

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

**Nostrand Deli & Grocery,**

**Appellant,**

**v.**

**Case Number: C0195836**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that a Permanent Disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Nostrand Deli & Grocery (hereinafter “Nostrand Deli”) by the Retailer Operations Division of FNS.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1)(i) in its administration of the SNAP when it imposed a Permanent Disqualification against Nostrand Deli on March 15, 2017.

**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 January 17, 2017, the Retailer Operations Division informed the Appellant that his firm was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270 – 282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm."

In telephone conversations with Retailer Operations Division staff on January 25, 2017 and March 1, 2017 and in letters received by the Retailer Operations Division on January 27, 2017, February 28, 2017, and March 3, 2017, the Appellant, through counsel, denied the trafficking allegations and provided various explanations for the questionable SNAP transactions that were outlined in the January 17, 2017 Charge Letter.

After considering the Appellant's replies and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated March 15, 2017, informing the Appellant that Nostrand Deli was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations.

In a letter postmarked March 27, 2017, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's decision to permanently disqualify the firm from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated April 3, 2017.

### **STANDARD OF REVIEW**

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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, amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6(e)(1)(i) of the Regulations establish the authority upon which a permanent disqualification may be imposed upon a retail food store or wholesale food concern. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

7 U.S.C. § 2021(b)(3)(B) states, *inter alia*:

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

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

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(e)(1)(i) states:

Disqualify a firm permanently if: Personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, *inter alia*:

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

7 CFR § 278.6(f)(1) states, *inter alia*:

A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

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

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 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 ...

7 CFR § 278.6(b)(2) states, *inter alia*:

(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). [Emphasis added].

(iii) 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 penalty. [Emphasis added].

## SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from May 2016 through September 2016. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were an unusual number of transactions that ended in a same cents value;
- There were multiple transactions made from individual benefit accounts in unusually short timeframes; and
- There were excessively large purchase transactions made from recipient accounts.

## APPELLANT'S CONTENTIONS

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

In the Appellant's replies to the Charge Letter, in the review request postmarked March 27, 2017, and in a subsequent correspondence postmarked April 28, 2017, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant denies that trafficking of SNAP benefits took place at Nostrand Deli;
- Nostrand Deli has been participating as an authorized retailer in the SNAP for approximately two decades and this is the first time that the firm has been cited for any SNAP violations;
- The SNAP transactions listed in FNS' Charge Letter are based solely upon a computer generated analysis and, therefore, are not based on any direct evidence such as an investigation of the store or observation of trafficking at the store by an investigator;
- The unusual number of transactions that ended in a same cents value are the result of: (1) **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The Appellant making purchases easier for those SNAP customers who lack basic mathematical skills;
- The multiple transactions made from individual benefit accounts in unusually short timeframes are not unreasonable given the extensive staple food inventory of Nostrand Deli;
- The excessively large purchase transactions are the result of: (1) Nostrand Deli being located in a densely populated community at which many of the residents are SNAP recipients; (2) Nostrand Deli not being a convenience store but rather a mini supermarket; (3) Nostrand Deli having an extensive inventory of food items to which food suppliers deliver tens of thousands of dollars in wholesale food goods; and (4) Nostrand Deli stocking large quantities of expensive infant formula which is required to be in stock at all times by the WIC Program;

- The Appellant is requesting that FNS not impose a permanent SNAP disqualification against Nostrand Deli and, in the alternative, issue either an Official Warning Letter or impose a reduced period of SNAP disqualification; and
- The Appellant is requesting that if FNS decides that an administrative action must be imposed upon Nostrand Deli, that the Agency impose a civil money penalty in lieu of a permanent SNAP disqualification.

In support of the Appellant’s contentions, the following documents were submitted to FNS:

- Statements regarding Nostrand Deli’s eligibility for a trafficking civil money penalty in lieu of a permanent SNAP disqualification;
- Signed affidavits from the Appellant, store manager, and a store employee indicating that they have been trained on the SNAP regulations in both English and Arabic;
- A copy of Nostrand Deli’s “USDA SNAP Training and Compliance”;
- An affirmation signed by 5 U.S.C. § 552 (b)(6) & (b)(7)(C), Attorney representing the Appellant, who affirmed that he interviewed employees of the authorized SNAP stores located within one mile of Nostrand Deli and that on several occasions, store employees indicated that they did not accept SNAP benefits or other government program benefits because their “machine was not working”; and
- 8 Photos of some of the food items stocked at Nostrand Deli.

