

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

Avalon Food Mart,

Appellant,

v.

Case Number: C0207940

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 Avalon Food Mart (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 July 25, 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 April 20, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in December 2017 through March 2018. 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 responded to the charges in a letter dated April 24, 2018, that admitted to offering credit. Upon receipt of Appellant's response, the Retailer Operations Division requested evidence of credit accounts by letter dated April 26, 2018, that was received by the firm on the following day. Appellant responded to this request in correspondence submitted via fax on April 30, 2018, and also provided invoices/receipts for inventory purchases in a letter dated May 21, 2018. The Retailer Operations Division notified Appellant by letter dated July 25, 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 July 30, 2018, Appellant appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. Subsequent correspondence was received.

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 four month period of December 2017 through March 2018. 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 owners have done nothing wrong to the best of their understanding and knowledge. There were some large transactions that would not normally occur in a small store because the area is still recovering from Hurricane Harvey and a major flood that occurred in late 2017;
- The owners took compassion on their many long-time customers who were displaced by allowing them to charge food on credit. These customers had not received replacement EBT cards, had not yet received SNAP benefits, or did not have sufficient benefits remaining. The amounts the customers promised to pay were written down on

slips of paper that were returned to them when they paid their balance. No cash or non-food items were purchased on credit. No credit records were kept and the POS was wiped-out during the flood. The owners had numerous problems at that time with the store drying out and phone problems;

- Many customers had no transportation and the store was the closest grocery to them. The local Health and Human Services Office was temporarily closed due to the flooding;
- The owners are replacing the register/POS system with a new system that can be programmed to accept SNAP EBT. Each inventory item can be coded as to whether or not it is SNAP eligible and reports will also be available. The coding will begin in a few weeks and will allow the owners to be in full compliance with SNAP rules; and,
- The owners claim ignorance and extenuating circumstances in doing what was morally right. They have not had any prior problems and this is an anomaly. They did what they felt was the right thing by helping people when they needed food.

Appellant submitted links to newspaper articles on the flooding 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.

The Retailer Operations Division presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at 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 initially authorized the firm on May 7, 2013. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a January 18, 2018, 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 firm's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a sizeable convenience store offering a very limited quantity and variety of staple foods and carrying no other unique items or offering any distinctive services.

- The store stocked traditional American brands and had no ethnic food or specialty foods.
- The store visit report and photos showed no shopping carts or hand baskets for customer use thus severely limiting the amounts of food that could be moved to the checkout.
- No food packages, bundles, case sales, bulk items, or other sales were evident that would explain the unusual transactions and no cased items outside of drinks were for sale.
- 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 sole checkout area was approximately 2.0 feet deep and 2.0 feet wide with displays and PIN pads taking up space on both sides leaving extremely limited space for customers to place their purchases. The checkout area had one cash register, an optical scanner, and a POS terminal as confirmed by the store owner.
- The store 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, and other drinks as well as many ineligible items.
- The store had no fresh unprocessed meat or seafood, no frozen unprocessed meat or seafood, an extremely limited quantity and variety of processed meats (canned meat/poultry and jerky only), no bacon, no packaged lunch meat, no deli meats, no hot dogs, no sausages, no processed seafood except for canned fish, no frozen entrees, no frozen dinners, only two cartons of eggs, an extremely limited selection of fresh fruit and vegetables (four lemons), no frozen fruits or vegetables, a limited selection of packaged single serving nuts, an extremely limited selection of canned soups, a very limited quantity and variety of canned and packaged staple food items, no deli cheeses, no packaged cheeses, no yogurt, no sour cream, no butter, only three margarine, no packaged ice cream other than single serving, no baby cereals or foods, no baby juices, no infant formula, only three loaves of bread, no rolls, no pitas, only four packages of tortillas, no tostadas, no corn meal, no flour, no sugar, no rice, no dried beans, no corn meal, only four small boxes of cold cereals, no hot cereals, many single serving noodle soups, no dry pasta, no dry noodles, many boxes of mac&cheese, no cocoa, no baking mixes, only three small bottles of cooking oil, and no expensive staple food items.
- Ineligible items included: gasoline, alcohol, tobacco, lottery, hot food, hot drinks, household products, paper products, pet products, auto products, health and beauty items, ATM, candles, incense, hats, clothing, office/school supplies, sunglasses, jewelry, & newspapers while accessory foods included: candy, spices, condiments, snacks, baked goods, three small bottles of cooking oil, single serving ice cream, coffee, tea, and un/carbonated drinks.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- The firm's hours of operation were open 7 AM-10 PM Sunday through Thursday and 7 AM-11 PM Friday-Saturday as per the store's owner. The owner also stated that the firm did not take phone or online grocery orders; did not deliver groceries; and did not round prices up/down.
- Most food items were priced with all visible prices ending in .x9 cents. Comments on the FNS store visit report specifically stated that most of the food prices ended in .x9

cents. A price ending in .x9 cents is the most common pricing structure for stores of this type.

