

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

274 Mini Market Corp,

Appellant,

v.

Case Number: C0201710

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, 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 against 274 Mini Market Corp (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant on November 28, 2017.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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 August 29, 2017, the Retailer Operations Division charged the 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 January 2017 through June 2017. 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 the 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 counsel, responded to the charges in a letter dated September 8, 2017, that included a Freedom of Information Act (FOIA) request. The Agency processed the FOIA request and sent a fee notification letter to counsel on October 12, 2017, and again on October 26, 2017, but received no response. Accordingly, the FOIA request was administratively closed on November 7, 2017, for fee-related reasons. Appellant, through counsel, submitted a second response to the charges in a letter dated November 20, 2017. Both charge letter responses stated that Appellant was not requesting a CMP. The Retailer Operations Division notified Appellant in a letter dated November 28, 2017, that the firm was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6(c) and 278.6(e)(1) for trafficking violations. This determination letter also stated that Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated ". . . you are not eligible for the CMP because you failed to submit sufficient evidence to demonstrate that your firm had established and implemented an effective compliance policy and program to prevent violations of the Supplemental Nutrition Assistance Program."

By letter dated December 7, 2017, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted. No subsequent correspondence was received from Appellant.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR Part 278.6(a) and Part 278.6(e)(1)(i) 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 of SNAP benefits.

7 U. S. Code § 2021(a)(2) states, "Regulations promulgated under this chapter shall provide criteria for the finding of a violation of, the suspension or disqualification of and the assessment of a civil penalty against a retail food store or wholesale food concern 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."

In addition, 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,

evidence obtained through a transaction report under an **electronic benefit transfer system . . .** .” (Emphasis added.)

7 CFR § 278.6(e)(1)(i) reads, in part, “FNS shall . . . [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2. ” Trafficking is defined, in part, in 7 CFR § 271.2, as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone” Trafficking is further defined, in 7 CFR § 271.2, to include “(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.”

7 CFR § 278.2(f) states, inter alia: “Coupons [SNAP benefits] shall not be accepted by an authorized retail food store in payment for items sold to a household on credit.”

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)(ii) states, inter alia: “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).” Part 278.6(b)(2)(ii) further states 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 in Part 278.6(b)(1), the firm shall not be eligible for such a penalty.

SUMMARY OF THE CHARGES

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. The charges on review were based on an analysis of SNAP EBT transaction data during the six month period of January 2017 through June 2017. This involved three patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from individual benefit accounts in unusually short time frames.
2. The majority or all of individual recipient benefits were exhausted in unusually short periods of time.
3. Excessively large purchase transactions were made from recipient accounts.

APPELLANT'S CONTENTIONS

In the two responses to the letter of charges and in the request for administrative review, Appellant has stated as its position in the matter the following:

- The charge letter is not based on any direct evidence that trafficking took place and is based upon entirely circumstantial evidence that does not support a permanent disqualification. In lieu of applying for a CMP, the store owner believes the Agency must dismiss all charges and take no further action;
- The business denies the multiple transactions in short timeframes were trafficking. The alleged violations do not support the charge of trafficking. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It also is hardly unreasonable for customers to shop more than once per day on successive days. Because no comparative information or data has been provided, the notion that these transactions were irregular is just an unsupported allegation. There is no analysis or comparative review of similarly situated comparable businesses;
- There is no evidence the large transactions were trafficking. The business is in a densely populated area with many low income residents receiving SNAP benefits. Many low income customers do not use large supermarket chains and instead rely on small local grocery stores for their food shopping and this explains the high foot traffic in the store. The store has a decent deli selection and many customers come for the large selection of deli meats. It is feasible for a normal sized family to require several pounds of expensive cold cuts and cheeses. It also is not unusual for a family with several children to spend a large amount of money in one shopping session; and,
- The Agency policy is arbitrary and in direct violation of substantive and procedural due process. USDA issued a summary decision to permanently the owner based on a computer compilation without any evidence of fraud or trafficking or any violation. None of the enumerated activities necessarily constitute trafficking. The Agency effectively denied the owner any opportunity to present defense in a display of abuse of power. The Agency action should be immediately reversed.

