

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

Neighbor Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0249644

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 Neighbor Market (hereinafter “Neighbor Market” 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 Neighbor Market.

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 December 23, 2021, the Retailer Operations Division informed the Appellant that Neighbor Market 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 December 24, 2021.

In a response to the Retailer Operations Division of January 3, 2022, the Appellant, through counsel, replied to the letter of charges. The response included a claim that some of the transactions documented in the charge letter were the result of credit extension to SNAP customers. The Retailer Operations Division requested, but was not provided, a signed letter of representation from the Appellant's counsel. In a letter dated January 4, 2022 (delivered to Appellant on January 5, 2022), the Retailer Operations Division requested that the Appellant provide documentation and any information, explanation, or evidence to support that food items were purchased on credit as noted in counsel's January 3, 2022 response. The Appellant was informed that it must submit this information within 10 calendar days of receipt of the January 4, 2022 letter. The record reflects that no additional information was submitted to the Retailer Operations Division in response to the credit letter.

After considering the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated January 21, 2022, informing the Appellant that Neighbor Market 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 January 26, 2022, the Appellant requested an administrative review of the Retailer Operations Division's determination. FNS granted the Appellant's request for administrative review by letter dated March 15, 2022. In an email correspondence of March 23, 2022, the Appellant 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 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 June 2021 through November 2021. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were multiple transactions made from the accounts of individual 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, the Appellant 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.
- Since the onset of opening this business, there were never any violations of the SNAP rules.
- This is a new business and the store is run by employees.
- The Appellant is located where most of its customers are SNAP recipients.
- The next closest store that accepts SNAP benefits is almost two miles away from the Appellant.
- The Appellant's employees are fully trained on how to accept SNAP payments and have been given proper instructions and have been shown training videos on the SNAP rules.
- Upon receipt of the charge letter, the Appellant checked all of the transactions noted in the charge letter and did not find anything wrong with those transactions.
- With regard to the transactions documented in Attachment 1, each household card can be used numerous times throughout the day for the reason that there are numerous individuals in each large family and that there are a significant number of unemployed customers that frequent the store.
- 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 amounts of customers. The Appellant has no intention on denying a customer the right to purchase goods at the store. 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 is located less than a mile from an elementary school. As a result, the Appellant sees many parents and children enter the store and make multiple transactions.

Since many children have access to their own SNAP-EBT card, they will often make purchases throughout the day.

- Since the pandemic, many families have been staying home. As a result, their eating patterns have changed and have increased overall.
- The Appellant's counsel mistakenly stated that the firm extends credit to SNAP customers. The Appellant does not extend credit to customers.
- The store's SNAP customers normally buy a lot of sodas, milk, bread, frozen foods and meats, candy, and juices. Per the submitted customer affidavits, customers frequently buy food items in large quantities from the Appellant.
- Submitted are sales reports from Heartland, the Appellant's payment processor, for all the transactions noted in the charge letter (Note: No sales reports from Heartland were submitted to FNS for review).
- Sometimes the register's scanner does not work and the cashier has to manually enter the transactions and those transactions are shown as "FS NO-TAXABLE" (Food Stamp Authorized Non Taxable Item).
- The scanner has been replaced.
- A SNAP disqualification would impose a financial hardship on the firm as a significant portion of its revenues come from SNAP sales.
- The Appellant implemented an effective compliance program to prevent violations of SNAP Section 271.2 and meets the eligibility requirements for the imposition of a civil money penalty in lieu of SNAP disqualification.
- With regard to Criterion 1, the Appellant has implemented an effective compliance policy. 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](http://www.fns.usda.gov/sites/default/files/Retailer%20Training%20Guide.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 submitted the following information for review:

- Four customer affidavits;
- Nine itemized EBT register receipts all of which are dated in January 2022;
- Numerous undated food stock photos;
- Photo of USDA SNAP poster, Don't Do It!; and
- Confirmation of installation of new POS system dated January 14, 2022.

