

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

A and H Super Market LLC #1,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0199159

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of A and H Super Market LLC #1 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 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against A and H Super Market LLC #1 (hereinafter referred to as A and H Super Market or “Appellant”).

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 May 9, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations,

based on a series of irregular SNAP transaction patterns that occurred during the months of October 2016 through March 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated the Appellant had the right to respond to the charges within 10 days of receipt to provide explanations for the irregular SNAP transaction patterns. The letter also stated that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

The Appellant replied to the charges in a fax on May 13, 2017. The Appellant stated that an employee was “doing things he was not supposed to do” when the owner was absent. The store owner stated she fired the employee after receiving the charge letter. The owner also states she was not aware that the transactions cited in the charge letter were being run. The Appellant did not request a trafficking CMP under 7 CFR § 278.6(i) within ten (10) days of receiving the charge letter.

After considering the evidence in the case, the Retailer Operations Division issued a determination letter dated July 12, 2017. The determination letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that 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. The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP 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 violations of the SNAP.

In a letter dated July 20, 2017, the Appellant, through counsel, requested an administrative review of the Retailer Operation Division’s determination. The request for administrative review was granted.

On August 31, 2017, the Appellant, through counsel, submitted a Freedom of Information Act (FOIA) request to FNS. As a result of the FOIA request, the administrative review was held in abeyance pending the agency’s official FOIA response which was delivered to Appellant’s counsel on November 7, 2017. The Appellant was then provided additional time to provide its contentions, evidence and any new information in support of the administrative review.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means an appellant has the burden of providing relevant evidence which a

reasonable mind, considering the record as a whole, might 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 covered in the Food & 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(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 or selling of ... [SNAP] benefits for cash or consideration other than eligible food

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(a) states, *in part*:

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

7 CFR § 278.6(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.

7 CFR § 278.6(b)(2) states, in part:

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

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

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from October 2016 through March 2017. This involved the following transaction patterns which are trafficking indicators:

- **Charge Letter Attachment 1:** There were an unusual number of transactions ending in a same cents value. This attachment lists 241 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- **Charge Letter Attachment 2:** Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment lists 51 sets of 113 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- **Charge Letter Attachment 3:** Excessively large purchase transactions were made from recipient accounts. This attachment lists 241 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- The Appellant generally denies trafficking in SNAP benefits and states that the transaction patterns detailed in the charge letter are explainable by the store inventory, geographic area, and various local conditions and shopping habits of its clientele.
- The agency's ALERT system is over utilized by the USDA. The ALERT system fails to account for special business practices, differences in demographics, foodstuff and geographic areas.
- The on-site inspection appears to have missed a substantial portion of the storage areas, and limited the store sketch to just that space which is available for customers to walk through. The Appellant has submitted a far more specific outline of the store, which includes the stairs to the basement and the storage room behind the deli counter, which is about 333 square feet in size. The basement is roughly the same size as the storage room. The pictures submitted by the store depict the back storage room and the basement where it keeps its canned foods, drinks and other food items.
- Regarding the same cent transactions, items like cereal (3 for \$10) account for most if not all of the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transactions. There are other sales that occur regularly on soda and drinks (2 for \$5), or a variety of foods that are put on special by telling the customers verbally. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The transactions cited in Charge Letter Attachment 2 are explainable by the following conditions and trends:
 - It is not uncommon for Appellant's SNAP clientele to make multiple purchases in a short period of time after the customer receives his or her benefits. Often, the participants realize after they've left the store (and made their initial purchase) that they've forgotten a grocery item, or have decided that they wanted to purchase items they saw during their first trip through the store, but originally opted not to purchase.
 - Due to the increasing trend of co-shopping, different household members will shop separately for different food items using the same card, or different household members will travel to the store together and make separate purchases using the same card in order to track of what each party uses. Multi-generational households have different shopping priorities, and because their benefits are awarded together, they are portioned out among the household members to permit purchase flexibility.
 - In yet other circumstances, the participants will go on a spending spree wherein they make purchase after purchase after purchase

