

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

Daily Food Store & Gas,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0245109

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 Daily Food Store & Gas (hereinafter “Daily Food Store & Gas” 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 Daily Food Store & Gas.

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 June 21, 2021, the Retailer Operations Division informed the Appellant that Daily Food Store & Gas 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 June 22, 2021.

The record reflects that via email of June 29, 2021, the Appellant, through counsel, submitted a response to the letter of charges. Counsel also requested an extension in time for providing a response to the letter of charges. Counsel's time extension request was granted to July 15, 2021.

Via phone request of July 21, 2022, counsel requested another time extension. Counsel's time extension request was granted to July 30, 2021. 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 per SNAP regulations.

In a response to the Retailer Operations Division of August 2, 2021, the Appellant, through counsel, replied to the letter of charges. On September 23, 2021, the Appellant, through counsel, resubmitted the information provided in the Appellant's August 2, 2021 response. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

After considering the Appellant's responses and the evidence in the case, the Retailer Operations Division issued a determination letter dated February 15, 2022, informing the Appellant that Daily Food Store & Gas 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) in accordance with 7 CFR § 278.6(i) 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 February 24, 2022, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. FNS granted the Appellant's request for administrative review by letter dated March 3, 2022.

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 covered 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. 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 December 2020 through March 2021. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were a large number of transactions in repeated dollar values;
- There were multiple transactions made from the accounts of individual households within a set time period;
- The bulk of the households' remaining benefits were depleted within short timeframes; 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 replies to the charge letter and in the administrative review request, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant has never violated any laws related to Section 271.2 and 278.6(e)(1).
- The Appellant holds itself as a fully functioning grocery store with a gas station.
- Most of the Appellant's customers buy groceries for their entire household as would a customer at a grocery store.
- The transactions noted in Attachment 2 are the result of coincidence—the shopping patterns of customers combined with the fact that the Appellant offers similar items as most convenience stores.
- The Appellant's customers make purchases on a random basis. There is nothing in the guidelines to stop customers from making purchases. In fact, there are rules to protect the dignity of customers in the SNAP rules that essentially prohibit retailers from asking questions as to the need of purchasing items.
- Page 8 of the USDA SNAP manual titled "Respect Your SNAP Customers" states that store owners are not allowed to restrict the time or purchase amount of customers.
- By adhering to the rules of the SNAP manual, the Appellant is abiding by the law by not questioning the large and/or frequent purchases.
- The Appellant has invested a significant amount of time into the community and making sure the store has a high variety and stock of inventory to accommodate all customers.
- Since the pandemic, many families have been staying home. As a result, their eating patterns have changed and increased overall.
- The pandemic caused a strain on the community to afford household goods in the same way as they would prior to the pandemic.
- Many customers requested to purchase food items on credit until they were financially capable of paying back the debt. The Appellant has always supported the community and felt

obligated to support them in such difficult times. Unfortunately, this led to the firm disregarding the USDA policy by allowing credit transactions.

