

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

**USA Grocery Deli 1 Inc,**

**Appellant,**

**v.**

**Case Number: C0205695**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the USDA that the record indicates that USA Grocery Deli 1 Inc., (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the program, as initially imposed by the Retailer Operations Division was appropriate.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant by letter dated June 25, 2018.

**AUTHORITY**

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

**CASE CHRONOLOGY**

In a letter dated April 20, 2018, 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 July 2017 through December 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil

money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

In a May 1, 2018, telephone conversation with Retailer Operations Division, Appellant, through counsel, requested an extension in which to respond to the charge letter. In a letter dated May 1, 2018, Retailer Operations Division granted Appellant a seven (7) day extension to May 10, 2018. The letter stated that the time to request a civil money penalty in lieu of a permanent disqualification and to provide the documentation to support such a request cannot be extended. In a May 9, 2018, telephone conversation with Retailer Operations Division, Appellant, through counsel, requested an additional 10 day extension in which to respond to the charge letter. In correspondence dated May 9, 2018, Retailer Operations Division granted Appellant an additional 10 day extension to May 20, 2018. Appellant was again notified that the time to request a civil money penalty in lieu of a permanent disqualification and to provide the documentation to support such a request has not been extended.

In correspondence dated May 20, 2018, Appellant, through counsel, responded to the charge letter and generally stated that the store is located in an area of high foot and vehicle traffic and is surrounded by residential multi-unit apartment buildings and brownstones. It is also located blocks from the New York State Capitol and as such there are many customers who live or work nearby and frequent the store on a regular basis. There is not a major grocery retailer within walking distance. The store does not utilize a scanner but has a basic cash register system that reflects the relative size of its business. Appellant, through counsel, provided receipts, photographs of the store's stock and purchase orders/invoices in support of its position. Appellant, through counsel, stated that the provided documentation demonstrates that the transactions listed in the charge letter are not examples of trafficking and the store is unaware of any such conduct (or proof thereof) on the part of its owners or any of its employees.

After giving consideration to the Appellant's reply and evidence of the case, Retailer Operations Division issued a determination letter dated June 25, 2018. This letter informed ownership that they were permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also states that Retailer Operations considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, Retailer Operations Division determined that Appellant was not eligible for the CMP because it failed to submit sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated July 3, 2018 and in subsequent correspondence dated August 24, 2018, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted.

## **STANDARD OF REVIEW**

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an Appellant has

the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

## **CONTROLLING LAW**

The controlling statute in this matter is contained in the Food & Nutrition Act of 1977, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) (c) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 CFR § 278.6(a) states, *inter alia*, that “FNS may disqualify any authorized retail food store...from further participation in the program if the firm fails to comply with the Food and Nutrition Act of 1977, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an *electronic benefit transfer system*,...” (*Emphasis added*)

7 CFR § 278.6(c) reads, in part, “*Review of Evidence*. 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)...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...”

7 CFR § 278.6(e)(1) reads, in part, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.” Trafficking is defined, in part, in 7 CFR § 271.2, as “the buying or selling of SNAP benefits for cash or consideration other than eligible food.”

7 CFR § 271.2 states in part that, “Eligible foods mean: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption.”

## **SUMMARY OF THE CHARGES**

The charges on review were based on an analysis of SNAP electronic benefit transfer (EBT) transactions dated during the six month period of July 2017 through December 2017. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from the accounts of individual SNAP households within a set time period.
2. Excessively large purchase transactions were made from recipient accounts.

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

### **APPELLANT'S CONTENTIONS**

The Appellant made the following summarized contentions in its response to the permanent disqualification letter issued by Retailer Operations Division, and its request for administrative review, in relevant part:

1. As previously stated in prior correspondence we have been provided with no proof of trafficking other than a list of transactions with corresponding dollar amounts.
2. USA Grocery Deli 1 Inc. operates in a "food desert" an area in the city of Albany with a large impoverished population that does not have a supermarket or other grocery store chain in walking distance. Because of that many customers purchase meat, formula and other foodstuffs that are available for sale and for which we have provided documentation.

