

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

Cudahy's Supermarket,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0257623

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 Cudahy's Supermarket (hereinafter "Cudahy's Supermarket" 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 Cudahy's Supermarket.

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 November 8, 2022, the Retailer Operations Division informed the Appellant that Cudahy's Supermarket 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 November 9, 2022.

In responses to the Retailer Operations Division of November 9, 2022, November 17, 2022, and November 21, 2022, the Appellant 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 November 30, 2022, informing the Appellant that Cudahy's Supermarket 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 an email correspondence of December 9, 2022, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. FNS granted the Appellant's request for administrative review by letter dated December 19, 2022. In an email correspondence of January 9, 2023, the Appellant, through counsel, 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 January 2022 through June 2022. 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;
- The bulk of the households' remaining benefits were depleted within short timeframes; and
- There were EBT transactions conducted that are large based on the observed store characteristics and recorded food stock.

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

APPELLANT'S CONTENTIONS

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

In the replies to the charge letter, in the administrative review request, and in subsequent correspondence, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant has been in business and an authorized SNAP retailer since 2015.
- The Appellant serves the community and runs the store ethically with no intention of committing any violations or crimes.
- The Appellant has never violated any laws related to Section 271.2 and 278.6(e)(1).
- The Appellant's transactions are based on the sale of qualified merchandise.
- The Appellant holds itself as a fully functioning grocery store.
- Most of the Appellant's customers buy groceries for their entire household as would a customer at a grocery store.
- The Appellant is located in an urban low-income community containing multiple neighborhoods for low-income families. The Appellant is on the main road and has been there for almost nine years. Customers recognize the store's name and its quality throughout the years.
- Video footage of the transactions noted in the charge letter Attachments is no longer available. If requested, the Appellant can provide video footage of any transaction within a 10-day period.
- With regard to the transactions documented in Attachment 1, it is common for individuals to come to the store regularly to purchase daily groceries.
- All of the transactions occurred within two hours apart except for two transactions. In fact, most multiple transactions occurred more than 15 hours apart from each other, and no transactions occurred within 15 minutes of each other.
- Submitted are EBT register receipts which show that the SNAP purchases were for eligible food items and not the result of trafficking. The Appellant uses a not-so-advanced machine, hence the receipts only showcase the transaction amounts, the time of the transactions, and the type of transactions.
- The Appellant is the only store in the area and most customers do not have vehicles, so the subject firm is convenient for those who walk.
- There is a senior citizens apartment complex on the corner and many of these residents shop at the Appellant every day, some even make large purchases since they prefer to shop every few days.

- With regard to the transactions documented in Attachment 3, the Appellant is the largest grocery store in the neighborhood. It has a massive inventory including vegetables and frozen meat.
- Being the biggest store in the community, the Appellant naturally attracts numerous individuals.
- Many customers come to the store to purchase their weekly groceries for the whole family.
- The store carries many high priced items. For instance, infant formula costs \$23.99 and a pack of frozen chicken costs \$16.99.
- With inflation at an all-time high, \$100.00+ purchases are frequent and normal.
- The Appellant has witnessed customers spending \$50.00 on snacks alone.
- A gallon of milk and a dozen eggs costs \$11.00.
- Being the largest and most profitable store in the community, the Appellant has no reason to risk the store for minimum benefits.
- Submitted are inventory purchase invoices for January, February, and March of 2022 to substantiate the firm's inventory and demonstrate that there was adequate eligible food items to account for the transactions during the review period.
- For the last couple of years, it has been difficult getting and keeping employees so the owner works alone most of the time and the store's inventory will get low at times since the owner must physically go to wholesalers to purchase food products for the store and it takes him a few days to get products on shelves. Since the store is located outside a major city, wholesalers will not deliver to the Appellant.
- This is the first time that the Appellant has been cited for SNAP violations.
- A permanent SNAP disqualification would impose a significant hardship on area customers.
- A permanent SNAP disqualification would impose a financial hardship on the Appellant.
- The Appellant has implemented an effective compliance program to prevent violations of the SNAP regulations Section 271.2 and meets the eligibility requirements for a CMP under Section 268.6(e)(1).
- The Appellant has taken the time and effort to ensure all employees have been properly trained for their position. Each employee knows the difference between SNAP-eligible items and ineligible nonfood items by heart. The Appellant has emphasized the consequences of exchanging SNAP benefits for cash or extending credit to SNAP customers.
- With regard to Criterion 1, since being authorized as a SNAP retailer, the owner has been active in ensuring full compliance with his employees and their obligations to FNS. A photocopied booklet is provided to each employee and issues and concerns regarding EBT processing are addressed as questions and issues arise. The Appellant's compliance policy states the following: (1) There is no exchange for cash for EBT card swipes; and (2) and only sell qualified EBT grocery items to your customers.
- 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.