- As such the Appellant qualifies for a one-year disqualification according to 7 CFR § 278.6(e)(4)(ii) and § 278.2(f).
- The Appellant serves many low-income customers who rely on this location because the prices are fair, it is nearby (within walking distance for many without reliable transportation), and convenient.
- Most of the large SNAP transactions took place during the winter months when there were icy conditions during the historic winter storm that plagued Texas.
- The Appellant was the only store that had electricity and was open during these icy weather days. All other big grocery stores like HEB and smaller stores were closed because they did not have electricity.
- During this time, the Appellant had long lines of people waiting to get inside the store to purchase items. The Appellant's shelves were wiped out. As such, the Appellant's SNAP sales average was greater compared to the normal amount of sales.
- The owner and associates had to purchase products from suppliers and vendors to make sure the store had products to sell to the community.
- The submitted inventory report substantiates the firm's inventory and demonstrates that there was adequate eligible food items to account for the transactions during the unusual weather conditions.
- The burden of proof lies with USDA to prove guilt. These allegations are derived from several coincidence that have been dispelled and not by any actual audit or visit to the store location. USDA must prove without a doubt that the Appellant is guilty with hard proof. A sting operation would be more appropriate and conclusive.
- A SNAP disqualification would impose a significant hardship on area customers as many would have to travel further distances and spend more money on expensive SNAP goods at the next closest competitor.
- The Appellant implemented an effective compliance program to prevent violations of SNAP Section 271.2 and requests the imposition of a civil money penalty in lieu of SNAP disqualification.
- With regard to Criterion 1, since being authorized as a SNAP retailer in 1997, the owner has been active in ensuring full compliance with his employees and their obligations to FNS. A photocopied booklet is provided to each employee and issues and concerns regarding EBT processing are addressed as questions and issues arise. The Appellant's compliance policy states the following: (1) There is no exchange for cash for EBT card swipes; and (2) and only sell qualified EBT grocery items to your customers.
- With regard to Criterion 2, the firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of the violations cited in the charge letter.
- With regard to Criterion 3, the firm developed and instituted an effective training program as specified in Section 271.2. The training program implemented by the Appellant includes: A review of the FNS handbook with each new employee and instructions to call USDA or the store owner if employees have any questions.
- With regard to Criterion 4, firm ownership was not aware of, did not approve of, did not benefit from or was not in any way involved in the conduct or approval of the trafficking violations; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm.

- The Appellant has a training policy in place for its employees. Using the url: http://www.fns.usda.gov/sites/default/files/Retailer_Training_Guide.pdf, the Appellant has provided in-store training and a copy of the manual to all employees and store operators. The contents of the manual are discussed and reviewed with employees and partners of the business on a semi-annual basis. Each employee is reminded by the Appellant to never engage in the following: (a) Giving back cash in return for EBT purchases; (b) Disallowing sales to known friends of the card user if it appears as though the card user is outright paying for the groceries of a person that is not part of their household; and (c) Disallow sales on unqualified EBT items.

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

- Affidavit of store owner (1 page); and
- Inventory report dated February 26, 2021 (3 pages).

ANALYSIS AND FINDINGS

SNAP Authorization

FNS authorized Daily Food Store & Gas for participation in the SNAP on March 24, 1997. During the review period of December 2020 through March 2021, Daily Food Store & Gas was classified as a convenience store. 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 March 17, 2021 store visit conducted by a FNS contractor to observe the nature and scope of the firm’s operation, stock, and facilities. 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. 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 1,500 square feet in size with approximately 300 square feet of storage area outside of public view which stocked predominantly drinks and candy;
- Had storage coolers/freezers;
- No shopping carts and no hand-held baskets available for customer use;

- Two cash registers and two EBT point-of-sale (POS) devices for use in ringing-up SNAP transactions;
- Had optical scanners;
- One small checkout counter area with limited check-out counter space;
- Had empty shelves;
- Had an 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;
- Did not utilize an unusual pricing structure, such as prices ending in \$x.x9 or \$x.00;
- Transaction totals were not rounded up or down at the checkout counter;
- Telephone and on-line orders were not taken and delivery was not offered;
- The six most expensive (i.e., costing \$5.00 and above) SNAP-eligible food items in stock were Old Trapper beef jerky at \$8.99 per 1/4 pound; Blue Bell ice cream at \$7.99 per ½ gallon (6 units in stock); Folgers coffee at \$6.59 per 10.3 ounces (4 units in stock); sodas at \$6.49 per 12 pack (12 ounce cans); water at \$5.49 per 24 pack (16.9 fluid ounces); and cereal at \$5.49 per 15.2 ounces (7 units in stock);
- No fresh or frozen meats, poultry, or seafood;
- Freezer was sparsely stocked with frozen food items which included such items as ice cream, pizza, meals, Hot Pockets, burritos, pot pies, and breakfast sandwiches;
- Did not have a kitchen and hot foods were not 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, eggs, hot dogs, meat jerky, and canned fish;
- Dairy included milk, sour cream, yogurt, and cheese;
- Fresh produce stock consisted of a few onions;
- Other staple foods available for purchase included such items as juice, pasta, rice, cereal, oats, baking mix, tortillas, flour, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, condiments, cakes/pastries, snack foods, and vegetable oil; and
- Ineligible nonfood items included health and beauty aids, paper products, household cleaning supplies, tobacco products, clothing, lottery tickets, automotive supplies, housewares, gift items/party goods/souvenirs, pet supplies, cell phone accessories, and alcohol.