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

### **ANALYSIS AND FINDINGS**

The FNS initially authorized the business as a small grocery store on November 21, 2014. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during the January 7, 2018, store visit to the business conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock and facilities. This information was then used to ascertain if there were justifiable explanations for the EBT transactions at Appellant that formed patterns indicative of trafficking. The firm review summary documented the following store size, description, and characteristics:

1. One cash register and one POS device with a small counter area partially obstructed by other smaller items available for sale. Partially enclosed in Plexiglas.
2. Estimated to be approximately 4500 square feet. (Based on store visit photo's store does not appear to be that large. Previous visit in 2014 shows store was 450 square feet. No apparent additions were noticed)
3. No shopping baskets or carts available for customers.
4. No adding machines or optical scanners were available at checkout. No specialty registers present.
5. Store does not operate through a night window or plastic barrier with food stock behind the barrier.
6. No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.

7. No unusual pricing structure such as ending most products with 00 cents and does not round transaction totals.
8. No food stored in an area outside of public view
9. No storage freezers or coolers and no food stored off site.
10. Store is not primarily selling one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables.
11. Store does not take telephone or online orders and does not offer delivery
12. Highest priced eligible food items were Enfamil (\$17.99), Turkey (\$6.99/LB), Cheese (\$7.90/1.5LBS) and Ensure (\$11.00).
13. Store stocks a significant amount of non-food items such as but not limited to paper products, household products, tobacco products, health and beauty aids, mobile phones, and cleaning products.
14. Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products. No fresh fruits or produce, no fresh meat or poultry. Most meats are canned, packaged or frozen.
15. A kitchen/prepared food area with hot foods sold. A prominent menu board posted offering a variety of hot foods and sandwiches.
16. Food is sold for on-site consumption with a microwave available for heating.
17. A deli or prepared food section. Stock is used in preparation of food.
18. No meat or seafood specials or bundles or fruit/vegetable boxes sold.
19. No fresh or frozen meat or seafood available for sale.
20. Some empty spaces on shelves. Layer of dust noticed on shelving and some food items.

The issue for consideration is whether Retailer Operations Division has presented a convincing case that Appellant likely trafficked in SNAP benefits. Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

**Attachment 1 of the Charge Letter - Multiple transactions were made from the accounts of individual SNAP households within a set time period.**

During the review period, there were 28 sets of 57 SNAP transactions that met the parameters of this attachment. Multiple transactions conducted by the same household account within a set time period is a method which violating stores use to avoid the detection of single high dollar transactions that cannot be supported by the retailer's inventory and structure. Appellant, through counsel, did not offer, with its review request, a direct explanation or related evidence in an attempt to clarify or justify the specific transactional behavior noted in the Attachment 1 of the Charge letter.

Appellant, through counsel, contends that the store is surrounded by a residential multi-unit apartment building and brownstones and only blocks from the New York State Capitol where many customers live or work and frequent the store on a regular basis. Appellant, through counsel, also contends that there is no major grocery retailer within walking distance. With regard to these contentions, the record reflects that there are 29 SNAP authorized stores within one mile of Appellant's store including 23 other small grocery stores of which 15 are less than a

half mile from Appellant, 4 medium grocery stores, 1 supermarket and 1 superstore. The record also reflects that SNAP households traveled to and shopped at three superstores and four supermarkets during the review period. Additionally, if customers who work in the area frequent Appellant's store, which is blocks from the State Capitol, it is questionable why they would bypass a number of the other small grocery stores, that are less than a half mile from Appellant's store and that they would no doubt encounter on the way to Appellant's store.

Appellant, through counsel, contends that USA Grocery Deli 1 Inc. operates in a food desert an area in the city of Albany with a large impoverished population. With regard to this contention, food deserts are defined as parts of the country void of fresh fruit, vegetables, and other healthful whole foods, usually found in impoverished areas. This is largely due to a lack of grocery stores, farmers' markets, and healthy food providers. Low-income census tracts where a significant number of the population is greater than ½ mile from the nearest supermarket, supercenter, or large grocery store for an urban area or greater than 10 miles for a rural area. Using this measure, an estimated 54.4 million people, or 17.7 percent of the U.S. population, live in tracts that are low-income and low access and are more than ½ mile or 10 miles from the nearest supermarket. Although Appellant's store may be located on the perimeter of a defined food desert, it does not mean that SNAP recipients do not have access to larger better stocked stores. The record reflects that SNAP households traveled to and shopped at three superstores and four supermarkets during the review period.

