

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

Papa Gi,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0246109

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 Papa Gi (hereinafter “Papa Gi” 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 Papa Gi.

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 July 21, 2021, the Retailer Operations Division informed the Appellant that Papa Gi 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 July 23, 2021.

The record reflects that via email of August 2, 2021, the Appellant's counsel requested an extension in time for providing a response to the letter of charges. By letter of August 3, 2021, the Retailer Operations Division granted counsel's time extension request to September 1, 2022. Counsel was informed in that letter that the time to request a civil money penalty in lieu of permanent disqualification and to provide the documentation to support such a request could not be extended per SNAP regulations.

In responses to the Retailer Operations Division of July 29, 2021, August 2, 2021, September 1, 2021, and December 1, 2021, the Appellant, through counsel, replied to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

After considering the Appellant's responses and the evidence in the case, the Retailer Operations Division issued a determination letter dated January 27, 2022, informing the Appellant that Papa Gi 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 7, 2022, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's decision to permanently disqualify the firm from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated February 17, 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 contained in the Food and Nutrition Act of 2008, amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6(e)(1)(i) of the Regulations establish the authority upon which a permanent disqualification may be imposed upon a retail food store or wholesale food concern. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

7 U.S.C. § 2021(b)(3)(B) states, inter alia:

... a disqualification under subsection (a) shall be ... permanent upon ... the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards ...

7 CFR § 278.6(a) states, inter alia:

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

7 CFR § 278.6(e)(1)(i) states:

Disqualify a firm permanently if: Personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, inter alia:

Trafficking means...The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone...

7 CFR § 278.6(f)(1) states, inter alia:

A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

7 CFR § 278.6(i) states, inter alia:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations ...

7 CFR § 278.6(b)(2) states, inter alia:

(ii) Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence as specified in § 278.6(i), that establishes the firm's eligibility for a civil

money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1). [Emphasis added].

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

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from January 2021 through June 2021. This involved the following SNAP transactions patterns which are indicative of trafficking:

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

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking.

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the 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 denies the trafficking allegations.
- The owner has owned and operated this and other stores for several years.
- The store consists of 1,400 square feet of space. There is a 10-door walk-in cooler at the rear of the store.
- A separate business, New York Platers & Fried Chicken, occupies the left side of the wall.
- Tobacco and smoking products are sold on the right side of the store. There are five aisles that separate four display counters with stock on both sides.
- The Appellant sells groceries, pet food, snacks and drinks, canned foods and pasta, candy, ice cream, soda, and energy drinks.
- The Appellant does not sell hot food or alcohol.
- The firm is open Monday through Saturday from 6:00 am to 12:00 midnight and Sunday from 6:00 am to 11:00 pm.

- The Appellant conducts substantial sales. Per the submitted Sales and Use Tax returns, gross sales for January 2021-July 2021 were \$323,755.00, with an average of \$46,251.00 per month.
- The submitted graphs comparing total gross sales versus food sales indicate that the total gross sales of food items from January 2021 through July 2021 was approximately \$200,000.00, with an average monthly sales of about \$29,000.00.
- There are a total of 426 total transactions documented in the charge letter Attachments. However, there are duplicative entries that are included in both Attachments 1 and 2. Therefore, the amount of 426 transactions should not be considered cumulative.
- With regard to the transactions noted in Attachment 1, the store has four carriages available for shoppers' convenience in buying multiple items.
- Store personnel are not allowed to refuse proper transactions under the SNAP. Retailers must accept payment from EBT cardholders who have a valid PIN. Store personnel should not question the EBT card holder regarding their purchases.
- Many eligible families received additional funds for food purchases through pandemic EBT benefits. This factor is reflected in the multiple transactions noted in Attachment 1. The additional benefits resulted in binge buying as well as "stocking up".
- Attachment 2 consists of 286 transactions, but includes 112 transactions that are less than \$50.00. This Attachments includes just 25 transactions that are in excess of \$100.00.
- The Appellant services many SNAP participants who live nearby.
- The Appellant sells items in bulk that are popular with customers, such as soda and expensive energy drinks.
- Some instances of trafficking take place outside of the store. The Appellant cannot be responsible for what happens to products that are purchased after customers leave the store.
- The charge of trafficking is unsupported by the evidence. The purchases were not out of the ordinary or excessive in view of the size of the store, its inventory, and sales volume.
- The penalty for trafficking is excessive, given the fact that the Appellant has no prior infractions and received no prior notice of any wrongdoing.
- The Appellant requests consideration for the imposition of a civil money penalty in lieu of permanent SNAP disqualification. The Appellant established a policy that any employee who was found to violate the SNAP regulations would be subject to immediate termination.
- This policy was in effect during the entire time that the business has operated and the policy is communicated to each employee at the time of hire.
- The Appellant provides training of employees on the proper acceptance and handling of SNAP benefits.
- As owner and manager of the store, the owner had no knowledge of any alleged violations by its employees.
- This is the first time that the Appellant has been charged with any violations of the SNAP regulations.
- As owner of the store, the Appellant did not benefit or profit from any of the alleged violations.

