

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

A & A Food Mart,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0243893

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 A & A Food Mart (hereinafter “A & A Food Mart” or “Appellant”) 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 A & A Food Mart.

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 April 13, 2021, the Retailer Operations Division informed the Appellant that A & A Food Mart 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.” 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). Per UPS confirmation of delivery, the charge letter was delivered to the Appellant at the store address of record on April 14, 2021.

The record reflects that in a letter dated April 20, 2021, the Appellant's counsel requested an extension in time for providing a response to the letter of charges. In a letter dated April 20, 2021, the Retailer Operations Division granted counsel's time extension request to May 24, 2021. In that letter, counsel was informed that the time to request a civil money penalty in lieu of permanent disqualification and to provide documentation to support such a request could not be extended.

In a response to the Retailer Operations Division of May 21, 2021, the Appellant, through counsel, replied to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

After considering the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated August 5, 2021, informing the Appellant that A & A Food Mart was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations. The letter also stated that the Appellant was not eligible for a trafficking civil money penalty (CMP) as the Appellant did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked August 9, 2021, 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 September 1, 2021. In an email correspondence of September 22, 2021, the Appellant, through counsel, submitted additional information in support of the request for administrative review.

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 November 2020 through February 2021. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were multiple transactions made from the accounts of individual SNAP households within a set time period; and
- There were EBT transactions conducted that are large based on the observed store characteristics and recorded food stock.

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.

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 reply to the charge letter, in the administrative review request, and in subsequent correspondence to FNS, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant denies that trafficking took place.
- The Appellant occupies 2,000 square feet of space and sells a variety and quantity of staple food items including chicken, beef, lunch meat, bacon, eggs, bread, cheese, cereal, Ensure, water, juice, milk, ice cream, chips, cookies, crackers, and additional items. The vast majority of the store's offerings are qualified items under the SNAP regulations.
- Some of the store's more expensive food items include: Chicken wings, \$119.99 per 40 pounds; beef, \$129.99 per 40 pounds; chicken breast, \$79.99 per 40 pounds; chicken legs, \$39.99 per 40 pounds; whole chicken, \$39.99 per 40 pounds; Ensure, \$39.99 per case; spaghetti sauce, \$25.00 per case; Fiji water, \$24.99 per 36 pack; soda, \$24.99 per 36 pack; Gatorade, \$22.99 per case; Nutriment, \$21.99 per case; and Zephyrhills water, \$8.99 per case.
- A substantial portion of the Appellant's customers come from the surrounding neighborhoods.
- There is also a funeral home across the street from the Appellant which brings business to the store due to people needing supplies and food for funerals.
- The Appellant is located in an economically depressed area. According to USDA's *Profile of Households for the 24th Congressional District of Florida*, 30% of the local households receive SNAP benefits.
- As noted in the April 2016 edition of Single Store Owner magazine, SNAP participants are more likely to shop at convenience stores and small grocery stores and customers of these stores are among the most loyal customers. Also, SNAP participants are more likely to shop regularly at small grocer/convenience stores than nonparticipants.
- Households with particular demographic information are more likely to be disqualified which shows a bias towards smaller grocers.