Appellant submitted no evidence or other rationales in support of these contentions.

The preceding may represent a summary of Appellant's contentions 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 herein.

ANALYSIS AND FINDINGS

The Retailer Operations Division presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant

business during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Store Background and FNS Store Visit

The FNS most recently reauthorized the business on May 8, 2014, and the business is classified as a small grocery store. The file shows that the business received a warning letter from FNS on April 27, 2005, based on the results of an undercover investigation showing that personnel at the Appellant business exchanged SNAP benefits for ineligible nonfood items. Additionally, the business has received two warning letters from the WIC State Agency as well as paid two monetary fines for WIC Program violations. The file also indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a June 28, 2017, 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 EBT transactions at Appellant's store that formed patterns indicative of trafficking. The store review summary documented the following store size, description, and characteristics:

- The business was a small store offering a minimal quantity and variety of staple foods and carrying no unique eligible food items or offering any distinctive services.
- The business stocked a very limited quantity and variety of Hispanic foods typically found in grocery stores as well as many American brand products.
- Exterior signage showed the business operates under the name Santa Clara Mini Markets & Deli Inc. and included ads for hot/cold foods, beer, ATM, and cigarettes.
- There were no shopping carts or handheld baskets for customer use seen during the visit making it difficult for customers to carry large amounts of food to the checkout area.
- The checkout area was an opening approximately four feet wide by one foot deep set into a plastic display wall. There were displays and a PIN pad on the counter and a large ice cream freezer directly in front of the checkout area that customers must reach over in order to place their purchases onto the checkout counter. The small size of the checkout area would make it problematic to process large orders.
- The checkout counter had one cash register, one POS terminal, one adding machine, and no optical scanner as evidenced by the store visit report and photographs.
- No food packages, bundles, bulk products, case sales, or other sales were evident that would explain the unusual transactions and no SNAP eligible cased items were available for purchase except for beverages, including beer.
- The store visit report specifically notes that the business was not a specialty store and that there were no meat bundles or fruit and vegetable boxes for sale.

- The store had a minimal stock of staple foods that also included many single serving and pre-packaged items with a large portion of inventory in accessory foods (primarily soda, candy, and other drinks), snacks, and ineligible items.
- The store had a large refrigerated deli display case with a small heated display case on top of it and a kitchen/food prep area containing a cooktop grill, commercial exhaust hood, commercial slicer, deep fat fryer, prep tables, microwave oven, etc.
- A large menu board advertised a wide variety of hot/cold prepared foods, chicken wings, sides, hot drinks, and hot breakfast items.
- No prices were posted for the deli meats, deli cheeses, or for the hot/cold, ready-to-eat prepared foods.
- Per a store employee, store staple food stock such as deli meats, deli cheeses, etc. were being used in the preparation of the hot/cold, ready-to-eat prepared foods making it difficult to determine if a food item in the deli case is actually for sale or for use in hot/cold food preparation.
- The store had no fresh unprocessed meats, no fresh unprocessed seafood, a very limited stock of fresh unprocessed fish (Pollock), no frozen unprocessed meats or seafood, a very limited quantity and variety of processed meats and seafood (canned meat/poultry/fish, a very limited stock of deli meats (five), hot dogs, bacon, sausage, and packaged lunch meats), no jerky, no eggs, no frozen entrees, no frozen dinners, a moderate selection of fresh fruit or vegetables, no frozen fruits or vegetables, a limited stock of single serving nuts, a limited stock of soups, a minimal quantity and variety of canned and packaged staple food items, no macaroni & cheese, no dry pasta/noodles, no sour cream, no butter, an extremely limited stock of deli cheeses (two), and very few expensive eligible food items.
- Ineligible items included: tobacco, alcohol, hot foods, ATM, household products, paper products, auto products, pet products, health and beauty items, hot drinks, cell phones/phone cards, and candles while accessory foods included: candy, spices, condiments, coffee, tea, cocoa, cooking oil, sugar, and carbonated/ uncarbonated drinks.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- The business's hours of operation were 7:00 AM-11:00 PM Monday-Friday and 7:00 AM-12:00 AM on weekends as confirmed by a store employee during the store visit.
- Many food items were priced with all visible staple food prices ending in .x9 cents except for a very limited number of items priced differently such as snacks priced at .50 cents, .75 cents, two for \$1.00, \$1.50, and some drinks priced at \$1.50. Comments on the FNS store visit report by the contract reviewer specifically stated that most of the food prices ended in .x9 cents. A price ending in .x9 cents is the most common pricing structure for stores of this type.

