

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

4 Brothers Food Market,

Appellant,

v.

Case Number: C0213710

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that a permanent disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against 4 Brothers Food Market (Appellant) by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1)(i) in its administration of the SNAP, when it imposed a permanent disqualification against 4 Brothers Food Market on March 15, 2019.

AUTHORITY

7 U.S.C. 2023 and its implementing regulations at 7 CFR § 279.1 provide that “[A] food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS.

CASE CHRONOLOGY

In a letter dated November 20, 2018, the Retailer Operations Division informed the Appellant that 4 Brothers Food Market was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270 –282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm."

In responses to the Retailer Operations Division of November 30, 2018, December 3, 2018, December 20, 2018, December 21, 2018, December 31, 2018, and January 28, 2019, the

Appellant, through counsel, denied the trafficking allegations and provided various explanations for the questionable SNAP transactions that were outlined in the November 20, 2018 Charge Letter. The Appellant also provided numerous documents and photos in support of its responses.

After considering the Appellant's replies and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated March 15, 2019, informing the Appellant that 4 Brothers Food Market was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations.

In a letter postmarked March 28, 2019, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's decision to permanently disqualify the firm from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated April 3, 2019.

STANDARD OF REVIEW

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

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6(e)(1)(i) of the Regulations establish the authority upon which a permanent disqualification may be imposed upon a retail food store or wholesale food concern. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

7 U.S.C. § 2021(b)(3)(B) states, inter alia:

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

7 CFR § 278.6(a) states, inter alia:

FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence

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

7 CFR § 278.6(e)(1)(i) states:

Disqualify a firm permanently if: Personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, inter alia:

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

7 CFR § 278.6(f)(1) states, inter alia:

A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

7 CFR § 278.6(i) states, inter alia:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations ...

7 CFR § 278.6(b)(2) states, inter alia:

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

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

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from June 2018 through September 2018. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were multiple transactions made from individual benefit accounts within a set period of time; and
- There were excessively large purchase transactions made from recipient accounts.

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

APPELLANT'S CONTENTIONS

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

In the replies to the Charge Letter and in the administrative review request, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- Regarding the transactions included in Charge Letter Attachment 1, households will visit the subject firm frequently, more than once per day and certainly more than once per week as the Appellant sells a variety of meats and poultry as well as a large variety of grocery and consumer products. The store is well sized and well stocked. In all grocery stores which sell a variety of products, items may be forgotten and customers may add them shortly after initial checkout, later in the day, or throughout the week. The transactions in this Attachment 5 U.S.C. § 552 (b)(6) & (b)(7)(C) into the next day. Given the variety of general groceries and convenience of the store it would not be unreasonable for a household to visit the store daily or more than once per week as this is their neighborhood store and the only store in the immediate vicinity that provides a variety of products and accepts SNAP benefits. As a neighborhood store, the Appellant is accessible for area residents to conveniently do their shopping. The store is situated below a residential apartment building and located across the street from a large residential apartment building, library, and a shelter which attract many customers. Therefore, the length of time cited between these transactions is not unusual given the variety of inventory sold at the store and norms of customer frequency and grocery business. Also, most of the households cited in this Attachment visited the store consistently during the review period, supporting the fact that the store was their neighborhood store and the households cited frequented the store in the same manner and consistency as any customer would frequent their neighborhood grocery store.
- With regard to the transactions included in Charge Letter Attachment 2, the Appellant purchases a large amount of products monthly from wholesalers as a result of the large turnover from sales. The Appellant sells many higher priced items, specifically soda and other drinks in bulk as well as higher priced consumer products. The "excessively large" purchases cited 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which are not large by measure in the grocery business for stores of similar size and stock. The transactions are completely reasonable when considering the size and stock of this store. For instance, among the higher priced items are: Red Bull at \$49.99 per case; Fiji water at \$19.99 per case; cereal

at 3 for \$9.99; loaf bread at \$7.49; chicken wings at \$5.98; whole chicken at \$9.99; fried chicken at \$9.99; Home Run Inn pizza from \$8.99, etc.