- Most visits to a store the size of the Appellant are made while the customer is on his/her way to work or school, or while running errands at night. Typically, SNAP participants who visit on a daily or weekly basis are significantly more likely to do so in the morning, or during the late evening.
- In support of the Appellant's discussions regarding SNAP households' shopping habits, the following studies were cited: *Benefit Redemption Patterns in the SNAP in Fiscal Year 2017 Final Report*, Insight Policy Research, September 2020; *Shopping Pattern and Food Purchase Difference Among SNAP Households and Non-SNAP Households in the United States*, Preventative Medicine Reports, June 20, 2017; and *What Does SNAP Benefit Usage Tell Us About Food Access in Low-Income Neighborhoods?*, Social Science & Medicine, 2014.
- With regard to the transactions documented in Attachment 1, they are the result of the store's business practices, co-shopping and/or the shopping habits of the SNAP clientele.
- As stated in the court in *Onukwughu v. U.S.*, "multiple transactions occurring over the span of hours" are not "inherently suspicious" as it is not uncommon for a customer to make multiple trips to the same store on the same day (finding it unclear as to why FNS found certain close in proximity transactions to be consistent with patterns of trafficking "rather than the innocent explanation of a shopper realizing he forgot something or, for example, one household member wanting to make a small purchase . . . while the other household member stays behind to complete a larger purchase).
- Past Administrative Review Branch decisions have identified a number of certain explanations for the presence of Attachment 1 transactions. The Appellant cited numerous administrative review cases and numbers in support thereof.
- FNS has previously conducted research (*Benefit Redemption Patterns in the SNAP*, Final Report 2011) which indicates that purchases made within the first seven days after receiving benefits is not unusual. Such patterns are supported by the *Benefit Redemption Patterns in the SNAP in Fiscal Year 2017 Final Report*, Insight Policy Research, September 2020 which found in an average month during that fiscal year, SNAP households spent more than half of their benefits in the first week and nearly three-quarters by the second week. Furthermore, 14% of the benefits were immediately used within the first 24 hours of receiving them.
- The Appellant services a much higher African American and Hispanic population than the average SNAP retailer to whom their transactions are compared. The presence of a large African American SNAP household community increases the store's likelihood to make purchases on a more frequent basis.
- Many of the local SNAP household members are unemployed. To satiate their boredom, these participants will regularly shop at stores to find something to do.
- Co-shopping is on the rise where both adult members are responsible for picking up groceries.
- The Appellant is aware that there are a number of SNAP households that come into the store multiple times a day because of convenience, often sending their children on separate shopping trips to pick up items. The Appellant cannot control what SNAP customers do with their cards.
- Also, families, especially those with multiple parents/adults, are more likely to shop in higher frequency and produce Scan B2 transactions because their purchases tend to be higher.
- The store does not have an optical scanner, but the clerk has the ability to visually identify and enter items into the register. Item prices are usually consistent if not outright uniform, and are frequently memorized by the clerk through repetition over time. Furthermore, the store will tabulate transactions on a rolling basis, meaning that unlike a grocery store when

you line up, set all of your items on the counter and then purchase them, this store permits participants to gather items, bring them to the register, and then return to gather more items. Although the EBT transactions are processed consecutively over a matter of a few minutes, the calculations, bagging and gathering of items can take dozens of minutes if the participant chooses.

- It is much easier for the customer to get through the spaces of a store like the Appellant's than it is for them to go into a supermarket/super store. Accordingly, these customers are more likely to come back for supplemental and quick shopping trips than they otherwise would at an average convenience store with an inferior inventory and a further distance from their homes.
- The affidavits submitted from six of the store's SNAP customers state they spend between \$50.00 to \$350.00 in a single trip, exhausting between 10% to 80% of their SNAP benefits, and the majority attesting to frequenting the store multiple times in a single day.
- The nearest SNAP retailer is located 0.32 miles away with the closest supermarket 0.34 miles away. The Appellant sits on a main transportation route and only a short walk from multiple bus stops. This transportation route causes an increased volume of transactions in comparison to stores who are not so well located.
- Many of these other stores are stacked one upon another. This causes a reduction in the flow of SNAP participants as they have more direct competition and a smaller portion of the overall SNAP business.
- Transportation inconsistency is another reason for the transactions outlined in this Attachment. Participants do not have their own vehicles so trips to larger stores are dependent upon rides from friends or family. A household that cannot depend on those trips is forced to shop nearby.
- Past Administrative Review Branch decisions have identified a number of certain explanations for the presence of Attachment 2 transactions. The Appellant cited numerous administrative review cases and numbers in support thereof.
- The transactions documented in Attachment 2 are the result of the store's inventory, co-shopping, and/or the normal reflection of a SNAP participant's shopping habits.
- The Appellant offers its clientele a considerable inventory in breads and meats.
- According to USDA's research (*Foods Typically Purchased by SNAP Households*), sweetened beverages and salty snacks are within the top 10 expenditures for SNAP households, as are meats and a number of other items offered by the Appellant. It is therefore reasonable to expect customers to spend large amounts and/or the majority of their benefits at the Appellant on the inventory evidenced in the on-site inspection.
- In all, the SNAP household study found that participants spend almost 62% of their monthly benefits on meats, sweetened beverages (sodas and energy drinks, Gatorade and the like), vegetables, frozen prepared foods, prepared desserts, high fat dairy/cheese and breads—in that order. It is therefore reasonable to expect SNAP customers to spend large amounts and/or the majority of their benefits at the Appellant store.
- According to the FMI *U.S. Grocery Shopping Trends* 2016 annual report, limited assortment stores saw an increase of consumers who use them as a primary grocery by 3% over 2015; convenience stores likewise saw an increase of 3% in consumers who used their store as their primary grocer; ethnic food stores saw a rise of 1% in primary grocery usage.
- Households that conducted the transactions in Attachment 2 have a large amount of SNAP residents residing in the areas surrounding the store, thus requiring a larger quantity of grocery products each month than those households with less participants.