## **ANALYSIS AND FINDINGS**

### **Store Characteristics**

FNS authorized Nostrand Deli as a convenience store on September 21, 1996. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an August 11, 2016 store visit conducted by a FNS contractor to observe the nature and scope of the firm’s operation, stock, and facilities. This information obtained from the store visit was also 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:

- Nostrand Deli is a small convenience store, approximately 600 square feet in size, that does not have a storage area outside of the public view;
- Nostrand Deli is located in an urban, commercial area of Brooklyn, New York;
- The space within the store aisles is narrow;
- Some of the store shelves were scantily filled;
- There were no shopping carts or hand-held baskets available for customer use;
- Nostrand Deli has one cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- There was no optical scanner or conveyor belt for the speedy processing of transactions;
- Nostrand Deli has a food stock that is typical of convenience stores and it offers customers a minimal variety and amount of eligible staple foods for sale;

- There were no meat/seafood specials or bundles that might sell for high prices;
- Nostrand Deli is not a WIC Program vendor; however, it does carry a few cans of infant formula. The store does not carry any other infant foods;
- The most expensive food item offered for sale at Nostrand Deli appears to be infant formula. It is important to note that the majority of households which qualify for WIC Program benefits also qualify for SNAP benefits. In most cases, these households utilize their WIC Program benefits to purchase infant foods and infant formula in lieu of using their SNAP benefits;
- It does not appear from the store visit observations that Nostrand Deli extends credit to customers;
- No signs were posted in the store nor were there any flyers advertising the availability of bulk foods offered at a discounted rate to include grocery package deals;
- The checkout counter has a limited space as it is obstructed by an ice cream freezer, is surrounded by miscellaneous items, and it has a Plexiglas barrier surrounding it. As such, the checkout counter does not provide adequate space for the large amounts of individual food items necessary to make up many of the large transactions cited in the Charge Letter Attachments;
- Nostrand Deli does not stock any fresh or frozen meats, poultry, or seafood items;
- Nostrand Deli has a deli case/section in which deli meats and cheeses are sold by the pound. The deli meats and cheeses stocked in the deli case/section are also used in the preparation of made-to-order sandwiches. There was a menu board posted in the store which advertises these foods and their prices;
- Nostrand Deli had a small kitchen/food preparation area in which hot and cold prepared, ready-to-eat foods that are intended for immediate consumption and require no additional preparation were prepared for sale to customers. These foods included several varieties of sandwiches and prepared salads such as: tuna salad, macaroni salad, cole slaw, grilled chicken salad, egg salad, Philly cheese steak sandwich, pastrami club, chicken cutlet sandwich, grilled chicken sandwich, turkey ham, egg and cheese sandwich, grilled BBQ chicken sandwich, egg and cheese sandwich, grilled cheese, bacon, egg and cheese sandwich, sausage, egg and cheese sandwich, beef patty sandwich, turkey burger, cheeseburger, cheeseburger deluxe, etc. The store has a menu board posted in the store which advertises these foods and their prices;
- Other meat items available for sale included canned fish, canned/potted meat, a minimal quantity of beef sausage, a minimal quantity of eggs, and meat jerky;
- Nostrand Deli does not stock any frozen fruits or vegetables;
- Nostrand Deli does not stock any fresh fruits or vegetables;
- The only frozen food item stocked at Nostrand Deli is single-serving size ice cream;
- Other staple foods available for purchase included such items as 100% juice, a limited variety of canned fruits and vegetables, pasta, rice, loaf bread, cereal, flour, corn meal, milk, margarine, snack foods, cakes/pastries, etc.;
- Much of the remaining food stock consisted of accessory foods such as candy and gum, carbonated and non-carbonated drinks, condiments, coffee, vegetable oil, and spices; and

- Nostrand Deli stocked a good supply of hot foods and ineligible nonfood items such as health and beauty items, tobacco products, paper products, household cleaning supplies, infant diapers, pet food, alcohol, electronic cigarettes, over-the-counter medications, etc.

On review, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed.

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. Based on this empirical data, and in the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the most likely explanation for “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges is trafficking. Transactions having such characteristics sometimes do have valid explanations that support that they were the result of legitimate purchases of eligible food items. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, the Retailer Operations Division determined that the Appellant’s contentions did not outweigh the evidence. The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

### **Denial of Trafficking Allegations**

Regarding the Appellant’s contention that he denies the trafficking allegations, this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is, as noted above, to determine whether the Appellant demonstrates by a preponderance of the evidence that the permanent disqualification should be reversed. In this case, therefore, if the Appellant demonstrates by a preponderance of the evidence that trafficking did not occur in the Appellant’s firm, then trafficking will be considered not to have occurred and the disqualification reversed. If this is not demonstrated the case is to be sustained. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

### **First Time Violator**

The Appellant contends that Nostrand Deli has been participating as an authorized retailer in the SNAP for approximately two decades and this is the first time that the firm has been cited for any SNAP violations. However, 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 those charges. Trafficking in SNAP benefits

is an extremely serious violation and both 7 U.S.C. § 2021(b)(3)(B) and 7 CFR § 278.6(e)(1)(i) state that a first time violation warrants a permanent disqualification.