- The FNS store visit report listed the four most expensive items costing more than \$5.00 for sale in the store as being a 12.5 ounce container of Enfamil infant formula priced at \$18.99, a one gallon bottle of corn oil priced at \$9.49, a 10 pound bag of rice priced at \$7.49, and deli pastrami priced at \$8.99/pound. The listing of the most expensive items was provided by a store employee during the store visit.
- The store was a WIC vendor and did stock baby foods and infant formula. Most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers, not SNAP EBT.

Multiple transactions in unusually short time frames

This Attachment documents 54 individual transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). One transaction set is comprised of four individual transactions, four sets are comprised of three individual transactions, and the remaining 19 sets are comprised of two individual transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends that the business denies the multiple transactions in short timeframes were trafficking. The alleged violations do not support the charge of trafficking. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It also is hardly unreasonable for customers to shop more than once per day on successive days. Because no comparative information or data has been provided, the notion that these transactions were irregular is just an unsupported allegation. There is no analysis or comparative review of similarly situated comparable businesses. Additionally, many low income customers do not use large supermarket chains and instead rely on small local grocery stores for their food shopping and this explains the high foot traffic in the store.

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment 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 a small grocery store's stock and facilities and are thus indicative of trafficking. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby like type small grocery stores further supporting that trafficking was occurring at the Appellant business during the period under review.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

An analysis of the shopping patterns for the 11 households listed in this Attachment shows that they have ready access to transportation as evidenced by their shopping at a variety of other

larger food stores located nearby and at a distance from Appellant's location. Additionally, all, but two of the 11 households were shopping at a variety of super stores and supermarkets contrary to Appellant's allegation that many low income customers do not use large supermarket chains. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This analysis brings-up the question of why would households who are regularly shopping at numerous larger and better stocked stores, both nearby and at a distance, elect to conduct multiple purchases at a minimally stocked small grocery store that carries no unique foods or offers any special services. Appellant's contentions fail to offer any explanation or rationale for these unusual and suspicious shopping patterns. Common sense dictates that it is improbable that households with limited cash resources would choose to travel these distances if their purchases consisted solely of eligible food items that could be purchased at any of the super stores, supermarkets, or other larger stores they were already regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant business and the multiple transactions were attempts by to obscure trafficking by dividing a large dollar value transaction into a series of smaller dollar value transactions. This is a method used by stores to avoid high dollar transactions that cannot be supported. This is further supported by the fact that six of the 11 households in this Attachment shopped at a super store or supermarket within one day of when they conducted multiple transactions at the Appellant business.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Near Depletions of SNAP Benefit Accounts

This Attachment lists a total of 20 EBT transactions in 12 sets of one or more transactions involving seven households during which the majority, if not all, of the household's monthly SNAP benefits were depleted in a short period of time. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

SNAP benefits are intended to supplement the food budget for recipient households whose net income is at or below the Federal Poverty Level. A government report on SNAP shopping patterns indicates that after the first day of benefit issuance, on average, 79.1 percent of a household's allotment remains unspent. Even after seven days, 42 percent of benefits still remain unspent. It typically takes two weeks to deplete 78.1 percent of one's benefits. This report further revealed that households most often redeemed their benefits at supermarkets and super stores with only four percent of households never shopping in a supermarket.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant contends that many low income customers do not use large supermarket chains and instead rely on small local grocery stores for their food shopping and this explains the high foot traffic in the store. The store has a decent deli selection and many customers come for the large selection of deli meats. It is feasible for a normal sized family to require several pounds of expensive cold cuts and cheeses. It also is not unusual for a family with several children to spend a large amount of money in one shopping session.

