

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

Eben Ezer Market,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0248141

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance (“ROC”) to impose a permanent disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) against Eben Ezer Market (“Appellant”).

ISSUE

The purpose of this review is to determine whether the ROC took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a Permanent Disqualification against Appellant on April 6, 2022.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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 February 15, 2022, the ROC charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations. This charge was based on a series of SNAP transaction patterns that “establish clear and repetitive patterns of unusual, irregular, and inexplicable activity for your type of firm.” This letter of charges states: “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.” The letter also states that “. . . under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of a permanent disqualification of a firm for trafficking.”

Appellant replied to the ROC's charges in writing. The record reflects that the ROC received and considered the information provided prior to making a determination. The ROC determined that Appellant's contentions did not outweigh the evidence that the store was trafficking. Based on the preponderance of evidence, the ROC concluded that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

The ROC issued a determination letter dated April 6, 2022. This letter informed Appellant that it was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6 (c) and 278.6(e)(1) for trafficking violations. The letter also states the ROC considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. The ROC determined that Appellant was not eligible for the CMP because Appellant had not submitted sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

On April 14, 2022, Appellant appealed the ROC's determination and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that 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 untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented 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 in the event that personnel of the firm engaged in trafficking of SNAP benefits.

7 CFR § 278.6(a) states, in part:

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

7 CFR § 278.6(a) states, in part:

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

7 CFR § 278.6(c) reads, in part:

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

7 CFR § 278.6(e)(1)(i) reads, in part:

FNS shall [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2.

Trafficking is defined in 7 CFR § 271.2, in part, as:

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”

Also at 7 CFR § 271.2, eligible food is defined as:

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

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

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

7 CFR § 278.6(b)(2)(iii) states:

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

SUMMARY OF CHARGES

The charges under review were based on an analysis of SNAP Electronic Benefit Transfer (EBT) transaction data during the period from February 2021 through July 2021. This analysis identified the following patterns of SNAP transaction activity that indicate trafficking:

- Multiple transactions made from the same accounts in unusually short time frames; and,
- Unusually large transactions.

The attachments enclosed with the charge letter specify the questionable and unusual SNAP transactions indicative of trafficking which were conducted at Appellant during the review period.

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- There is insufficient evidence to support the charges of trafficking. There is no firsthand observation of trafficking.
- There is no direct evidence of trafficking or undercover investigation.
- This is the first time Appellant has had an issue with SNAP compliance.
- Appellant has not received any warnings.
- There is no evidence that Appellant was warned or intended to violate the regulations as required by § 278.6(d).
- Transactions cited in the charge letter are because Appellant sells El Salvadoran specialty products.
- Appellant's customers have limited access to transportation.
- Large purchases may be because families are buying in volume.
- Large purchases are because SNAP participants had increased benefit amounts during this period.
- Back-to-back transactions are because Appellant is conveniently located.
- Back-to-back transactions are because households share payments for food with other household members, friends, or neighbors.
- Multiple transactions are because customers occasionally make consecutive transactions.
- Multiple transactions may be because a purchaser forgot an item or decided to make an additional purchase after depositing the initial purchase in a car or with another person.
- Transactions included in the charge letter did not occur during unusually short time frames.

- Appellant is prejudiced and denied due process by the delay in charging Appellant with violations. This delay prevented Appellant from being able to investigate itself and find evidence in support of its transaction activity.
- Large transactions are because SNAP participants had high balances and were unconcerned about paying higher prices at smaller stores.
- The store has a wide variety of staple food items.
- Large transactions are because prices went up during the pandemic.
- FNS failed to conduct an analysis of the information contained in the charge letter;
- The investigative report is inadequate as it is not signed under the penalty of perjury.
- Appellant requests a CMP.
- There is nothing in SNAP regulations that prohibit multiple transactions.
- SNAP customers do not care what they buy or if they can save money at supermarkets.
- Appellant has no control over how SNAP recipients use their benefits.

In support of its contentions, Appellant provided the following documentation:

- Approximately 260 pages of register receipts;
- Approximately 13 pages of store pictures; and,
- ~650 pages of invoices.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

Appellant insists it is prejudiced by the delay in charging Appellant with violations as this delay prevented Appellant from being able to investigate itself and find evidence in support of its transaction activity. Appellant was charged seven months after the investigative period. There was no unreasonable delay in charging Appellant.