- 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.

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

- Inventory purchase invoices for January, February, and March of 2022 (106 pages total);
- Customer affidavits (10 total);
- Attachments 1 and 2 of the charge letter;
- EBT register receipts (18 pages); and
- 27 photos of current food stock and outside of the store.

ANALYSIS AND FINDINGS

SNAP Authorization

FNS authorized Cudahy's Supermarket for participation in the SNAP on February 2, 2015. During the review period of January 2022 through June 2022, Cudahy's Supermarket was classified as a convenience store. When he signed a SNAP application for the store and in subsequent reauthorization applications, the owner 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 June 21, 2022 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 1,300 square feet in size with approximately 100 square feet of storage area outside of public view which stocked predominantly drinks and alcohol;
- Did not have storage coolers or freezers;
- No shopping carts and 12 hand-held baskets available for customer use;
- One small checkout counter area with limited check-out counter space;
- Two cash registers and two EBT point-of-sale (POS) devices for use in ringing-up SNAP transactions;
- Had optical scanners;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals;
- No meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers;
- Did not utilize an unusual pricing structure, such as prices ending in \$.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;
- Did not stock any specialty items;
- Had empty/scantily filled shelves;
- Had dusty cans/packages;
- Firm was a WIC Program vendor;
- The eight most expensive (i.e., costing \$5.00 and above) SNAP-eligible food items in stock were Similac Soy infant formula at \$22.99 per 12.4 ounces (2 units in stock); Similac Advance infant formula at \$22.99 per 12.4 ounces (2 units in stock); Banquet fried chicken at \$14.99 per 29 ounces (6 units in stock); Banquet bone-in wings at \$10.99 per 11 ounces (9 units in stock); Iltaco taco puff at \$9.99 per 24 ounces; Folgers coffee at \$7.99 per 11.3 ounces (4 units in stock); Red Bull at \$7.99 per 4-pack (8.4 ounces each); and Sea Best tilapia at \$6.99 per 16 ounces (3 units in stock);
- No fresh meats, poultry, or seafood;
- Had a minimal variety and amount of frozen unprocessed meats and seafood stock to include ground beef, tilapia (3 units in stock), and shrimp (1 unit in stock);
- No frozen unprocessed poultry;
- Frozen food stock included such items as meals, pizza, taquitos, Hot Pockets, chimichangas, sandwiches, pot pies, appetizers, corn dogs, ice cream, and vegetables;
- Did not have a kitchen and hot foods were not sold;
- Did not have a deli or prepared food area and deli meats and cheeses were not sold by the pound;
- Meat items included units of eggs, canned/potted meat, packaged lunch meat, hot dogs, bacon, meat jerky, and canned fish;
- Dairy included milk, infant formula, and cheese;
- No fresh produce stock;
- Other staple foods available for purchase included such items as juice, nuts, loaf bread, pasta/ramen, rice, cereal, flour, baking mix, 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, spices, and sugar; and

- Ineligible nonfood items included health and beauty aids, paper products, household cleaning supplies, tobacco products, automotive supplies, mobile phone accessories, lottery tickets, and a large variety and amount of alcohol.

Charge Letter Attachments

On review, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed.

