

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

121 Convenience Deli Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0188947

FINAL AGENCY DECISION

It is the decision of the United States Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the permanent disqualification of 121 Convenience Deli Corp. (121 Convenience Deli or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

AUTHORITY

7 USC § 2021 and the 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 April 20, 2016, 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 during the months of September 2015 through February 2016. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant, through its previous counsel, replied to the charges by letter on May 5, 2016. With the reply to the charges, counsel requested documents under the Freedom of Information Act (FOIA). FNS responded to the FOIA request on June 15, 2016. Appellant's counsel at the time appealed the Agency's FOIA response on September 21, 2016. FNS responded to Appellant's current counsel regarding the FOIA appeal on August 11, 2020. On August 18, 2020, the Retailer Operations Division provided counsel with ten days to provide its final response to the letter of charges. Counsel did not provide any additional information.

After considering the retailer's original reply and the evidence, the Retailer Operations Division issued a determination letter dated September 28, 2020. The determination letter informed Appellant that it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that Appellant was not eligible for a trafficking CMP because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

By letter postmarked October 5, 2020, Appellant, through counsel, appealed the Retailer Operations Division's determination and requested an administrative review. The administrative review was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) and (e)(1) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 USC § 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, that, 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.

7 CFR § 271.2 defines trafficking, in part, as:

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

7 CFR § 278.6(a) states:

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) reads, in part:

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

7 CFR § 278.6(i) states, inter alia:

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.

7 CFR § 278.6(b)(2) states, in part:

(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 a penalty. [Emphasis added.]

SUMMARY OF THE CHARGES

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from September 2015 through February 2016. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were an unusual number of transactions ending in a same cents value.
- There were multiple transactions made from individual benefit accounts within a set time period.
- There were excessively large purchase transactions made from recipient accounts.

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

APPELLANT'S CONTENTIONS

In its October 5, 2020, administrative review request, Appellant, through counsel, provided the following summarized contentions:

- The conclusion that the firm engaged in trafficking was based solely on a faulty analysis of transactions records with no additional investigation.
- Appellant vehemently denies that the firm was involved or engaged in any activities which constitute violations of the SNAP regulations.
- There has been no action to warn the firm.
- There has been no prior compliance history proving that the owner has not been in compliance with the rules and regulations of SNAP.
- There is no evidence to show the firm's intent to violate the regulations.
- SNAP transactions account for 65% of the store's business.
- The owner has continuously trained and tested his employees concerning the SNAP since it was authorized in 2014.
- The store's unblemished record is evidence of Appellant's continued compliance with the law and the training and supervision of employees.
- The training program consist of two weeks of intensive hands on classes overseen by the owner of the store.
- The owner ensures that the employees watch the on-line video and provides employees with handbooks and other printed material, which they must read, study, and learn prior to their full employment
- There is a test at the end of the two week period and any employee that fails the test is terminated.
- It is unclear who was on duty during the alleged transaction as there are no exact dates.
- The store is well stocked at all times with staple food inventory specifically designed to accommodate low-income customers who regularly purchase large quantities of items.
- Appellant sells fruit, vegetables, and other cooking ingredients, including rice, beans, and pasta.
- Appellant has a deli counter with an array of sandwiches including a large variety of cold

cuts on rolls, subs, and other bread, which is the store's best-selling item.

