

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

**Gorkhas Grocery Store,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0197146**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is not sufficient evidence to support the Retailer Operations Division's determination to permanently disqualify Gorkhas Grocery Store (hereinafter "Appellant") from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). Therefore, the permanent disqualification decision is reversed.

**ISSUE**

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of SNAP, when it imposed a permanent disqualification against Gorkhas Grocery Store.

**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."

**SUMMARY OF CHARGES**

The Appellant was charged with trafficking and subsequently permanently disqualified based on an analysis of EBT transaction data from July 2016 through December 2016. This involved the following transaction patterns which are common trafficking indicators:

- There were multiple transactions made from individual household benefit accounts within unusually short timeframes.
- Excessively large purchase transactions were made from recipient accounts.

### **CASE CHRONOLOGY**

The agency's record shows that FNS initially authorized Gorkhas Grocery Store for SNAP participation as a small grocery store on September 8, 2015. In a letter dated February 8, 2017, 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 between the months of July 2016 and December 2016. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

Over the course of the next several months, which included a FOIA request and agency response, the Appellant, through counsel, submitted a large amount of correspondence in response to the charge letter, generally stating that trafficking did not occur, but rather the transaction patterns listed in the charge letter were the result of shopping habits of the store's clientele, in which they purchased ethnic and rare staple food items not readily available at other local stores.

The Appellant argued that because of the large amounts of expensive and specialty ethnic foods available at the store, many SNAP clients use Gorkhas Grocery Store as their primary grocer, thus transacting large amounts of SNAP benefits at a single time or in consecutive transactions. The Appellant further argued that an undercover investigation conducted by USDA concurrent with this EBT analysis case yielded no SNAP violations and proves that the firm does not engage in violative behavior. Other arguments submitted by the Appellant include a claim that co-shopping may result in the transaction patterns listed in Attachment 1 of the charge letter.

In support of its responses to the charges, the Appellant provided a large amount of documentation. The most relevant evidence included the following:

- 722 pages of cash register receipts, which are itemized and show

precisely what was purchased during each transaction. The Appellant submitted receipts for all but a very few of the transactions listed in the two charge letter attachments.

- Ten customer affidavits signed by apparent SNAP customers, indicating that they make regular, large purchases at the store.
- Approximately 300 pages of inventory invoices and receipts from various vendors, showing the purchase of large amounts of unique and expensive food items, including large bags of rice, vegetables, goat meat, etc. Appellant acknowledged that the invoices provided do not represent all invoices the firm had, as some have been destroyed or lost. However, Appellant believes that they are an accurate reflection of the monies utilized to stock the store.
- Photos of the store, including areas which were not photographed by the agency's contractor, such as a stock room in the basement. Photos of this room show boxes of goods waiting to be placed on the shelves.
- Tax documentation, such as state business tax returns.

After reviewing the Appellant's response and further considering the evidence in the case, the Retailer Operations Division determined that the Appellant's explanations and documentation were insufficient to justify the unusual transaction patterns listed in the charge letter. The Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated July 18, 2017. This determination letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but that a CMP was not appropriate in this case 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 SNAP violations.

In a letter postmarked July 25, 2017, the Appellant appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

### **STANDARD OF REVIEW**

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 found in the Food and 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 § 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, [or] evidence obtained through a transaction report under an electronic benefit transfer system...** [Emphasis added.]

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 states, in part:

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 § 271.2 states, in part:

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

7 CFR § 278.6(b)(1) states, in part:

Any firm considered for disqualification...under paragraph (a) of this section...shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification.... The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter...

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(b)(2)(ii) states, in part:

Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence... that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).

7 CFR § 278.6(b)(2)(iii) states:

If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such a penalty.

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 § 279.4(a) states, in part:

Upon receipt of a request for review of administrative action, the administrative action shall be held in abeyance until the designated reviewer has made a determination. However, permanent disqualifications for trafficking shall not be held in abeyance and shall be effective immediately as specified in 278.6(b)(2) of this chapter. If the disqualification is reversed through administrative or judicial review, the Secretary shall not be held liable for the value of any sales lost during the disqualification period...

### **APPELLANT'S CONTENTIONS**

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

- The Appellant has provided all but nine itemized cash register receipts, which provide that the transactions are legitimate. The receipts identify the items sold, the quantity of the items purchased, the base price, and the total price.
- Attachments 1 and 2 are diametrically opposed. On one hand the Retailer Operations Division suggests that the firm is breaking down large transactions into smaller, but more frequent transactions to avoid suspicion. On the other hand the Retailer Operations Division is suggesting that the firm is doing large transactions anyway. Such logic is inconsistent.
- As to why the patterns found in Attachment 1 might exist, the Appellant cannot be in the minds of the households to know why they choose to shop in succession at the store.
- Co-shopping may be part of the reason for such repetitive transactions. This was explained in detail in response to the charge letter.
- There are no regulations pertaining to how frequently a SNAP household is permitted to shop at a particular store, and the store has no control over such transactions.
- Likewise, there are no regulations concerning the size of a SNAP purchase. In this case, the cash register receipts show exactly what the participants were buying. The transaction receipts should put to rest any concerns about the veracity of the transactions. The pricing of items is consistent across the board, and all items purchases are clearly outlined. There can be no better

gold standard for data analysis evidence on the part of the Appellant than what they have put forth with the receipts.

- Short of having videotaped each SNAP transaction, there is no other evidence that the Appellants could reasonably be expected to maintain in support of their position. The fact that only nine receipts are missing out of the 1,149 transactions shows the level of thoroughness and careful detail that the Appellants maintain in the operation of their business.
- FNS can offer little more than circumstantial evidence, while the Appellants have set out specific and exact explanations for virtually all of the transactions – and certainly satisfy more than enough of the transactions to reduce the number of suspicious transactions well below the thresholds that FNS maintains.

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

## **ANALYSIS AND FINDINGS**

The primary issue for consideration in a case based on questionable SNAP redemption data is whether or not the Retailer Operations Division adequately established that the Appellant firm engaged in the violation of trafficking. In other words, did the Retailer Operations Division, through a preponderance of the evidence, establish that it is more likely true than not true that the irregular and questionable transactions cited in the charge letter were the result of trafficking?

After a thorough review of all documentation in this case, it is the determination of this review that the Appellant’s evidence, particularly the itemized cash register receipts, indicate that the transactions in question were, more likely than not, legitimate purchases of eligible food. When this receipt evidence is considered along with the inventory invoice documentation, the contractor’s store visit reports, and the unsuccessful undercover investigation that occurred simultaneous to this EBT analysis case, this review finds that the preponderance of evidence weighs substantially in favor of the Appellant.

There is not a way for this review to definitively conclude that trafficking did not, at any point, occur at the Appellant firm; nor would it be possible to do so in a case based primarily on an analysis of SNAP redemption data. However, a determination of permanent disqualification must be supported to such a degree as to conclude that trafficking is the most plausible explanation. In light of the evidence and information that was provided by the Appellant, it is the determination of this review that there are other legitimate theories, besides trafficking, for the unusual transaction patterns listed in the charge letter.

## **CONCLUSION**

It is the determination of this review that the Appellant has met the burden of proving, by a preponderance of the evidence, that the transactions listed in the charge letter were, more likely than not, legitimate purchases of eligible food. Therefore, it is the conclusion of this review that trafficking was likely not committed by the Appellant firm. As such, the determination to impose a permanent disqualification against Gorkhas Grocery Store is hereby reversed.

## **RELEASE OF INFORMATION**

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.

JON YORGASON  
Administrative Review Officer

February 8, 2018