### **Disqualification Not Based On Direct Evidence**

The Appellant contends that the SNAP transactions listed in FNS' Charge Letter are based solely upon a computer generated analysis and, therefore, are not based on any direct evidence such as an investigation of the store or observation of trafficking at the store by an investigator. Firms are chosen for analytical investigation based upon numerous detailed and rigorous mathematical algorithms. This data presents the Retailer Operations Division with a statistically valid prima facie indication of highly unusual transaction activity; the activity therein identified is not marginally aberrant, but markedly so. Properly analyzed and interpreted, the Retailer Operations Division does not contend that EBT transactions are overtly suspicious when they occur on an occasional or intermittent basis, but when such transactions form repetitive patterns, on a comparative basis, over a period of time that ensures such activity is not simply intermittent, such activity is identified for further analysis.

Once such firms have been identified as potential compliance cases, from approximately 262,462 authorized firms nationwide, the Retailer Operations Division undertakes a detailed examination of the available transaction data and obtains further relevant information regarding the firm's business operations such as the level and condition of staple food stock maintained by the firm, the presence or absence of the firm's logistical retail wherewithal and numerous other factors pertinent to the firm's ability to legitimately process the transaction activity for which the firm has been flagged. Agency policy and procedures direct that only after a careful, comprehensive and complete analysis, from which appropriate conclusions are logically derived, will the firm be issued a Charge Letter. The firm is then given the opportunity to reply to those charges and provide any information it deems appropriate in justifying as legitimate the transaction activity detailed in the Charge Letter. In the present case, these policies and procedures are shown by the record to have been duly performed in all relevant and pertinent detail. Moreover, 7 CFR § 278.6(a), noted above, established the authority upon which FNS may disqualify any authorized retail food store on the basis of evidence obtained through a transaction report under an electronic benefit transfer system. The Retailer Operations Division's use of transaction data and other reports, in addition to store visit observations and an analysis of household shopping behavior and other relevant data and information, in rendering a finding that trafficking is the most likely explanation of the transaction activity, is as valid a means of establishing evidence as that obtained through an on-site investigation and the eye witnessing of trafficking. Accordingly, the Appellant's contention that the charges are speculative and based solely upon a computer generated analysis is not compelling.

### **Unusual Number of Transactions Ending in a Same Cents Value (Charge Letter Attachment 1)**

This Attachment lists 289 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits.



The Appellant contends that the unusual number of transactions that ended in a same cents value are the result of: 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Appellant making purchases easier for those SNAP customers who lack basic mathematical skills.

With regard to the Appellant's contention that the unusual number of transactions ending in a same cents value are the result of him instructing store employees to sometimes round down sales to the nearest even-dollar, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in an effort to streamline and expedite sales, the Appellant's unsubstantiated statement is not supported by available evidence. For example, there are no signs in the store advising its customers of such a pricing policy. Instead, a review of the store visit pictures shows pricing labels on food and/or store shelves ending in a variety of price variations. Typical retail food stores operate on relatively low profit margins and it is unlikely that a store would be rounding down its prices. Likewise, it is unlikely that store clerks would have the authority to choose when to round down amounts or to charge based on the price labels. This method of pricing would be seemingly arbitrary to store customers and would likely lead to more conflicts within the store and not less.

The Appellant also contends that the unusual number of transactions that ended in a same cents value are the result of many of the food items stocked in the deli and prepared food coolers 5 U.S.C. § 552 (b)(6) & (b)(7)(C). While some of the food items stocked in Nostrand Deli's deli and prepared food cooler (which are listed on the store's menu board) have prices 5 U.S.C. § 552 (b)(6) & (b)(7)(C), the majority of these food items are considered hot and cold prepared, ready-to-eat foods that are intended for immediate consumption and require no additional preparation were prepared for sale to customers. Per the SNAP regulations, these foods are not eligible to be purchased with SNAP benefits. In addition, the food items that are listed on the store's menu board which can be purchased with SNAP benefits (i.e., deli meats and cheeses) are listed as being priced at \$x.99 or \$x.49 per pound. As such, the Appellant's contention is unsubstantiated.

The Appellant contends that the unusual number of transactions that ended in a same cents value are also the result of the Appellant making purchases easier for those SNAP customers who lack basic mathematical skills. However, the Appellant's explanation for these questionable SNAP transactions is not logical as an EBT card works similarly to a credit card. The customer is only charged (debited) for the exact amount of the purchase. There is no need for "mathematical skills" on the part of the SNAP customer. The EBT POS device adds up the transaction and informs the customer of the exact amount of benefits that will be debited from the EBT card. The store customer is not responsible for adding up or totaling the SNAP transaction. As such, the Appellant's contention is unsubstantiated.