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.

Transactions in Repeated Dollar Values (Charge Letter Attachment 1)

This charge letter Attachment documents 19 transactions with repeated dollar values of \$50.xx totaling \$950.17; 22 transactions with repeated dollar values of \$98.xx totaling \$2,164.23; and 12 transactions with repeated dollar values of \$100.xx totaling \$1,200.89. Typically, the frequency of transactions peak at the average for that store type. Thereafter, the frequency of store transactions gradually decreases as the amounts in the transactions increases. The frequency of transactions do not typically spike at specific amounts. Such unusual clustering around specific transaction amounts is indicative of trafficking.

The Appellant did not prove any specific contentions with regard to the transactions documented in Attachment 1.

5 U.S.C. § 552 (b)(7)(E).

Patterns of transactions spiking at particular dollar amounts indicate that SNAP transaction amounts are contrived. Random data, which legitimate transaction activity approximates, is extremely difficult to produce intentionally; it is very difficult to avoid repetitive patterns when attempting to create the appearance of normal, near-random transactions. That various customers each repeatedly had totals around certain dollar amounts during the review period strains the credibility of Appellant's declaration that this activity reflected the acceptance of SNAP benefits in exchange for eligible food items. As the Appellant has offered no rational explanation for why such patterns might exist, it is reasonable to conclude that these same dollar value transactions are the result of trafficking.

Repeat Transactions by the Same Household (Charge Letter Attachment 2)

This charge letter Attachment documents 39 sets of transactions (97 total transactions) that total \$6,610.50 in SNAP benefits to meet the parameters of this scan. These transactions were conducted by 28 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 these transactions are the result of coincidence—the shopping patterns of customers combined with the fact that the store offers similar items as most convenience stores. The Appellant's customers make purchases on a random basis. There is nothing in the guidelines to stop customers from making purchases. In fact, there are rules to protect the dignity of customers in the SNAP rules that essentially prohibit retailers from asking questions as to the need of purchasing 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.

5 U.S.C. § 552 (b)(7)(E).

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, very little fresh produce stock, no fresh or frozen meats, poultry, or seafood, and a minimal variety and amount of frozen food stock.

The store visit report, which was completed in collaboration with and signed by a store employee, and photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Daily Food Store & Gas 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 store visit observations also indicate that the firm offered no special or custom services to customers, such as on-line or telephone orders and/or delivery services, or a profusion of specialty or ethnic goods which would entice SNAP customers to utilize the subject store over other area authorized retail stores. The store visit observations also indicate that the firm's checkout area was limited in size and there were no shopping carts or hand-held baskets available to customers for transporting food within the store and no conveyor belts to expedite high dollar or rapid consecutive purchases. The customers have no place to put multiple purchases or carry the items while shopping.

The available inventory of SNAP-eligible food is 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. The second, third, and subsequent transactions in each set are too large to consist of forgotten items. While research reports acknowledge the rapid spending habits of SNAP participants as normal practices, it is expected SNAP benefits are expended in establishments with adequate inventory to support purchases. Such inventory was not confirmed in the subject store.

The Appellant contends that the firm allowed many customers to purchase food items on credit until they were financially capable of paying back the debt. As such the Appellant qualifies for a one-year disqualification according to 7 CFR § 278.6(e)(4)(ii) and § 278.2(f).

