

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

3 O's Supermarket,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0216207

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a permanent disqualification of 3 O's Supermarket (hereinafter "Appellant") from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against 3 O'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."

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified based on an analysis of EBT transaction data from August 2018 through January 2019. This involved the following transaction patterns which are common trafficking indicators:

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

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized 3 O's Supermarket for SNAP participation as a convenience store on November 30, 2011. In a letter dated March 27, 2019, 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 between the months of August 2018 and January 2019. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made and supporting documentation submitted within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In correspondence between April 4, 2019, and April 26, 2019, the Appellant, through counsel, responded to the charges, claiming that the firm was not engaged in trafficking and contending that the transactions listed in the charge letter were typical transactions conducted in the normal course of business. The Appellant's formal written response, dated April 26, 2019, included eight pages of explanation detailing its arguments disputing the allegations of trafficking, and approximately 150 pages of evidence, including customer declarations, a product pricing list, store and inventory photographs, and inventory purchase reports. The Appellant's contentions are outlined in detail below in the section entitled "Appellant's Contentions."

After reviewing the Appellant's responses and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated May 31, 2019. This letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but that a CMP was not appropriate in this case because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked June 6, 2019, the Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

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

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

7 CFR § 278.6(a) states, in part:

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

7 CFR § 278.6(e)(1)(i) states:

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

7 CFR § 271.2 states, in part:

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 § 271.2 states, in part:

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

7 CFR § 278.6(b)(1) states, in part:

Any firm considered for disqualification...under paragraph (a) of this section...shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification.... The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter...

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(b)(2)(ii) states, in part:

Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence... that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).

7 CFR § 278.6(b)(2)(iii) states:

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

7 CFR § 278.6(i) states, in part:

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

APPELLANT'S CONTENTIONS

The Appellant, through counsel, did not submit any new contentions or evidence as part of its request for administrative review. Rather, the Appellant requested that this review examine the formal arguments and evidence submitted to the Retailer Operations Division on April 26, 2019. A summary of the Appellant's contentions is as follows, in relevant part:

- Based on extensive evidence that the firm's EBT transaction pattern was legitimate and in full compliance with federal law, Appellant is requesting that FNS determine that no further action is warranted in this case.
- Other than redemption data, no other information was provided by FNS to support the allegations of trafficking.
- 3 O's Supermarket is a stand-alone convenience store and neighborhood grocery with more than 2,500 square feet of retail space and has been in business for over 25 years.
- The store owner and manager are active in the business, and one of them is present to run the cash register and EBT machine at all times.
- The store has a loyal customer base, as evidenced by 27 customer declarations which describe customers' purchasing habits at the store. The fact that the store was able to collect this many declarations within a few weeks is compelling evidence of the store's large number of loyal EBT customers.

- The store sells a wide variety of EBT-eligible foods, including bread, milk, eggs, bulk snack foods, and frozen meat. The store sells a far greater variety of high-dollar EBT eligible food items than would be expected for a store of this size, resulting in larger than expected EBT transactions.
- The store sells several items in bulk, including boxes of Famous Amos cookies (\$17.99 for a box of 30 pouches), Gold Fish (\$14.99 for a box of 30 snack packs), and Rice Krispies (box of 25 bars). These items are frequently sold to EBT customers, are prominently displayed in the store, and are frequently mentioned in the customer declarations.
- Additional expensive items include frozen steak, baby formula, concentrate, baby food, and various drink products.
- The store's EBT sales have been consistent over the course of the last year. There were no notable changes during the investigation period of August 2018 to January 2019.
- The firm's inventory as shown in the photographs provided by the Appellant is indicative of the EBT-eligible inventory stocked and sold during the investigation period. This is known because the firm maintains extensive records on their inventory purchases.
- The firm has three main suppliers: Adams Wholesale, Sam's Club, and Fred's Food Club. In total, the firm paid over 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to these three vendors alone during the review period, most of which was spent on EBT-eligible items. This is more than enough to account for the average monthly SNAP sales during the same period.
- The store is known in the neighborhood for selling a large variety of EBT-eligible grocery items, and many customers prefer to shop at 3 O's Supermarket based on the availability, variety, and competitive pricing of these items, as well as the proximity of the store to their homes.
- Many customers visit the store frequently to make purchases of staple food items, snacks, baby formula, baby food, etc. The firm's inventory is more akin to a small specialty grocery store than a gas station or convenience store, and the EBT transactions reflect it.
- Because most of the firm's customer base live within walking distance of the store, their purchasing habits vary significantly from traditional big-box retail customers. It is not unusual for customers to make multiple food purchases in small time frames, often reflecting the fact that they do not have a car to transport large grocery purchases.
- A Google Maps search shows that the store is located near several large public housing projects in the middle of one of the most impoverished communities in the state of North Carolina. The Appellant is well aware of these demographics and has done its best to focus its sales strategies on the individuals in the neighborhood. For instance, the firm offers free delivery to any customer who spends 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in a single visit. This is particularly useful for the large percentage of EBT customers who do not have access to reliable transportation. The firm also takes advantage of extended business hours to serve its customer base.
- Regarding Attachment 2 (large transactions):
 - Large transactions are a common occurrence at 3 O's Supermarket, regardless of the type of payment used to make a purchase.
 - The 27 submitted customer declarations establish the following:
 - The store is the closest available option for EBT customers to purchase a wide variety of food items, and many customers shop at the store multiple times a week or even multiple times in the same day;