- The charges and Exhibits attached to the Charge Letter do not detail or provide any evidence against the firm regarding the trafficking of SNAP benefits as defined in Section 802 of title 21, United States Code. Therefore, by definition a charge of trafficking cannot be assessed against the store.
- The Appellant has no prior history of SNAP violations.
- A permanent SNAP disqualification will impose a hardship on area SNAP customers as the Appellant provides a unique service to the area and sells name brand products and a large variety of products not typically offered in the area. The store has been a vital part of the community and has established a reputation in the neighborhood for going above and beyond their customers. The store offers a variety of products for sale and is among the only stores in the area that accepts SNAP benefits that keeps regular hours and is well stocked.
- The Appellant requests that FNS dismiss the permanent SNAP disqualification or a period of supervision be assessed.

In support of the Appellant's contentions, the following information/documents were submitted to FNS:

- Customer affidavits/statements;
- Photographs of store and food stock with prices; and
- Purchase invoices.

ANALYSIS AND FINDINGS

Store Characteristics

FNS authorized 4 Brothers Food Market as a small grocery store on April 18, 2017. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an October 23, 2018 store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information obtained from the store visit was also used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Approximately 1,100 square feet in size with approximately 200 square feet of additional food storage outside of public view which stocks predominantly drinks;
- One shopping cart and two hand-held baskets available for customer use;
- One cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- Limited check-out counter space;
- No optical scanners;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals;

- No meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers;
- No indication from the store visit report that the firm has a special pricing structure, such as prices ending in \$x.x9, \$x.50, and/or \$x.00;
- Transactions are rounded at the checkout counter;
- There was an empty cooler and several of the store shelves were scantily filled;
- The four most expensive foods items in stock were Red Bull at \$39.99 per case; Monster Java at \$24.99 per case; Folgers coffee at \$14.99 per 51 ounces; and French toast at \$12.99 per 48 ounces;
- No fresh meats, poultry, or seafood;
- A limited variety and amount of frozen meats, poultry, and seafood;
- Deli meats and cheeses were not sold by the pound;
- Hot foods were not sold;
- Meat items included units of canned/potted meat, canned fish, eggs, lunch meat, meat jerky, and bacon;
- Dairy included milk, butter, sour cream, and cheese;
- A limited variety and amount of fresh produce;
- Other staple foods available for purchase included such items as juice, pasta, rice, loaf bread, buns/rolls, cereal, flour, baking mix, tortillas, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, condiments, sugar, and vegetable oil; and
- Ineligible nonfood items included tobacco products, health and beauty items, paper products, household cleaning supplies, hats, automotive supplies, housewares, gift items/souvenirs, and pet food.

The available inventory of SNAP eligible food at the time of the store visit showed food stock that would be typical of a small grocery store, where households normally purchase a limited number of items. There was little indication that SNAP households would be inclined to regularly visit the store to purchase large quantities of groceries. 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.

Charge Letter Attachments

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

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Based on this empirical data, and in the absence of any reasonable explanations for such transaction patterns, a

conclusion can be drawn through a preponderance of evidence that the most likely explanation for “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges is trafficking. Transactions having such characteristics sometimes do have valid explanations that support that they were the result of legitimate purchases of eligible food items. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, the Retailer Operations Division determined that the Appellant’s contentions did not outweigh the evidence. The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

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

This Charge Letter Attachment documents 28 sets of transactions (61 total transactions) **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits to meet the parameters of this scan. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer’s inventory and structure.

The Appellant contends that with regard to the transactions included in Charge Letter Attachment 1, households will visit the subject firm frequently, more than once per day and certainly more than once per week as the Appellant sells a variety of meats and poultry as well as a large variety of grocery and consumer products. The store is well sized and well stocked. In all grocery stores which sell a variety of products, items may be forgotten and customers may add them shortly after initial checkout, later in the day, or throughout the week. The transactions in this Attachment **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** into the next day. Given the variety of general groceries and convenience of the store it would not be unreasonable for a household to visit the store daily or more than once per week as this is their neighborhood store and the only store in the immediate vicinity that provides a variety of products and accepts SNAP benefits. As a neighborhood store, the Appellant is accessible for area residents to conveniently do their shopping. The store is situated below a residential apartment building and located across the street from a large residential apartment building, library, and a shelter which attract many customers. Therefore, the length of time cited between these transactions is not unusual given the variety of inventory sold at the store and norms of customer frequency and grocery business. Also, most of the households cited in this Attachment visited the store consistently during the review period, supporting the fact that the store was their neighborhood store and the households cited frequented the store in the same manner and consistency as any customer would frequent their neighborhood grocery store.