The FNS store visit shows this is a small store offering a minimal quantity and variety of staple foods items as well as a large variety of the accessory foods and ineligible items typically found in convenience stores or small grocery stores. Specifically, on the day of the FNS store visit, the

store had only five types of deli meats and two types of deli cheeses available for purchase. This hardly qualifies as a large selection, particularly for households that are also shopping at larger stores that would offer a greater variety of deli products at lower prices. It is unlikely that most SNAP households would choose this store as a destination for making large household food purchases if they had the ability to shop at larger stores.

An analysis of the transactions listed in this Attachment shows that all, but one of these households shopped at super stores and/or supermarkets during the period under review. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. It seems unlikely that multiple single person households with very limited food dollars would be purchasing large quantities of eligible food products that would exhaust the majority or all of their monthly SNAP benefits at a store where they seldom shop. The multiple transactions combined with the high number of households comprised of one individual make it unlikely that the transactions listed in this Attachment are for eligible food items.

Appellant has failed to provide any explanations for the irregular shopping patterns exhibited by the households listed in this Attachment, the majority of whom are not regular customers of the Appellant business, or why these households would deplete or exhaust their SNAP benefits in a single day conducting multiple consecutive transactions to do so. While SNAP households do tend to make larger purchases in the days immediately following receipt of their monthly allotment, the behavior by households in this Attachment is contrary to the documented shopping patterns of SNAP households, as previously discussed, who typically make just over nine transactions each month consisting of relatively small dollar amounts. Also, no explanation or rationale has been offered by Appellant as to why households that are regularly shopping at larger stores offering a greater variety and quantity of SNAP eligible food stock at lower prices and who apparently have no transportation limitations would be conducting high dollar value transactions at a small grocery store that offers a limited selection of staple food items and has no shopping carts that would be needed for the large transactions in this Attachment. Based on this discussion, trafficking is the only feasible explanation for these irregular shopping patterns.

It should be noted that this Attachment is not targeting excessively large transactions per se. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. As previously noted, this is not typical shopping behavior exhibited among SNAP recipients.

High Dollar Value Transactions

This Attachment lists 113 individual EBT transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The substantial number of high dollar transactions is uncharacteristic for a small grocery store of this size offering a minimal stock of staple foods and calls into question the legitimacy of these transactions. The SNAP transactions listed in this Attachment are all substantially higher than the average SNAP transaction amount of \$13.08 for this store type in Westchester County. The 113 excessively large SNAP EBT transactions at Appellant's business for the review months **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant business are also shopping at many full-line supermarkets and super stores, located nearby as well as at a

distance from Appellant's location, that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the Appellant business. The large dollar transactions remain questionable when considering the proximity of these other SNAP authorized stores that would be better shopping options for consumers. Based on these shopping patterns, transportation does not appear to be an issue for these households. Yet, these recipients continue to shop and spend suspicious high dollar amounts at the Appellant business, where the eligible food stock is limited, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at larger food stores.