- Legitimate transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per month are extremely common for these repeat customers;
 - They uniformly describe the store as having excellent customer service and they have never been offered cash in exchange for SNAP benefits;
 - According to Attachment 2, every EBT transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) from August 2018 through January 2019 was an “excessively large purchase transaction.”
 - The average transaction amount for these 190 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
 - Not only do the customer declarations directly refute the allegation that the transactions are “excessively large,” but an in-depth look at the firm’s inventory demonstrates that customer transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) represent reasonable transaction amounts for SNAP-eligible items at the store.
 - A customer could purchase one package of baby formula or a single bulk snack item and approach the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) price point determined by FNS to be suspicious.
 - Given that the store advertises free delivery for any purchase 5 U.S.C. § 552 (b)(6) & (b)(7)(C), the firm’s customers are incentivized to condense their trips to a larger purchase in order to qualify for the free delivery.
 - Based on the firm’s eligible food inventory, FNS’s assumption that any EBT sale 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is somehow “suspicious” or “excessively large” is completely unwarranted.
- Regarding Attachment 1 (multiple transactions from the same household):
 - There were only 25 incidents of these “too-close together” transactions over the course of a 180-day investigation period, meaning such transactions occurred only once every week on average.
 - These transactions can be explained by customer purchase behavior unique to this particular type of neighborhood and store.
 - As noted in the customer declarations, many customers acknowledge frequent use of their EBT cards at 3 O’s Supermarket, including one who stated that he shopped at the store as many as three or four times a day.
 - Some customers share their EBT card with another household member, who then makes a purchase after one has already been made.
 - It is common for customers without transportation to return to the store multiple times a day to break up the number of items to carry home if they are not spending enough to take advantage of the free delivery option.
 - Store personnel have never suspected fraud based on customer behavior, and per SNAP regulations, are not allowed to question a purchase as long as the customer has the card and the applicable PIN.
- Although federal courts have recognized that FNS is entitled to consider EBT transaction data in disqualifying stores for trafficking, suspicious EBT redemption data is not sufficient on its own to justify a trafficking determination without a finding that the data is abnormal compared to the transaction activity of similar retailers.
- Appellant describes the case of Brooklyn Mini Mart, a small grocery store that was disqualified by FNS, but in U.S. District Court, the Court ruled that while the transaction data at Brooklyn Mini Mart was “arguably suspicious,” FNS was not entitled to summary

judgment because there was “genuine dispute as to whether the EBT transaction activity...[was] abnormal” compared to other similar SNAP retailers.