With regard to these contentions, although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions noted in the Charge Letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of the Appellant’s stock and facilities and are therefore indicative of trafficking. While the Appellant contends that it provides a variety of products to its customers and that it is well sized and well stocked, the store visit observations indicate that 4 Brothers

Food Market is not set up to provide for all of one's food needs with no fresh meats, poultry, or seafood, a minimal variety and amount of frozen meats, poultry, and seafood, a limited variety and amount of fresh produce, and lacks an abundant depth and breadth of staple foods. The Appellant had an empty cooler and several of the store shelves were scantily filled. The photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at 4 Brothers Food Market multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. The second, third, and fourth transactions in each set are too large to consist of forgotten items. The photographs provided by the Appellant support these findings.

The store visit report and photos of October 23, 2018 indicate that there were no signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals, no evidence of meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices, and no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers. The store visit report and photos indicate that 4 Brothers Food Market is approximately 1,100 square feet in size with approximately 200 square feet of additional storage area outside of public view that stocks predominantly drinks. It is irregular for small grocery stores to have purchases such as those cited, especially when 4 Brothers Food Market stocks only a few high priced food items so the majority of the food items stocked at the store are low priced items.

FNS acknowledges that the Appellant is a neighborhood grocery store and that it is likely situated below a residential apartment building and located across the street from a large residential apartment building, library, and a shelter. However, a review of client shopping data for the review period shows that clients shopping at 4 Brothers Food Market are also shopping at other area grocery stores, as well as full-line supermarkets and super stores that most likely offer customers a much larger quantity and variety of eligible food items for better prices. Based on these shopping patterns, transportation to other stores is not an issue for these SNAP customers. Yet, these customers continue to shop and spend suspicious high dollar amounts in short timeframes at 4 Brothers Food Market, where the eligible food stock is limited, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of their purchases at better stocked stores. This is a strong indicator of trafficking.

The Appellant contends that given the variety of general groceries and convenience of the store it would not be unreasonable for a household to visit the store daily or more than once per week as this is their neighborhood store and the only store in the immediate vicinity that provides a variety of products and accepts SNAP benefits. It is noted that sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, there are 22 SNAP authorized retailers (including two large grocery stores and one super store) located within a 1.0 mile radius of 4 Brothers Food Market that can meet the nutritional needs of SNAP customers. Some of these area authorized SNAP stores offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store. As mentioned previously, SNAP customers who shopped at 4 Brothers Food Market during the review period also shopped at other area grocery stores and, therefore, transportation to other stores is not an issue for these customers. Therefore, lack of access to other authorized

stores does not appear to be an explanation for 4 Brothers Food Market's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

5 U.S.C. § 552 (b)(7)(E).

Unfortunately, the Appellant has not provided any evidence to show that the transactions listed in Attachment 1 were legitimate purchases of eligible foods. The arguments presented by the Appellant hold little weight without some kind of evidence to substantiate its claims.

Excessively Large Purchase Transactions (Charge Letter Attachment 2)

This Charge Letter Attachment lists 65 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with a small grocery store in Will County, Illinois. During the review period, the average transaction amount for a small grocery store in Will County, Illinois was \$11.86. The average transaction in Attachment 2 is seven times larger than the average purchase amount for this store type. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar sized competitors. These large transaction amounts are also not consistent with the store's inventory. There were no fresh meats, poultry, or seafood, a minimal variety and amount of frozen meats, poultry, and seafood, and a minimal variety and amount of fresh produce in stock. Most of the food products in 4 Brothers Food Market consisted of accessory food items such as snack foods, candy, and drinks and inexpensive staple foods such as canned and packaged goods. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant contends that with regard to the transactions included in Charge Letter Attachment 2, the firm purchases a large amount of products monthly from wholesalers as a result of the large turnover from sales. The Appellant sells many higher priced items, specifically soda and other drinks in bulk as well as higher priced consumer products. The "excessively large" purchases cited 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which are not large by measure in the grocery business for stores of similar size and stock. The transactions are completely reasonable when considering the size and stock of this store. For instance, among the higher priced items are: Red Bull at \$49.99 per case; Fiji water at \$19.99 per case; cereal at 3 for \$9.99; loaf bread at \$7.49; chicken wings at \$5.98; whole chicken at \$9.99; fried chicken at \$9.99; Home Run Inn pizza from \$8.99, etc.