Store Characteristics

In reaching a disqualification determination, the ROC considered information obtained during an April 26, 2021 store visit conducted by a USDA contractor to observe Appellant's operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report documented the following store size, description, and characteristics:

- Store size is approximately 900 square feet with no area of food storage outside of public view;
- Available inventory of SNAP-eligible food items showed stock composed predominantly of inexpensive items, which is typical of a small grocery store;
- Only one cash register and one electronic SNAP terminal device;
- No shopping carts and four hand baskets;

- Scanners and no conveyor belts;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers; and,
- No meat or seafood specials or bundles.

In addition, the store's checkout counter space area was cluttered, small and surrounded by plastic barriers allowing very little surface area to place large purchases and making it impractical to process more than one customer at a time.

Appellant provided 13 pages of store pictures. These store pictures showed Appellant to be better stocked than Appellant was on the day of the store visit. Appellant asserted the store has a wide variety of staple food items. Appellant's variety of stock was typical for a small grocery store. There was no indication that SNAP households were inclined to visit the store regularly to purchase large quantities of grocery items. Although Appellant carried goods that catered to Central American communities, it also lacked common staple foods, such as butter and margarine. The available food was primarily of a low-dollar value and there was no hint that the firm sold items in bulk. Given the available inventory, there was no sign that Appellant would be likely to have SNAP redemption patterns that differed significantly from those of similarly-sized competitors.

Repeat Transactions by the Same Household

Attachment 1 to the charge letter documents the same household conducting back-to-back transactions in unusually short time frames. Violating stores may conduct multiple transactions from the same household account within a 48-hour period to avoid the detection of single, high-dollar trafficking transactions. There are 68 repeat transactions totaling \$4,169.24 included in this document.

Appellant argues that its customers have limited access to transportation. The record reflects that customers conducting rapid, repetitive, and large transactions at Appellant frequently spent SNAP benefits at better-stocked and more competitively-priced grocery stores, sometimes on or about the same day they shopped at Appellant.

Appellant contends back-to-back transactions are because Appellant is conveniently located. The Case Analysis Document identifies much larger stores with more reasonable prices located within one mile of Appellant. There is no basis for unusually high customer attraction to Appellant, there being no great price advantage, profusion of ethnic goods, or special or custom services rendered. Oddly, some SNAP households spent considerably less at the larger stores than at Appellant.

The following examples from the ROC's Case Analysis Document show households shopped at better stocked firms on or about the same day as conducting large transactions at Appellant:

SNAP Household #1

One day, this household made a purchase at a superstore for \$178.36, followed by a transaction at Appellant 31 minutes later for \$61.42. Another day, this household made a transaction at a superstore for \$84.85, followed by a transaction at Appellant three hours later for \$135.51.

SNAP Household #2

This household is located 25 miles from Appellant. One day, this SNAP household made a transaction at superstore for \$71.25, followed by a transaction at Appellant the following day for \$225.40. Another day, this household made a transaction at Appellant for \$203.86, followed a transaction at a superstore the following day for \$33.

Appellant contends the back-to-back transactions are due to households sharing payments for food with other household members, friends, and neighbors. Appellant has offered no evidence whatsoever that SNAP households share their cards with other household members, relatives, or friends. Appellant has also not provided any explanation for why, if such behavior was occurring, these purchases would occur at Appellant rather than at nearby, larger stores. It is unlikely that a family relying on SNAP to supplement their nutritional needs would share these benefits with another family that purchases and prepares meals separately. An unsubstantiated argument such as this does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant is correct that customers sometimes forget an item or see something at the checkout and decide to purchase it after already having completed a transaction. In such instances, it is reasonable to expect the subsequent purchase would be for a nominal amount. This is because it is quite rare to find very expensive items positioned at the checkout area, especially in smaller stores. Also, forgotten goods purchased immediately after a prior transaction typically consist of only one or two items. However, the subsequent transactions exceeded any minor amount. In some cases, the amounts of subsequent transactions equaled or exceeded the preceding transaction total.