- without leaving the store, or by returning after a brief absence, thereby reducing their benefits in short order.
- Stores with a limited variety of main food items are seeing an increase in visits by consumers using them as their primary grocer. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Appellant store fits into this niche.
- A considerable portion of the store's customers walk to the store for several reasons, such as convenience, food inventory, the safety of their children or due to a lack of transportation. When a lack of transportation is the issue, recipients will make a second visit to the store to carry food they could not transport during the first visit.
- Affidavits were submitted by recipients who indicated that they routinely and legitimately conducted multiple purchases within a short time frame.
- The transactions cited in Charge Letter Attachment 3 are explainable by the following conditions and trends:
 - The Appellant stocks a variety of basic grocery foods including: fresh vegetables and fruit, nuts, candies, chips, canned meat, bakery cakes, canned vegetables, bread products, eggs, milk, yogurt, rice, beans, cooking oils, coffee, tea, assorted nuts, sugar, flour, cereals, and other items, along with fresh beef, pork, chicken, turkey, and deli meat. These foods are offered at lower prices than the surrounding stores.
 - The store sells expensive items such as Similac, a gallon of Goya Oil at \$24.99, jasmine rice and other types of rice at \$19.99 for a 25 lb. bag and \$35.49 for a 50 lb. bag.
 - Half of the store food inventory is ethnic and includes maizena, farina, Goya products, plantains, sofrito, canned Spanish vegetables and fruits throughout the store.
 - Signed affidavits from nine (9) store SNAP customers attest to the fact that they regularly shop at the store and make large dollar food purchases.
 - The store has more than sufficient inventory to account for a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) purchase. This is supported by the store's inventory for which invoices and pictures have been furnished.
 - In this instance, FNS doesn't have a meaningful comparison store to A and H Super Market and thus doesn't have any context to conclude that the transactions cited in the charge letter are excessively large or irregular.

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

ANALYSIS AND FINDINGS

Authorization History

The Food & Nutrition Service (FNS) authorized A and H Super Market for the SNAP on August 6, 2013. The owner signed the SNAP application for the store on May 7, 2013 and acknowledged that the owner was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking.

During the review period of October 2016 through March 2017, the Retailer Operations Division classified A and H Super Market as a small grocery store. A review of the case record indicates that FNS properly classified A and H Super Market as a small grocery store during the review period.

Store Visit Report

The case record documents that, in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a December 10, 2016 store visit conducted by an 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 store’s irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- A and H Super Market is approximately 700 square feet in size and operates out of a corner building in an urban commercial area.
- The store had one (1) cash register and one (1) point-of-sale device.
- The store had no optical scanners or conveyor belts at the checkout.
- The store had no shopping carts and only a few handheld shopping baskets for customer use.
- There was no food stored outside of public view in a storage area.
- There were no large bulk foods, international or specialty foods that might sell for a high price. There were no fresh meat/seafood bundles or large boxes of fresh fruit and vegetables for sale. The store did have a limited to moderate amount of infant formula and some large bags of rice.
- The checkout area consisted of a small countertop at a window surrounded by plastic shelving containing candy and snack products for sale. On the countertop there was a PIN pad, a large jar of pickles and

other jars containing what appears to be cookies or snack items. In front of the checkout counter there was a large reach-in cooler containing single-serving ice cream products. The very limited space at the checkout area made it not conducive to conducting large transactions.

The inventory of food items at the time of the store visit was typical of a small grocery store with a limited selection of staple food stock. The SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. Accessory food items included, but were not limited to: coffee, tea, carbonated and non-carbonated drinks, condiments, and spices. This store has a small deli section with deli meats and cheeses by the pound, but no prices were filled in on the sign above the deli counter. The deli section was also used for SNAP ineligible made-to-order sandwiches not intended for home preparation and consumption. The stocked ineligible items included tobacco products, health and beauty products, paper goods, cleaning products, general houseware, and cell phone accessories.