- The vast majority of the people who patronize this store use this store as their primary food shopping location.
- Within a two-block radius of the vendor, there are numerous large multi-family complexes, apartment houses, all with large families.
- The closest supermarket is approximately one-half mile away.
- There are no other similar eligible SNAP providers in the immediate area, and as such a disqualification would cause a hardship.
- FNS should offer Appellant a civil money penalty per Section 278.6(a), because disqualification would cause hardship to participating households.
- Regular customers will often call the store and pre-order their large grocery orders, and then personally pick-up these orders at which time they pay for the telephone orders and purchase additional items.
- Customers also buy items on their way home from picking up their children from school or to and from church using this store as a primary source of daily food for their families.
- The same cent transaction are legitimate transactions and many resulted from rounding purchase amounts off so customers could remember their balance
- The store also sells sandwiches that end in 00 or 50 cents.
- This is the business model for the owner and he has a right to make such a business judgement under the law without being accused and suspected of wrongful behavior.
- It is not credible to assert that Appellant would risk permanent disqualification for a mere sum 5 U.S.C. § 552 (b)(6) & (b)(7)(C) over a six-month period.
- The usage of the EBT card is not within the control of the store owner
- Some SNAP recipients allow others to use their card or use the card for other families.
- Most of the customers do not own vehicles and need to make multiple trips and while there are larger stores in the area those supermarkets are not preferred by the residents, as they are crowded with long lines, selling the same items for similar prices.
- There is nothing unusual about customers in New York City using a large grocery store to buy all their groceries.
- Many customers live in the immediate area and don't have the capacity to carry heavy shopping bags through the street and up to their apartment buildings.
- The fact that there are multiple transactions on the same card is in no way indicative of trafficking and such transactions are not unusual.
- It is ridiculous to think that this owner would risk permanent disqualification for a sum 5 U.S.C. § 552 (b)(6) & (b)(7)(C), where it is unknown by the agency as to what portion of that amount might have been exchanged for cash, if any swiped amount was if fact exchanged for cash.
- Many of the larges purchases are made immediately after the benefits are added to the SNAP EBT card.
- The average purchase 5 U.S.C. § 552 (b)(6) & (b)(7)(C) which is not unusual under these circumstances.
- Numerous customers bought in bulk to avoid having to go out when the weather was hot.
- At some point the card has to be exhausted and it makes common sense that the cardholder would use at their neighborhood store.
- These excessively large purchase transactions are nothing more than the expensive cost

- of goods in New York City, where all food items are costly.
- It is not credible that Appellant would risk permanent disqualification for the mere sum **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP over a six-month period.
- It is unconscionable that FNS can cause an owner to be permanently disqualified, lose his livelihood, and the large sums of monies he has invested based solely on a data driven analysis, without any other proof of wrongdoing.
- There is nothing in any of these attachments that reveal conclusively or by a fair preponderance of the credible evidence that the vendor has been exchanging SNAP benefits for cash.
- The letter of charges in nothing more than unsubstantiated general accusation; it has no merit; and to base a decision upon such an accusation is to deprive the Appellant of due process.
- The review and analysis based on EBT transactions are not and cannot be a basis of the determination that the firm's intent was to violate the regulations.
- The Statue of Limitations precludes the bringing up of such charges after such a long period of time, as it prejudices the owner by no longer having access to receipts, surveillance video or records due to the gap in time before the charges were brought.
- Appellant requests a hardship CMP given that the owner's livelihood relies substantially up this retail store.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced.

ANALYSIS AND FINDINGS

Store Visit

FNS authorized 121 Convenience Deli as a convenience store on May 30, 2014. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a February 29, 2016, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then 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:

- 121 Convenience Deli is approximately 600 square feet.
- There was one checkout space, one cash register, and one point-of-sale device.
- There was no optical scanner for the speedy processing of items at checkout.
- There were no shopping baskets or shopping carts for customer use.
- Checkout occurred through a window space that was surrounded by a glass wall without no additional counter space outside of the window area to place food items.
- There was no fresh unprocessed meat but there was a deli case with processed cold cuts.
- There was no fresh produce and there were not fruit items of any kind.
- Dairy included milk, cheese, sour cream, and butter.

- Other staple foods available for purchase were juice, rice, bread, beans, cereal, pasta, and a selection of canned goods.
- There was a menu of hot sandwiches with a couple of cold sandwiches.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included alcohol, lottery, tobacco, health and beauty products, cleaning products, pet food, and paper products.

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. Given the available inventory as noted above, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors.

Charge Letter Attachments

Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

Charge Letter Attachment 1. There were an unusual number of transactions ending in a same cents value. During the review period, there were 1,173 transactions ending in a same cents value (either 00 cents or 50 cents) **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits that meet the parameters of this attachment. When such patterns are unsupported by special pricing structures, they are a strong indicator of trafficking in SNAP benefits.

