

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

Ceny Grocery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0248506

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 Retailer Operations Division to impose a permanent disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) against Ceny Grocery (hereinafter “Appellant”).

ISSUE

The issue accepted for review is whether the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Ceny Grocery.

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

Ceny Grocery was initially authorized to participate in SNAP on January 11, 2021. In a letter dated January 12, 2022, the Retailer Operations Division charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred between the months of June 2021 through November 2021 and information obtained during a visit to the store by an FNS contractor on August 18, 2021. The attachments enclosed with the charge letter specified the questionable and unusual SNAP transactions indicative of trafficking that were conducted at Appellant’s firm during the review period. The letter noted that the penalty for trafficking is permanent disqualification, as provided

by 7 CFR § 278.6(e)(1). It informed Appellant of the right to respond to the charges within 10 days of receipt to explain the irregular SNAP transaction patterns and provided that Appellant may request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking within 10 days of receipt of the charge letter, under the conditions specified in 7 CFR § 278.6(i).

The record reflects that on January 18, 2022, Appellant's counsel requested an extension of time for providing a response to the letter of charges. The Retailer Operations Division granted the extension.

Appellant, through counsel, responded to the trafficking charges in a letter dated February 18, 2022. Appellant denied that the store engaged in trafficking. Among other contentions, Appellant attempted to explain the irregular transaction patterns as due to the statistical results of the store's normal business operations and circumstances, local demographics, particular shopping habits of the store's clientele, and the lack of other SNAP authorized stores offering comparable stock in the area. Appellant submitted studies, reports, and articles about SNAP benefit redemption patterns and grocery shopping patterns, a congressional district profile, invoices, photographs, affidavits, an inventory list, a SNAP Employment and Training document, and a coefficient calculation to support these explanations.

After evaluating Appellant's response and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated April 13, 2022. This letter informed Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but that a CMP was not appropriate because 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.

In an email dated April 18, 2022, Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted. In an email correspondence of May 16, 2022, Appellant, through counsel, submitted additional information in support of the request for administrative review.

On April 25, 2023, the administrative review was reassigned to review officer Amie Churchill.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 AND REGULATIONS

The controlling law in this matter is found 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.

7 U.S.C. § 2021(b)(3)(B) states, in part:

[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 § 271.2 states, in part:

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

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 § 278.2(a) states, in part:

[SNAP benefits] may be accepted by an authorized retail food store only from eligible households...only in exchange for eligible food. [SNAP benefits] may not be accepted in exchange for cash...[and] may not be accepted in payment of interest on loans or for any other nonfood use.

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, [or] evidence obtained through a transaction report under an electronic benefit transfer system....** [Emphasis added.]

7 CFR § 278.6(b)(1) 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(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.

7 CFR § 278.6(e)(1)(i) states:

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

7 CFR § 278.6(c) states, 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(i) states, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking...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 of the Program.

SUMMARY OF CHARGES

FNS charged Cený Grocery with trafficking based on an analysis of FNS records, which included observed store characteristics, recorded food stock, and store pricing gathered during a store visit, as well as Electronic Benefit Transfer (EBT) transaction data for June 2021 through November 2021. The attachments enclosed with the charge letter reflected the following transaction patterns, which may be indicators of trafficking:

- **Charge Letter Attachment 1:** Multiple transactions made from the accounts of individual SNAP households within a set time period.
- **Charge Letter Attachment 2:** EBT transactions that were large based on the observed store characteristics and recorded food stock.

APPELLANT'S CONTENTIONS

Appellant, through counsel, submitted a voluminous brief which included a considerable number of contentions targeted to broadly question the validity of trafficking cases based on SNAP benefit redemption data, as well as the processes used to develop and decide these cases. Appellant also argues, in part, that normal SNAP household shopping behaviors, local business conditions, and other factors can explain the transactions identified in the charge letter. Appellant cites case law and past administrative review decisions in support of its contentions. For purposes of brevity, these broader arguments will not be specifically listed here.