The Appellant notes that the store visit report did not include a description or pictures of the basement and storage area where additional food items were kept. It is true that store visit contractors do not normally review areas outside of the normal view of customers which include backroom storage areas due to security and safety concerns. Instead, the store visit contractor will ask store personnel if there is such a storage area containing food. If told yes or no during the interview, the store visit contractor will make that notation on the store visit form as well as any other information provided by store personnel. Based on the additional information including the pictures submitted by the Appellant, the Retailer Operations Division does not contest the Appellant's assertion that it has a storage area and basement where additional food may have been kept. However, these storage areas appeared to contain mostly low cost canned goods and drinks without any expensive items such as fresh meat/poultry/seafood bundles or other items that could explain the store having SNAP transactions amounts greatly exceeding those of other small grocery stores in the area.

Given the available inventory as noted above, there is no indication from the store visit report that the store would be likely to have SNAP transaction patterns significantly different from similar-sized competitors. In addition, the store pictures provided by the Appellant of the areas accessible to customers are substantially the same as those taken during the store visit and do not show any food for sale in bulk, specialty food or international food that would sell for a high price.

ALERT System

The Appellant makes multiple contentions regarding the limitations of the agency's ALERT system and states it is relied upon too heavily by the agency. With regard to these contentions, it should be noted that the ALERT system is a computerized fraud detection tool to identify SNAP transactions that form patterns having characteristics indicative of trafficking. However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still conduct an extensive analysis of the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior, local conditions, and a comparison of similar stores in the area using transaction data from the same review period, and render a determination whether the questionable transactions were, more likely than not, the result of trafficking. Lastly, the Appellant is always given a chance to explain the specific transaction patterns before the determination letter is issued and during the administrative review. A review of the case file documents that the Retailer Operations Division appropriately considered those additional factors referenced by the Appellant including business practices, demographics, foodstuff and geographic location before issuing its determination letter. The Retailer Operations Division also reviewed the new information and contentions supplied by the Appellant's counsel and concluded that the evidence in the case still supported a permanent disqualification decision.

The legality of this methodology is supported by 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, **evidence obtained through a transaction report under an electronic benefit transfer system**" [Emphasis added.]

The Appellant further cites some case law which it claims supports its position on the ALERT system. Although the Appellant may disagree, considerations of legal precedent through case law, or the lack thereof in relation to the present case, is beyond the scope of this review. Instead this administrative review is limited to whether the Retailer Operations Division appropriately followed the Food and Nutrition Act of 2008, as amended, and the regulations promulgated under the Act, and whether the action taken is sustainable by a preponderance of the evidence. Therefore, any application of a supposed judicial precedent would best be addressed in a judicial review in a court of law. Accordingly, no further findings or conclusions are rendered in this regard.

Same Cent Transactions

Charge Letter Attachment 1 lists 241 transactions
5 U.S.C. § 552 (b)(6) & (b)(7)(C). During the review period, A and H Super Market conducted 4,340 SNAP transactions. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C). When such repetitive patterns are unsupported by special pricing structures they are an indicator of trafficking in SNAP benefits.

The Appellant states that items like cereal (3 for \$10) account for most if not all of the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transactions. There are other sales that occur regularly on soda and drinks (2 for \$5), or a variety of foods that are put on special by telling the customers verbally. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Pictures of these pricing amounts are shown in both the store visit report and the pictures supplied by the Appellant.

Based on the store visit report, there was some evidence that the Appellant store had specials that could account for many of the transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). While there is no evidence that the store had a special pricing policy, there was also little evidence to determine the overall pricing structure that existed in the store. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Due to the overall lack of evidence in the case regarding store pricing it cannot be shown by a preponderance of the evidence that the transaction patterns cited in Charge Letter Attachment 1 are due to the store trafficking in SNAP benefits.

Multiple Transactions by the Same Household

SNAP households have no limit on the number of times they may use their SNAP cards or how much eligible food they may purchase. However, 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 a small grocery store's stock and facilities and are thus indicative of trafficking. It is also noteworthy that every single transaction in each group of transactions cited in the charge letter exceeds the average for a Philadelphia County small grocery store during the review period.