In conclusion, it is therefore more likely true than not true that the irregular transactions cited in the charge letter Attachment 1 are due to trafficking in SNAP benefits.

#### **Attachment 2 of the Charge Letter - Excessively large purchase transactions were made from recipient accounts.**

There were 192 SNAP transactions that met the parameters of this attachment. Based on the results of the contracted store visit, the large transaction amounts are not consistent with the store's inventory of low priced foods. The firm does not offer food in bulk or any ethnic or specialty foods that sell for a high price. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

Appellant, through counsel, provided a number of register receipts and purchase invoices in support of its position. With regard to these documents, the record reflects that an analysis of the register receipts provided show that they all of the receipts contained the same transaction number and show tender of food stamps. Also, though the receipts appear detailed, it is unclear what was actually purchased under the title of "grocery" since there is also a label of "food" on the receipts. The receipts did not cover the entire review period and cannot be considered sufficient evidence that trafficking absolutely did not take place at Appellant's store.

Additionally, an analysis of the invoices, provided to Retailer Operations Division, indicate that Appellant's total SNAP redemptions, for the review period, exceeded the firms redeemable inventory by more than 4,000 percent. Appellant's purchase transactions far exceeded those of nearby similar stores during the review period and were 62 percent higher than other small grocery stores in the county during the review period. Appellant's purchase invoices provided do not justify Appellant's SNAP redemptions.

Based on this empirical data, and in the absence of sufficient evidence as to the legitimacy of such transactions, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the charge letter evidence trafficking as the most likely explanation. In this case, ownership did not provide sufficient evidence to legitimize Appellant’s transaction data as outlined in the Attachments. Retailer Operations Division determined that Appellant’s contentions did not outweigh the evidence that the store was trafficking and concluded, through a preponderance of evidence, that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

The transaction data and overall firm record convincingly demonstrate repetitive patterns of unusual, irregular, and inexplicable SNAP activity for this type of firm indicative of trafficking. Once Retailer Operations Division established a convincing case against Appellant, ownership bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. If this is not demonstrated, the case is to be sustained.

As noted, 7 CFR § 278.6(a) states that FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Retailer Operations Division has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns in two attachments of EBT transaction data, the inadequacy of the firm’s eligible food stock as observed and recording during the onsite visit to support such large transactions, the lack of evidence of invoices of foods in inventory to cover SNAP redemption totals for the review months, the lack of explanation for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant, and the irregular SNAP transaction data of Appellant as compared to other small grocery stores in the State.

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

The purpose of the administrative review process is to ensure that firms aggrieved by Retailer Operations Division' adverse actions have the opportunity to have their position fairly considered by an impartial review authority prior to that adverse action becoming final. Appellant has been duly given, and has taken the opportunity to present to USDA through the administrative review process whatever evidence and information it deems pertinent in support of its position that Retailer Operations Division's adverse action should be reversed. Therefore, any evidence and information that Appellant presented to Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to Appellant's right to a fair and thorough review.

### **CIVIL MONEY PENALTY**

Appellant was notified in the charge letter dated April 20, 2018, that it had 10 calendar days upon receipt of the charge letter to provide required documentation in order to be considered for the trafficking CMP. Appellant failed to provide Retailer Operations Division with the required documentation to be considered for a trafficking CMP in lieu of disqualification. Therefore, Retailer Operations Division correctly determined that Appellant was not eligible for a trafficking CMP as set forth in the SNAP regulations.

### **CONCLUSION**

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

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify USA Grocery Deli 1 Inc., from participation in the SNAP. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Therefore, based on a review of all the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged by Retailer Operations Division. Based on the discussion herein, the determination to impose a permanent disqualification against USA Grocery Deli 1 Inc. is sustained.

### **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the



U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

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

Monique Brooks  
Administrative Review Officer

October 24, 2018