Contentions specific to Appellant's case are summarized below:

- Appellant denies the trafficking allegations.
- Appellant is in an economically depressed area surrounded by poverty and many low-income families. It is near public transportation and places that draw, house, or place a significant number of SNAP participants.
- The store visit report did not document the store inventory in complete detail. The list of higher priced items was not exhaustive as there appear to be items in inventory that were documented but not listed by price. Appellant provided a list of products and bundles with coordinating prices it states were missed by the contractor.
- The pandemic resulted in changes to customer shopping habits, including prioritizing convenience, spending more money per trip, and buying in bulk.
- Regarding Charge Letter Attachment 1:
 - These transactions are the result of Appellant's business practices, forgotten items, co-shopping, and/or the habits of SNAP clientele.
 - Co-shopping is on the rise.

- Telephone orders impacted the transactions on this attachment. Sometimes the transactions are broken up into separate orders and paid for separately when being picked up.
- A number of SNAP households come into the store multiple times a day, often sending children on separate shopping trips to pick up items from time to time.
- Customers make purchases for friends, for large gatherings, or to satisfy needs that are not obvious.
- There are no logistic barriers to the transactions in Attachment 1.
- Appellant's inventory is of such a variety that a household could satisfy all of their needs on a single shopping trip.
- SNAP participants shop at Appellant because it is more convenient.
- SNAP customers shop at Appellant because they lack consistent transportation.
- SNAP customers make back-to-back purchases at Appellant because they are unemployed or bored.
- Regarding Charge Letter Attachment 2:
 - These transactions are the result of Appellant's pricing structure, inventory, co-shopping, a portion of local participants relying on Appellant as a primary grocery, and/or are the normal reflection of SNAP participants' shopping habits.
 - These are not very large transactions; the largest was 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
 - Appellant is not responsible for monitoring SNAP household shopping habits.
 - Sweetened beverages and salty snacks are within the top 10 expenditures for SNAP households. It is reasonable to expect SNAP customers to spend large amounts and/or the majority of their benefits at Appellant's store, given its inventory.
 - Households in the charge letter are likely to be large, resulting in large transaction amounts.
 - The high-priced items in the store do not require the store to have a huge amount of counter space for transactions.
 - The transactions are tied directly to the store's substantial inventory and convenience for households that do not have regular access to transportation.
 - Other stores nearby do not offer similar inventory.
 - The store carries many high-priced items and bundles.
- In the alternative, Appellant requests a trafficking civil money penalty (CMP) and contends to have implemented an effective compliance program to prevent SNAP violations.
- Appellant stated it provided household affidavits and inventory receipts to the Retailer Operations Division to support its contention that trafficking did not occur.

Appellant did not submit any additional evidence in support of its contentions.

The preceding represents a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any that have not been specifically listed here.

ANALYSIS AND FINDINGS

This review examines the relevant information regarding the Retailer Operations Division's trafficking determination. The record must contain evidence sufficient to raise a presumption that trafficking occurred. In a trafficking determination, this evidence includes SNAP transaction data, considered together with other available information, such as store visit observations, the location and characteristics of competitor firms, and household shopping patterns. Once the presumption is established, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that it did not engage in trafficking. If Appellant fails to show this, the case will be sustained.

Retailers are provided opportunities to submit evidence accompanied by explanations of the legitimacy of questionable transactions, both to the Retailer Operations Division and here on administrative review. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

Based on the evidence in this case, the SNAP transactions listed in the January 12, 2022, charge letter were indicative of trafficking. Appellant has not provided reasonable explanations supported by sufficient credible and convincing evidence to demonstrate that these transactions were more likely due to reasons other than trafficking. Accordingly, the permanent disqualification is sustained. Discussed below are elements of the Retailer Operations Division's record, Appellant's contentions, and the findings of this review.

Administrative Reviews Independent of FOIA Process

Appellant alleges it is unable to meaningfully respond to the charges because it is not provided with all the information on which the charges are based. Along with the charge letter, Appellant was provided with a detailed list of suspect transactions and the store visit documentation.

