support 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP transaction activity. However, the total of SNAP transactions during the review period was far greater than this amount. This also does not account for any non-SNAP purchases of food items at Appellant. In sum, the invoices do not explain the questionable transactions at Appellant.

## **Infant Formula**

Appellant contends that high transaction amounts are due in part to selling expensive infant formula. At the time of the store visit, Appellant did not sell infant formula.

Even if Appellant sold infant formula, it would be unusual for a SNAP household to purchase baby formula with SNAP benefits, as households who participate in SNAP are eligible to participate in the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). WIC has a more lenient income threshold for participation - and a higher participation rate of eligible participants - than SNAP. WIC provides participants with vouchers for baby formula as well as other staple items, such as orange juice and cereal.

## **Customer Statements**

With regard to customer statements provided by Appellant that purport to establish that questionable transactions were legitimate and no trafficking occurred, the truth of such statements cannot be verified. Customers engaging in trafficking transactions would be unlikely to admit to this behavior. On the contrary, customer statements would be expected to attest to the legitimacy of questionable transactions regardless of whether they were, in fact, legitimate.

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<sup>2</sup> *National Association of Convenience Stores (NACS) State of the Industry Annual Report 2017*

### **No Undue Hardship to Appellant**

Appellant maintains that disqualification would pose an extreme hardship to the firm. Economic hardship is a likely consequence whenever a store is permanently disqualified from SNAP participation. However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from such a penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship to the firm would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity to competing stores and other participating retailers who are complying fully with program regulations, and also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that it will incur economic hardship due to an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the imposed penalty.

### **No Statute of Limitations**

Appellant argues the statute of limitations precludes bringing charges after such a long period of time. There is no statute of limitations with regards to an administrative action against a firm, although the agency does strive to take such actions as soon as they are able. Further, the charges were brought in a timely manner; the charge letter was issued within three months of the review period. The time elapsed between the charge letter and the determination letter does not have any effect on the potency or validity of the charges.

### **No Undue Hardship to SNAP Participants**

Appellant asserts that disqualification would be a hardship to SNAP households who rely on the store. Some degree of inconvenience to SNAP benefit users is inherent in the disqualification from SNAP of any participating food store, since the normal shopping pattern of such SNAP participants may be changed due to the disqualification. Section 278.6(f)(1) of SNAP regulations provides for Civil Money Penalty (CMP) assessments in lieu of disqualification in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable participating retail food store in the area to meet their needs. However, this regulation also sets forth the following specific exception: "A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification." Because the matter at hand involves a permanent disqualification, this CMP provision is not applicable.

### **Evidence of Trafficking**

Appellant argues that the determination is arbitrary, there is no proof of wrongdoing, and no trafficking occurred during field inspections. As previously stated, 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, **evidence obtained through a transaction report under an electronic benefit transfer system** . . . (Emphasis added.)

FNS employs a computerized fraud detection tool to identify EBT transactions that form patterns having characteristics indicative of trafficking. Appellant is correct that FNS employs a computerized fraud detection tool to identify EBT transactions that form patterns having characteristics indicative of trafficking. However, this tool does not determine that trafficking has occurred. The ROC must still analyze the transaction patterns, along with other information such as store visit observations, customer shopping patterns, and comparative data from nearby stores. Only then does the ROC conclude whether questionable transactions were, more likely than not, the result of trafficking. Transactions with these patterns sometimes have valid explanations that support the idea they were the result of legitimate purchases of eligible food items, which is why opportunities are given to charged retailers to explain the questionable transactions cited. In this case, based on the suspicious patterns displayed and the other supporting evidence in the file - and in the absence of any reasonable explanations for such transaction patterns - the preponderance of the evidence supports that the “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges are the result of trafficking.

### **No Denial of Due Process**

Appellant contends that it has been denied due process. In this regard, the permanent disqualification of Appellant by the ROC is neither a criminal nor a civil action, but rather an administrative action imposed against the firm as a result of trafficking violations. Section 278.6(b)(1) of the SNAP regulations states 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.”

Appellant was provided with the opportunity to reply to the charges and provide explanations for the questionable transactions. Appellant’s representative received extension of time to reply to this letter. After considering the evidence of the case, the ROC determined that a permanent disqualification was warranted.

FNS’s due process procedures include two levels of review. First, the retailer is afforded an opportunity to reply to the charges leveled by the ROC. The regulations at 7 CFR § 278.6(c) state:

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.