The contracted Reviewer noted during the store visit that the majority of the food items stocked at Nostrand Deli do not end in any particular price variation. Due to Nostrand Deli's mostly low cost foods, the larger dollar transactions cited in the Charge Letter would normally consist of multiple food products being purchased in one transaction. It is implausible that several of these relatively inexpensive items purchased together would disproportionately result in a total purchase price 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Instead, when SNAP customers buy multiple food items, resulting in higher dollar amounts, the total transaction amount is more likely to result in a

more dispersed statistical spread 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Consequently, when there are a disproportional amount of transactions that end in a same cents value, it appears that these transaction amounts are contrived and therefore, in the absence of any compelling rationale to the contrary, are a strong indicator that the firm is trafficking in SNAP benefits. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

### **Multiple Transactions Made from Individual Benefit Accounts in Unusually Short Timeframes (Charge Letter Attachment 2):**

Attachment 2 of the Charge Letter lists 22 sets of transactions (47 total transactions) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is not credible that the subject store would have so many suspicious SNAP transactions greatly exceeding the average SNAP transaction for convenience stores in the State during the review period. Violating stores often conduct multiple transactions from the same household account as a method to avoid detection of single high dollar transactions that cannot be supported by the retailer's food inventory and infrastructure.

The Appellant contends that the multiple transactions made from individual benefit accounts in unusually short timeframes are not unreasonable given the extensive staple food inventory of Nostrand Deli. While there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, the SNAP transactions noted in the Charge Letter are questionable because they display characteristic of use inconsistent with the nature and extent of the store's stock and facilities and are indicative of trafficking. Although it is not uncommon for customers to conduct more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. Nostrand Deli is not set up to provide for all of one's food needs with no fresh or frozen meats, poultry, or seafood items, no frozen fruits or vegetables, no fresh produce items, and lacks an abundant depth and breadth of staple foods. Also, the store visit observations indicate that there is no evidence of a price advantage or custom or special services rendered at the subject store. It is irregular for convenience stores to have purchases such as those cited, especially when Nostrand Deli stocks only one high priced food item in minimal quantities (infant formula) so the majority of food items stocked at the store are low priced items.

A review of client shopping data for the review period shows that clients shopping at Nostrand Deli are also shopping at other area grocery stores, as well as full-line supermarkets and super stores that most likely offer customers a much larger quantity and variety of eligible food items for better prices. Based on these shopping patterns, transportation to other stores is not an issue for these SNAP customers. Yet, these customers continue to shop and spend suspicious high dollar amounts in short timeframes at Nostrand Deli, where the eligible food stock is limited, 5 U.S.C. § 552 (b)(7)(E) of their purchases at better stocked stores. This is a strong indicator of trafficking.

Sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. The Appellant provided FNS with an affirmation signed by 5 U.S.C. § 552 (b)(6) & (b)(7)(C), Attorney representing the Appellant, who affirmed that he interviewed employees of the authorized SNAP stores located within one mile of Nostrand Deli

and that on several occasions, store employees indicated that they did not accept SNAP benefits or other government program benefits because their “machine was not working”. However, there are 262 SNAP authorized retailers located within a 1.0 mile radius of the subject store which, per FNS’ records, were actively participating in the SNAP and conducting SNAP transactions during the five month review period. These numerous authorized retail food stores are used by area SNAP customers to meet their nutritional needs and include 15 full-service supermarkets and 6 super stores, with one super store being located less than 200 feet away from Nostrand Deli. As mentioned above, SNAP customers that shopped at Nostrand Deli during the five month review period also shopped at other area grocery stores and, therefore, transportation to other stores is not an issue for these customers. Therefore, lack of access to other authorized stores does not appear to be an explanation for Nostrand Deli’s abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

The Appellant did not provide any compelling justification as to why SNAP households are conducting multiple transactions at Nostrand Deli or evidence that all of the irregular transactions cited in the Charge Letter were for eligible food items only. 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 Purchase Transactions (Charge Letter Attachment 3)**

This Attachment lists 193 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. As noted previously, there is no indication from the store visit report that Nostrand Deli would be likely to have SNAP redemption patterns significantly different from similar-sized competitors offering similar food items.

The Appellant contends that the excessively large purchase transactions are the result of: (1) Nostrand Deli being located in a densely populated community at which many of the residents are SNAP recipients; (2) Nostrand Deli not being a convenience store but rather a mini supermarket; (3) Nostrand Deli having an extensive inventory of food items to which food suppliers deliver **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in wholesale food goods; and (4) Nostrand Deli stocking large quantities of expensive infant formula which is required to be in stock at all times by the WIC Program.