Appellant also contends not holding determinations in abeyance while FOIA responses are pending violates 7 CFR §278.6(b)(1) according to *Triple E Express vs. ROD*, Case No. C0191279 because Appellant is not given a full opportunity to respond. The finding in *Triple E Express* is based on outdated regulations. Since October 26, 2020, holding determinations and administrative reviews in abeyance while FOIA responses are pending is prohibited.

Store Characteristics

In reaching a disqualification determination, the Retailer Operations Division considered information obtained during the August 18, 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 store size, description, available stock, and characteristics. The store visit report noted there were no shopping carts or baskets available for customer use. The visit also noted that the store did not offer telephone orders, online orders, or delivery. The report also described the store's checkout counter space area and noted the effect of any limitations of the available surface area on placing large purchases or processing more than one

customer at a time. The comments from the store visit report stated that the store did not offer meat or cheese by the pound; the meat and cheese stock was only for prepared foods.

In its reply to the Retailer Operations Division and on review, Appellant stated the contractor missed some of the high-priced items offered by the store. Appellant provided a list of high-priced items it claims the contractor missed, including deli meats and cheeses starting at \$5.99 per pound and other items priced up to \$22.00 for an 18-pack of Ritz Crackers. Appellant also stated it offers bundles priced between \$10.00 and \$40.00. In support of these contentions, Appellant provided the Retailer Operations Division approximately 32 undated photographs of the store's stock, a 16-page list of the store's inventory dated January 28, 2022, and approximately 163 pages of inventory purchase invoices to support its contentions.

Regarding these contentions, the Retailer Operations Division noted that the contractor completed the store visit report in collaboration with one of the store's owners. The store owner verbally informed the inspector of the pricing of some high-priced items. At the time of the store visit, the store's highest-priced items ranged from \$5.00 to \$5.89. In addition, the store visit report stated that the store did not sell bundles, specials, or packages. Further, the Retailer Operations Division noted that the store visit photographs supported the store visit report and did not show the high-priced items and bundles cited by Appellant.

The store inventory list provided by Appellant was dated approximately two months after the review period. There was no evidence of any dates affixed to the 32 photographs provided by Appellant, so it is likely they were taken after the firm received the charge letter. The photographs appear to show greater levels of stock than what the contractor found during its inspection, particularly with regard to the store's bundles, which the Retailer Operations Division determined were not reported or photographed in the store visit materials. Because there is no way for this review to determine that Appellant's photographs and inventory list reflect store conditions at the time of the review period, this review finds them to be of little probative value.

The Retailer Operations Division completed an analysis of the inventory invoices using the 60% markup provided by Appellant. Based on that analysis, the Retailer Operations Division determined that the firm lacked sufficient purchased food stock to cover its SNAP redemptions for the review period months.

The Retailer Operations Division concluded that the photographs, inventory list, and invoices provided by Appellant were insufficient evidence that the store carried sufficient eligible food stock to meet its SNAP redemptions or that it offered stock in the price points and quantities, including bundles, cited by Appellant. In sum, the Retailer Operations Division determined that the photographs, inventory list, and invoices provided by Appellant did not explain the questionable transactions at Appellant.

The SNAP eligible food stock documented during the store visit 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. Given the available inventory, there was very little sign that Appellant would likely have SNAP redemption patterns that differed significantly from

those of similarly sized competitors, especially competitors that sell similar or identical food items.

SNAP Transaction Analysis

While SNAP households are not limited in the number of times they may use their SNAP benefit card or how much eligible food they may purchase in SNAP transactions, government analyses have found that stores likely trafficking SNAP benefits have particular transaction patterns or characteristics that are inconsistent with the transaction patterns and characteristics of similarly situated stores. The charge letter attachments specify the unusual transactions and transaction patterns found at Appellant's store.