Evidence shows that the difference in the average SNAP transaction dollar amount, the total SNAP transaction dollar volume, and the SNAP transaction count for Westchester County small grocery stores during the review months and at the Appellant business is significant. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). A comparison of Appellant's SNAP redemptions to that of nearby small grocery stores that had redemptions for the review period shows similar differences. Additionally, none of these nearby stores exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant business even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is a further indication that the SNAP transactions in this Attachment and the others do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

This store also had irregular SNAP transaction data as compared to like type small grocery stores in Westchester County. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These unusual spikes in both transaction numbers and dollar volume do not appear in the transaction count and dollar volume averages for other Westchester County small grocery stores. These high dollar transactions are considered to be irregular and suspicious based on the Appellant store's food inventory. The Retailer Operations Division determined there was no credible reason for the Appellant business to have transactions at those high dollar levels given the minimal stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and therefore also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

Appellant contends there is no evidence the large transactions were trafficking and that the business has no control over the spending habits of its customers. The business is in a densely populated area with many low income residents receiving SNAP benefits. Many low income customers do not use large supermarket chains and instead rely on small local grocery stores for their food shopping and this explains the high foot traffic in the store. The store has a decent deli selection and many customers come for the large selection of deli meats. It is feasible for a normal sized family to require several pounds of expensive cold cuts and cheeses. It also is not unusual for a family with several children to spend a large amount of money in one shopping session.

Appellant is correct in that a business has no control over the spending habits of its customers as it may not refuse a SNAP sale and it also may not limit the dollar amount of SNAP transactions. However, 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. An analysis of shopping patterns by the Retailer Operations Division shows that households in this Attachment are all regularly shopping at much larger stores, and conducting transactions of large dollar amounts, yet are conducting comparable or higher dollar value transactions at the Appellant business. It would make no sense for a household that regularly shops at larger stores and apparently has no transportation limitations to spend large dollar amounts at the Appellant business since its cost of goods would be higher than that of larger stores such as supermarkets or super stores.

Information obtained during the FNS store visit on June 28, 2017, shows that the Appellant business offers a minimal quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Much of the inventory for sale consists of inexpensive snacks, beverages, and single serving foods as well as many ineligible items. Since the Appellant business offers no fresh unprocessed meats, no fresh unprocessed seafood, a very limited stock of fresh unprocessed fish (Pollock), no frozen unprocessed meats or seafood, a very limited quantity and variety of processed meats and seafood (canned meat/poultry/fish, a very limited stock of deli meats (five), hot dogs, bacon, sausage, and packaged lunch meats), no jerky, no eggs, no frozen entrees, no frozen dinners, a moderate selection of fresh fruit or vegetables, no frozen fruits or vegetables, a limited stock of single serving nuts, a limited stock of soups, a minimal quantity and variety of canned and packaged staple food items, no macaroni & cheese, no dry pasta/noodles, no sour cream, no butter, an extremely limited stock of deli cheeses (two), and has very few expensive eligible food items, these patterns are deemed to be suspicious. The fact that tobacco, alcohol, hot foods, ATM, household products, paper products, auto products, pet products, health and beauty items, hot drinks, cell phones/phone cards, and candles are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts. The business carries no special foods or offers any unique services that are not also available at other nearby grocery stores making it unlikely that SNAP recipients with available transportation would make this business their grocery store of choice.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Increasing food prices make it even more unlikely that SNAP recipients, with limited food benefits, would want to spend a considerable part of their benefits in a small grocery store that does not address all of their food shopping needs when they are already shopping at larger, fully-stocked stores that would offer a greater variety of foods at lower prices. Many of these stores would also offer store brand products at lower prices, offer weekly specials, and have shopping carts and checkouts with scanners and conveyor belts to facilitate processing purchases quickly. Additionally, Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions and no evidence was provided of SNAP eligible store stock via receipts of products taken into inventory for the relevant review months. The Appellant business has a very small checkout area and does not have shopping carts, hand baskets, or a scanner thereby making it difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. Therefore, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of carts and more likely that the amounts were contrived.

It is further noted that SNAP redemptions at the Appellant business fluctuated unusually following receipt of the charge letter on August 31, 2017. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). A

pronounced decrease in SNAP transactions following receipt of the charge letter is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

Based on this discussion, Appellant did not provide adequate evidence to support the legitimacy of the excessively large transactions in this Attachment.