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Based on this empirical data, and in the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the most likely explanation for “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges is trafficking. Transactions having such characteristics sometimes do have valid explanations that support that they were the result of legitimate purchases of eligible food items. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, the Retailer Operations Division determined that the Appellant’s contentions did not outweigh the evidence. The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Repeat Transactions by the Same Household (Charge Letter Attachment 1)

This charge letter Attachment documents 24 sets of transactions (51 total transactions) that total \$4,887.08 in SNAP benefits to meet the parameters of this scan. These transactions were conducted by 16 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.

5 U.S.C. § 552 (b)(7)(E).

The Appellant contends that it is common for individuals to come to the store regularly to purchase daily groceries. All of the transactions occurred within two hours apart except for two transactions. In fact, most multiple transactions occurred more than 15 hours apart from each other, and no transactions occurred within 15 minutes of each other. There is a senior citizens apartment complex on the corner and many of these residents shop at the Appellant every day, some even make large purchases since they prefer to shop every few days.

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, a minimal variety and amount of frozen unprocessed meats and seafood, no frozen unprocessed poultry, and a moderate variety and amount of frozen food stock. The store visit observations indicate that the subject firm is a convenience and liquor store without unique food stock, floor plan, or other characteristics. The Appellant's transaction activity is unusual as every transaction in each set of transactions range from \$22.95 to \$202.52 and the average convenience store transaction in 5 U.S.C. § 552 (b)(6) & (b)(7)(C) during the review period was 5 U.S.C. § 552 (b)(7)(E) and 5 U.S.C. § 552 (b)(7)(E) for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) County. The second and third transactions in each set are too large to consist of forgotten items.

The store visit report, which was completed in collaboration with and signed by the store owner, and store visit photos as well as the stock photos provided by the Appellant offer no explanation as to why SNAP customers would routinely shop at Cudahy's Supermarket 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 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. The food stock photos provided by the Appellant show a larger quantity and variety of stock than was observed during the store visit. It is likely that this additional store stock was acquired after the receipt of the charge letter in an attempt to explain the suspicious transactions and patterns noted in the charge letter. It is important to note that even "well stocked" stores will sometimes engage in trafficking, so the food stock shown in the Appellant's photos provides no definitive explanation for the suspicious transactions and patterns noted in the charge letter.

In addition, the store visit report and photos indicate that there was only one checkout counter with limited check-out counter space, no shopping carts available to customers for transporting food within the store, and no 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.

While the Appellant firm may be located in an area/community 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 the submitted EBT register receipts show that the SNAP purchases were for eligible food items and not the result of trafficking. The Appellant uses a not-so-advanced machine, hence the receipts only showcase the transaction amount, the time of the transactions, and the type of transactions. However, as noted by the Appellant, the submitted EBT register receipts are not itemized and are not as detailed as needed to show that these items were legitimate purchase of SNAP-eligible foods. The transactions indicate "EBT" and give the total transaction amount. A

listing of the individual items purchased is not included. As such, it cannot be verified that these transactions were for eligible food items and not the result of trafficking.

The Appellant contends that it is the only store in the area and most customers do not have vehicles, so the subject store is convenient for those who walk. 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 7 SNAP authorized retailers located within a 1.0 mile radius of Cudahy's Supermarket, including 1 super store, 3 combination grocery/other stores, and 3 other convenience stores, that could meet the nutritional needs of SNAP customers. In addition, there were 17 SNAP authorized stores located within a 2.0 mile radius of the subject firm, including 1 super store, 7 combination grocery/other stores, and 9 other convenience stores. Some of these authorized SNAP stores are larger than Cudahy's Supermarket and offer a 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 Cudahy's Supermarket during the review period also shopped at other area grocery stores and, therefore, transportation to other stores is not an issue for these customers. Therefore, lack of access to other authorized stores or the availability of other food stores does not appear to be an explanation for the Appellant's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

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

Bulk of SNAP Benefits Exhausted (Charge Letter Attachment 2)

This charge letter Attachment documents 24 suspicious transaction sets (27 total transactions) which ranged from \$80.06 to \$223.50 and totaled \$3,096.94. These transactions were conducted by 11 different SNAP households. Depleting the household's entire allotment in one or a few transactions, or within one or two days, leaving little or no benefits for the rest of the month is inconsistent with the normal shopping behaviors of SNAP benefit households.