ANALYSIS AND FINDINGS

SNAP Authorization

FNS authorized Neighbor Market for participation in the SNAP on July 11, 2018. During the review period of June 2021 through November 2021, Neighbor Market 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 September 10, 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 1,200 square feet in size with approximately 75 square feet of storage area outside of public view which stocked predominantly drinks and alcohol;
- Did not have storage coolers/freezers;
- No shopping carts and no hand-held baskets available for customer use; The store had two shopping carts located in the storage area that were for store use only;
- One cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- Had an optical scanner;
- One small checkout counter area with limited check-out counter space which was surrounded by a glass barrier;
- Had expired/outdated/spoiled food;
- 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;
- Utilize an unusual pricing structure, such as prices ending in \$.x9 or \$.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 five most expensive (i.e., costing \$5.00 and above) SNAP-eligible food items in stock were Jack Links at \$16.99 per 10 ounces (3 units in stock); Sodas at \$6.99 per 12-pack; Ozarka water at \$6.99 per 24-pack (5 units in stock); Monster energy drink at \$6.00 per two-16 ounces; and Red Bull energy drink at \$5.33 per two-12 ounces;
- No fresh or frozen unprocessed meats, poultry, or seafood;
- Frozen food stock included such items as ice cream, pizza, meals, Hot Pockets, burritos, French fries, vegetables, waffles, and sandwiches;
- Had a kitchen; however, the kitchen was not in use at the time of the store visit; As such, no 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, eggs, hot dogs, sausage, bacon, meat jerky, and canned fish;
- Dairy included milk (dairy, coconut, and almond varieties), sour cream, butter, margarine, and cheese;
- Fresh produce stock consisted of a few bananas;
- Other staple foods available for purchase included such items as juice, pasta, rice, cereal, grits, baking mix, tortillas, flour, loaf bread, buns/rolls, corn meal, 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, household items, gift items/party goods/souvenirs, and alcohol. The Appellant also had gaming machines.

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 98 sets of transactions (250 total transactions) that total \$20,053.54 in SNAP benefits to meet the parameters of this scan. These transactions were conducted by 58 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 each household card can be used numerous times throughout the day for the reason that there are numerous individuals in each large family and that there are a significant number of unemployed customers that frequent the store. Since the pandemic, many families have been staying home. As a result, their eating patterns have changed and have increased overall. There is nothing in the guidelines to stop customers from making these purchases.

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 unprocessed 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 the store manager, as well as the photographs from the store visit and the stock photos provided by the Appellant offer no explanation as to why SNAP customers would routinely shop at Neighbor Market 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 as it was surrounded by a glass barrier and that there was only one cash register and one EBT POS device for ringing up purchases, 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 second, third, and subsequent transactions in each set are too large to consist of forgotten items.

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. 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.

While the Appellant firm may be located in a neighborhood with households that qualify for SNAP benefits and near an elementary school, 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 the next closest store that accepts SNAP benefits is almost two miles away from the subject firm. 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 14 SNAP authorized retailers located within a 1.0 mile radius of Neighbor Market, including 1 supermarket (located 0.54 miles away), 1 super store (located 0.68 miles away), 10 other convenience stores, and 2 combination grocery/other stores, that could meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than Neighbor Market 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 Neighbor Market 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.

Excessively Large Purchase Transactions (Charge Letter Attachment 2)

This charge letter Attachment documents 506 SNAP transactions, as large as \$300.78, that total \$39,183.98. 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. The store's SNAP customers normally buy a lot of sodas, milk, bread, frozen foods and meats, candy, and juices. 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 Neighbor Market 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 the store manager, as well as the store visit photos and the photos provided by the Appellant show that Neighbor Market offers a moderate stock of SNAP-eligible foods with no fresh or frozen unprocessed meats, poultry, or seafood, no fresh produce stock other than a few bananas, 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 expired/outdated/spoiled food in stock indicating that these items are not sold on a regular or consistent basis. 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.

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 September 10, 2021, the subject store did not have inventory to support the numerous large transactions. The Appellant also provided no evidence, 5 U.S.C. § 552 (b)(7)(E), of continuously purchasing inventory throughout the review period to satisfy the 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 per the four customer affidavits, customers frequently buy food items in large quantities from the Appellant. 5 U.S.C. § 552 (b)(7)(E). Even if it is assumed that the customer statements were 100% accurate and accepted as evidence of legitimate transactions, they could account for just a small percentage (5 U.S.C. § 552 (b)(7)(E)) 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.

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.

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.

No Prior Violations

The Appellant is correct 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.

Corrective Action

With regard to the Appellant's contention that the store's scanner has been replaced, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that

the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that it has taken or will take corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Financial Hardship

With regard to the Appellant's contention that a SNAP disqualification would impose a financial hardship on the firm, there is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, the Appellant's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

In the December 23, 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 response to the charge letter of January 3, 2022, the Appellant, through counsel, requested consideration for a civil money penalty in lieu of permanent disqualification pursuant to 7 CFR § 278.6(i) and contends that it meets eligibility for a trafficking CMP in lieu of permanent SNAP disqualification. The Appellant's employees are fully trained on how to accept SNAP payments and have been given proper instructions and have been shown training videos on the SNAP rules.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking civil money penalty in lieu of a disqualification under 7 CFR § 278.6(i) because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. **5 U.S.C. § 552 (b)(7)(E).**

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 the Appellant did not provide the required supporting documentation, 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 Neighbor Market 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 26, 2022