- Similarly, FNS should determine that the allegations outlined in the charge letter are insufficient to justify an administrative determination that 3 O’s Supermarket violated SNAP regulations by trafficking in SNAP benefits. FNS’s sole evidence of trafficking is a few months of redemption data that shows a set of transactions that are “arguably suspicious.” The activity at the firm is actually not unusual when accounting for the products, location, and customers of the store.
- The charge letter issued to the Appellant actually exhibits less evidence of trafficking than what was presented by FNS against Brooklyn Mini Mart. In that case, FNS showed significant increases in SNAP redemptions during the relevant time period, whereas in this case, FNS has failed to show any difference in redemptions between this period and any other period. Additionally, FNS has failed to include any facts or analysis from any site visit report regarding the quantity and type of EBT-eligible inventory sold by the firm. Had FNS done so, it would have seen items for sale and pricing structures to support the types of transactions cited as “inexplicable.”
- This case is much more similar to the Brooklyn Mini Mart case than any other federal cases cited by the Appellant in which suspensions were upheld. In each of the cases that were upheld, there was a finding that the transaction data was found to be abnormal in comparison with like retailers or other compelling circumstances.
- Based on the foregoing arguments, evidence, and case law, the Appellant requests a decision which will allow the firm to remain authorized.

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. However, in reaching a decision, full attention was given to all evidence and contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The primary issue for consideration in a case based on suspicious SNAP redemption data is whether or not the Retailer Operations Division adequately established that the Appellant firm engaged in the violation of trafficking. In other words, did the Retailer Operations Division, through a preponderance of the evidence, establish that it is more likely true than not true that the irregular and unusual transactions cited in the charge letter were the result of trafficking?

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm’s EBT transactions, but also information obtained from a March 3, 2019, store visit which was conducted by an FNS contractor to observe the nature and scope of the firm’s operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm’s irregular SNAP transaction patterns. The store visit report and photographs documented the following store size, description, and characteristics:

- 3 O's Supermarket is a convenience store, roughly 2,500 square feet in size, operating in the city of Rocky Mount, Edgecombe County, North Carolina.
- At the time of the contractor's visit, the firm did not have any shopping carts or hand-held baskets for customer use, which is not unusual for stores of this size. Customers shopping in convenience stores generally purchase only as much food as they can carry in their arms. It is noted at the time of the inspection there were four shopping carts in the back storage area, but all were filled with stored inventory and did not appear to be available for public use.
- The store visit photographs show two cash registers and agency records reflect the use of one EBT point-of-sale terminal for SNAP purchases.
- The store's staple food stock is sufficient for program eligibility in each of the four staple food categories, and is typical of a convenience store with a heavy emphasis on snack foods and drinks.
- The report indicates that the store sells SNAP-eligible, non-staple accessory food items, such as carbonated and uncarbonated drinks, snacks, candy, and condiments. The store also sells ineligible, nonfood items, including alcoholic beverages, tobacco products, lottery tickets, automotive products, cleaning supplies, and other miscellaneous household merchandise.
- During the review period, the firm was an authorized retail store in the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC). This is reflected in the food items available for purchase with WIC benefits, including fresh produce, canned tuna, 100 percent fruit juice, eggs, bread, milk, breakfast cereal, peanut butter, and infant foods such as infant formula and jars of baby food. It should be noted that the vast majority of SNAP households that contain infants and children under the age of five are also eligible for WIC participation. Therefore, it is uncommon for such households to purchase WIC-eligible foods, particularly expensive items like infant formula, with their SNAP benefits.
- The checkout area includes two very small, cluttered countertop spaces. The checkout area is not suitable for conducting large or rapid transactions as there is very little space on the counter to place more than a few small items at a time and little room for customers to maneuver with large amounts of groceries.
- There is no indication from the store visit report that the firm has a special pricing structure, although most items appear to end with a cents-value of 9, such as \$2.99, \$3.29, \$4.89, etc. The report also states that the firm does not round transaction totals up or down at checkout.
- The store visit, which was conducted in collaboration with store personnel, also indicated that the firm did not take telephone orders or offer delivery.
- There is no indication from the report that the firm has special food packages for sale or that items are sold in bulk. According to the report, the most expensive food items available for purchase include variations of infant formula and 64-ounce bottles of fruit juice, both of which are eligible for purchase through the WIC program.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a convenience store, where households normally purchase a limited number of items to supplement their overall dietary needs. There was no indication that SNAP households would be inclined to regularly visit 3 O's Supermarket to purchase large quantities of groceries, especially considering the absence of shopping carts and baskets and the availability of

larger grocery stores in the area, including at least six full-line supermarkets or superstores within three miles of the store. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of similar-sized competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: Multiple transactions were made from the accounts of individual SNAP households within a set time period. This attachment lists 25 sets of transactions (59 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E).

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), an extraordinary amount for a convenience store carrying largely snack foods and having no shopping carts or baskets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Attachment 1 is filled with similar examples.