Although many households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefit allotment in only a few transactions or in a single day. Depleting one's entire allotment in one or two days or in a single day, especially in a convenience store with moderate stock, leaving no benefits for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP households. Rather, large single transactions, or multiple and high cumulative transactions which diminish balances over a short period of time soon after benefit issuance, are indicative of SNAP benefit trafficking and attempts to diminish attention to signs of the same.

Of the 24 transaction sets included in this Attachment, 21 sets consisted of only one transaction and all were conducted in 0 seconds. Only three of the 24 transactions consisted of more than one transaction (each of these sets contained two transactions). These three transaction sets were processed between 1 minute 37 seconds and 5 hours 56 minutes 11 seconds.

5 U.S.C. § 552 (b)(7)(E).

A review of the store visit report, which was signed by and completed in cooperation with the store owner, as well as the stock photos indicate that Cudahy's Supermarket offers a moderate stock of SNAP-eligible foods with no fresh meats, poultry, or seafood, a minimal variety and amount of frozen unprocessed meats and seafood, no frozen unprocessed poultry, a moderate variety and amount of frozen food stock, no fresh produce stock, and has a lack of an abundant depth and breadth of staple foods. The store's inventory contained almost exclusively inexpensive single-serving prepared food items and accessory foods. The store visit inventory report and photos also show only a few expensive eligible foods in stock that would account for these large amounts, no signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, specials such as buy one food item and get one for free, and grocery package deals, no evidence of meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices, and no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers.

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

Excessively Large Purchase Transactions (Charge Letter Attachment 3)

This charge letter Attachment documents 216 SNAP transactions, as large as \$206.11, that total \$17,569.84. These transactions were conducted by 61 different SNAP households. 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 it holds itself as a fully functioning grocery store with a massive inventory including vegetables and frozen meat. Most of the Appellant's customers buy groceries for their entire household as would a customer at a grocery store. With inflation at an all-time high, \$100.00+ purchases are frequent and normal. The Appellant has witnessed customers spending \$50.00 on snacks alone. A gallon of milk and a dozen eggs costs \$11.00.

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 Cudahy's Supermarket to have purchases like those included in this Attachment to the charge letter.

The store visit observations indicate that the Appellant is a convenience and liquor store which measures approximately 1,300 square feet in size with approximately 100 square feet of storage area outside of public view which stocked predominantly drinks and alcohol and does not have storage coolers or freezers. The stock of SNAP-eligible foods is moderate with no fresh meats, poultry, or

seafood, a minimal variety and amount of frozen unprocessed meats and seafood, no frozen unprocessed poultry, a moderate variety and amount of frozen food stock, no fresh produce stock, and has a lack of an abundant depth and breadth of staple foods. In addition, the store had empty/scantily filled shelves and dusty cans/packages indicating that these food items are not sold on a regular or consistent basis.

The FNS store visit report, which was completed in collaboration with and signed by the store owner, as well as the store visit photos indicate that 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, 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. In addition, 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 it carries many high priced items. For instance, infant formula costs \$23.99 and a pack of frozen chicken costs \$16.99. However, the store visit observations indicate that there were only a few expensive eligible foods in stock, some of which were in limited quantities, that would account for these large amounts. Specifically, the eight most expensive (i.e., costing \$5.00 and above) SNAP-eligible food items in stock were Similac Soy infant formula at \$22.99 per 12.4 ounces (2 units in stock); Similac Advance infant formula at \$22.99 per 12.4 ounces (2 units in stock); Banquet fried chicken at \$14.99 per 29 ounces (6 units in stock); Banquet bone-in wings at \$10.99 per 11 ounces (9 units in stock); Iltaco taco puff at \$9.99 per 24 ounces; Folgers coffee at \$7.99 per 11.3 ounces (4 units in stock); Red Bull at \$7.99 per 4-pack (8.4 ounces each); and Sea Best tilapia at \$6.99 per 16 ounces (3 units in stock). If there were additional SNAP-eligible items in stock costing more than \$5.00, it would be likely that the store owner would have told the store visit reviewer.

