

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

**Mj Deli Grocery Inc,**

**Appellant,**

**v.**

**Case Number: C0214459**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of Mj Deli Grocery Inc. as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Mj Deli Grocery Inc.

**AUTHORITY**

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

**CASE CHRONOLOGY**

In a letter dated March 5, 2018, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of June 2018 through November 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated the Appellant had the right to respond to the charges within 10 days of receipt to provide explanations for the irregular SNAP transaction patterns.

The letter also stated 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). The charge letter was delivered to the Appellant by UPS on March 8, 2019.

The Appellant did not reply to the Retailer Operations Division within the ten-day response timeline. The Appellant did send an e-mail to the Retailer Operations Division on March 25, 2019 requesting an extension; however, the Retailer Operations Division declined to grant an extension due the lateness of the Appellant's request. Instead, the Retailer Operations Division issued a determination letter dated March 26, 2019. The letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and 7 CFR § 278.6(e)(1). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of 7 CFR § 278.6(i). The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP. The determination letter was delivered to the Appellant on March 28, 2019.

In an e-mail dated April 5, 2019, the Appellant requested an administrative review of the Retailer Operation Division's determination. The request for administrative review was granted.

### **STANDARD OF REVIEW**

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action 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 AND REGULATIONS**

The controlling law in this matter is covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

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

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

7 CFR § 271.2 states that the definition of "coupon" includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

7 CFR § 278.6(e)(1)(i) states:

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

7 CFR § 271.2 defines trafficking, 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 ....

7 CFR § 271.2 defines eligible food, in part, as:

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

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(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.

7 CFR § 278.6(b)(2) states, in part:

(ii) 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 as specified in § 278.6(i), 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).

## SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from June 2018 through November 2018. This involved the following transaction patterns which are trafficking indicators:

- **Charge Letter Attachment 1:** Multiple transactions were made from individual benefit accounts in a set time frame. This attachment lists 26 sets of 67 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits. T5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- **Charge Letter Attachment 2:** Excessively large purchase transactions were made from recipient accounts. This attachment lists 80 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

## APPELLANT'S CONTENTIONS

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

- The high volume of SNAP transactions and the demand for food is due to the nature of the local community. During the time in question, Mj Deli Grocery was the only SNAP authorized store in the area and there was a higher demand for food. It was not until recently that another store was authorized for the SNAP. A nearby ShopRite was also in the process of closing and is now closed.
- The store has provided an invoice summary from one of its suppliers from the review period.
- The store is suffering from the permanent disqualification and the local community is suffering a hardship from the store's disqualification. The Appellant has provided statements from three (3) customers attesting to the need and the good character of the owners of Mj Deli Grocery Inc.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

## ANALYSIS AND FINDINGS

### Authorization History

FNS authorized Mj Deli Grocery Inc. for the SNAP on September 23, 2014. During the review period of June 2018 through November 2018, the Retailer Operations Division classified the store as a small grocery store.

The owner signed the SNAP application for the store on May 13, 2014 and acknowledged that the owner was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible items.

### **Store Visit Report**

The case record documents that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a December 3, 2018 store visit conducted by an FNS contractor to observe the nature and scope of the store’s operation, stock and facilities. This information was then used to ascertain if there were justifiable explanations for the store’s irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Mj Deli Grocery Inc. is approximately 550 square feet in size. Aisles in the store were long and very narrow.
- The store had no shopping carts and only one (1) handheld shopping basket for customer use.
- The store had one (1) cash register and one (1) point-of-sale device for purchases.
- There were no large bulk foods, expensive international or specialty foods that might sell for a high price. There were no fresh meat/poultry/seafood bundles or large boxes of fresh fruit and vegetables for sale.
- There were many empty shelves and many canned and packaged goods had dust on them indicating that there was not a frequent turnover of food inventory for these items.
- The store had a storage area outside of public view which contained excess soda and paper goods.
- The store did not have any optical scanners and there was no conveyor belt at the checkout area.
- The checkout area consisted of a small window opening within a Plexiglas barrier with an area of about 18 inches by 18 inches of available space upon which to place items for purchase. The Plexiglas barrier had cubbyhole shelving accessible from the rear containing mostly candy and cigarettes. There was also a long reach-in ice cream freezer located directly in front of the checkout area. The very limited space for stacking food at the checkout area made it not conducive to conducting large transactions.