Appellant stated multiple transactions are because customers occasionally make consecutive transactions, and transactions included in the charge letter do not constitute unusually short time frames. Appellant is correct that there is nothing in SNAP regulations that prohibit multiple transactions. While there are legitimate reasons why a SNAP recipient might return to a small grocery store in a short period of time, the examples in Attachment 1 indicate a series of purchases that total to large amounts. SNAP benefits are intended to supplement the food budget for households whose net income is near or below the Federal Poverty Level. It is difficult to believe customers who must rely on SNAP benefits to make ends meet prefer to pay higher prices and spend considerable amounts of their benefits at a small grocery store. Spending sizable portions of one's SNAP benefit allotment in a small grocery store - when there are larger stores at which one also shops that carry more variety of foods at a lower cost - is unreasonable customer behavior. Moreover, households listed in this attachment conducted this strange shopping pattern of making substantial purchases at Appellant multiple times during the review period. Given the common practice of violating retailers breaking up large, suspicious

transactions into multiple, smaller transactions to avoid detection, a firm's explanation and evidence for why these transactions are occurring in a 48-hour period in a small grocery store should be both rational and compelling. Appellant's explanation is neither.

SNAP Participant Shopping Activity

Appellant asserted large transactions are because and SNAP customers do not care what they buy or if they can save money at supermarkets. A government report on SNAP shopping patterns¹ indicates that households most often redeemed their benefits at supermarkets and supercenters, with only four percent of all households never shopping in a supermarket.

It is extremely doubtful that a SNAP household making a legitimate purchase would choose to spend a large portion of its monthly allotment at a small grocery store with likely higher prices and substantially less inventory than what would be found at a supermarket or superstore. 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 benefits in only a few transactions or a single day. Depleting a large portion of one's SNAP balance early in the benefit month, leaving little to purchase food for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP households.

Large Transactions

Appellant contends large purchases may be because families are buying in volume. The food stock and facilities of 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 small grocery 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. It is rare for a small grocery store such as Appellant's to have purchases like those included in Attachment 2 to the charge letter. This attachment cites 234 EBT transactions during the six-month period of investigation of \$47.85 or more totaling \$63,766.89. Of these transactions, 135 totaled \$100 or more, 26 totaled \$150 or more, and 7 totaled \$200 or more.

Additionally, many of the charge letter transactions arrive at, or cluster around, certain dollar amounts in \$5 increments (e.g., \$50, \$60). Households typically shop to obtain a certain mix of food items, irrespective of the total cost (other than to remain within allotment balances), and do not strive to achieve a particular total. The purchase amount of eligible food items typically approximates a random total. In contrast, firms facilitating trafficking tend to concentrate transactions at particular dollar amounts. In the absence of any compelling rationale to the contrary, the pattern of clustering transactions around certain dollar levels is implausible and indicative of transaction structuring and SNAP-benefit trafficking.

¹U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program*, by Laura Castner and Juliette Henke. Project officer: Anita Singh, Alexandria, VA: February 2011.

These transactions significantly exceed the county's average SNAP transaction, which was \$14.52 for this type of store during the six months of the review period. The Case Analysis Document shows the average transaction at Appellant during the same period totaled \$26.46. Appellant's average transaction is significantly higher than the county's average transaction. As previously stated, Appellant has a limited food stock typical of a small grocery store and does not have any features that would induce people to spend substantially more than the typical small grocery store purchase amount.

Its large transactions during the review period were also much more frequent than those of similar stores in the county. For example, small grocery stores had an average of 197.6 transactions between \$30 and \$39.99, 98.8 transactions between \$40 and \$49.99, 55.2 transactions between \$50 and \$59.99, and 33.7 transactions between \$60 and \$69.99. Appellant had 567, 341, 275, and 164 such transactions, respectively.

Appellant contends large transactions were because the price of food increased during the pandemic and SNAP participants had higher balances. Appellant does not explain why these factors would not similarly increase transaction activity at nearby stores. The Case Analysis Document contains a comparison of Appellant's redemption activity during the analysis period to two SNAP-authorized small grocery stores located nearby. Appellant's SNAP redemptions during the analysis period ranged from 1.5 to 3 times that of the nearby comparable firms.

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 superstore. 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 or shopping baskets, especially since larger, better-stocked stores are readily available and in the vicinity of the Appellant firm. 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. 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.

No Applicable Mitigating Factors

Appellant asserts that this is the first time there has been an issue related to SNAP and that it did not receive prior warnings. A record of program participation with no documented previous violations, however, does not constitute valid grounds for mitigating the impact of the present serious determination of trafficking. To require Appellant to receive a warning of violations before administrative action can be taken would render the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA virtually meaningless.