Regarding the Appellant’s contention that the excessively large purchase transactions are the result of Nostrand Deli being located in a densely populated community at which many of the residents are SNAP recipients, this explanation has no bearing on this case. There are 262 SNAP authorized retailers located within a 1.0 mile radius of Nostrand Deli that can meet the nutritional needs of SNAP customers. These SNAP authorized stores include 15 full-service supermarkets and 6 super stores, with one super store being located less than 200 feet away from Nostrand Deli. As mentioned above, SNAP customers that shopped at Nostrand Deli during the five month review period also shopped at other area grocery stores and, therefore, transportation to other stores is not an issue for these customers. Therefore, lack of access to other authorized stores does not appear to be an explanation for the excessively large SNAP transactions that occurred at Nostrand Deli during the review period.

The Appellant also contends that the excessively large purchase transactions are the result of Nostrand Deli not being a convenience store but rather a mini supermarket and the store having an extensive inventory of food items to which food suppliers deliver tens of thousands of dollars in wholesale food goods. However, the Appellant provided no vendor receipts to FNS for foods purchased during the five month review period that would validate this contention. The contracted Reviewer noted during the store visit that Nostrand Deli is a small convenience store that is not set up to provide for all of one's food needs with no fresh or frozen meats, poultry, or seafood items, no frozen fruits or vegetables, no fresh produce items, and lacks an abundant depth and breadth of staple foods. Also, the store visit observations indicate that there is no evidence of a price advantage or custom or special services rendered at the subject store. It is irregular for convenience stores to have purchases such as those cited, especially when Nostrand Deli stocks only one high priced food item in minimal quantities so the majority of food items stocked at the store are low priced items.

The Appellant contends that the excessively large purchase transactions are the result of Nostrand Deli stocking large quantities of expensive infant formula which is required to be in stock at all times by the WIC Program. However, according to FNS' records, Nostrand Deli is not an approved WIC Program vendor. In addition, at the time of the store visit, Nostrand Deli stocked only one variety of infant formula in minimal quantities (there were approximately six cans of infant formula in stock at the time of the store visit). It is important to note that the majority of households which qualify for WIC Program benefits also qualify for SNAP benefits. In most cases, these households utilize their WIC Program benefits to purchase infant foods and infant formula in lieu of using their SNAP benefits. Therefore, even if Nostrand Deli was an approved WIC Program vendor, most SNAP recipients would not utilize their SNAP benefits to purchase infant formula or infant foods at Nostrand Deli. SNAP recipients would utilize their WIC Program vouchers to purchase infant formula for their children. As such, the Appellant's contention that these questionable SNAP transactions are the result of Nostrand stocking large quantities of expensive infant formula which is required to be in stock at all times by the WIC Program is unsubstantiated.

The FNS store visit report and photos show that Nostrand Deli offers a minimal stock of SNAP eligible foods with no fresh or frozen meats, poultry, or seafood items, no frozen fruits or vegetables, and no fresh produce items. The inventory report and photos also show that Nostrand Deli stocks only one high priced food item that would account for these large amounts as well as showing the store has limited checkout counter space, no optical scanner, and no shopping carts or hand-held baskets in which to transport the large number of items required to make up these large transaction amounts. Without these, it is unlikely that such large dollar value transactions could be for actual food purchases and more likely they are trafficking.

The record shows that there are 262 SNAP authorized retailers located within a 1.0 mile radius of Nostrand Deli. The majority of these SNAP authorized stores are larger than the subject store and offer a greater quantity and variety of food products at comparable, or better prices as compared to the subject store. An analysis of the shopping patterns for all of the SNAP households listed in this Attachment shows that all of the households shopping at Nostrand Deli have access to transportation and that all are regularly shopping at a variety of larger stores,

including super stores and supermarkets, located nearby and at several miles distance from the Appellant's location. While Nostrand Deli does offer some staple food items, SNAP recipients are already shopping at other larger SNAP retailers located in proximity to the Appellant's business offering a greater quantity and variety of products, including fresh meats/seafood and produce, at lower prices. Therefore, the store has nothing to attract SNAP customers as there are no special or custom services offered.

The Retailer Operations Division compared the total dollar volume and the total purchase count of Nostrand Deli during the review period to that of other convenience stores located in Kings County, New York during the same time period. 5 U.S.C. § 552 (b)(7)(E).