Such repetitive transaction sets and dollar amounts at a convenience store like 3 O's Supermarket are highly irregular and are often an indication of trafficking. As such, these transactions warrant further explanation.

The Appellant contends that there were only 25 incidents of these transactions over the course of a 180-day investigation period and can be explained by customer purchase behavior unique to this particular type of neighborhood and store. The Appellant noted that several customers, in their handwritten declarations, acknowledged frequent use of their EBT cards at 3 O's Supermarket, including one who stated that he shopped at the store as many as three or four times a day. The Appellant further stated that some customers share their EBT card with another household member, who then makes a purchase after one has already been made. According to the Appellant, it is also common for customers without transportation to return to the store multiple times a day if they are not spending enough to take advantage of the free delivery option. Finally, the Appellant argues that store personnel are not allowed to question a purchase as long as the customer has the card and the applicable PIN.

As for the Appellant's insinuation that large, repetitive transactions are rare at 3 O's Supermarket, 5 U.S.C. § 552 (b)(7)(E).

5 U.S.C. § 552 (b)(7)(E)

Additionally, it is reasonable to presume that customer behavior at three similarly-stocked convenience stores within one mile of each other would be fairly uniform. Thus, if multiple trips to the store were common at 3 O's Supermarket, it stands to reason that they would be common at a nearby store with nearly identical inventory. If it is true that EBT cards are shared among different household members, this would manifest itself at other stores as well. And yet, only at the Appellant store did customers routinely conduct large, repetitive transactions. It appears to this review that something besides the Appellant's inventory or its customer service was driving such behavior. It should be noted that the store visit report included no mention or evidence of a free delivery program. The report, which was completed in collaboration with store personnel, specifically noted that the firm does not offer delivery. One of the photographs submitted by the

Appellant shows a sign advertising free delivery with the purchase **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, but this sign is nowhere to be found in the contractor's photographs, strongly suggesting that the sign was created and posted after receipt of the charge letter for the purpose of supporting the Appellant's response to the charge letter.

It should be made clear that SNAP regulations do not provide limitations on the number of transactions that can be made by SNAP households or how large the individual transactions can be. However, the transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display patterns of use that are inconsistent with the store's documented physical characteristics and in comparison with similar stores in the area. It should be further noted that the transactions identified in the charge letter are not marginally abnormal, but decidedly so. This review does not contend that the EBT transactions detailed in the charge letter are overtly suspicious when they occur on an occasional or intermittent basis. But when such transactions form repetitive and questionable patterns on a consistent basis over a substantial period of time, such activity is considered highly irregular, and a firm's intent to comply with program regulations is called into question.

Finally, the Appellant has offered no compelling evidence, such as itemized cash register receipts, to prove that the questionable transactions were legitimate purchases of eligible food. Anecdotal explanations, whether from the Appellant or from SNAP customers, without persuasive supporting documentation do little to convince this review that the transactions in Attachment 1 were legitimate. Therefore, it is reasonable for this review to conclude that trafficking was a likely cause of the transaction patterns listed in this attachment.

Charge Letter Attachment 2: The store conducted EBT transactions that were large based on observed store characteristics and recorded food stock. This attachment lists 190 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These large transactions are not consistent with a convenience store in the state of North Carolina. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a convenience store in North Carolina was \$6.79. In Edgecombe County, the average was even lower, at \$5.76 per transaction. The average transaction in Attachment 2 is almost 10 times larger than the average purchase amount for this store type.

Given that the Appellant firm has a moderate inventory of staple foods and other SNAP-eligible items, such as snacks and drinks, it is probable that there would be an occasional purchase where the transaction amount is high, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. As such, there may be some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 2. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from nearby, similar-sized competitors, especially considering the severely constricted checkout area, the lack of shopping carts and baskets, and the availability of much larger stores in the area. The substantial number of high-dollar transactions in a six-month period calls into question the legitimacy of these transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering how many food items it would typically take to add up **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, and considering that the firm does not have any shopping carts or baskets, and considering that many of the high-priced food items such as infant

formula are likely to be purchased with WIC vouchers rather than SNAP benefits, and given the fact that there are much larger grocery stores in the area with substantially greater inventory and variety, this review finds it unlikely that every transaction in Attachment 2 was a legitimate purchase of eligible food.