After the determination letter is issued, the second level of due process involves an administrative review. Appellant availed itself of this option and in the process of which Appellant was granted 21 days to provide additional information in support of the request for review. Appellant took advantage of this opportunity and provided additional information.

The purpose of the administrative review process is to ensure that a firm aggrieved by FNS's adverse actions has the opportunity for their position to be fairly considered by an impartial reviewing authority prior to that adverse action becoming final. Through the administrative review process, Appellant has been duly given, and has taken, the opportunity to present any evidence and information it deemed as pertinent in support of its position that the ROC's adverse action should be reversed. All evidence and information that Appellant presented to the ROC, as well as any such information submitted subsequently, have now been considered in this administrative review prior to rendering the final agency decision. The firm provided no additional records during the administrative review that would establish that the suspicious transactions were legitimate purchases. The record does not indicate any departure from established procedures with regard to Appellant's right to a fair and thorough review. Appellant has exercised its opportunity to reply to the charge letter and its administrative review rights. By doing so, it has availed itself of the full complement of the agency's statutory obligations with regard to due process.

## **Summary**

The ROC determined that Appellant likely trafficked in SNAP benefits. The charges of violations were based on the ROC's assessment that substantial evidence exists that the questionable transactions occurring during the review period displayed patterns inconsistent with legitimate sales of eligible food to SNAP participants. The evidence the ROC considered in support of its determination included:

- The irregular SNAP transaction data of Appellant as compared to similar stores;
- Observations made during an store visit by a USDA contractor, including the inadequacy of the firm's staple food stock to support such large transactions;
- The availability and characteristics of other SNAP-authorized stores located close to Appellant; and,
- Shopping behaviors of Appellant's customers.

The transaction data and overall firm record demonstrate the patterns of unusual, irregular, and inexplicable SNAP activity for this firm is likely the result of trafficking.

Appellant argued the sanction is unjustified, inappropriate, cruel and unusual. Upon review, Appellant failed to prove by a preponderance of the evidence that the administrative action should be reversed. Appellant provided inadequate explanations for the suspicious transactions and insufficient evidence to legitimize its transaction data. It has not convincingly rebutted the ROC's determination that Appellant most likely trafficked in SNAP benefits. 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 must disqualify the firm permanently.

## CIVIL MONEY PENALTY

Appellant requested a civil money penalty (CMP) contending that it had established and implemented an effective compliance policy and program to prevent SNAP violations. According to 7 CFR § 278.6(i) of the SNAP regulations, FNS may impose a CMP in lieu of permanent disqualification for trafficking.

For an Appellant's request for a CMP to be considered, the regulations at 7 CFR § 278.6(b)(2) require that Appellant submit supporting documentation within ten days of receipt of the charge letter. Appellant was advised of this provision in the charge letter of January 19, 2021. A review of the administrative record indicates Appellant did not submit documentation to support its eligibility for this alternative sanction by this deadline.

7 CFR § 278.6(i) sets forth the eligibility requirements for a CMP:

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 Section 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 Section 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 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 . . .

In support of Appellant's contention that it is eligible for a CMP, it provided described its compliance policy and training program. In this regard, the various statements made by Appellant is not "substantial evidence" that fulfills each of the four criteria of 7 CFR § 278.6(i), demonstrating "that the firm had established and implemented an effective compliance policy and program to prevent violations."

The standards of eligibility for a trafficking CMP are high. They require substantial proof that a compliance policy and program was established and implemented prior to the occurrence of violations. These standards exist to thwart attempts to falsely present compliance policies and programs that were not actually implemented prior to violations. As Appellant did not provide the required supporting documentation, the ROC did not assess a CMP. According to the requirements stated in 7 CFR § 278.6(b)(1), § 278.6(b)(2)(ii and iii), and § 278.6(i), Appellant is not eligible for a CMP in lieu of a permanent disqualification from participation as an authorized retailer in SNAP. The determination by the Office of Retailer Operations and Compliance to deny Appellant a civil money penalty is sustained.

## **CONCLUSION**

The record has yielded no indication of error in the finding by the Office of Retailer Operations and Compliance that Appellant trafficked in SNAP benefits. A review of the evidence supports that it is more likely true than not true that program violations occurred as charged. Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against Johnson Gourmet Deli & Grill, Inc. from participating as an authorized retailer in SNAP is sustained.

## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

RICH PROULX  
ADMINISTRATIVE REVIEW OFFICER

May 17, 2021