#### 5 U.S.C. § 552 (b)(7)(E)

The Appellant did not provide FNS with any vendor invoices for foods purchased for Nostrand Deli during the five month review period in order to help substantiate that Nostrand Deli purchased enough staple foods to cover/explain the SNAP transactions that occurred at the store during the review period. Therefore, an invoice analysis could not be conducted by FNS. It is important to note that even if the Appellant had provided FNS with all of Nostrand Deli's vendor invoices for the five month review period and the vendor invoices showed that Nostrand Deli had 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 unusual numbers of transactions ending in a same cents value and rapid and consecutive transactions by individuals during the same store visit or in a single day. Even the large dollar transactions would remain questionable if there were sufficient food inventory to support such transactions when consideration is made of there being only a limited variety of stock in the store, no fresh meats, no frozen meats, no frozen fruits or vegetables, no fresh produce items, a greater variety of foods at comparable or lower prices at other stores, no shopping carts or hand-held baskets available for customer use, and very little counter space to place food for purchase at the checkout counter. Even if there were sufficient food stock at Nostrand Deli to mathematically support high dollar transactions, there does not appear to be anything that would reasonably attract SNAP households to shop there, a convenience store, in some cases traveling a few miles to do so, and spend substantial amounts of their SNAP benefits.

Lastly, the case record documents that the Retailer Operations Division conducted a detailed analysis of four SNAP households identified in the Charge Letter to analyze their shopping patterns at Nostrand Deli compared to their shopping patterns at other SNAP authorized stores. Each of these households had access to, and shopped at larger stores including super stores and/or supermarkets. It is obvious that these SNAP households had transportation available to them to reach these other authorized stores. However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at Nostrand Deli often 5 U.S.C. § 552 (b)(7)(E) of shopping at the larger stores where they conducted much smaller SNAP purchases. It is highly unlikely that a convenience store with minimal staple foods would have legitimate SNAP transactions greater than these larger and better stocked stores.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding those 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 hand-held baskets support the Retailer Operations Division's determination. It is not plausible that the store's customers are carrying large amounts of food around the store without the benefit of shopping carts and hand-held baskets. 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 the preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 3 are more likely than not the result of trafficking in SNAP benefits.

### **Reconsideration of Imposed Sanction**

The Appellant is requesting that FNS not impose a permanent SNAP disqualification against Nostrand Deli and, in the alternative, issue either an Official Warning Letter or impose a reduced period of SNAP disqualification. However, the Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that "... a disqualification . . . 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 ...". In keeping with this legislative mandate, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked.

### **CIVIL MONEY PENALTY**

The Appellant is requesting that if FNS decides that an administrative action must be imposed upon Nostrand Deli, that the Agency impose a civil money penalty in lieu of a permanent SNAP disqualification. There is a provision at 7 CFR § 278.6(i) of the SNAP regulations for the imposition of a trafficking civil money penalty (CMP) in lieu of a permanent disqualification for trafficking if the retail store establishes that there was an effective compliance policy and training program and that both were in effect and implemented prior to the occurrence of violations. The Appellant was advised of this provision in the Charge Letter of January 17, 2017 which also advised that documentation of eligibility for that alternative sanction was to be **substantial**, in accordance with the four criteria detailed in the referenced regulation and must be provided within a specific time limit (i.e., within ten days of the receipt of the Charge Letter). If the Appellant's request and the required documentation are not submitted on time, he will lose his right for any further consideration for a trafficking CMP. The regulations do not provide the Agency discretion to extend the time within which documentation and evidence in support of a CMP may be submitted. As such, only the information that is submitted within ten days of the Appellant's receipt of the Charge Letter may be considered by FNS when considering the Appellant's request for implementation of a trafficking CMP in lieu of a permanent SNAP disqualification.

In a written correspondence received by the Retailer Operations Division on January 27, 2017 in which the Appellant was responding to the Charge Letter allegations, the Appellant, through

counsel, requested consideration for a trafficking CMP in lieu of a permanent SNAP disqualification. However, the Appellant only partially addressed the requirements described herein and did not provide substantial evidence, in accordance with the criteria detailed in the referenced regulations, that the firm established and implemented an effective policy and program to prevent violations. Therefore, in the March 15, 2017 Disqualification Letter, the Appellant was informed by the Retailer Operations Division that consideration was given to the Appellant for a CMP according to the terms of the SNAP regulations but the Retailer Operations Division determined that the Appellant was not eligible for the CMP because he failed to submit sufficient evidence to demonstrate that Nostrand Deli had established and implemented an effective compliance policy and program prior to the SNAP violations occurring in order to prevent violations of the SNAP.

To verify that the Appellant had established and implemented an effective compliance policy and program at Nostrand Deli prior to the occurrence of the SNAP violations, the Appellant submitted the following information to the Retailer Operations Division in his January 27, 2017 response to the Charge Letter allegations:

- A statement from the Appellant indicating that he had reviewed and stored in Nostrand Deli a copy of all of the SNAP training materials provided by FNS, to include the SNAP regulations;
- A statement from the Appellant indicating that he had posted at the point of sale the following educational item in Nostrand Deli: A notice to SNAP recipients outlining the limitations and prohibitions on certain items and the manner in which their EBT cards are to be used at Nostrand Deli (provided in both English and Arabic languages);
- A statement from the Appellant indicating that notices to store employees highlighting the penalties for violations of the SNAP, as well as the Do's and Don'ts for cashiers were published to all employees and posted within the work place (provided in both English and Arabic languages); and
- A statement from the Appellant that he was unaware, nor approved or benefitted from, the unauthorized trafficking by management, employees, or SNAP recipients and/or retail purchases of items of unauthorized items under the SNAP.