It is noted that 3 O's Supermarket had many more suspiciously large transactions during the review period than its two nearby comparison stores. See chart below:

5 U.S.C. § 552 (b)(7)(E)

The largest transaction from either of the two comparable stores was 5 U.S.C. § 552 (b)(7)(E), whereas 5 U.S.C. § 552 (b)(7)(E).

It is further notable that many of the transactions listed in Attachment 2 were made by SNAP households who shopped at much larger supermarkets and superstores 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of shopping at 3 O's Supermarket. For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C)..

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

When considering the two examples above, it is difficult for this review to comprehend what was available at 3 O's Supermarket that would not have been available at a supermarket or superstore a short time earlier or later, and where overall inventory and variety are substantially greater and where prices are likely lower. It is conceivable that the households would have visited 3 O's Supermarket to supplement the purchases made at the larger stores, but in both cases, the households spent substantially more at 3 O's Supermarket – a standard convenience store with typical inventory – than at much larger, better stocked grocery stores, where shopping carts would have been available to help transport large quantities of groceries. Inexplicable behavior such as this is often indicative of trafficking.

The Appellant has argued that large transactions are a common occurrence at 3 O's Supermarket, regardless of the type of payment used. It also pointed to the 27 handwritten customer declarations, which claim, among other things, that customers routinely 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at the store and that the store is the closest available option to purchase a wide variety of food items. Additionally, the Appellant takes exception to the insinuation in the charge letter that every transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was "excessively large," especially when considering the firm's eligible food inventory. The Appellant argues that a single package of infant formula or a single bulk snack item could approach the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) price point. Finally, the Appellant argues that customers are incentivized to make large purchases because of its free delivery option for transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

With regard to these contentions, it should first be made clear that at no time did the agency's charge letter state that the transactions in Attachment 2 were "excessively large." The Appellant used this phrase multiple times, but it does not appear anywhere in the charge letter or in the attachments to the charge letter. Rather, the letter simply states that the transactions were large

based on observed store characteristics and recorded food stock. A transaction is not deemed suspicious solely because it reaches a certain threshold, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

As to the 27 customer declarations, such documentation is largely unconvincing. Customers engaging in trafficking violations are unlikely to admit to such conduct. Even if well-intentioned, affidavits and declarations do not typically represent a household's actual shopping behavior, as households generally do not retain records of transactions and often do a poor job of recalling spending patterns at a particular location.

Regarding the Appellant's inventory records, this review readily concedes that the firm likely purchased sufficient inventory to cover the full amount of its SNAP and WIC redemptions during the review period. However, inventory records without accompanying documentation, such as itemized cash register receipts, rarely persuade a reviewer to reverse a disqualification determination as invoices and purchase summaries offer little insight into what transpired at the point of sale.

Regarding the photographs provided by the Appellant, these were very likely taken after the firm received the charge letter, and thus do not represent store conditions during the review period or at the time the agency contractor visited the store. For example, in the contractor's photographs, the checkout area included two very small, cluttered countertop areas where it would be difficult to place more than a few items, thus making very large transactions problematic. In the Appellant's photos, however, these areas are substantially cleaned up and are more spacious. The overall inventory is greater in the Appellant's photos, and there are bulk items, such as full boxes of Cheez-It crackers and Keebler cookies, that were not present at the time of the inspection. One pair of photos show a floor freezer near the checkout area. In one photo, several containers of ice cream are clearly visible. In the second photo, the ice cream is no longer there. In its place are several packages of frozen steak, which were not present at the time of the contractor's visit. Finally, several signs appear to have been added after the inspection, including some merchandise sales prices and a sign advertising free delivery for purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C). In short, the photographic evidence submitted by the Appellant gives this review an impression of manipulating store conditions after receipt of the charge letter in an attempt to demonstrate that large transactions were not only possible, but routine.

It also bears repeating that during the store visit, store personnel indicated to the contractor that the firm did not offer delivery. A review of household SNAP transactions also indicates that transportation limitations were likely not as prevalent as the Appellant suggests. The vast majority of households who shopped at 3 O's Supermarket during the review period also regularly shopped at other stores in the area, including supermarkets, superstores, and other convenience stores.