5 U.S.C. § 552 (b)(7)(E).

The Appellant did not provide any evidence or documentation in support of its contention of credit extension to SNAP households. **5 U.S.C. § 552 (b)(7)(E).**

Although the firm may have, on a rare occasion, accepted SNAP benefits as repayment on credit accounts, the evidence submitted by the Appellant does not support its contention that the irregular SNAP transactions listed in the charge letter are due to repayment on credit accounts.

The Appellant contends that the store serves many low-income customers who rely on this location because the prices are fair, it is nearby (within walking distance for many without reliable transportation), and convenient. 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 10 SNAP authorized retailers located within a 1.0 mile radius of Daily Food Store & Gas, including 1 supermarket, 8 other convenience stores, and 1 combination grocery/other store, that could meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than Daily Food Store & Gas and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store.

The record indicates that SNAP customers who shopped at Daily Food Store & Gas 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.

The Appellant has not provided any evidence to show that the transactions listed in this Attachment were legitimate purchases of eligible foods and not the result of trafficking of SNAP benefits. The arguments presented by the Appellant hold little weight without some kind of evidence to substantiate its claims. The Appellant has the burden to provide relevant evidence to rebut the trafficking charges. This burden has not been met.

Bulk of SNAP Benefits Exhausted (Charge Letter Attachment 3)

This charge letter Attachment documents 24 suspicious transaction sets (49 total transactions) which ranged from \$75.73 to \$307.45 and total \$3,017.54. These transactions were conducted by 17 different SNAP households. Depleting the household's entire allotment in one or a few transactions, or within one or two days, leaving little or no benefits for the rest of the month is inconsistent with the normal shopping behaviors of SNAP benefit households.

The Appellant did not prove any specific contentions with regard to the transactions documented in Attachment 3.

Although many 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 only a few transactions or in a single day. Depleting one's entire allotment in one or two days or in a single day, especially in a moderately stocked convenience store, leaving no benefits for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP households. Rather, large single transactions, or multiple and high cumulative transactions which diminish balances over a short period of time soon after benefit issuance, are indicative of SNAP benefit trafficking and attempts to diminish attention to signs of the same.

5 U.S.C. § 552 (b)(7)(E).

“Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program in the Fiscal Year 2017” is FNS research conducted by Insight Policy Research and published in September 2020. Data from this report suggests that “On average, SNAP households had less than one-quarter of their benefit left by the middle of the month. On the day the issuance was distributed, the average household redeemed 16.5 percent of its benefits. By days 7 and 14, the average household had redeemed 56.7 percent and 77.6 percent of its monthly benefit, respectively and 89.1 percent by day 21.”

However, 57.4% of all transactions were conducted at supermarkets and super stores and 82.1% of all SNAP benefits were redeemed at these same very large store types. If one includes medium and large grocery stores, the percentage of benefits spent increases to 86.2%. Only 5.5% of all SNAP benefits were spent at convenience stores. Thus, while SNAP households on average do deplete their benefit balance significantly during the first half of the month, this activity would be expected to occur at larger stores rather than convenience stores, and certainly not at convenience stores like the Appellant that mainly stock snacks and drinks along with canned and packaged foods and some other accessory items.

The Appellant did not provide any compelling justification or evidence as to why SNAP households are spending the majority or all of their SNAP benefits in short periods of time at Daily Food Store & Gas or evidence that all of the irregular transactions cited in this charge letter Attachment were for eligible food items only. Based on the analysis above and in the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

Excessively Large Purchase Transactions (Charge Letter Attachment 4)

This charge letter Attachment documents 186 SNAP transactions, as large as \$172.32, that total \$12,976.23. 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 store holds itself as a fully functioning grocery store with a gas station. Most of the Appellant’s customers buy groceries for their entire household as would a customer at a grocery store. 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 Daily Food Store & Gas to have purchases like those included in this Attachment to the charge letter.