With regards to the statements provided by the Appellant which attest that he had stored or posted in Nostrand Deli: (1) A copy of all of the SNAP training materials provided by FNS, to include the SNAP regulations; (2) A notice to SNAP recipients outlining the limitations and prohibitions on certain items and the manner in which their EBT cards are to be used at Nostrand Deli (provided in both English and Arabic languages); and (3) Notices to store employees highlighting the penalties for violations of the SNAP, as well as the Do's and Don'ts for cashiers (provided in both English and Arabic languages), it is important to note that upon a thorough review of the numerous photos taken by the contracted Reviewer during the store visit of Nostrand Deli, there is no indication that any of these notices/documents are posted in Nostrand Deli. In addition, the Appellant did not provide FNS with a copy of any of the training materials and notices that he claims are posted in Nostrand Deli. The store visit photos indicate that the USDA poster "We Accept SNAP Benefits" was posted at the checkout counter; however, the poster was badly torn so that only the top one-third of the poster was left. As such, the poster is not legible. The only other sign/poster related to the SNAP that was posted in the store was also

located at the checkout counter. This poster appeared to show a photo of an EBT card. However, approximately two-thirds of the poster was obstructed by a Consumer Affairs poster which had been placed over the EBT card sign/poster. Therefore, it appears that the Appellant's claim that he has stored or posted SNAP training materials and notices regarding the SNAP within Nostrand Deli is a fabrication for the purposes of attempting to qualify for a CMP in lieu of a permanent SNAP disqualification.

The Appellant also provided FNS with a copy of the "USDA SNAP Training and Compliance" for Nostrand Deli which states that:

**"DELI GROCERY MUST OBEY THE RULES AND REGULATIONS OF THE USDA FOOD STAMP PROGRAM IN ORDER TO BE ABLE TO SELL FOOD FOR AND IN EXCHANGE OF COUPONS AND EBT.**

**ALL EMPLOYEES MUST BE FAMILIAR WITH THE RULES THAT ARE CONTAINED IN THE BOOK THAT THE USDA HAS PROVIDED US.**

**THE NOTICES POSTED IN THE STORE ON HOW TO HANDLE FOOD STAMP EXCHANGE AND WHAT HAPPENS IF THEY ARE VIOLATED, MUST ALWAYS BE MAINTAINED AND REMAIN ON DISPLAY AND MAY NOT BE REMOVED.**

**IF ANY EMPLOYEE DOES NOT UNDERSTAND ANY RULES OR REGULATIONS, A FIRM MANAGER WILL EXPLAIN IT TO THE EMPLOYEE IN THE ARABIC LANGUAGE.**

**ALL EMPLOYEES WILL REVIEW THE RULES AT LEAST ONCE A MONTH AND SIGN HIS NAME TO THE SCHEDULE WITH THE DATE THAT HE WAS FURTHER TRAINED, INSTUCTED, OR RULES MADE CLEAR."**

The Appellant also submitted to FNS signed affidavits from himself, the store manager, and one store employee. The affidavits attest that each of the listed persons has provided or received training on the SNAP rules (on at least an annual basis) and that all employees who are involved in violations of the SNAP will be immediately terminated from employment at Nostrand Deli.

However, the documents provided by the Appellant are not sufficient to demonstrate that Nostrand Deli had established and implemented an effective compliance policy and program prior to the occurrence of the SNAP regulations. The Appellant submitted no evidence to validate that Nostrand Deli had an effective compliance policy and program in place prior to the occurrence of the SNAP violations, other than his statement of such. The Appellant did not provide an employee roster showing dates of hire for each employee (both current and past employees who received training—including any store managers and the store owner), no signatures were provided from each employee (both past and present) acknowledging that they had received training or that a compliance policy was in effect prior to the review period and on which dates they had received the training, etc. The Appellant did not provide FNS with any documentation to validate the employees who had worked at Nostrand Deli, verification on the dates of their employment at Nostrand Deli, verification that the employees listed have been the only employees who have worked at the store since the compliance program was implemented, etc.