Consideration of Factors for a Sanction

Appellant stated that FNS should consider the factors listed in 7 CFR § 278.6(d) before imposing a sanction: the nature and scope of the violations; whether the firm was warned violations were occurring; and, any evidence of intent to violate the regulations. This argument is based on an incorrect understanding of the regulations. The severity of the penalties, set forth in the subsequent paragraph 7 CFR § 278.6(e), are based on the factors listed in 7 CFR § 278.6(d). For example, permitting the sale of cigarettes with SNAP benefits results in a three-year disqualification, but this becomes five years if the firm had been previously warned. Other sanctions consider intent, such as whether false information on an application was “knowingly submitted” or whether the sale of nonfood items was “the firm’s practice” (which carries a three-year disqualification) rather than “due to carelessness or poor supervision” (which results in a six-month disqualification). Trafficking is the most serious violation and a single instance carries the penalty of permanent disqualification.

No Control Over Benefit Use

Appellant insists that it has no control over how and when SNAP customers spend their benefits. In truth, SNAP households have no limits on the number of times they may use their SNAP cards or how much eligible food they may purchase. The SNAP transactions of Appellant are questionable not because they exceed any limits for use. Rather, they display characteristics not typically found at small grocery stores and are indicative of trafficking.

Expensive Offerings

Appellant asserts it sells expensive El Salvadoran specialty products which explain the large purchases. The evidence does not support this contention.

Appellant states it sells Loroco which costs \$300 for 30 pounds. During the store visit, the store clerk identified the most expensive items at Appellant, which were then recorded and photographed by the store reviewer. Loroco was not among these items.

While there were occasions when Appellant purchased Loroco and other expensive specialty foods, based on the low volume of purchases of expensive specialty items (as documented by invoices provided by Appellant) relative to the large transactions and evidence from the store visit it is more likely true than not true that the sale of expensive items does not explain the large SNAP transactions that occurred at Appellant. Trafficking is a more likely explanation for the unusual and irregular pattern of high-dollar transactions.

Receipts

Appellant provided 260 pages of register receipts to support the validity of its transactions. However, the register receipts provided by Appellant contain unusual characteristics that call into question the legitimacy of these receipts. The register receipts do not explain the questionable transactions at Appellant.

Invoices

Appellant submitted approximately 650 pages of invoices to establish that the store purchased enough inventory to support the total of its SNAP sales. However, the invoices are insufficient to demonstrate this. Many of the invoices provided did not include Appellant's name or the supplier's name, were outside of the review period, did not include a list of items purchased or included items that are not eligible for purchase with SNAP benefits. The SNAP-eligible inventory included in the invoices from the review period totaled approximately \$98,189. Using the average mark up for SNAP-eligible items as provided by Appellant of 45%, this amount of inventory would support \$142,374 in SNAP transaction activity. However, the total of SNAP transactions during the review period was higher than this amount. This also does not account for any non-SNAP purchases of food items at Appellant. In sum, the invoices do not explain the questionable transactions at Appellant.

Evidence of Trafficking

Appellant argues there is no evidence of trafficking or of an undercover investigation and no investigative report signed under the penalty of perjury. Appellant also maintains FNS failed to conduct an analysis of the information contained in the charge letter. As previously stated, 7 CFR § 278.6(a) states, in part:

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

FNS employs a computerized fraud detection tool to identify EBT transactions that form patterns having characteristics indicative of trafficking. This tool does not determine that trafficking has occurred. The ROC must still analyze the transaction patterns, along with other information such as store visit observations, customer shopping patterns, and comparative data from nearby stores. Only then does the ROC conclude whether questionable transactions were, more likely than not, the result of trafficking. Transactions with these patterns sometimes have valid explanations that support the idea they were the result of legitimate purchases of eligible food items, which is why opportunities are given to charged retailers to explain the questionable transactions cited. In this case, based on the suspicious patterns displayed and the other supporting evidence in the file - and in the absence of any reasonable explanations for such transaction patterns - the preponderance of the evidence supports that the "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges are the result of trafficking.

No Denial of Due Process

Appellant contends that it has been denied due process. In this regard, the permanent disqualification of Appellant by the ROC is neither a criminal nor a civil action, but rather an administrative action imposed against the firm as a result of trafficking violations. Section

278.6(b)(1) of the SNAP regulations states that upon charging a firm with SNAP violations, the letter informing the firm of the charges “shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter.”

FNS’s due process procedures include two levels of review. First, the retailer is afforded an opportunity to reply to the charges leveled by the ROC. The regulations at 7 CFR § 278.6(c) state:

in the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section . . . the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

After the determination letter is issued, the second level of due process involves an administrative review. Appellant availed itself of this option and in the process of which Appellant was granted 21 days to provide additional information in support of the request for review. Appellant took advantage of this opportunity and provided additional information.