Violating stores often conduct split multiple transactions from the same household account as a method to avoid the detection of single high dollar transactions that cannot be supported by the retailer's food inventory and infrastructure. Charge Letter Attachment 2 lists 51 sets of 113 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E). It is not credible that a household shopping at A and H Super Market would have multiple suspicious SNAP transactions each exceeding the average SNAP transaction of a supermarket or superstore in Philadelphia County during a short time period.

The Appellant states that it is not uncommon for SNAP customers to make multiple purchases in a short period of time after the customer receives his or her benefits. Often, the participants realize after they've left the store (and made their initial purchase) that they've forgotten a grocery item, or have decided that they wanted to purchase items they saw during their first trip through the store, but

originally opted not to purchase. Regarding this contention, while it is possible that a SNAP recipient could forget an item or two and make a second purchase, it is very unlikely that the second or succeeding purchase would greatly exceed the average for a SNAP authorized small grocery store in Philadelphia County during the review period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Appellant contends that, in other instances, multiple members of the same household will shop together and then make their purchases separately (using the same account and card) in succession. Allegedly, multi-generational households have different shopping priorities, and because their benefits are awarded together, they are portioned out among the household members to permit purchase flexibility. To support this contention, the Appellant references a 2016 Food Marketing Institute study of grocery shopping trends. FMI stated that this report is based on online surveys of 2,061 U.S. shoppers, at least 18 years of age, who claimed to be responsible for at least 50 percent of the household's grocery shopping. In addition, the researchers also completed one-on-one interviews with a small sample of consumers located in Seattle, Washington. It should be noted that the FMI study is based on a sampling of all households and does not mention SNAP households at all. In addition, the study contains no reference to households conducting multiple large dollar transactions at the same store within a short time period. Therefore, it appears the Appellant has taken an overly broad interpretation of this study in order to justify the transactions cited in the charge letter.

Nevertheless, the survey states that out of all households, 45% are multiple-person households with a primary shopper, 9% are multiple-person households with a secondary shopper, and 22% are multiple-person households with an equal-share shopper. (The remaining 24% are shoppers in single-person households.) However, even if these statistics applied to SNAP households, it would not justify the transactions cited in the charge letter. SNAP households are defined by regulation as households that purchase and prepare food together, and there would be no need for different household members to obtain a separate receipt if shopping together at the same time at the same store. Households that purchase and prepare meals separately are considered separate households and would have their own EBT card with a different account number. The Appellant has offered no evidence such as itemized cash register receipts or other documentation to support its contention that these were legitimate transactions.

The Appellant claims that, in other circumstances, SNAP recipients will go on a spending spree wherein they make purchase after purchase after purchase without leaving the store, or by returning after a brief absence, thereby "reducing their benefits in short order." The Appellant offers no evidence to support this contention. Although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend large amounts of their monthly benefits in multiple transactions within a short time frame at a

single small grocery store. Depleting one's allotment in such a manner is inconsistent with the normal shopping behavior of SNAP benefit households.

The Appellant states that stores with a limited variety of main food items are seeing an increase in visits by consumers using them as their primary grocer. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Appellant states that A and H Supermarket fits into this niche. Regarding this contention, A and H Supermarket is a small grocery store and not a convenience store. Although A and H Super Market sells some low cost common food products marketed to Hispanic customers, it does not appear to stock expensive international foods that sell for a high price and is unlikely to be considered an "ethnic" store primarily catering to a specific clientele. Even if A and H Super Market had seen a small percentage increase in customers, it would be unlikely to explain the irregular transaction patterns cited in Charge Letter Attachment 2.

The Appellant states that a considerable portion of the store's customers walk to the store for several reasons, such as convenience, food inventory, the safety of their children or due to a lack of transportation. Allegedly, when a lack of transportation is the issue, recipients will make a second visit to the store to carry food they could not transport during the first visit. However, while such circumstances may legitimately lead to additional trips to shop, it would be unlikely to result in multiple transactions involving large dollar purchases greatly exceeding those of a small grocery store. In addition, such large purchases would involve the purchase of multiple food items that could not be easily carried home without transportation whether on the first or second trip.