Other Contentions

It is important to state that this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is to determine whether Appellant demonstrates, by a preponderance of the evidence, that the disqualification should be reversed. In this case, therefore, if Appellant demonstrates by a preponderance of the evidence that it did not engage in trafficking with SNAP benefits, then such transactions will be considered legitimate and the disqualification reversed. If this is not demonstrated, the case is to be sustained. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. Regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, ownership is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time. Additionally, a record of participation in 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.

Appellant also alleges that the Agency policy is arbitrary and in direct violation of substantive and procedural due process. USDA issued a summary decision to permanently the owner based on a computer compilation without any evidence of fraud or trafficking or any violation. None of the enumerated activities necessarily constitute trafficking. The Agency effectively denied the owner any opportunity to present defense in a display of abuse of power. Regarding this assertion, Section 278.6(b)(1) of the SNAP regulations provides that upon charging a firm with SNAP violations, the letter informing the firm of the charges “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.” This section further states that, “Any firm considered for disqualification, shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination.” A review of the Retailer Operations Division’s administrative actions regarding this matter indicates full compliance with all applicable SNAP regulations, policies, and procedures. This disqualification is an administrative action and SNAP regulations provide for an administrative review of the action. The Act, as amended, and regulations provide that any firm aggrieved by an administrative review determination may seek judicial review of the determination in Federal court or a State court of record having competent jurisdiction. In such event, trial de novo proceedings ensure the firm of a full evidentiary hearing on the agency action at issue. In summary, no violations of due process were noted in this administrative action.

The owner and the business were charged with trafficking based on a computer analysis of the store's transactions for the months of January 2017 through June 2017. The charges do not derive from the use of a confidential informant or independent investigator who visited the store and made illegal purchases to support findings of trafficking, but by a computer program used by SNAP Administrators. While traditional undercover operations are still in use by USDA, for many years federal regulations have also authorized the use of evidence consisting of EBT transaction data in investigations of SNAP retail stores to determine if trafficking is occurring.

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, "FNS shall . . . [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2." SNAP regulations at 7 CFR § 271.2, define trafficking as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone . . ." SNAP regulations at 7 CFR § 278.6(a) clearly state, in part, 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, 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). In the present case, the data presented in the Attachments is solely based on the SNAP electronic benefit transfer transactions conducted at the Appellant business during the period under review. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the period under review. All of the transactions were then reviewed and analyzed by the Retailer Operations Division staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photographs from the FNS store visit on June 28, 2017, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant business during the review period. This analysis also included a review of the business to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

Based on this empirical data, and in the absence of sufficient evidence for the legitimacy of 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 charge letter evidence trafficking as the most likely explanation for the questionable transactions listed in the charge letter Attachments. It is herein determined that Appellant did not provide a preponderance of evidence demonstrating that the transactions contained in the charge letter were more likely due to eligible food sales than not. Under review, the evidence more substantially supports a conclusion that the transaction activity in the charge letter Attachments is due primarily to

trafficking in SNAP benefits.

The evidence under review shows SNAP activity indicative of trafficking. Neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto 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 the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial 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, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall 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 and second chances are not an authorized option under existing regulations.

CIVIL MONEY PENALTY

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because Appellant failed to request a trafficking CMP or to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

Appellant made no mention of how the business met any of the four criteria in either its response to the charge letter or in the request for administrative review and no documentation or other evidence of any kind, including written statements, was subsequently received from Appellant in support of a trafficking CMP. Therefore, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division's decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

The Retailer Operations Division has presented a case that Appellant has likely trafficked in SNAP benefits. 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. This is evidenced by: the suspicious patterns in three Attachments of EBT transaction data, the inadequacy of the store's staple food stock as observed during the store visit to support large

transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type and larger stores in the county and state.

The retailer has not provided sufficient evidence to rebut the case that Appellant most likely trafficked 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, in fact, occur as charged by the Retailer Operations Division. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, Retailer Operations properly determined that Appellant was not eligible for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

ROBERT T. DEEGAN
Administrative Review Officer

March 29, 2018