Charge Letter Attachment 1: Multiple transactions were made from the accounts of individual SNAP households within a set time period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Abnormally repetitive transactions over short periods of time at rates substantially greater than expected can be an indication that trafficking violations are occurring. During the review period, Appellant conducted an average of more than 61 transactions per month that met the parameters of this attachment.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Although it is not uncommon for customers to have multiple transactions in a day or two, it is uncommon that, at a convenience store, such multiple transactions total 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 Appellant's stock and facilities and are therefore indicative of trafficking.

Appellant contends that it is located in an area with many SNAP participants. While this may be true, the Retailer Operations Division identified similar and larger stores within half a mile of Appellant. There is no basis for unusually high customer attraction to Appellant, there being no great price advantage, profusion of otherwise unavailable ethnic goods, or special or custom services rendered.

Appellant contends the transactions on this attachment are due to customers sharing benefits with others, splitting food purchases, or purchasing items for large gatherings. Appellant has offered no evidence that the store's SNAP customers share their cards or benefits with others, split food purchases, or purchase items for large gatherings. As to whether or not co-shopping actually affected Appellant during the review period, this argument is little more than conjecture.

Appellant has provided no evidence to show that co-shopping is particularly common among SNAP recipients in Philadelphia, Pennsylvania. Appellant has also not provided any explanation for why, if such behaviors were occurring, these purchases would occur at Appellant much more frequently than at nearby similarly situated 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. Unsubstantiated arguments such as these do not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant stated the store's telephone orders impacted the transactions in this Attachment. Appellant contends that when customers come in to pick up their telephone orders, they sometimes request that the orders are broken up into separate transactions. Appellant provided an affidavit signed by the store's owners to the Retailer Operations Division, which stated, in part, that the store took telephone orders. As previously noted, the store visit report, completed in collaboration with one of the store's owners, reported the store did not offer telephone ordering at the time of the store visit. Without supporting evidence, Appellant's contention does not constitute valid grounds for overturning the determination.

Appellant contends that back-to-back purchases are because SNAP customers lack access to transportation, Appellant's inventory is superior to that of nearby stores, and that SNAP participants shop at Appellant because it is more convenient. Appellant provided no evidence to demonstrate that its inventory during the review period was superior to that of nearby stores. Appellant provided eight customer affidavits to the Retailer Operations Division to support its contentions. The Retailer Operations Division matched seven of these customer affidavits to SNAP households. The Retailer Operations Division determined that the affidavits provided by Appellant did not provide a valid basis for dismissing the charges. The affidavit documentation is largely unconvincing. Customers engaging in trafficking violations are unlikely to admit to such conduct. Furthermore, affidavits, even if well-intentioned, do not typically represent a household's actual shopping behavior, as households generally do not retain records of transactions and often do a poor job of recalling spending patterns at a particular location. In addition, 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.

Finally, Appellant contends that SNAP customers make back-to-back purchases at Appellant because they are unemployed and bored or because they return to the store to make a second purchase for forgotten items or additional needs. Again, while there are legitimate reasons why a SNAP recipient might return to a convenience store in a short period of time, the examples in the attachment 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. Anecdotal arguments offer little insight into the transactions in question and do not verify what took place between the customers and the store clerks at the point of sale.

Without compelling evidence from Appellant to show that the transactions in Attachment 1 were legitimate, this review finds that trafficking was a likely cause of the unusual patterns.

Charge Letter Attachment 2: EBT transactions that are large based on the observed store characteristics and recorded food stock. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The transactions in this charge letter attachment were all higher than 85% of all convenience store purchase transactions during the review period.

Appellant contends that because sweetened beverages and salty snacks are within the top 10 expenditures for SNAP households, it is reasonable to expect SNAP customers to spend large amounts and/or the majority of their benefits at Appellant's store given its inventory. Further, Appellant argues the largest transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C). At the time of the

August 18, 2021, store visit, the six highest-priced items identified by the contractor in collaboration with one of the store owners were Whole Shabang chips, Breyers ice cream, and two varieties of family-sized cereal boxes, each priced at \$5.00, Gerber infant rice priced at \$5.89, and Quaker Quick oats priced at \$5.19. Given the recorded stock at the time of the store visit, a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transaction was large.