- Households comprised of Hispanic members are far more likely to make large purchase transactions than households of other ethnicities.
- Given the higher priced items in the store, it is not difficult to imagine \$60.00 worth of groceries being purchased in a single trip – and being transported by hand back to the store. The remainder of the transactions could easily be transported by two people.
- The number of high priced items in the store does not require the store to have a huge amount of counter space to set all of the items. Given that a number of these items is roughly \$7.00 each, 8 to 9 of such items would not be difficult to carry and could be placed on the given space set out in the store visit report.
- Furthermore, visual identification on the part of the store clerk is easier than scanning items as they are aware of the prices because of experience so they need only to identify the items and enter the price on the register.
- Because the Appellant is located much closer to the SNAP participants and its inventory contains such a wide variety of items, these transactions are more likely to occur as a matter of course.
- The submitted bank statements, inventory invoices, and tax return for the review period substantiate the firm’s inventory and demonstrate that there was adequate eligible food items to account for the transactions during the review period.
- USDA does not know the correlation coefficient between ALERT scans and trafficking. The Appellant has calculated this based on results of undercover investigations and determined that it was a positive correlation, but the relationship between the values is weak.
- The ALERT system cannot identify fraud. It is designed to identify “suspicious behavior” at most, but the basis for the system is unknown. See *TG Mini Mart, Inc.* and *Lima Mini Mart Inc.*
- It is likely that the presence of a Confirmation Bias exists, as it does in many cases handled by FNS. The danger of Confirmation Bias is obvious: USDA starts with the theory that trafficking exists because that is allegedly what the ALERT patterns were designed to detect and if the store is flagged often enough, then the automatic hypothesis put forth by USDA that trafficking is occurring.
- The pertinent burden of proof of SNAP disqualification is the “preponderance of evidence” standard, which means that the evidence must be adequate enough which is a reasonable mind, considering the record as a whole, would accept as sufficient a conclusion that the matter is asserted more likely to be true than not true. See *L&M Grocery Market, Inc. vs. Retailer Operations and Compliance*. The Department bears the burden of proof, not the retailer. See *Cardenes Market vs. Retailer Operations and Compliance*.
- The transaction patterns identified have been explained by the Appellant as required in *Skyson USDA, LLC vs. U.S.*
- Recent administrative review cases discuss the precedent that should be considered in this case: *Howard’s Quik Mart vs. Retailer Operations Division* and *Gloesis Group vs. Retailer Operations Division*.
- Not holding the determinations in abeyance while a FOIA response is pending violates 7 CFR § 278.6(b)(1) according to *Triple E Express vs. ROD*, because the Appellant is not given a full opportunity to respond.
- In the event that FNS determines that trafficking did occur, the Appellant requests imposition of a civil money penalty in lieu of permanent disqualification. The Appellant has trained staff on the appropriate rules and regulations regarding the SNAP and have made certain that each employee understands the SNAP rules prior to being permitted to operate the cash

register without constant supervision. The Appellant has always maintained a policy that SNAP violations will not be tolerated.

In support of these contentions, the Appellant, through counsel, submitted the following documents for review:

- Affidavits of six SNAP customers;
- Bank statements from October 1, 2020 – October 31, 2020, December 1, 2020 – December 31, 2020, and January 1, 2021 – January 31, 2021;
- Corporation income tax return for 2020;
- Vendor invoices/receipts (142 total) for purchases;
- Store (34 total) stock photos;
- *Profile of SNAP Households in 2018, Florida Congressional District 24*, USDA FNS;
- *Benefit Redemption Patterns in the SNAP in FY 2017 Final Report*, Insight Policy Research;
- *Know Your Core, Protect Your Core*, Convenience Store News for the Single Store Owner, April 2016;
- *U.S. Grocery Shopping Trends Annual Report*, FMI, 2016; and
- *Foods Typically Purchased by SNAP Households*, FNS, November 2016.

ANALYSIS AND FINDINGS

SNAP Authorization

During the review period of November 2020 through February 2021, A & A Food Mart was classified as a convenience store. When the Appellant was authorized by FNS for participation in the SNAP, the owner signed a SNAP application for the store and acknowledged he was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible items.

