

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

7-Eleven 32429A,

Appellant,

v.

Case Number: C0168208

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 7-Eleven 32429A (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 June 11, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and the 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

By letter dated February 20, 2014, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in July 2013 through September 2013. 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 February 27, 2014, that denied trafficking, requested an administrative review, and also requested documents under the Freedom of Information Act (FOIA). Following a telephone conversation with Retailer Operations Division staff on March 13, 2014, to clarify the requirements for administrative review, counsel submitted a second response to the charges in a letter dated March 3, 2014, that reserved the right to request an administrative review in the future, again submitted a FOIA request, and also included a letter of representation signed by the store owner. The agency responded to the FOIA request by correspondence dated September 4, 2014. On September 9, 2014, Appellant, through counsel, appealed the FOIA response. Due to a backlog of FOIA appeals, the agency did not respond to the FOIA appeal until March 14, 2018, in correspondence that was received by counsel on March 15, 2018.

In a letter dated March 22, 2018, that was not received until April 3, 2018, due to delays by UPS, the Retailer Operations Division notified counsel that Appellant had ten days to respond to the charges. Counsel responded in a letter dated April 2, 2018, stating that he was unable to locate his client. In a second letter dated April 12, 2018, counsel responded that he had located his client who was out of the country. This letter also requested the charges be dropped due to the excessive time for the FOIA appeal to be resolved. Counsel, in a third letter dated April 23, 2018, submitted an affidavit by the store owner admitting to offering credit and stating that due to the delay in the FOIA appeal that he no longer has any records. None of counsel's responses requested or included documentation in support of a CMP. Upon receipt of Appellant's response, the Retailer Operations Division requested evidence of credit accounts by letter dated May 23, 2018, that was received by counsel's firm on the following day. Appellant failed to respond to the request for evidence of credit accounts. The Retailer Operations Division notified Appellant by letter dated June 11, 2018, that the firm was permanently disqualified from participation as a SNAP retailer in SNAP in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter dated June 18, 2018, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. Subsequent correspondence dated July 18, 2018, 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 SNAP benefits.

7 CFR § 278.6(a) states: “FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system.”

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.” Trafficking is defined in part as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food”. Trafficking includes “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: “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: “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 a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the specified 10 days, 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 three month period of July 2013 through September 2013. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from individual benefit accounts in unusually short time frames.
2. Excessively large purchase transactions were made from recipient accounts.

APPELLANT'S CONTENTIONS

The following 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:

- The store owner would routinely let several customers with whom he had developed a relationship with shop whenever they did not have any benefits available and he would keep a running bill for them until they received their benefits. They would shop two or three times over the course of three to four weeks adding to their tab and when they received their benefits would pay the full amount off which may have accumulated
5 U.S.C. § 552 (b)(6) & (b)(7)(C);
- Due to the passage of close to four years, the owner no longer possesses the records from the alleged period of trafficking; and,
- The owner states he did not commit trafficking, nor has he violated the SNAP provisions in any way.

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

ANALYSIS AND FINDINGS

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. Nevertheless, transactions having such characteristics are sometimes valid and sufficient evidence that support that they were the result of legitimate purchases of eligible food items is provided. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited and to provide evidence that they are legitimate.

Retailer Operations 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 Appellant's store 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

FNS authorized the firm as a convenience store on June 7, 1999. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a November 14, 2013, 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 suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a typical convenience store offering a very limited quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- 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.
- The store visit report specifically noted that the firm was not a specialty store and that there were no meat bundles or fruit and vegetable boxes for sale.
- The firm had a very limited stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, baked goods, and other drinks as well as many ineligible items.
- The store visit report and photos showed no shopping carts and only three small handheld baskets for customer use making it difficult for them to move large amounts of food to the checkout area.
- The two checkout areas share the same counter space that is approximately 2.0 feet deep and 3.5 feet wide with displays, PIN pads, and scanners taking up space on both sides reducing the available area for customers to place their purchases. The small size of the checkout area would make it problematic to process large orders. The checkout counter had two cash registers, an optical scanner, and two POS terminals.
- The store had no fresh unprocessed meat/seafood, no frozen unprocessed meat/seafood, a very limited quantity and variety of processed meats and seafood (limited quantities of canned meat/poultry/fish, hot dogs, bacon, packaged lunch meats, and frozen processed chicken), no deli meats, no sausages, limited quantities of jerky, minimal frozen entrees, no frozen dinners, only three cartons of eggs, very limited quantities and varieties of fresh fruits and vegetables, no frozen fruits and vegetables, a limited stock of single serving packaged nuts, a limited stock of canned soups, a very limited quantity and variety of canned and packaged staple food items, no tortillas, no tamales, only one package of corn meal, only four packages of rice, a limited stock of uncooked pasta/noodles, a limited quantity and variety of cold cereal, no hot cereal, many single serving noodle soups, many single serving cold cereals, no baby cereal, no deli cheese, limited packaged cheese, no butter, limited margarine, yogurt, no baby foods, no infant formula, and very few expensive eligible food items.
- Ineligible items included: tobacco, tobacco accessories, lottery, hot foods, hot drinks, health and beauty items, household products, paper products, auto products, pet products, clothing, toys, fresh flowers, magazines, greeting

cards, diapers, & cell phone accessories while accessory foods included: candy, condiments, tea, cocoa, coffee and un/carbonated drinks.