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

- Photos of food stock (16 total);
- Interior store diagram (1 page);
- Massachusetts Sales and Use Tax documents (January 2021-July 2021) (8 pages);
- Gross sales graph (1 page);
- Food purchase graph (less than 1 page); and
- Prepaid tax report from J. Polep Distribution Services (February 4, 2021–June 25, 2021) (1 page).

ANALYSIS AND FINDINGS

SNAP Authorization

During the review period of January 2021 through June 2021, Papa Gi was classified as a convenience store. When the Appellant was authorized by FNS for participation in the SNAP on March 5, 2020, 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 an April 8, 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, drinks, 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 1,000 square feet in size with no storage area outside of public view;
- Did not have storage coolers/freezers;
- No shopping carts and 4 hand-held baskets available for customer use;
- One small checkout counter area with limited check-out counter space;
- One specialty cash register for lottery sales;
- One cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- Did not have an optical scanner;

- Had a special pricing structure, such as prices ending in \$.xx9 or \$.00;
- Did not round transactions up or down at the checkout counter;
- Had an ATM or money transfer service;
- Had poor lighting;
- Had dusty cans/packages;
- 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;
- Telephone and on-line orders were not taken;
- Delivery was not offered;
- The six most expensive (costing \$5.00 and above) SNAP-eligible food items in stock were Jack Links jerky at \$12.45 per 10 ounces (1 unit in stock); Banquet fried chicken at \$9.29 per 29 ounces (3 units in stock); Jack Links jerky at \$7.99 per 3.25 ounces (9 units in stock); Matador jerky at \$6.99 per 3 ounces (3 units in stock); Maxwell House coffee at \$5.50 per 11.5 ounces (2 units in stock); and Jamestown bacon at \$5.19 per 1 pound (3 units in stock);
- No fresh meats, poultry, or seafood;
- No frozen unprocessed meats, poultry, or seafood;
- Frozen food stock included such items as ice cream, Hot Pockets, meals, pizza, brown-n-serve sausage, and burgers;
- Did not have a kitchen and hot foods were not sold;
- Did not have a deli or prepared food section and deli meats and cheeses by the pound were not sold;
- Pre-packaged deli sandwiches were offered for sale;
- Meat items included units of canned fish, canned/potted meat, meat jerky, eggs, packaged lunch meat, and bacon;
- Dairy included milk, butter, margarine, and cheese;
- No fresh produce stock;
- Other staple foods available for purchase included such items as juice, loaf bread, pasta, rice, flour, baking mix, cereal, buns/rolls, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, condiments, sugar, snack foods, and cakes/pastries; and
- Ineligible nonfood items included health and beauty aids, paper products, household cleaning supplies, tobacco products, lottery tickets, automotive supplies, clothing, housewares, cell phone accessories, and pet food.

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 48 sets of transactions (140 total transactions) that total \$7,384.82 in SNAP benefits to meet the parameters of this scan. These transactions were conducted by 21 different 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 the store has four carriages available for shoppers’ convenience in buying multiple items. Store personnel are not allowed to refuse proper transactions under the SNAP. Retailers must accept payment from EBT cardholders who have a valid PIN. Store personnel should not question the EBT card holder regarding their 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.

Although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefit allotment in just one or two days, especially from a convenience store like the Appellant firm that has a moderate food stock, no fresh produce stock, no fresh meats, poultry, or seafood, no frozen unprocessed meats, poultry, or seafood, and a minimal variety and amount of frozen food stock.