Store Visit Observations

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a February 9, 2021 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:

- Approximately 1,900 square feet in size with approximately 50 square feet of additional storage area outside of public view which stocked non-food items;
- Had empty/broken/unused storage coolers/freezers;
- Had storage coolers which stocked foods used in hot and/or cold prepared food products;
- No shopping carts and no hand-held baskets available for customer use;

- One small checkout counter area with limited check-out counter space which was surrounded by a Plexiglas barrier;
- One cash register and one EBT point-of-sale (POS) devices for use in ringing-up SNAP transactions;
- Had an optical scanner;
- Had ATM or money transfer service;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals;
- No meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers;
- No orders (telephone or on-line) were taken;
- Delivery was not offered;
- Had dusty cans/packages;
- Had expired/outdated/spoiled food;
- The six most expensive SNAP-eligible food items in stock were Jupina soda at \$18.00 per 24 pack (12 ounce cans) (3 units in stock); Canada Dry ginger ale at \$10.00 per 12 pack (12 ounce cans)(3 units in stock); Nestle Pure Life water at \$8.00 per 24 pack (16.9 ounce bottles) (7 units in stock); Rex vegetable oil at \$6.99 per 96 ounces (3 units in stock); Friendly Farm whole milk at \$5.50 per 1 gallon (5 units in stock); and Hiland premium ice cream at \$5.00 per 1 pint;
- No fresh or frozen meats, poultry, or seafood;
- Frozen food items included ice cream only;
- Had a kitchen and hot foods were sold;
- Did not have a deli area and deli meats and cheeses were not sold by the pound;
- Meat items included units of canned/potted meat, canned fish, eggs, meat jerky, and hot dogs;
- Dairy included milk (cow and coconut varieties), margarine, and cheese;
- No fresh produce stock;
- Other staple foods available for purchase included such items as juice, pasta, rice, cereal, loaf bread, corn meal, flour, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, condiments, snack foods, cakes/pastries, and coffee; and
- Ineligible nonfood items included tobacco products, health and beauty aids, paper products, household cleaning supplies, household items, lottery tickets, alcohol, automotive supplies, and clothing.

The available inventory of SNAP eligible food at the time of the store visit showed food stock that would be typical of a convenience store, where households normally purchase a limited number of items. The SNAP eligible food stocked by the store was generally of a low dollar value, consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. There was little indication that SNAP households would be inclined to regularly visit the store to purchase large quantities of groceries. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of similar sized competitors.

Charge Letter Attachments

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.

Repeat Transactions by the Same Household (Charge Letter Attachment 1)

This charge letter Attachment documents 31 sets of transactions (73 total transactions) that total \$6,640.60 in SNAP benefits to meet the parameters of this scan. These transactions were conducted by 22 different SNAP households. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer’s inventory and structure.

The Appellant contends that as noted by FNS in its *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program Final Report* (2011), a large portion of households redeem nearly all of their benefits within the first two weeks of the month. Purchases made within the first seven days after receiving benefits is not unusual. The owner cannot control what SNAP customers do with their cards. The Appellant is aware that there are a number of SNAP households that come into the store multiple times a day because of convenience, often sending their children on separate shopping trips to pick up items.

Although it is not uncommon for customers to have more than one transaction per day and there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of the Appellant’s stock and facilities and are therefore, indicative of trafficking.

Although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefit allotment in just one or two days, especially from a convenience store like the Appellant firm that has a moderate food stock, no fresh produce stock, no fresh meats, poultry, or seafood, and no frozen meats, poultry or seafood. The February 2011 government report cited by the Appellant revealed that households most often redeemed their benefits at supermarkets and super stores with only 4% of all households never

shopping in a supermarket or super store. Thus, when a supermarket or super store is available, it is highly unlikely that a SNAP recipient would conduct multiple transactions within a limited period of time or excessively large SNAP transactions at a convenience store like A & A Food Mart with a moderate selection of staple foods.

The Appellant contends that as was noted in the 2016 study conducted by the Convenience Store News, small grocery/convenience store customers are among some of the most loyal customers when it comes to their store selection.

FNS acknowledges the statement regarding small grocery/convenience store shoppers being some of the most loyal, based on the supplied 2016 study and that customers often pick-up needed items on their way to or from work or school. However, no evidence was submitted by the Appellant to support the statement that SNAP customers are more likely to shop regularly at a small grocery or convenience store than non-participants. The Appellant's claim that SNAP customers are more likely to shop regularly at a small grocery or convenience store than non-participants is located nowhere in the supplied study. This study appears to refer to all types of customers. The consumer research on convenience store core shoppers cited in the 2016 study did not address SNAP redemptions or SNAP customers.