- Signage was in English and no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) were visible in the store.
- The firm's hours of operation were 6 AM-12 AM daily.
- Many food items were priced with almost all visible staple food prices ending in .x9 cents except for a very limited number of items priced differently such as some candy bars priced at \$1.25, breakfast burritos priced at two for \$3.00, some snacks priced at \$3.25 and two for \$1.00, and bananas priced at three for \$1.00. A price ending in .x9 cents is the most common pricing structure for stores of this type.
- There were very few items priced for more than \$5.00 such as coffee priced at \$6.19 and \$5.99, Red Bull priced at \$6.99, and ice cream priced at \$5.49.
- The firm was not a WIC vendor.

Multiple transactions in unusually short time frames

This Attachment documents 120 individual transactions in 49 sets of two or more transactions conducted by 29 different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The dollar amounts of the subsequent transactions in each set are all substantial and they nearly equal or exceed the dollar amount of the initial transaction in 40 of the 49 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Three sets are comprised of four individual transactions, 16 sets are comprised of three individual transactions, and the remaining 30 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. 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. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant provided no documentation or explanation to support the legitimacy of the listed transactions in this Attachment.

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 convenience 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. However, it is unusual that the subsequent transaction dollar amount is for a substantial amount in all of these transaction sets and that they nearly equal or exceed the dollar amount of the first transaction in 40 of the 49 sets. It is also unusual based on the firm's limited staple food stock that all of the transaction sets in this Attachment 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average convenience store SNAP

transaction dollar amount in Suffolk County during the period under review was \$7.76. These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high dollar value transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. The likelihood that approximately one out of every 10 individual transactions ends in .00 cents combined with 12.24 percent of the 49 transaction set totals ending in whole dollar amounts is further evidence that these transaction amounts were likely contrived by store employees as it is statistically improbable that these amounts would occur randomly based on the store's pricing structure of most food items ending in .x9 cents. The store's very limited stock of eligible staple food items combined with the lack of expensive food items also makes it highly unlikely that these high dollar value transactions could be supported by store inventory. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby like type grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review.

FNS Retailer Operations Division staff conducted an analysis of the shopping patterns for households listed in the charge letter attachments. This analysis shows that these households 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, including a variety of super stores and supermarkets. These households frequently shopped at these much large stores on or about the same day as shopping at the Appellant firm where they were conducting larger dollar value transactions. Appellant offers no explanation or rationale as to why households who are shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases totaling to high dollar values at a convenience store with very limited staple food stock. Common sense dictates that it is improbable that households would choose to spend large dollar amounts at the Appellant firm if their purchases consisted solely of eligible food items that could be purchased at any of the super stores and/or supermarkets they were already regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant firm.

There may be legitimate reasons why a SNAP household might return to a store during a short period of time, but the examples in this Attachment indicate a series of SNAP purchases that total to large dollar amounts. Multiple transactions over a short period of time, especially those of high dollar values, are indicative of attempts to obscure trafficking by dividing a large dollar value transaction into a series of smaller dollar value transactions and are a method which violating stores use to avoid high dollar transactions that cannot be supported.

High Dollar Value Transactions

This Attachment lists 399 individual EBT transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). There are 27 transactions ending in a whole dollar amount that are not supported by store inventory or pricing. The substantial number of high dollar value transactions is uncharacteristic for a convenience store offering a very limited 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 \$7.76 for this store type in Suffolk County. The 399 excessively large SNAP EBT transactions at Appellant's firm for the

review months represents 30.59 percent of all SNAP redemptions at Appellant's firm during the period under review. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores, located nearby as well as at a distance that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the Appellant firm. The large dollar transactions remain questionable when considering the proximity of these other 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 firm, where the eligible food stock is limited,

5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at larger stores.

While households residing in areas with extremely limited grocery store options may conduct high dollar value transactions at convenience stores out of necessity, this is not the case when households have better alternatives. FNS records show there are 68 comparably sized or larger SNAP retailers located within a one mile radius of Appellant that includes two super stores, two supermarkets, two medium grocery stores, and 20 small grocery stores that offer greater quantities and varieties of staple food items at lower prices than would be found at a minimally stocked convenience store offering no fresh or frozen unprocessed meats or seafood and very limited fresh and no frozen produce. The closest super store is located 0.4 miles from Appellant's location and the closest small grocery store is only 0.19 miles or two blocks away.

The difference in the average SNAP transaction dollar amount and the total SNAP transaction dollar volume for Suffolk County convenience stores during the review months and at the Appellant firm is significant. 5 U.S.C. § 552 (b)(7)(E). Additionally, none of these nearby stores exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant firm 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 convenience stores in Suffolk 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 like type 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 admits that the store owner would routinely let several customers with whom he had developed a relationship with shop whenever they did not have any benefits available and he

would keep a running bill for them until they received their benefits. They would shop two or three times over the course of three to four weeks adding to their tab and when they received their benefits would pay the full amount off which may have accumulated

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant offered no other explanations for the excessively large transactions in this Attachment. Credit will be discussed in greater detail later in this decision.