Appellant explains that these transactions were the result of rounding to make it easier for SNAP recipients to keep track of their benefits. There was no evidence submitted to support a rounding policy. Moreover, the Retailer Operations Division determined that 65% of the transactions that met the parameters of this scan were same cent transactions. Given that 35% of similar transactions were not rounded, it does not seem likely that rounding was a routine policy.

Appellant, through counsel, contends that the firm's pricing structure is to price items that end in 00 and 50 cents. Appellant did not submit any evidence to support this statement. The photographs from the store visit show a menu of prepared sandwiches that end in 00 and 50 cents. However, most of these items are hot sandwiches and are not eligible for purchase with SNAP benefits. It is possible that some of the smaller transactions are the result of purchasing some same cent items and this could explain some of the lower dollar same cent transactions. However, the larger transactions cited in the charge letter would most likely consist of the purchase of several relatively inexpensive items and it is unlikely that these purchases would routinely total to an amount ending in same cents. Consequently, when many transactions end in a same cents amount, it appears that these transaction amounts are contrived and in the absence of compelling evidence to the contrary, are suggestive of trafficking.

Appellant failed to provide a credible explanation for the same cent transactions listed on Charge Letter Attachment #1.

Charge Letter Attachment 2: Multiple transactions were made from individual benefit accounts in unusually short time frames.

This attachment documents 28 transaction sets 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits that meet the parameters of this scan. 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.

Counsel explains that many of these transaction sets are due to households placing a telephone order and then then making additional purchases when they come to pick up their items. If this was the case, it would seem more reasonable that the transactions would occur at the same visit and therefore be close in time. Y 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is therefore unlikely that these transaction were conducted during the same visit. Appellant is a small 600 square foot convenience store. It would be unusual to spend that much time at Appellant selecting items.

Counsel explains that it is not unusual for household members to visit Appellant many times per day. Counsel further reports that there is nothing in the federal regulation that defines within a short timeframe. 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. Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Appellant multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale. Appellant is not set up to provide for all of one's food needs and lacks an abundant depth and breadth of staple foods. The second and third transactions in each set are too large to consist of forgotten items.

Counsel explains that some SNAP recipients allow others to use their card or use the card for other families. Counsel further notes most of the customers do not own vehicles and need to make multiple trips and while there are larger stores in the area those supermarkets are not preferred by the residents, as they are crowded with long lines, selling the same items for similar prices. This can be true in some cases. However, when a firm has a pattern of several customers shopping in a different manner than other nearby stores, the question becomes why the pattern exists at this particular store. The Retailer Operations Division compared Appellant to two nearby convenience stores. Appellant conducted 28 transaction sets that met the parameters of this scan, whereas the other two nearby stores did not conduct any transaction sets that met the parameters of this scan. Appellant's explanation does not address why this transaction pattern occurs much more frequently at Appellant than at other nearby similar stores.

Appellant has not offered any evidence to show that the transactions listed in Charge Letter Attachment #2 were legitimate purchases of eligible food.

Charge Letter Attachment 3: Excessively large purchase transactions were made from recipient accounts. This attachment lists 387 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

These large transaction amounts are questionable because they are not consistent with the store's inventory. Appellant does not have any shopping carts or baskets to transport such large orders and it has limited space at the check-out counter to place items for purchase. There is no fresh meat and no fresh produce. The frequency of high-dollar purchases in a six-month period calls into question the legitimacy of these transactions.

Counsel explains that the average transaction **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** is not unusual. It is correct that the average transactions listed is within this range. However, that average amount is still five to seven time larger than the average SNAP transaction at a convenience store in the county. Appellant also conducted more SNAP transaction **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** than the average for convenience stores in the State.

The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of store and the store's stock. Households listed in charge letter are regularly shopping at much larger stores and conducting transactions of large dollar amounts, yet are conducting comparable or higher dollar value transactions at Appellant's smaller and minimally stocked business. Since Appellant's business carries no fresh or frozen unprocessed meat or seafood, no fresh produce, and minimal staple food stock, these patterns are deemed to be suspicious. Moreover, Appellant has a small checkout area and no shopping baskets or carts thereby making it difficult to facilitate the quantities of eligible food items required to make up these high dollar transactions. Therefore, it is unlikely that the food items purchased in these large dollar amounts could be carried to the register without the use of baskets or carts and more likely that the amounts were contrived.