The SNAP eligible staple food stocked by the store consisted mainly of inexpensive canned and packaged goods. Staple food in the Meat/Poultry/Fish category mainly consisted of canned goods, deli foods and ten (10) cartons of eggs. There was no fresh meat, poultry or fish and a very limited amount of fresh produce. The store also sold a large amount of inexpensive accessory food items such as snack foods, ice cream, candy, potato chips, coffee, tea, carbonated and non-carbonated drinks, condiments, and spices. The stocked ineligible items included tobacco, health and beauty products, paper goods, household cleaning products, and clothing. The store also had a large commercial kitchen where SNAP ineligible cold and hot food was prepared for carryout.

At the time of the store visit, the four (4) most expensive food items sold by the store were two (2) stocking units of 96 ounce Mazola corn oil at \$9.99 each; beef bacon at \$7.49 per pound; four (4) stocking units of buffalo chicken at \$6.99 per pound; and a liter of Pedialyte at \$5.99. Given the available inventory and store layout as noted above, there is no indication from the store visit report that the store would be likely to have SNAP transaction patterns significantly different from similar-sized competitors offering similar food items.

### **Multiple Transactions by the Same Household within a Set Time Period**

SNAP households have no limit on the number of times they may use their SNAP cards or how much eligible food they may purchase. However, 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 a small grocery store's stock and facilities and are thus indicative of trafficking.

Charge Letter Attachment 1 lists 26 sets of 67 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(7)(E)**. In fact, this average SNAP transaction is greater than the average SNAP transaction at a Pennsylvania supermarket during the review period and is comparable to a superstore. It is not credible that a small grocery store with a limited selection of inexpensive staple foods would have a series of suspicious SNAP transactions greater than a supermarket and comparable to a superstore. It is even less likely that these excessively large transactions would be conducted multiple times by the same household during a set time period.

The Appellant offered no explanation for this irregular transaction pattern. The evidence in the case file documents that it is unlikely that SNAP customers would shop at the store and purchase such a large volume of items multiple times during a set time frame. In addition, the store's small checkout area and limited counter space makes it unsuitable for conducting large transactions. The store also had no shopping carts and only one (1) shopping basket for transporting food within the store which would be required for the large dollar transactions. Based on the analysis above, and 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.

### **Excessively Large Transactions**

SNAP households have no limit on the amount of eligible food they may purchase (subject to the remaining balance on the card). However, the SNAP transactions noted in the charge letter are questionable not because they exceed any regulatory limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of a small grocery store's stock and facilities and are thus indicative of trafficking.

Charge Letter Attachment 2 cites 80 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(7)(E)**. This average transaction is also greater than the average SNAP purchase for a supermarket or superstore in Pennsylvania during the review period. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Even the smallest transactions cited in the charge letter had an amount which is three (3) or four (4) times higher than the average SNAP purchase amount for a Philadelphia County small grocery store.

The store visit pictures show that the store layout is not conducive to these excessively large transactions. There were no shopping carts and only (1) handheld shopping basket for transporting food around the store and the checkout window and counter space is limited and not conducive to stacking multiple items for purchase. In addition, the store's stock is mainly inexpensive canned and packaged goods, snack foods, single serving food items and accessory food items. The store visit report and pictures do not show that the firm offered any specialty or international items, fresh meat/seafood bundles, or boxes of fresh produce that would justify high dollar transactions atypical of a small grocery store. The Retailer Operations Division properly considered these factors in making its determination that the transaction patterns cited in the charge letter are, more likely than not, due to trafficking.

The Appellant provided a copy of a summary of purchases made during the review period from one of its suppliers. This summary invoice shows the purchase of 177 cases of an unnamed product for **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and an additional purchase **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** during the month of April 2018 which is outside the review period. The summary invoice also shows the purchase of 260 cases of an unnamed product **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** during the month of July 2018 which is within the review period. The Appellant does not indicate how this explains the irregular SNAP transactions cited in the charge letter. Presumably, the Appellant is arguing that the store had a sufficient food inventory to cover the SNAP transactions cited in the charge letter. However, it should be noted that even if the store had sufficient inventory to support its SNAP redemptions, this would still not explain the irregular transaction patterns cited in the charge letter. It is also not unusual for violating stores to conduct largely legitimate SNAP transactions while conducting a smaller number of trafficking transactions with a few trusted households.