With regard to these contentions, the food stock and facilities of the Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at small grocery stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. The Appellant contends that the large transactions are not the result of trafficking of SNAP benefits. However, it is rare for a small grocery store such as 4 Brothers Food Market to have purchases like those included in Attachment 2 to the Charge Letter. This Attachment cites 65 EBT transactions during the four month period of investigation 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The FNS store visit report and photos of October 23, 2018 show that 4 Brothers Food Market offers a minimal stock of SNAP eligible foods with no fresh or frozen meats, poultry, or seafood,

a minimal variety and amount of frozen meats, poultry, and seafood, and a minimal variety and amount of fresh produce. The inventory report and photos also show only a few expensive eligible foods in stock that would account for these large amounts as well as showing the store has limited checkout counter space and only one shopping cart and two hand-held baskets available in which to transport the large number of items required to make up these large transaction amounts. Without a sufficient source of these, it is unlikely that such large dollar value transactions could be for actual food purchases and more likely they are trafficking. It is also important to note that after receipt of the Charge Letter on November 21, 2018, the Appellant's SNAP redemptions dropped sharply the next month by 29%. In addition, the store conducted no "multiple transactions made from individual benefit accounts within a set period of time" and only one "excessively large purchase transaction" after receipt of the Charge Letter. These are good indicators that trafficking may be occurring at the subject firm.

The Appellant contends that it sells many higher priced items, specifically soda and other drinks in bulk as well as higher priced consumer products. For instance, among the higher priced items are: Red Bull at \$49.99 per case; Fiji water at \$19.99 per case; cereal at 3 for \$9.99; loaf bread at \$7.49; chicken wings at \$5.98; whole chicken at \$9.99; fried chicken at \$9.99; Home Run Inn pizza from \$8.99, etc. However, the FNS store visit report and photos indicate that the four most expensive food items in stock were Red Bull at \$39.99 per case; Monster Java at \$24.99 per case; Folgers coffee at \$14.99 per 51 ounces; and French toast at \$12.99 per 48 ounces. In addition, the store visit observations indicate that the Appellant had an empty cooler and several of the store shelves were scantily filled. When one considers that SNAP benefit allotments are calculated to provide households with a bare minimum of food security, it is unreasonable to believe that SNAP households would choose to spend a large majority of their monthly benefit allotments at a minimally stocked small grocery store like 4 Brothers Food Market.

The record shows that there are 22 SNAP authorized retailers (including two large grocery stores and one super store) located within a 1.0 mile radius of 4 Brothers Food Market that can meet the nutritional needs of SNAP customers. Some of these area authorized SNAP stores offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store. An analysis of the shopping patterns for all of the SNAP households listed in this Attachment shows that the majority of the households shopping at 4 Brothers Food Market have access to transportation and that all are regularly shopping at a variety of larger stores, including super stores and/or supermarkets, located nearby and at several miles distance from the Appellant's location. While 4 Brothers Food Market does offer some staple food items, SNAP recipients are already shopping at other larger SNAP retailers located in proximity to the Appellant's business offering a greater quantity and variety of products, including fresh meats/seafood and produce, at lower prices. Therefore, the store has nothing to attract SNAP customers as there are no special or custom services offered.

5 U.S.C. § 552 (b)(7)(E).

The burden to disprove trafficking rests with the Appellant. In this matter, insufficient evidence was advanced to support the contentions. **5 U.S.C. § 552 (b)(7)(E).**

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the Charge letter. Therefore, based on this empirical data, and in the absence of credible evidence for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation. Nevertheless, transactions having such characteristics do sometimes have valid explanations that support that they were the result of legitimate purchases of eligible food items, and this is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, however, the Retailer Operations determined that the Appellant’s contentions did not outweigh the evidence. Assertions that the firm has not violated program regulations, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations.