The Retailer Operations Division compared Appellant to two other convenience stores that were located nearby. Appellant's average SNAP transaction amount, number of SNAP transaction during the review period, and total SNAP redemptions dollar value were also significantly greater than the other two stores. The Retailer Operations Division also determined that the transaction pattern of Appellant exceeded the two nearby convenience stores, as seen on the table herein. The data from these nearby stores show that the transaction patterns at the Appellant firm were highly unusual and indicative of possible trafficking violations.

5 U.S.C. § 552 (b)(7)(E)

Counsel explained that the excessively large purchase transactions can be attributed to households who are unable to get to the larger supermarkets and rely upon Appellant for their primary food shopping. It is true that sometimes a firm may have higher than average SNAP transactions amounts due to the lack of access to other SNAP authorized stores. However, the Retailer Operations Division determined that within a one-mile radius of Appellant there are 300 authorized stores with comparable stock or better. In addition, Appellant does not seem to have sufficient food stock to supply all of the food needs for its customers. Again, there was no fresh meat, poultry, or fish and there was no fresh produce.

Counsel also states that the vast majority of customers who patronize Appellant use this store as their primary food shopping location. The Retailer Operations Division determined that 81% of

the households that conduct the listed transactions conducted a SNAP transaction at a supermarket or a super store within three days of its flagged transaction at Appellant. In addition, the Retailer Operations Division looked at 15 households that conducted the most of the transactions in each scan and the transactions they conducted at other retailers. Each of these households conducted several transactions at other retailers. The evidence does not support Appellant's explanations.

The Retailer Operations Division examined three households identified in the charge letter to analyze their shopping patterns at 121 Convenience Deli compared to their shopping patterns at other SNAP authorized stores. Despite access to better stocked stores, each of the other households conducted excessively large transactions at 121 Convenience Deli within a short time of shopping at a supermarket or super store. It is questionable as to why households would conduct large transactions at Appellant, when these households had just visited or planned to visit larger stores with a better selection of fresh meat and produce and likely better prices. The inventory and layout at 121 Convenience Deli does not support these transactions.

Basis for Determination

Appellant, through counsel, contends that the store or its employees have not violated the SNAP rules and regulations. Counsel also reports that Appellant has not had any previous any violations of the SNAP regulation nor has Appellant received a previous warning. The SNAP regulation at 7 CFR § 278.6(d) states, in part, that in making a disqualification determination FNS shall consider:

- (1) The nature and scope of the violations committed by personnel of the firm,
- (2) Any prior action taken by FNS to warn the firm about the possibility that violations are occurring, and
- (3) Any other evidence that shows the firm's intent to violate the regulations.

With regard to the nature and scope of the violations, trafficking in SNAP benefits is an extremely serious violation and both 7 USC § 2021(b)(3)(B) and 7 CFR § 278.6(e)(1)(i) state that a first time violation warrants a permanent disqualification. Therefore, whether or not the store had any prior violations is not relevant in this case.

Regarding prior warnings, 7 CFR § 278.6(d) simply requires FNS to consider any prior warnings when determining a sanction. However, the SNAP regulations do not require the Retailer Operations Division to give prior warnings before issuing a charge letter for trafficking. SNAP regulations at 7 CFR § 278.6(e)(7) states that FNS will "send the firm a warning letter if violations are too limited to warrant a disqualification." Trafficking transactions are not considered to be "violations that are too limited to warrant a disqualification."

Lastly, the definition of trafficking contained in the SNAP regulations at 7 CFR § 271.2 does not require an element of intent on the part of the violator. Therefore, whether or not the owner or store employees intended to commit SNAP trafficking violations is not relevant in this case.