The Appellant provided statistics pertaining to the general demographic of SNAP households. However, there is no indication as to how this explains the questionable transaction patterns addressed in the charge letter. Many households are comprised of a diverse family dynamics, yet this is not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not occurring in other similarly or even better stocked stores. If specific family needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would exist at other neighboring stores.

As to whether or not co-shopping actually affected the Appellant firm during the review period, this argument is little more than conjecture. The Appellant has provided no evidence to show that co-shopping is particularly common among SNAP recipients in Miami, Florida. If co-shopping truly impacted A & A Food Mart as the Appellant suggests, it would stand to reason that co-shopping would affect other nearby firms as well. This would manifest itself in comparable firms having similar transaction patterns – multiple transactions from the same household in a short period of time. But this is simply not the case.

The Appellant contends that the store sells a variety and quantity of staple food items with the vast majority of the store's offerings are qualified items under the SNAP regulations. It is much easier for the customer to get through the spaces of a store like the Appellant's than it is for them to go into a supermarket/super store. Accordingly, these customers are more likely to come back for supplemental and quick shopping trips than they otherwise would at an average convenience store with an inferior inventory and a further distance from their homes.

However, the second, third, and fourth transactions in each set are too large to consist of forgotten items. In addition, the report and photographs from the store visit as well as the stock photos submitted by the Appellant offer no explanation as to why SNAP customers would routinely shop at A & A Food Mart multiple times during a short period or purchase such a large volume of items, there being no great variety or advertisements of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. The majority of the Appellant's food stock consists of packaged food items, canned items, accessory food items, snacks, and beverages. The

store had dusty cans/packages and expired/outdated/spoiled foods indicating that they are not frequently purchased by customers. The firm also offered no special or custom services to customers, such as on-line or telephone orders and/or delivery services, which would entice SNAP customers to utilize the subject store over other area authorized retail stores.

The Appellant contends that the store does not have an optical scanner, but the clerk has the ability to visually identify and enter items into the register. Item prices are usually consistent if not outright uniform, and are frequently memorized by the clerk through repetition over time. Furthermore, the store will tabulate transactions on a rolling basis, meaning that unlike a grocery store when you line up, set all of your items on the counter and then purchase them, this store permits participants to gather items, bring them to the register, and then return to gather more items.

While the store visit observations indicate that the firm had an optical scanner, the store did not have any conveyor belts to expedite high dollar or rapid consecutive purchases. There was only one cash register and one EBT POS device for ringing up SNAP purchases and a small checkout area with limited check-out counter space which was surrounded by a Plexiglas barrier. The customers have no place to put multiple purchases while shopping. As a customer this would be inconvenient at best and it would make it hard for the cashiers to keep a running total of items purchased as the Appellant suggests. As such, even if cashiers do know the price of goods by memory, these factors call into question that this is a reasonable explanation for the transactions.

The Appellant contends that the affidavits submitted from six of the store's SNAP customers state they spend between \$50.00 to \$350.00 in a single trip, exhausting between 10% to 80% of their SNAP benefits, and the majority attesting to frequenting the store multiple times in a single day.

Upon review of the state administrative terminal database, the Retailer Operations Division was able to identify five of the six people identified in the affidavits as having shopped at the Appellant during the review period. 5 U.S.C. § 552 (b)(7)(E).

While FNS acknowledges the statements, affidavits/customer statements provided in cases where violations are suspected are frequently considered unreliable because the persons writing them historically give inaccurate information. These affidavits, even if well-intentioned, are typically not accurate depictions of a household's shopping behavior, as households generally do not retain records of transactions and often do a poor job of recalling actual spending patterns at a particular location. Even if it is assumed that all six customer statements were 100% accurate and accepted as evidence of legitimate transactions, they could account for just a small percentage of the transactions in the charge letter. These statements are not found to be more persuasive of legitimate SNAP transactions for eligible foods than the evidence supporting trafficking.

The Appellant contends that the nearest SNAP retailer is located 0.32 miles away with the closest supermarket 0.34 miles away. The Appellant sits on a main transportation route and only a short walk from multiple bus stops. This transportation route causes an increased volume of transactions in comparison to stores who are not so well located.

It is recognized that sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, during the review period there were five SNAP authorized retailers located within a 1.0 mile radius of A & a Food Mart, including a supermarket located 0.3 miles away, which could meet the nutritional needs of SNAP customers. The majority of

these area authorized stores offer a comparable or greater quantity and variety of food products at comparable or better prices as compared to the subject store.

The Appellant contends that transportation inconsistency is another reason for the transactions outlined in this Attachment. Participants do not have their own vehicles so trips to larger stores are dependent upon rides from friends or family. A household that cannot depend on those trips is forced to shop nearby.