The “USDA SNAP Training and Compliance” that was provided to FNS states that “ALL EMPLOYEES WILL REVIEW THE RULES AT LEAST ONCE A MONTH AND SIGN HIS NAME TO THE SCHEDULE WITH THE DATE THAT HE WAS FURTHER TRAINED, INSTUCTED, OR RULES MADE CLEAR.” However, documentation of each store employee’s monthly review of the SNAP rules was not provided to FNS. It is important to note that Nostrand Deli had been authorized to participate in the SNAP for approximately twenty (20) years when it received the Determination Letter from the Retailer Operations Division and was disqualified from the SNAP. It is extremely unlikely that only one store employee (Note: An affidavit was provided to FNS from only one store employee) had worked at Nostrand Deli during the store’s SNAP authorization period and during the time period that the store’s compliance policy was supposedly in place. If the Appellant had implemented an employee training program at Nostrand Deli during the store’s authorization period, he would have been able to provide FNS with training records and affidavits from numerous employees who had worked at the store. Therefore, the Appellant’s claim that he had implemented an employee training program that was in effect and implemented prior to the occurrence of SNAP violations is unfounded.

The Appellant did not provide FNS with any documentation to verify that he had developed and implemented an employee training manual prior to the cited SNAP violations. The Appellant did not provide FNS with any documentation/validation that the training materials used to train store employees and store managers on the SNAP rules and regulations clearly stated that the following acts are prohibited and are in violation of the Food and Nutrition Act and regulations: 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.

The Appellant did not provide any evidence to verify that all new employees are trained on the compliance policy and program prior to being able to conduct SNAP transactions as there were no signatures provided from store employees verifying this claim. The Appellant did not provide any evidence to validate that all new employees and managers whose work brings them into contact with SNAP benefits were trained within one month of their employment at Nostrand Deli, as is required by Appellants who are seeking an assessment for a CMP in lieu of permanent SNAP disqualification. The Appellant did not provide FNS with the dates of the annual training sessions for employees. In addition, the Appellant provided no documentation, other than the signed affidavits, that store employees received on-going, periodic training on the SNAP regulations and the proper acceptance and handling of SNAP coupons. In addition, the Appellant did not provide FNS with an evaluation of the effectiveness of the firm’s compliance policy and program to ensure SNAP compliance and to prevent SNAP violations, as is required by Appellants who are seeking an assessment for a CMP in lieu of permanent SNAP disqualification.

With regards to the signed affidavits provided by the Appellant which purport to establish that the questionable SNAP transactions listed in the Charge Letter are legitimate, that training

materials were stored at Nostrand Deli, that all store employees received training on the SNAP rules, and that no employee has trafficked SNAP benefits at the subject store, the truth of such declarations can neither be confirmed nor denied. Although such affidavits may be sworn to and notarized, that does not mean that they are necessarily truthful. One would not expect store owners/employees/managers to admit, when applying for a CMP in lieu of a SNAP disqualification, that questionable transactions were not legitimate and/or that there was no compliance policy in place prior to SNAP violations occurring, were it really so. On the contrary, one would expect that any store owner/employee/manager affidavit provided would attest to questionable transactions being legitimate and that there was a compliance policy and training program in place prior to SNAP violations occurring at the retail food store in order to qualify for implementation of a CMP in lieu of a permanent SNAP disqualification.

The Appellant provided FNS with a statement that he “was unaware, nor approved or benefitted from, the unauthorized trafficking by management, employees, or SNAP recipients and/or retail purchases of items of unauthorized items under the SNAP”. However, the Appellant did not submit any supporting documentation to verify this claim. In determining whether store ownership benefited from trafficking of SNAP benefits in which they were not directly involved, it is generally assumed that if EBT settlements are made to the store owner’s account, the store owner had benefited from such transaction. The store employee, manager, or store owner involved in the trafficking transactions took cash out of the store’s cash register and the benefits most likely went into the Appellant’s bank account. The Appellant did not submit any documentation to contradict this issue. Therefore, based on the lack of substantial evidence and information submitted, the Appellant failed to demonstrate that Nostrand Deli had established and implemented an effective compliance policy and program prior to the SNAP violations that occurred during the review period. As such, the Appellant’s request for consideration of a trafficking civil money penalty in lieu of a permanent SNAP disqualification was appropriately denied.

## CONCLUSION

The Retailer Operations Division’s analysis of the Appellant’s EBT transaction record, upon which charges of violations are based, together with observations made during the store visit and an analysis of customer shopping behaviors, provide substantial evidence that questionable transactions during the focus period have characteristics and display patterns that are not consistent with legitimate sales of eligible food to SNAP benefit customers at a store of this type, size and makeup. Rather, the characteristics are indicative of illegal trafficking in program benefits. The Appellant’s contentions do not outweigh this evidence.

The record has yielded no indication of error or discrepancy in the reported findings by the Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Therefore, the decision to impose a permanent disqualification from participation in the SNAP against Nostrand Deli & Grocery is sustained.

## **RIGHTS AND REMEDIES**

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

Under the Freedom of Information Act, 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.

LORIE L. CONNEEN  
Administrative Review Officer

January 12, 2018