Within Attachment 2, there were unusual patterns of repeating transaction totals and ending cents values. For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). In large purchase transactions, where multiple items are being purchased, it is unusual for the same transaction total to naturally recur multiple times. This can indicate that transaction totals are being contrived, which happens when stores are trafficking SNAP benefits. Appellant provided insufficient evidence to support its contentions about the store's inventory during the review period and no evidence to support that other stores in the area did not offer comparable stock. As previously noted, the store visit report, which was completed in collaboration with the store owner, indicated the store carried a limited variety and quantity of items priced at \$5.00 or more. There is no evidence in the record that would explain the recurrent transaction amounts in these dollar values, or why Appellant would so frequently have higher transaction amounts as compared to similar stores.

In addition, this attachment had unusual patterns of repeating ending cent values. For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The pricing noted in the store visit report, and the legible pricing visible in the store visit photographs did not appear to explain the unusual ending cents patterns.

Appellant claims the high-priced items in the store do not require the store to have a huge amount of counter space for transactions. Appellant's checkout area sits behind a glass or Plexiglass barrier, and transactions are conducted through a small opening. Based on the store layout, infrastructure, and available inventory, it is not credible that Appellant would so frequently conduct large, repetitive transactions. It is not plausible that the firm's customers would regularly carry 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 Appellant.

As previously noted, Appellant provided inventory invoices to the Retailer Operations Division as part of its reply to the charge letter. The Retailer Operations Division analyzed the invoices and determined they were insufficient to support a finding that the firm purchased sufficient eligible food stock to meet its SNAP redemptions during the review period. It is important to note that even if the results of the invoice summary report analysis had appeared to indicate that Appellant had purchased sufficient food inventory to account for the firm's SNAP redemption volume, sufficient inventory alone does not explain the suspicious patterns of SNAP transactions such as repeat transactions by the same household during the same store visit or in a short period of time. Even the large dollar transactions would remain questionable if there were sufficient food inventory to support such transactions when consideration is made of there being only a limited variety of stock in the store, a greater variety of foods at comparable or lower prices at other stores, and little counter space to place food for purchase at the checkout counter. Even if there were sufficient food stock at Appellant to mathematically support high dollar transactions, there does not appear to be anything that would reasonably attract SNAP households to shop

there, a convenience store, in some cases traveling a couple of miles to do so, and spend substantial amounts of their SNAP benefits.

Appellant stated that larger purchases might be because the SNAP households are larger. While this may be true, this does not explain why larger SNAP households are more likely to shop at Appellant rather than other stores offering similar stock within half a mile.

As previously noted, Appellant claims that the store visit inspector missed some high-priced items, including bundles. However, store personnel verbally informed the inspector of the pricing of some high-priced items and stated the store did not offer any bundles or specials at the time of the store visit. The store visit photographs supported the contractor report. Appellant has provided no evidence that the items mentioned were stocked and sold in these quantities and noted price points during the review period.

Appellant, through counsel, has argued that it has no control over and no obligation to monitor customer shopping habits. Appellant further argues that the store operates as a primary grocery for some households. With regard to these contentions, it is true that retailers have no regulatory or statutory obligation to monitor the spending habits of SNAP recipients, including how much a household may spend at a store at a given time. It is also true that some households may choose to spend most or all of their monthly allotment at a single store, especially if that store is conveniently located or offers food items that are not readily available elsewhere. However, the transactions cited in the charge letter are questionable not because they exceed any limits for use, but because they display patterns of use that are inconsistent with the store's documented physical characteristics and food inventory, and significantly different from patterns found in nearby competitive stores – even those competitors who sell similar food items.

This review does not doubt that Appellant sells eligible food items and conducts legitimate SNAP business. There is no evidence that this has ever been questioned. But when unusually large transactions form patterns that are substantially different from similarly-stocked stores, further evidence from Appellant is warranted to verify that there is not something more, such as trafficking or other program violations, taking place. In this case, Appellant has not offered adequate evidence, which might have included cash register receipts or other accounting records, to better explain what took place between the customer and the clerk at the point of sale for the specific transactions listed in the charge letter. In the absence of compelling information or documentation weighed in comparison to that provided by the Retailer Operations Division, the agency's determination must be sustained.