The record indicates that SNAP customers who shopped at A & a Food Mart during the 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 or the availability of other food stores does not appear to be an explanation for the Appellant's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

No documentation was offered to support the Appellant's contention that trafficking was not occurring at the firm. The Appellant has the burden to provide relevant evidence to rebut the trafficking charges. Unfortunately, the Appellant has not provided any evidence to show that the transactions listed in this Attachment were legitimate purchases of eligible foods. The arguments presented by the Appellant hold little weight without some kind of evidence to substantiate its claims.

Excessively Large Purchase Transactions (Charge Letter Attachment 2)

This charge letter Attachment documents 167 SNAP transactions, as large as \$500.95, that total \$16,112.82. These large transaction amounts are not consistent with the store's observed characteristics and food inventory. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant contends that the vast majority of the store's offerings cover a material portion of the grocery purchases of the local SNAP participants. The Appellant offers its clientele a considerable inventory in breads and meats.

However, the food stock and facilities of the Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at convenience stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. The Appellant contends that the large transactions are not the result of trafficking of SNAP benefits. However, it is rare for a convenience store such as A & A Food Mart to have purchases like those included in this Attachment to the charge letter.

The Appellant contends that given the higher priced items in the store, it is not difficult to imagine \$60.00 worth of groceries being purchased in a single trip. The number of high priced items in the store does not require the store to have a huge amount of counter space to set all of the items. Given that a number of these items is roughly \$7.00 each, 8 to 9 of such items would not be difficult to carry and could be placed on the given space set out in the store visit report. Furthermore, visual identification on the part of the store clerk is easier than scanning items as they are aware of the prices because of experience so they need only to identify the items and enter the price on the register.

However, the store visit observations indicate that the Appellant had one cash register and one EBT POS device, an optical scanner, and a small checkout area with limited check-out counter space which was surrounded by a Plexiglas barrier. A review of the store visit report and photos also indicates that A & A Food Mart is a convenience store offering a moderate variety and amount of staple food items and does not offer any specialty or ethnic food items that are not available at other area authorized retail food stores. The stock of SNAP eligible foods is moderate with no fresh or frozen meats, poultry, or seafood, no fresh produce stock, and lacks an abundant depth and breadth of staple foods.

While the Appellant provided a list of 12 high priced staple foods that it claims the store stocks, many of these items including chicken wings, beef, chicken breast, chicken legs, whole chicken, and Ensure were not noted in the store visit observations. In addition, the spaghetti sauce and Nutriment noted by the Appellant was not offered in large/case quantities. The store visit evidence shows that only a few high priced eligible foods were in stock, most of which were in limited quantities, so the majority of the food items stocked at the store are low priced items.

While there is no definition in the SNAP regulations for an excessively large purchase or transaction, FNS makes its determination based on the store type, characteristics and stocked inventory. The burden is on the Appellant to prove transactions FNS identified as large for the store type (in this case, a convenience store) are for legitimate purchases. According to the store visit of February 9, 2021, the subject store did not have inventory to support the numerous large transactions. The store must have stocked inventory to repetitively generate large sales, which was not evident in the store visit.

The Appellant contends that according to USDA's research (*Foods Typically Purchased by SNAP Households*), sweetened beverages and salty snacks are within the top 10 expenditures for SNAP households, as are meats and a number of other items offered by the Appellant. It is therefore reasonable to expect SNAP customers to spend large amounts and/or the majority of their benefits at the Appellant store.

It is acknowledged that the subject store does offer items that SNAP households would purchase; however, many of these items are accessory items that a SNAP customer would not purchase all the time. However, the key findings of the noted study indicate that there were no major differences in the expenditure patterns of SNAP and non-SNAP households, no matter how the data was categorized. The study noted that similar to most American households: About 40 cents of every dollar of food expenditures by SNAP households was spent on basic items such as meat, fruits, vegetables, milk, eggs, and bread; another 20 cents out of every dollar was spent on sweetened beverages, desserts, salty snacks, candy and sugar; the remaining 40 cents was spent on a variety of items such as cereal, prepared foods, dairy products, rice, and beans; and the top 10 summary categories and the top 7 commodities by expenditure were the same for SNAP and non-SNAP households, although ranked in slightly different orders.

The Appellant provided statistics pertaining to the general demographic. However, there is no indication as to how this explains the questionable transaction patterns addressed in the charge letter. Many households are comprised of a diverse family dynamics, yet this is not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not occurring in other similarly or even better stocked stores. If specific family needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would exist at other neighboring stores.