The FNS store visit report, which was completed in collaboration with and signed by a store employee, as well as the store visit photos show that Daily Food Store & Gas offers a moderate stock of SNAP-eligible foods with no fresh or frozen meats, poultry, or seafood, no fresh produce stock other than a few onions, a minimal variety and amount of frozen food stock, and a lack of an abundant depth and breadth of staple foods. In addition, the store had empty shelves. The store visit observations also show only a few expensive eligible foods in stock, some of which were in limited quantities, that would account for these large amounts, 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, specials such as buy one food item and get one for free, and grocery package deals, no evidence of meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices, and no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers.

The Appellant contends that most of the large SNAP transactions took place during the winter months when there were icy conditions during the historic winter storm that plagued Texas. The Appellant was the only store that had electricity and was open during these icy weather days. All other big grocery stores like HEB and smaller stores were closed because they did not have electricity. As such, the Appellant's SNAP sales average was greater compared to the normal amount of sales.

5 U.S.C. § 552 (b)(7)(E). While the cold weather and power outages may have been an explanation for the Scan F transactions that occurred at the Appellant from February 15 through February 17, 2021, they could account for just a small percentage (5 U.S.C. § 552 (b)(7)(E)) that occurred at the Appellant.

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, 5 U.S.C. § 552 (b)(7)(E). 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.

Based on the discussion above and in the absence of credible evidence 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. Nevertheless, transactions having such characteristics do sometimes have valid explanations that support that they were the result of legitimate purchases of eligible food items, and this is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, however, the Retailer Operations determined that the Appellant's contentions did not outweigh the evidence. Assertions that the firm has not violated program regulations, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations. As noted herein, the Appellant has the burden of providing credible, relevant evidence, which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than not true. This burden has not been met.

Evidence of Trafficking

Regarding the Appellant's contentions with respect to the reliability of the ALERT system, 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.

Invoice Analysis

The Appellant contends that the submitted inventory report substantiate the firm's inventory and demonstrates that there was adequate eligible food items to account for the transactions during the unusual weather conditions.

The Appellant submitted for review a three-page inventory report dated February 26, 2021. The report noted inventory by the following categories: groceries, candy, beverages, cigarettes/tobacco, cups/coffee/soda, beer, and wine. 5 U.S.C. § 552 (b)(7)(E), the analysis of the SNAP-eligible inventory (groceries, candy, and beverages) indicates that the Appellant firm purchased enough eligible foods to cover the SNAP redemptions conducted at the store for February 2021. However, the analysis does not include cash, check, credit or debit card sales for that month.

5 U.S.C. § 552 (b)(7)(E). Even if there were sufficient food stock at Daily Food Store & Gas 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.

Owner Affidavit

With regard to the owner affidavit provided by the Appellant which purports to establish that questionable transactions were legitimate and that no trafficking occurred, the truth of such declarations can neither be confirmed nor denied. Although such affidavits may be sworn to and notarized, that does not mean that they are necessarily truthful. One would not expect store owners to admit that questionable transactions were not legitimate, were it really so. On the contrary, one would expect that any owner affidavit provided would attest to questionable transactions being legitimate.

No Prior Violations

The Appellant contends that the firm has not been cited for any prior SNAP violations. However, a record of participation in the SNAP with no previously documented instance of violations does not

constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

Customer Hardship

With regard to the Appellant's contentions that a SNAP disqualification would impose a hardship on area SNAP customers, 7 CFR § 278.6(f) of the SNAP regulations provides for civil money penalty assessments in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs. However, this regulation also sets forth the following specific exception to such assessments there under: "A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification". Therefore, since this case involves a permanent disqualification action, the civil money penalty provision is not applicable to the present case.

CIVIL MONEY PENALTY

In the June 21, 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 February 24, 2022 request for administrative review, (i.e., after the required 10 days of receipt of the June 21, 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) as the firm had implemented an effective compliance program to prevent violations of the SNAP.

The record supports that the Appellant did not submit a timely request and supporting 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 Daily Food Store & Gas 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

May 20, 2022