Competitor Stores:

The Retailer Operations Division reviewed the number of SNAP authorized retailers within a half-mile radius of Appellant to determine if households living near Appellant had access to other shopping options during the review period. Mapping showed five (5) supermarkets, 11 small grocery stores, and 13 other convenience stores within the half-mile radius. This review demonstrates that households shopping at Appellant were nearby a larger store that may have lower prices and better inventory, making it less likely that SNAP recipients would expend their

SNAP benefits in large amounts at Appellant's convenience store, and that they would do so recurrently.

Household Analysis:

In addition to determining if households had access to other shopping options, the Retailer Operations Division conducted a household analysis to determine if households conducting suspicious transactions at Appellant actually utilized larger stores during the review period. As noted above, larger stores usually have lower prices and better inventory. The analysis included examples of five households; the Retailer Operations Division determined two of these households lived more than one mile from Appellant. The analyzed households had unusual shopping patterns at Appellant while also regularly shopping at larger stores. Despite their access to larger, better stocked stores, these sampled households conducted unusual transactions at Appellant.

In addition, Agency records show 73% of households in the charge letter conducted a transaction at a large grocery store, supermarket, or superstore within a day of a charge letter transaction. This would suggest that the majority of households in the charge letter had access to larger, better stocked stores during the review period.

Comparison with Similarly Situated Stores:

The Retailer Operations Division compared Appellant's transaction activity to the transaction activity of four comparable convenience stores located within a half-mile radius of Appellant. Appellant had significantly more SNAP transactions meeting the parameters of multiple transactions from the same household in set time frames and transactions that were large based on the observed store characteristics and recorded food.

The Retailer Operations Division also compared Appellant's redemption data to the redemption data for the four nearby comparable stores it identified. The comparison revealed Appellant's transaction count and dollar volume in ten-dollar increments from 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is unusual for a convenience store to recurrently conduct higher dollar transactions so frequently as compared to other similarly situated stores.

Appellant's inventory, characteristics, and location do not explain why Appellant had more frequent transactions meeting the parameters in the charge letter and significantly different redemption patterns as compared to nearby convenience stores. If Appellant's arguments about store location, pandemic spending, or SNAP household shopping patterns were causing the questionable transactions at the subject store, it would be expected that similar patterns would exist at other nearby similarly stocked stores. However, that is not the case.

Evidence of Trafficking

Regarding 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 the local area, to render a determination as to whether or not the questionable transaction patterns were, more likely than not, the result of trafficking. SNAP 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.

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

Civil Money Penalty

As noted earlier, the Retailer Operations Division determined that Appellant was not eligible for a CMP in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a CMP to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate supporting documentation within 10 days of receipt of the charge letter. The case record shows that Appellant did not request a trafficking CMP or provide any evidence of a compliance policy or training program within the required 10-day period. Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

Case Law and Past Administrative Reviews

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

With regard to the prior Final Agency Decisions cited by Appellant, this administrative review decision is based on the specific circumstances of this case as documented by the materials provided by Appellant and the Retailer Operations Division. This administrative review decision

does not establish policy or supersede Federal law or regulations. The determination in this case conforms to SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations.

CONCLUSION

The Retailer Operations Division's analysis of the EBT transaction record for Cený Grocery was the primary basis for its determination to permanently disqualify the retailer. This data provided sufficient evidence for this review to conclude that the questionable transactions and patterns listed in the charge letter were more likely than not the result of trafficking violations committed by Appellant. Likewise, Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

Based on a review of all available information in this case, the decision to impose a permanent disqualification against Appellant, Cený Grocery, under the ownership of Gustavo E. Molina Naar and Livaneri Altagracia Lovera, is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

AMIE CHURCHILL
Administrative Review Officer

May 11, 2023