5 U.S.C. § 552 (b)(7)(E).

As to whether or not co-shopping actually affected the Appellant firm during the review period, this argument is little more than conjecture. The Appellant has provided no evidence to show that co-shopping is particularly common among SNAP recipients in Miami, Florida. If co-shopping truly impacted A & A Food Mart as the Appellant suggests, it would stand to reason that co-shopping would affect other nearby firms as well. This would manifest itself in comparable firms having similar transaction patterns – excessively large purchase transactions made from recipient accounts. But this is simply not the case.

While the Appellant firm may be located in a neighborhood with households that qualify for SNAP benefits and has a funeral home located across the street, these factors are not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not displayed in other similarly stocked stores. If specific household needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would also present themselves at nearby firms as well. But this is simply not the case.

The Appellant contends that according to the 2016 *U.S. Grocery Shopping Trends Annual Report*, FMI, limited assortment stores saw an increase of consumers who use them as a primary grocery by 3% over 2015; convenience stores likewise saw an increase of 3% in consumers who used their store as their primary grocer; ethnic food stores saw a rise of 1% in primary grocery usage. FNS does not question the data in the report and acknowledges that it could be possible that some people shop at the subject store regularly. However, the Appellant is using this average and or overall data to attempt to explain the questionable transactions in the charge letter. This data, however, is not specific to the subject store. This report does not mention the number of SNAP recipients, if any, included in the survey. In addition, the survey participants were located in Seattle, Washington, while the subject firm is located in Miami, Florida. As such, the referenced report does not substantiate that trafficking did not occur at the Appellant firm.

In support of the Appellant's contentions regarding SNAP households' shopping habits, the following studies were cited: *Benefit Redemption Patterns in the SNAP in Fiscal Year 2017 Final Report*, Insight Policy Research, September 2020; *Shopping Pattern and Food Purchase Difference Among SNAP Households and Non-SNAP Households in the United States*, Preventative Medicine Reports, June 20, 2017; and *What Does SNAP Benefit Usage Tell Us About Food Access in Low-Income Neighborhoods?*, Social Science & Medicine, 2014. While FNS does not dispute the findings of these studies, they do not provide any evidence that trafficking was not occurring at A & A Food Mart.

The Appellant contends that because the store is located much closer to the SNAP participants and its inventory contains such a wide variety of items, these transactions are more likely to occur as a matter of course. 5 U.S.C. § 552 (b)(7)(E).

Based on the store layout, infrastructure, and available inventory, it is not credible that the Appellant would so frequently conduct large transactions closely resembling those typically found at a supermarket or super store. It is not plausible that the firm's customers would regularly carry very large amounts of merchandise around the store without the benefit of shopping carts, especially since larger, better-stocked stores are readily available and in the vicinity of the Appellant firm. The

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

Evidence of Trafficking

Regarding the Appellant's contentions with respect to the reliability of the ALERT system and Confirmation Bias, USDA employs a computerized fraud detection tool to identify EBT transactions that form patterns that have characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. The Retailer Operations Division analyzes the transaction data and patterns along with other documentation such as, information from the onsite store visit report including photographs of stock and the store layout, an analysis of recipient shopping behavior, and comparisons with similar store types in local area, to render a determination as to whether or not the questionable transaction patterns were, more likely than not, the result of trafficking. The regulations at 7 CFR § 278.6(a) state 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, and that 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.

The Appellant argues that USDA does not know the correlation coefficient between ALERT scans and trafficking. The Appellant asserts that it has calculated this based on results of undercover investigations and determined that it was a positive correlation, but the relationship between the values is weak. These contentions are pure conjecture on the part of the Appellant. The Appellant does not have the necessary data to perform a reliable correlation analysis.

Tax Records/Bank Statements/Invoices

The Appellant contends that the submitted bank statements, inventory invoices, and tax return for the review period substantiate the firm's inventory and demonstrate that there was adequate eligible food items to account for the transactions during the review period.

The bank statements submitted are from October 1, 2020 – October 31, 2020, December 1 – 31, 2020, and January 1 – 31, 2021. These statements are within the review period (11/2020 – 02/2021) but lack information for the entire review period. The statements provide general descriptions of transactions made by Cricket Star BD1 Inc but do not provide detailed transactions that would allow FNS to evaluate the store's inventory. The corporation tax return for 2020 does not contain sufficient detail for FNS to evaluate the store's inventory. It provides no insight into the inventory purchased by the store or the individual SNAP transactions that occurred during the review period. As such, these documents do not offer additional insight as to what occurred during the charge letter transactions and do not validate that they were legitimate, bona-fide transactions.