5 U.S.C. § 552 (b)(7)(E).

The report and photographs from the store visit of April 8, 2021, as well as the stock photos provided by the Appellant offer no explanation as to why SNAP customers would routinely shop at the Appellant multiple times during a short period or purchase such a large volume of items,

there being no great variety of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. The majority of the Appellant's food stock consists of packaged food items, canned items, accessory food items, snacks, and beverages. The second, third, and subsequent transactions in each set are too large to consist of forgotten items.

In addition, the store visit report, which was completed in collaboration with and signed by the store manager, and store visit photos indicate that there was a small checkout area with one cash register and one EBT POS device for ringing up food purchases. While the Appellant is correct that the store has four hand-held baskets, there were no shopping carts available to customers for transporting large quantities of food within the store and no optical scanners or conveyor belts to expedite high dollar or rapid consecutive purchases. 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 Appellant contends that many eligible families received additional funds for food purchases through pandemic EBT benefits. This factor is reflected in the multiple transactions noted in Attachment 1. The additional benefits resulted in binge buying as well as "stocking up". The charge letter was delivered to the Appellant on July 23, 2021. After receipt of the charge letter, significant changes in SNAP transaction activity occurred at the subject store. 5 U.S.C. § 552 (b)(7)(E). Such a change in behavior is suggestive that this is not normal shopping patterns and is more indicative of trafficking.

In addition, receipt of additional EBT benefits via pandemic-EBT is 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 an increase in SNAP benefits was 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.

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 a total of 45 SNAP authorized retailers located within a 1.0 mile radius of Papa Gi, including 1 medium grocery store, 1 large grocery store, 1 supermarket, and 3 super stores, that could meet the nutritional needs of SNAP customers. Some of these area authorized stores offer a comparable or greater quantity and variety of food products at comparable or better prices as compared to the subject store.

In addition, the record indicates that SNAP customers who shopped at Papa Gi 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 286 SNAP transactions, as large as \$140.34, that total \$17,410.54. 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 services many SNAP participants who live nearby. The store consists of 1,400 square feet of space. There is a 10-door walk-in cooler at the rear of the store. A separate business, New York Platers & Fried Chicken occupies the left side of the wall. Tobacco and smoking products are sold on the right side of the store. There are five aisles that separate four display counters with stock on both sides. The Appellant sells groceries, pet food, snacks and drinks, canned foods and pasta, candy, ice cream, soda and energy drinks. The Appellant sells items in bulk that are popular with customers, such as soda and expensive energy drinks.

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. It is rare for a convenience store such as Papa Gi to have purchases like those included in this Attachment to the charge letter.

A review of the store visit report, which was completed in collaboration with and signed by the store manager, as well as the store visit stock photos indicates that Papa Gi is a convenience store of approximately 1,000 square feet in size with no storage area out of view and has no storage coolers or freezers for stocking additional food items. While the Appellant is sufficiently stocked in the four staple food categories to meet Criterion A eligibility requirements, the stock of SNAP-eligible foods is moderate with no fresh meats, poultry, or seafood, no frozen meats, poultry, or seafood other than a few units of processed/fried chicken, no fresh produce stock, and lacks an abundant depth and breadth of staple foods. Some of the canned and packaged foods were dusty indicating that these items are not sold and stock replenished on a regular basis.

In addition, the Appellant does not offer any special or custom services to customers, such as on-line or telephone orders and/or delivery services, or profusion of specialty or ethnic foods which would entice SNAP customers to utilize the subject store over other area authorized retail stores. There were 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 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. There were only a few expensive eligible foods in stock, most of which were in limited quantities, which would account for these large amounts.

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, the subject store did not have inventory to support the numerous large transactions.

The Appellant contends that some instances of trafficking take place outside of the store. The Appellant cannot be responsible for what happens to products that are purchased after customers leave the store. While the Appellant's claim that trafficking is occurring outside of the store may be true, the issue at hand is the questionable SNAP transactions which took place at the Appellant within the review period. The Appellant's statement appears not to deny the charges noted in the charge letter but rather to deny culpability and place the blame for those charges directly on SNAP customers. In addition, when the owner signed the SNAP application for the store he certified his role in combating SNAP/EBT fraud.