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 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 firm. It makes 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 firm since its cost of goods would be higher than that of larger stores such as supermarkets or super stores. These households also appear to have no transportation issues as evidenced by their shopping patterns.

Information obtained during the FNS store visit on November 14, 2013, shows that the Appellant firm offers a very limited quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Because much of the inventory for sale consists of inexpensive snacks, candy, beverages, and single serving foods as well as many ineligible items and very few expensive eligible food items, these patterns are deemed to be suspicious.

Increasing food prices make it even more unlikely that SNAP recipients, with very limited food benefits, would want to spend a considerable part of their benefits in a convenience 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 built-in 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 firm has a small checkout area and no shopping carts 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.

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

Credit Contentions

Appellant contends the firm allows credit accounts as evidenced by the store owner's affidavit, a violation of SNAP regulations at Section 278.2(f), and the affidavit also states that the owner has not violated SNAP provisions in any way. Specifically, the affidavit states that the owner would routinely let several customers with whom he had developed a relationship with shop whenever they did not have any benefits available and he would keep a running bill for them until they received their benefits. They would shop several times adding to their tab and would pay the full amount off which could have accumulated 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

While store ownership may or may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom store ownership may utilize to handle store business or their degree of involvement in store operations, the owner is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. When the owner signed the certification page of the SNAP retailer application to begin operating as a SNAP retailer and again when he signed the reauthorization application, he confirmed he understood and agreed to abide by program rules and regulatory provisions. He agreed to accept responsibility for SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. This certification page specifically cites violations such as accepting SNAP benefits as payment on credit accounts or loans. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. Despite agreeing to abide by SNAP rules and regulations, ownership now admits that the firm allowed credit accounts, a clear violation of SNAP regulations and rules. Additionally, the SNAP Retailer Training Guide and the training video, provided to all retailers upon initial authorization, are also available on the FNS retailer web site that contains the online SNAP retailer applications. Both the guide and video cite credit accounts as violating SNAP regulations. Had store ownership read the SNAP training materials provided by FNS or trained his employees using these materials within 30 days of SNAP retailer authorization, as required, it is inconceivable that he could not have been aware that credit accounts violated SNAP regulations.

The owner's admission to extending credit is documented in the case file under review and is not contested. Accepting SNAP benefits for payment on credit is a violation of Section 278.2(f) and warrants a one year disqualification period as specified by Section 278.6(e)(4). It is the agency's position that credit violations constitute owner or management involvement and that a one year disqualification is the base sanction. To refute charges of trafficking, the retailer must provide adequate proof that credit accounts existed at the time the suspicious transactions occurred so that a comparison can be made with transactions outlined in the charge letter. A level of detail regarding the legitimacy of credit accounts is necessary since retailers have long admitted to credit in an attempt to garner a lesser penalty after committing more egregious violative acts. Credit transactions must be accounted for with substantive evidence such as the dates credit was extended, to whom, for what amount, and for what items. If such exculpatory evidence is not advanced, the appropriate penalty is permanent disqualification.

In support of the admission to accepting SNAP benefits for payment on credit accounts, a program violation, Appellant contends that due to the passage of close to four years, the store owner no longer possesses the records from the alleged period of trafficking. Regarding this

statement, it makes no sense that the owner, who had already been charged with trafficking, would not have retained store records that could have helped his case. It also is unbelievable that the owner was unable to submit any documentation, such as customer statements, to support the existence of credit accounts despite having stated that these accounts involved customers with whom he had developed a relationship and extended them credit because they had no SNAP benefits remaining. Based on the lack of any evidence, it seems more likely than not that the owner is now claiming credit in an attempt to receive a lesser penalty

Appellant was unable to provide substantial evidence that the firm permitted credit accounts during the review period. Since Appellant was unable to account for any of the charge letter transactions as being due to credit, the original determination made by the Retailer Operations Division was evaluated to determine if trafficking occurred. The transactions showed clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity indicative of trafficking as previously discussed.

Other Contentions

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the 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. 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.

The owner and the firm were charged with trafficking based on a computer analysis of the store's transactions for the months of July 2013 through September 2013. 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 and U.S. District Courts have long upheld the validity of EBT transaction data.

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 disqualify 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". SNAP regulations at 7 CFR § 278.6(a) clearly state that "FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, 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”. In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant firm during the review period. 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 review period. All of the transactions were then reviewed and analyzed by the Retailer Operations Division 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, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant firm 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 Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not 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 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 did not request a trafficking CMP in lieu of a disqualification nor did it make any mention of how the business met any of the four criteria needed to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the timeframe specified in the charge letter. No documentation or other evidence was received from Appellant in support of a trafficking CMP. Therefore, Appellant failed to meet the regulatory standard for a trafficking CMP required by 7 CFR §278.6(i).

CONCLUSION

The Retailer Operations Division presented a case that Appellant has likely trafficked in SNAP benefits. Their 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 consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in two 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. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a trafficking CMP according to 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

October 29, 2018