The Appellant also submitted 142 vendor purchase receipts/invoices for review. Of the 142 invoices submitted, two were from outside the review period, two were unreadable, four did not include dates, and 13 were duplicates. Therefore, they were excluded from the analysis. With an average mark-up of 40%, an analysis of the acceptable invoices by the Retailer Operations Division indicates that the Appellant firm purchased enough eligible foods to cover the SNAP redemptions conducted at the store for the review months. The analysis however, does not include cash, check, credit or debit card sales for the review period.

It is important to note that a review of the invoices indicates an emphasis on typical convenience store food items such as sweetened beverages, candy, and snack foods. The invoice analysis indicates the majority of SNAP-eligible items purchased were low price single-serve items. In addition, the purchases of beef, chicken, and pork were most likely for the use in the hot and cold prepared food items sold at the store. While these food items were included in the invoice analysis, the SNAP regulations do not allow for hot foods to be purchased with SNAP benefits.

Even if the invoices appear to indicate that the Appellant 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 rapid and consecutive transactions by individuals during the same store visit or in a short period of time. 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 moderate variety of stock in the store, no fresh or frozen meats, poultry, or seafood, no fresh produce, 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 little counter space to place food for purchase at the checkout counter. Even if there were sufficient food stock at A & A Food Mart 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.

Case Laws and Past Administrative Reviews

With regard to the case laws cited by the Appellant, it is beyond the scope and authority of this review to determine the applicability of same. This review is limited to consideration of whether or not the Retailer Operations Division duly adhered to the Food and Nutrition Act of 2008, as amended, and the implementing regulations, and whether or not the action taken is sustainable by a preponderance of the evidence. Therefore, the application of any judicial precedent is better addressed via judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

With regard to the prior Final Agency Decisions cited by the Appellant, this administrative review decision is based on the specific circumstances of this case as documented by the materials provided by the Appellant and the Retailer Operations Division. This administrative review decision does not establish policy or supersede Federal law or regulations. The determination in this case conforms to SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations.

FOIA

The Appellant contends that not holding determinations in abeyance while FOIA responses are pending violates 7 CFR §278.6(b)(1) according to *Triple E Express vs. ROD*, because the Appellant

is not given a full opportunity to respond. With regard to this contention, effective October 26, 2020, the changes to 7 CFR § 278.6 and 7 CFR § 279.4 went into effect. These changes prohibit holding determinations and administrative reviews in abeyance while FOIA responses are pending. The finding in *Triple E Express* was based on outdated regulations.

CIVIL MONEY PENALTY

In the April 13, 2021 charge letter the Appellant was informed by the Retailer Operations Division that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000 in lieu of permanent disqualification of a firm for trafficking. Per Section 278.6(i) of the SNAP regulations, four criteria must be met in order to be considered for a trafficking civil money penalty. If requesting a trafficking CMP, an Appellant must meet each of the four criteria listed and provide the documentation as specified within ten days of the Appellant's receipt of their charge letter. As specified in 7 CFR § 278.6(i), in determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following four criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in 7 CFR § 278.6(i)(1);

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violations(s) occurred prior to the occurrence of violations cited in the charge letter;

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in 7 CFR § 278.6(i)(2); and

Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations.

If the Appellant's request for a trafficking CMP and the required documentation are not submitted on time, it will lose its right for any further consideration for a trafficking CMP. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) that "if a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified, the firm shall not be eligible for such a penalty". The regulations do not provide the agency discretion to extend the time within which documentation and evidence in support of a trafficking civil money penalty may be submitted.

In the September 22, 2021 response in support of the request for administrative review, (i.e., after the required 10 days of receipt of the April 13, 2021 charge letter), the Appellant, through counsel, requested consideration for a civil money penalty in lieu of permanent disqualification pursuant to 7 CFR § 278.6(i). The Appellant has trained staff on the appropriate rules and regulations regarding the SNAP and have made certain that each employee understands the SNAP rules prior to being permitted to operate the cash register without constant supervision. The Appellant has always maintained a policy that SNAP violations will not be tolerated.

The record supports that the Appellant did not submit timely substantial evidence, as required by the regulations, to meet the criteria for a trafficking CMP in lieu of permanent disqualification. Therefore, the Retailer Operations Division's decision not to impose a civil money penalty in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record, 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 A & A Food Mart 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, FNS is releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

December 1, 2021