This review does not doubt that 3 O's Supermarket sells eligible food items and conducts legitimate SNAP transactions. There is no evidence that this has ever been questioned. But when unusually large transactions form patterns that are substantially different from similar-sized and similarly-stocked stores in the area, further evidence from the Appellant is warranted to verify that there is not something more, such as trafficking or other program violations, taking place. In

this case, the Appellant has not offered compelling evidence, such as cash register receipts or other accounting records, to better explain what took place between the customer and the clerk at the cash register during the specific transactions listed in the charge letter.

The transactions identified in the charge letter are highly irregular and substantially different from comparable stores in the area. In an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that trafficking did not occur. Unfortunately the Appellant's evidence does not meet this standard, and thus, does not prove by a preponderance of the evidence that trafficking did not take place during the review period.

Trafficking Case based on EBT Data

A key argument by the Appellant relates to FNS's use of EBT data as a basis for the allegations of trafficking. The Appellant contends that although federal courts have recognized that FNS is entitled to consider EBT transaction data in disqualifying stores for trafficking, suspicious EBT redemption data is not sufficient on its own to justify a trafficking determination without a finding that the data is abnormal compared to the transaction activity of similar retailers. The Appellant further contends that FNS failed to include any facts or analysis from a site visit report regarding the quantity and type of EBT-eligible inventory sold by the firm. The Appellant argues that had FNS done so, it would have seen items for sale and pricing structures to support the types of transactions cited as "inexplicable."

To support its argument against the use of EBT data as the basis for trafficking allegations, the Appellant cited an earlier court case in which FNS was not entitled to summary judgment because there was, in that case, "genuine dispute as to whether the EBT transaction activity...[was] abnormal" compared to other similar SNAP retailers.

With regard to these contentions, this review acknowledges that a conclusion of trafficking cannot be drawn from EBT data alone, nor would it be possible to do so in a case based primarily on inconsistent redemption data. It is noted that FNS employs a computerized fraud detection tool to identify EBT transactions that form patterns having characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. FNS's Retailer Operations Division must still analyze the transaction data and patterns with other factors, such as observations from a store visit, an analysis of customer shopping behavior, and a comparison with similar stores in the area, and then render a determination as to whether or not the questionable transactions were, more likely than not, the result of trafficking. The legality of this method is identified in 7 CFR § 278.6(a) which states, in part, "FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. **Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, [or] evidence obtained through a transaction report under an electronic benefit transfer system ...**" [Emphasis added.]

Prior to a disqualification determination, the accused firm is given ample opportunity to reply to the charges and provide any information it deems appropriate in justifying as legitimate the transaction activity detailed in the charge letter.

It should be noted that this reviewer has thoroughly examined the documentation and information provided by the Retailer Operations Division and has found no evidence to suggest that the agency simply manufactured numerical data and declared it to be trafficking. From all indications, the Retailer Operations Division obtained the EBT data, found it to be suspicious in comparison to other area stores of similar size, and then completed a thorough analysis before concluding that trafficking was likely occurring. As described throughout this document, the contractor's site visit as well as the agency's comparisons to like stores proved to be important factors in FNS's trafficking determination. Accordingly, this review finds the cited court cases to be of little relevance in this matter.

It is important to restate here that in an appeal of adverse action, the onus is on the Appellant to prove by a preponderance of the evidence that the administrative action should be reversed. Despite being presented with a specific list of questionable transactions, the Appellant's has offered no persuasive evidence, such as cash register receipts or other evidence from the point of sale, to prove that the transactions listed in the charge letter were legitimate purchases of eligible food.

Civil Money Penalty

The Retailer Operations Division determined that the Appellant firm was not eligible for a civil money penalty in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and training program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a civil money penalty to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate documentation within designated timeframes. The case record shows that the Appellant did not request a trafficking CMP when it replied to the charge letter and there is no evidence that the Appellant submitted any documentation that would indicate that the firm had a compliance policy or training program of any kind.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

An analysis of the Appellant's EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify 3 O's Supermarket from SNAP participation. This data provided sufficient evidence for this review to conclude that the questionable transactions and patterns listed in the charge letter were more likely than not the

result of trafficking violations committed by the Appellant. Likewise, the Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

Based on a review of all available information in this case, the decision to impose a permanent disqualification against the Appellant, 3 O's Supermarket, under the ownership **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. If a judicial review is desired, the complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision.

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.

JON YORGASON
Administrative Review Officer

September 9, 2019