The Appellant states that it was the only SNAP authorized store in the area during the review period and that this explains the store's high dollar SNAP transactions. It is true that sometimes a store may have higher than normal SNAP transactions due to the lack of access to other SNAP authorized stores in the area. However, agency mapping systems show that during the review period there were 58 SNAP authorized stores within a one-mile radius of Mj Deli Grocery Inc. These SNAP authorized stores included 25 other small grocery stores, two (2) medium grocery

stores, and two (2) supermarkets. A government report<sup>1</sup> on SNAP benefit redemption patterns revealed that households most often redeemed their benefits at supermarkets and superstores with only four (4) percent of all households never shopping in a supermarket or superstore. Thus, when a supermarket or superstore is available, it is highly unlikely that a SNAP recipient would conduct excessively large SNAP transactions at a small grocery store with a limited selection of staple foods.

The case record also documents that the Retailer Operations Division conducted an in-depth review of three (3) nearby competitor stores with similar or superior food stock to Mj Deli Grocery. These stores were located within 0.55, 0.65 and 0.66 miles from Mj Deli Grocery. If neighborhood conditions are causing these type of irregular transaction patterns one would expect those patterns to be repeated at nearby competitor stores that offer a similar variety and quantity of staple and accessory food. However, the Retailer Operations Division determined that none of these nearby competitor stores exhibit the same irregular transaction patterns that occurred at Mj Deli Grocery.

Lastly, the case record also documents that the Retailer Operations Division conducted a detailed analysis of four (4) households with irregular transactions identified in the charge letter to analyze their shopping patterns at Mj Deli Grocery compared to their shopping patterns at other SNAP authorized stores. All of these households had access to, and shopped at both supermarkets and superstores. However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at Mj Deli Grocery on the same day or within a day of shopping at a supermarket or superstore. It is highly unlikely that a small grocery store with limited staple foods would have legitimate SNAP transactions comparable or larger than these SNAP authorized superstores.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts and shopping baskets support the Retailer Operations Division determination. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on a preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 2 are more likely than not the result of trafficking in SNAP benefits.

### **Customers Depend on the Store**

The Appellant states that there are many local residents, regular customers of Mj Deli Grocery Inc., who rely on the store to provide staple foods for purchase through the SNAP. Where there is a hardship to SNAP households, FNS may impose a hardship CMP on a firm in lieu of a **less than permanent** disqualification where there is a lack of authorized stores in the area.

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<sup>1</sup> "Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program," report prepared by Mathematica Policy Research for the Food and Nutrition Service, February 2011.



However, the regulations at 7 CFR §278.6(f)(1) clearly state that “a civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.” Because the Retailer Operations Division has taken action to permanently disqualify the Appellant’s firm, a hardship CMP in lieu of disqualification cannot be granted. In any case, there are currently approximately 59 SNAP authorized stores, including two (2) supermarkets, within a one-mile radius of Mj Deli Grocery Inc. Therefore, the local community would at most suffer an inconvenience and not a hardship due to the permanent disqualification of Mj Deli Grocery Inc.

### **Hardship to Store**

The Appellant contends that the permanent disqualification has created a hardship for the store as it relies on the SNAP as a small business. With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in the SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to either the owner personally or the firm resulting from the imposition of such penalty. To allow stores to be excused from assessed administrative penalties based on a purported economic hardship would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

### **CIVIL MONEY PENALTY**

The Appellant did not 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. The SNAP regulation at 7 CFR § 278.6(b)(2)(ii) mandates that a request for a trafficking CMP along with supporting documentation shall be submitted within ten (10) days of receipt of the charge letter.

The SNAP regulation at 7 CFR § 278.6(b)(2)(iii) also states, in part, that “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 ... the firm **shall not be eligible** for such a penalty.” [Emphasis added.]

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’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 the Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify the retailer. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. 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.

In the absence of any reasonable explanations 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. 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 in fact occur as determined by the Retailer Operations Division. Based on the discussion above, the decision to impose a permanent disqualification against Mj Deli Grocery Inc., Appellant, is sustained.

### **RIGHTS AND REMEDIES**

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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, FNS is 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.

RONALD C. GWINN  
Administrative Review Officer

May 16, 2019