It is also important to note that while the Appellant carried a few units of infant formula, the majority of households that qualify for WIC Program benefits also qualify for and are SNAP recipients. In most cases, these households utilize their WIC Program benefits to purchase infant formula and infant foods in lieu of their SNAP benefits in order to save their SNAP benefits for other needed food items. The Appellant is a WIC Program vendor and therefore, it is unlikely that WIC Program recipients would routinely or consistently choose to utilize their SNAP benefits to purchase infant formula and foods at the subject firm.

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. While the Appellant contends that the store's inventory will get low at times since the owner must physically go to wholesalers to purchase food products because wholesalers will not deliver to the store, the inventory purchase invoices provided for review indicate that the Appellant purchases food products from several wholesale vendors. As such, the Appellant's contention is unsubstantiated.

5 U.S.C. § 552 (b)(7)(E).

With regard to the customer affidavits/statements provided by the Appellant that purport to establish that the transactions in the charge letter were legitimate purchases of eligible food, the truth of such statements cannot be verified. Written affidavits or declarations, by themselves and without supporting documentation relative to the specific transactions in question, offer little to no insight into the actions that occurred between the customer and the store clerk at the point of sale. Unsubstantiated statements are insufficient to rebut the trafficking determination.

The Appellant contends that these large transactions are the result of the firm having to raise prices due to inflation. However, 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 increased store prices due to inflation 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.

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.

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.

Invoices

The Appellant submitted numerous inventory purchase invoices (106 pages) for January, February, and March of 2022 to substantiate the firm's inventory and demonstrate that there was adequate eligible food items to account for the transactions during the review period.

FNS conducted an analysis of the invoices submitted for review. Invoices were excluded from the analysis which were illegible, undated, duplicates, or were dated outside of the review period, if applicable. With an average mark-up of 40% (per information provided by the Appellant), the analysis of the invoices indicates that the firm purchased sufficient food stock to cover its SNAP redemptions for the three review period months. However, the analysis also does not account for any non-SNAP purchases (cash, credit and debit card, etc.) of food items at the Appellant.

5 U.S.C. § 552 (b)(7)(E). Even if there were sufficient food stock at Cudahy's Supermarket to mathematically support high dollar transactions, there does not appear to be anything that would reasonably attract SNAP households to shop there, a convenience store, in some cases traveling a few miles to do so, and spend substantial amounts of their SNAP benefits.

Compliance History

The Appellant contends that the firm has not been cited for prior SNAP violations. Being the largest and most profitable store in the community, the Appellant has no reason to risk the store for minimum benefits.

The Appellant is correct that the firm has no previous history of SNAP program violations or warnings. 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.

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.

Customer Hardship

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

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 November 8, 2022 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.

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 December 9, 2022 request for administrative review (i.e., past the 10 day required timeframe of receipt of the November 8, 2022 charge letter), the Appellant, through counsel, requested consideration for the imposition of a trafficking civil money penalty in lieu of permanent disqualification. The Appellant contends that the firm implemented a legitimate training program for its employees and an effective compliance program to prevent violations of the SNAP prior to the occurrence of the SNAP violations.

However, the record supports that the Appellant did not submit a timely request and timely substantial evidence, as required by the regulations, to meet the criteria for a trafficking CMP in lieu of permanent disqualification. Therefore, the Retailer Operations Division's decision not to impose a civil money penalty in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record, upon which charges of violations are based, together with observations made during the store visit and an analysis of customer shopping behaviors, provide substantial evidence that questionable transactions

during the focus period have characteristics and display patterns that are not consistent with legitimate sales of eligible food to SNAP benefit customers at a store of this type, size and makeup. Rather, the characteristics are indicative of illegal trafficking in program benefits. The Appellant's contentions do not outweigh this evidence.

The record has yielded no indication of error or discrepancy in the reported findings by the Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Therefore, the decision to impose a permanent disqualification from participation in the SNAP against Cudahy's Supermarket 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

March 15, 2023