While the Appellant firm may be located in a neighborhood with households that qualify for SNAP benefits, 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 Attachment 2 consists of 286 transactions, but includes 112 transactions that are less than \$50.00. This Attachment includes just 25 transactions that are in excess of \$100.00. 5 U.S.C. § 552 (b)(7)(E).

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 at other area stores, 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.

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.

Sales and Use Tax Returns/Sales Graphs

The Appellant contends that the store conducts substantial sales. Per the submitted Sales and Use Tax returns, gross sales for January 2021-July 2021 were \$323,755.00, with an average of \$46,251.00 per month.

Massachusetts Sales and Use Tax documents were submitted for review dated January 31, 2021, February 28, 2021, March 31, 2021, April 30, 2021, May 31, 2021, June 30, 2021, and July 31, 2021. 5 U.S.C. § 552 (b)(7)(E). As such, this information provides little probative value and does not validate that the transactions noted in the charge letter are the result of legitimate purchases of eligible food items and not the result of trafficking.

The Appellant contends that the total gross sale of food items from January 2021 through July 2021 is approximately \$200,00.00 with a monthly average of \$29,000.00. 5 U.S.C. § 552 (b)(7)(E). The issue at hand is the suspect violative transactions as detailed in Attachments 1 and 2 of the charge letter. These households are not only conducting transactions that are suspiciously large due to the available store stock, but are also shopping at supermarkets and super stores shortly after making purchases at the Appellant. This strongly suggests that households are not using the subject firm as their primary shopping source. It is highly unlikely that a convenience store with moderate staple foods would have legitimate SNAP transactions greater than these larger and better stocked stores.

The Appellant also submitted a gross sales graph and food purchase graph for review. 5 U.S.C. § 552 (b)(7)(E). As such, this information provides little probative value.

Prepaid Tax Report

To substantiate the firm's inventory and demonstrate that there was adequate eligible food items to account for the transactions during the review period, the Appellant submitted for review a prepaid tax report from J. Polep Distribution Services dated February 4, 2021-June 25, 2021.

FNS cannot determine from the prepaid tax report what items were purchased for the Appellant as an itemized list of purchased items is not included. 5 U.S.C. § 552 (b)(7)(E), the invoice analysis indicates that the firm lacked sufficient purchased food stock (5 U.S.C. § 552 (b)(7)(E)) to cover its SNAP redemptions for the review period. The analysis also does not account for any non-SNAP purchases (cash, credit and debit card, etc.) of food items at the Appellant. In sum, the invoices do not explain the questionable transactions at the Appellant.

Compliance History

The Appellant contends that the penalty for trafficking is excessive, given the fact that the Appellant has no prior infractions and received no prior notice of any wrongdoing.

While the Appellant is correct that the firm has not been cited for prior SNAP violations, 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.

Neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be extremely serious, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a nonmanagerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store.” In keeping with this legislative mandate, § 278.6(e)(1)(i) of the SNAP regulations states that FNS must disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved.

No Warning

The Appellant contends that there has been no prior action taken by FNS to warn the firm about the possibility that violations are occurring. 7 CFR § 278.6(d)(2) and (3) of the SNAP regulations provides that “The FNS office making a disqualification or penalty determination . . . shall consider . . . any prior action . . . to warn the firm about the possibility that violations are occurring....” The citation simply requires FNS to consider any prior warnings when determining a sanction. It does not require FNS to give such warnings. FNS did not consider prior actions to warn the Appellant about the possibility that violations were occurring because there were no prior warnings.

CIVIL MONEY PENALTY

In the July 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 Appellant's reply to the charge letter of August 2, 2021 and in the request for administrative review, the Appellant, through counsel, requested consideration for a civil money penalty in lieu of permanent disqualification. The Appellant contends that it established a policy that any employee who was found to violate the SNAP regulations would be subject to immediate termination. This policy was in effect during the entire time that the business has operated and the policy is communicated to each employee at the time of hire. The Appellant provides training of employees on the proper acceptance and handling of SNAP benefits. As owner and manager of the store, the owner had no knowledge of any alleged violations by its employees. This is the first time that the Appellant has been charged with any violations of the SNAP regulations. As owner of the store, the Appellant did not benefit or profit from any of the alleged violations.

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 Papa Gi 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 3, 2022