The Appellant submitted nine (9) signed non-notarized statements from SNAP recipients who allegedly shopped at the store. Each statement claimed that they made frequent purchases at the store often within a few days. Utilizing the names and addresses provided on these statements, the Retailer Operations Division searched the Pennsylvania SNAP database to identify the households and review their certification and redemption history. Contrary to the customer statements, only one (1) of the nine (9) households had repeat large dollar transactions within a short time frame at A and H Super Market. Two (2) of the households did not make any SNAP purchases at the store during the review period.

The remaining households shopped at the store but did not make large repeat purchases at the store in a short time period. Based on this analysis, the customer statements do not support the Appellant's contentions but appear to be further evidence of the irregular nature of the transactions cited in Charge Letter Attachment 2.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). However, the Appellant's explanation is mere speculation and the Appellant offers no evidence such as itemized cash register

receipts or other documents that could explain this set of excessively large transactions.

In summary, the store visit pictures show that it is unlikely that SNAP customers would want to shop at this store multiple times during a short time frame, or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale. In addition to the store's limited counter space which is unsuitable for repeated large transactions, A and H Super Market has only a limited number of handheld shopping baskets and no shopping carts for transporting food within the store. Based on the analysis above, and in the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

Excessively Large Transactions

SNAP households have no limit on the amount of eligible food they may purchase (subject to the remaining balance on the card). However, 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 a small grocery store's stock and facilities and are thus indicative of trafficking.

Charge Letter Attachment 3 cites 241 SNAP transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E). It is possible that A and H Super Market might have slightly higher SNAP transactions than the average for other SNAP authorized Philadelphia County small grocery stores. However, it is not likely that A and H Super Market would have transactions which significantly exceed the average transactions for a SNAP authorized supermarket or superstore in Philadelphia County during the review period.

The store visit pictures show that the store layout is not conducive to these excessively large transactions. A and H Super Market has no shopping carts and only a few handheld shopping baskets for transporting food around the store and the checkout counter space is extremely limited. In addition, the store's stock is mainly inexpensive snack foods, canned/packaged foods and accessory food items. There are only a few more expensive items such as bags of rice and infant formula. However, as noted above, A and H Super Market does not have any bundles of fresh meat or seafood, food for sale in bulk, expensive international items, or any other food items that would justify high dollar transactions atypical of a small grocery store.

The Appellant states that half of the store food inventory is "ethnic" and includes maizena, farina, Goya products, plantains, sofrito, canned Spanish vegetables and fruits throughout the store. A review of the store visit pictures does not fully

support this contention. The majority of the food items in the store consist of canned and packaged goods, deli foods, accessory food items, candy and snack foods that are not specific to any particular “ethnic” group. Even the items listed by the Appellant as “ethnic foods” are not expensive international items but are low cost products marketed to Hispanic customers but consisting mostly of common products (e.g., corn, beans, beets and rice) that any shopper might buy. These items are not sufficient to explain the excessively large dollar transactions cited in Charge Letter Attachment 3.

The Appellant submitted nine (9) signed non-notarized statements from SNAP recipients who allegedly shopped at the store. Each statement claimed that they made large purchases of food at the store with six (6) claiming amounts 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Utilizing the names and addresses provided on these statements, the Retailer Operations Division searched the Pennsylvania SNAP database to identify the households and review their certification and redemption history. Two (2) statements were from SNAP recipients who never shopped at the store during the review period. Contrary to the customer statements, only four (4) of the nine (9) households had large dollar transactions at A and H Super Market that were cited in the charge letter.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). In addition, two (2) of these recipients lived from five (5) to twelve (12) miles away from the store and were bypassing better stocked supermarkets and superstores to conduct excessively large transactions at A and H Super Market. Based on this analysis, the customer statements do not support the Appellant’s contentions but appear to be further evidence of the irregular nature of the transactions cited in Charge Letter Attachment 3.