In summary, the store’s layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding those of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the limited availability of shopping carts and hand-held baskets support the Retailer Operations Division’s determination. It is not plausible that the store’s customers are carrying large amounts of food around the store without the benefit of a sufficient source of shopping carts or hand-held baskets. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on the preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 2 are more likely than not the result of trafficking in SNAP benefits.

Invoices

In support of its contentions that the questionable SNAP transactions included in the Charge Letter Attachments are legitimate food purchases and not the result of trafficking of SNAP benefits, the Appellant provided FNS with numerous vendor invoices/receipts for food and other nonfood item purchases.

FNS conducted an analysis of the invoices provided by the Appellant. **5 U.S.C. § 552 (b)(7)(E).** There is no reasonable explanation for this discrepancy other than trafficking is most likely occurring at 4 Brothers Food Market.

Customer Affidavits

The Appellant provided FNS with 16 affidavits signed by households in support of 4 Brothers Food Market. The affidavits indicate that the permanent SNAP disqualification of the Appellant firm would impose a hardship on these households. The affidavits provided by the Appellant do not, however, attest that the Appellant did not traffic SNAP benefits during the review period.

While the Appellant asserts that the statements/affidavits provided to FNS purpose to establish that questionable transactions were legitimate and that no trafficking occurred, the truth of such declarations cannot be verified. Customers engaging in trafficking transactions would be

unlikely to admit to this behavior. On the contrary, customer statements would be expected to attest to the legitimacy of questionable transactions regardless of whether they were, in fact, legitimate.

Charge Letter

The Appellant contends that the charges and Exhibits attached to the Charge Letter do not detail or provide any evidence against the firm regarding the trafficking of SNAP benefits as defined in Section 802 of title 21, United States Code. Therefore, by definition a charge of trafficking cannot be assessed against the store.

With regards to this contention, the Appellant appears to be equating non-disclosure of evidence with a lack of evidence. Neither the Food and Nutrition Act of 2008 nor the SNAP regulations pursuant thereto provide for evidentiary proceedings at the administrative level of review, and therefore such proceedings are not included in the administrative review process. Rather, the Act 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.

No Prior Violations

The Appellant contends that the firm has no prior history of SNAP violations. However, a record of participation in the SNAP with no previously documented violations does not constitute valid grounds for mitigating the impact of the present serious determination of trafficking.

Customer Hardship

The Appellant contends that a permanent SNAP disqualification will impose a hardship on area SNAP customers as the firm provides a unique service to the area and sells name brand products and a large variety of products not typically offered in the area. The store has been a vital part of the community and has established a reputation in the neighborhood for going above and beyond their customers. The store offers a variety of products for sale and is among the only stores in the area that accepts SNAP benefits that keeps regular hours and is well stocked.

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

Reconsideration of Charges

The Appellant requests that FNS dismiss the permanent SNAP disqualification or a period of supervision be assessed.

However, the Food and Nutrition Act of 2008 at § 2021 does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that "... a disqualification . . . 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 ...". In keeping with this legislative mandate, 7 CFR § 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.

CIVIL MONEY PENALTY

As previously indicated, the March 15, 2019 Determination Letter advised the Appellant of the ineligibility for consideration for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations. The letter of charges dated November 20, 2018 advised the Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The regulations specify that such documentation must, in part, establish that there was an effective compliance policy and training program and that both were in effect and implemented prior to the occurrence of violations. The letter indicates that no information was provided by the Appellant for consideration; therefore, on review the Retailer Operations Division's determination that the Appellant firm is ineligible for the imposition of civil money penalties in lieu of disqualification is affirmed.

CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record, upon which charges of violations are based, together with observations made during the store visit and an analysis of customer shopping behaviors, provide substantial evidence that questionable transactions during the focus period have characteristics and display patterns that are not consistent with legitimate sales of eligible food to SNAP benefit customers at a store of this type, size and makeup. Rather, the characteristics are indicative of illegal trafficking in program benefits. The Appellant's contentions do not outweigh this evidence.

The record has yielded no indication of error or discrepancy in the reported findings by the Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Therefore, the decision to impose a permanent disqualification from participation in the SNAP against 4 Brothers Food Market is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, FNS is releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

LORIE L. CONNEEN
Administrative Review Officer

May 30, 2019