The purpose of the administrative review process is to ensure that a firm aggrieved by FNS’s adverse actions has the opportunity for their position to be fairly considered by an impartial reviewing authority prior to that adverse action becoming final. Through the administrative review process, Appellant has been duly given, and has taken, the opportunity to present any evidence and information it deemed as pertinent in support of its position that the ROC’s adverse action should be reversed. All evidence and information that Appellant presented to the ROC, as well as any such information submitted subsequently, have now been considered in this administrative review prior to rendering the final agency decision. The firm provided no additional records during the administrative review that would establish that the suspicious transactions were legitimate purchases. The record does not indicate any departure from established procedures with regard to Appellant’s right to a fair and thorough review. Appellant has exercised its opportunity to reply to the charge letter and its administrative review rights. By doing so, it has availed itself of the full complement of the agency’s statutory obligations with regard to due process.

Summary

The ROC determined that Appellant likely trafficked in SNAP benefits. The charges of violations were based on the ROC’s assessment that substantial evidence exists that the questionable transactions occurring during the review period displayed patterns inconsistent with legitimate sales of eligible food to SNAP participants. The evidence the ROC considered in support of its determination included:

- The irregular SNAP transaction data of Appellant as compared to similar stores;
- Observations made during an store visit by a USDA contractor, including the inadequacy of the firm’s staple food stock to support such large transactions;

- The availability and characteristics of other SNAP-authorized stores located close to Appellant; and,
- Shopping behaviors of Appellant's customers.

The transaction data and overall firm record demonstrate the patterns of unusual, irregular, and inexplicable SNAP activity for this firm is likely the result of trafficking.

Upon review, Appellant failed to prove by a preponderance of the evidence that the administrative action should be reversed. Appellant provided inadequate explanations for the suspicious transactions and insufficient evidence to legitimize its transaction data. It has not convincingly rebutted the ROC's determination that Appellant most likely trafficked in SNAP benefits. The SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have trafficked, which is that FNS must disqualify the firm permanently.

CIVIL MONEY PENALTY

Appellant requested a civil money penalty (CMP) contending that it had established and implemented an effective compliance policy and program to prevent SNAP violations. According to 7 CFR § 278.6(i) of the SNAP regulations, FNS may impose a CMP in lieu of permanent disqualification for trafficking.

For an Appellant's request for a CMP to be considered, the regulations at 7 CFR § 278.6(b)(2) require that Appellant submit supporting documentation within ten days of receipt of the charge letter. Appellant was advised of this provision in the charge letter of February 15, 2022. A review of the administrative record indicates Appellant did not submit documentation to support its eligibility for this alternative sanction by this deadline.

7 CFR § 278.6(i) sets forth the eligibility requirements for a CMP:

The firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:

Criterion 1: The firm shall have developed an effective compliance policy as specified in Section 278.6(i)(1); and,

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 violations cited in the charge letter sent to the firm; and,

Criterion 3: The firm had developed and instituted an effective personnel training program as specified in Section 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; or it is 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 . .

. .

Appellant provided no evidence in support of its contention that it is eligible for a CMP. In this regard, the various statements made by Appellant is not “substantial evidence” that fulfills each of the four criteria of 7 CFR § 278.6(i), demonstrating “that the firm had established and implemented an effective compliance policy and program to prevent violations.”

The standards of eligibility for a trafficking CMP are high. They require substantial proof that a compliance policy and program was established and implemented prior to the occurrence of violations. These standards exist to thwart attempts to falsely present compliance policies and programs that were not actually implemented prior to violations. As Appellant did not provide the required supporting documentation, the ROC did not assess a CMP. According to the requirements stated in 7 CFR § 278.6(b)(1), § 278.6(b)(2)(ii and iii), and § 278.6(i), Appellant is not eligible for a CMP in lieu of a permanent disqualification from participation as an authorized retailer in SNAP. The determination by the Office of Retailer Operations and Compliance to deny Appellant a civil money penalty is sustained.

CONCLUSION

The record has yielded no indication of error in the finding by the Office of Retailer Operations and Compliance that Appellant trafficked in SNAP benefits. A review of the evidence supports that it is more likely true than not true that program violations occurred as charged. Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against Eben Ezer Market from participating as an authorized retailer in SNAP is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant’s owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

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

RICH PROULX
ADMINISTRATIVE REVIEW OFFICER

July 14, 2022