The Appellant claims that the store has more than sufficient inventory to account for a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) purchase and that this is supported by the store’s inventory for which invoices have been furnished. A review of the case record documents that the Retailer Operations Division concluded that the invoices from the review period fell far below the SNAP redemption total during the review period even after adding a 40 percent markup. The Appellant does state that it did not provide all purchase invoices from the review period and correctly notes that firms are not required to maintain purchase invoices. However, even if the Appellant had provided all of its invoices, and it could be shown that there was sufficient food to support the store’s SNAP redemptions, it would still not explain the irregular transactions cited in Charge Letter Attachment 3. This is because violating stores often conduct trafficking transactions with only a few trusted households. In such cases a store could be trafficking and still have sufficient inventory to support all of its sales whether by SNAP benefits, cash or credit card sales. In conclusion, the invoices provided by the Appellant do not provide any probative evidence in this case.

The Appellant states that FNS does not have any meaningful comparison stores in this case and therefore has no context to conclude that the transactions are irregular. The Appellant further alleges that comparing the data from nearby

stores to the Appellant store's data is flawed because it does not take into account intimate details about the comparison stores, such as bad customer service, spoiled food or food specials. Regarding this contention, the Retailer Operations Division properly concluded that there is nothing unique about A and H Super Market that would cause it to have such excessively large transactions even exceeding those of a superstore or supermarket in Philadelphia County. In contrast, the Appellant has presented no evidence to support its contention that the Appellant store provides exceptional service or food specials and is merely offering speculative conclusions in order to justify the excessively large transactions.

It is true that a store may have higher than normal SNAP transactions due to the lack of other SNAP authorized stores in the area. However, the Retailer Operations Division determined that within a one-mile radius of A and H Super Market there are 33 comparable or larger SNAP authorized stores including four (4) supermarkets and two (2) superstores. A government report on SNAP benefit redemption patterns¹ revealed that households most often redeemed their benefits at supermarkets and superstores with only four (4) percent of all households never shopping in a supermarket or superstore. Thus, when a supermarket or superstore is available, it is highly unlikely that a SNAP recipient would conduct excessively large SNAP transactions at a small grocery store with a limited selection of staple foods like A and H Super Market.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the very limited counter space for checking out and the lack of shopping carts support the Retailer Operations Division determination. Based on a preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 3 are more likely than not the result of trafficking in SNAP benefits.

Owner Accountability

The Appellant in its initial response to the charge letter stated that an employee was "doing things he was not supposed to do" when the owner was absent. The owner stated she was not aware that the transactions cited in the charge letter were being run.

Although the owner was allegedly not involved in the violations, it cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. Regardless of whom the owner of a store may utilize to handle store business, the owner is accountable for the proper training of staff and

¹ "Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program," report prepared by Mathematica Policy Research for the Food and Nutrition Service, February 2011.

the monitoring and handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons whom the owner chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. As noted above, the store owner signed the FNS application to become a SNAP authorized retailer on May 7, 2013. That application included a certification and confirmation that the owner would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.”

Corrective Action

The store owner stated that she fired the employee who conducted the transactions after receiving the charge letter. With regard to this contention, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier determination of the Retailer Operations Division. This review is limited to what circumstances existed at the time that was the basis of the Retailer Operations Division’s action. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that a store may begin to comply with program requirements.

In addition, there are no provisions in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of alleged or planned corrective actions implemented subsequent to findings of program violations. Therefore, the Appellant’s contention that corrective action has taken place does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

The Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i) even though it was informed of the right to do so in the charge letter. Therefore, under the regulations at 7 CFR § 278.6(b)(2) the Appellant is not eligible for a trafficking CMP. Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program prior to the violations. Therefore, the Retailer Operations Division’s decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify the retailer. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. 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.

In the absence of any reasonable explanations 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. 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 determined by the Retailer Operations Division. Based on the discussion above, the decision to impose a permanent disqualification against A and H Super Market LLC #1, Appellant, is sustained.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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, 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.

RONALD C. GWINN
Administrative Review Officer

January 31, 2018