Statute of Limitations

Counsel contends that the statute of limitations precludes the bringing up of such charges after such a long period of time, as it prejudices the owner by no longer having access to receipts, surveillance video or records due to the gap in time before the charges were brought. With regard to the Appellants' contention, there is no statute of limitations with regards to an administrative action against a firm, however, the agency does strive to take such actions as soon as they are able. The records shows that the charge letter was sent to Appellant on April 20, 2016. This is less than two months after the review period ended and does not support any type of unexplained gap. Appellant requested documents under FOIA and then appealed this FOIA response resulting in the delay between the charges and the final determination.

Household Hardship

Counsel asserts that a permanent hardship presents a hardship to the surrounding community. As indicated, the Retailer Operations Division determined that within a one-mile radius of Appellant there were there are 300 other authorized stores. Moreover, where there is a hardship to SNAP households, FNS may impose a hardship CMP on a firm in lieu of a disqualification where there is a lack of authorized stores in the area. However, 7 CFR § 278.6(f)(1) clearly states that "a civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a permanent disqualification." Because the Retailer Operations Division has taken action to permanently disqualify Appellant's firm, a hardship CMP in lieu of disqualification cannot be granted.

Appellant Hardship

Counsel also contends that a permanent hardship is a hardship to Appellant and that 65% of Appellant's total sales are from SNAP benefits. However, there is no provision in the SNAP regulations for a 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 excuse ownership 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 ta firm's economic hardship 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, Appellant's contention that the firm will 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 imposition.

Evidence

Counsel states that it is unconscionable that FNS can permanently disqualify Appellant based solely on a data driven analysis, without any other proof of wrongdoing. Counsel contends that there is nothing in any of these attachments that reveal conclusively or by a fair preponderance of the credible evidence that the vendor herein has been exchanging SNAP benefits for cash.

Similarly, counsel states that the decision to permanently disqualify Appellant is based on inadequate proof and is inconclusive and arbitrary.

The transactions reports are derived from the ALERT system, a computerized fraud detection tool to identify SNAP transactions that form patterns having characteristics indicative of trafficking. However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still conduct an extensive analysis of the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether the questionable transactions were, more likely than not, the result of trafficking.

The legality of this method is supported by 7 CFR §278.6(a) which 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.]

The documentation and evidence provided by the Retailer Operations Division was thoroughly examined. From all indications, the Retailer Operations Division obtained the EBT data (provided by ALERT), found it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough investigation before concluding that trafficking was likely occurring.

Appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed and that the transactions detailed in the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. Appellant offered insufficient evidence to prove that the transactions listed in the charge letter were legitimate purchases of eligible food. In the absence of compelling information or documentation weighed in comparison to the evidence provided by the Retailer Operations Division, the evidence weighs in favor of the Retailer Operations Division’s determination that SNAP-benefit trafficking substantially produced the transaction activity at issue in the present case.

Summary

In summary, Appellant’s layout, business structure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. Therefore, in the absence of evidence to legitimize such transaction patterns, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation.

CIVIL MONEY PENALTY

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR § 278.6(i). Appellant was informed that it would need to provide both the request and supporting evidence within ten calendar days of receiving the charge letter and that no extension of time could be granted for making the request or for providing the required evidence. Appellant did not request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i), even though it was informed of the right to do so in the charge letter.

With its administrative review request, Appellant through counsel, requests a CMP. Counsel contends that Appellant has implemented an effective compliance policy and that Appellant provide verbal training, in-store training, and a copy of the manual to all employees. There is no authority to extend the deadline for making a request for a CMP and submitting the required evidence of its eligibility for this alternative penalty. The regulations are clear that a request for a CMP in lieu of permanent disqualification and any supporting documentation must be submitted to FNS within 10 days of the firm's receipt of the charge letter. In this case, Appellant did not meet this regulatory deadline. Therefore, the Retailer Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

The Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did occur as charged by the Retailer Operations Division. The determination to impose a permanent disqualification against Appellant is sustained.

The Retailer Operations Division also determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations. Under review, the denial of a trafficking CMP was deemed correct and proper.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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's owner resides or is 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, 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.

Mary Kate Karagiorgos
ADMINISTRATIVE REVIEW OFFICER

January 13, 2021