- The FNS store visit report listed the four most expensive food items costing more than \$5.00 for sale in the store as being a case of canned tea priced at \$23.99, a case of cranberry juice priced at \$14.99, a 35 pack case of bottled water priced at \$11.99, and a 24 pack case of bottled water priced at \$5.99. This listing of the most expensive items was provided by the store owner during the store visit.
- The firm was not a WIC vendor.
- The store visit report noted many empty shelves as confirmed by photos showing numerous empty or marginally stocked shelves indicative of a slow turnover of stock.
- The quantity and variety of the store's staple food inventory was considerably less than that seen during the previous FNS store visit on May 3, 2016.

Multiple transactions in unusually short time frames

This Attachment documents 34 individual transactions in 17 sets of two transactions conducted by four different households in a short period of time. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 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 within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by store 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. Although Appellant claims to have extended credit to households, no explanation was provided as to how extending credit would result in multiple, high dollar value transactions in unusually short time frames.

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. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out, of household members/friends shopping together and making separate purchases, or of a household making a payment on a credit account preceded or followed by a second purchase as all of the transaction sets 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. 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.

The Retailer Operation Division's shopping pattern analysis for the households in this Attachment shows they have ready access to transportation as evidenced by their shopping at a variety of larger food stores located nearby and at a distance from Appellant's location, including a variety of super stores and supermarkets. Specifically, all four of the households in this Attachment shopped at a super store and/or a supermarket on the same day that they conducted the transactions listed in this Attachment at the Appellant firm. Appellant fails to offer any 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 large dollar amounts at a very poorly stocked convenience store. 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 high 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 85 individual EBT transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. 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 transactions are also substantially higher than the average SNAP transaction amount **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** for this store type in Wharton County. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at full-line supermarkets and super stores, located nearby as well as at a distance from Appellant's location that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the Appellant firm. The high dollar value transactions remain questionable when considering the proximity of these other stores that would be better shopping options for consumers. Based on their shopping patterns, transportation does not appear to be an issue for these households, contrary to Appellant's contentions. 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 food stores. Specifically, 47.37 percent of the households in this Attachment shopped at a super store and/or a supermarket on the same day that they conducted the transactions listed in this Attachment at the Appellant firm.

FNS records show there were 13 comparably sized or larger SNAP retailers that included a super store and a supermarket located within a three mile radius of the Appellant firm during the review period. The supermarket is located one mile away from Appellant's location while the super store is 1.62 miles away. Both the super store and supermarket offer greater quantities and varieties of staple food items at lower prices than could be found at a poorly stocked convenience store.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for Wharton County medium grocery stores during the review months and at the Appellant firm is significant. 5 U.S.C. § 552 (b)(7)(E). A comparison of Appellant's SNAP redemptions to that of nearby like type stores having redemptions for the review period shows that none 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 further indication that the transactions in this Attachment and the previous do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

The firm also has irregular SNAP transaction data compared to like type stores in Wharton 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 large dollar transactions are considered to be irregular and suspicious based on the firm's food inventory. The Retailer Operations Division determined there was no credible reason for the firm to have transactions at these dollar levels given the very limited stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

Appellant contends that the area was still recovering from Hurricane Harvey and a major flood that occurred in late 2017 and resulted in many long-term customers being displaced from their homes. Many of these customers had no transportation and the store was the closest grocery to them. The local Health and Human Services Office was also temporarily closed due to the flooding. These customers had not received replacement EBT cards, had not yet received SNAP benefits, or did not have sufficient benefits remaining and the owners took compassion on them by allowing them to charge food on credit. The amounts the customers promised to pay were written down on slips of paper that were returned to them when they paid their balance. No cash or non-food items were purchased on credit. No credit records were kept and the POS was wiped-out during the flood. Appellant submitted links to newspaper articles on the flooding in support of these contentions.

Regarding Appellant's contentions, it is a matter of record that Hurricane Harvey made landfall on the Texas coast approximately 46 miles southwest of Wharton on August 25, 2017, and that more than 40 percent of Wharton properties were flooded by the rising Colorado River over the next four days. FNS issues disaster SNAP (D-SNAP) benefits for individuals living in areas severely impacted by disasters, and also replacement SNAP benefits for recipients living in areas

that have experienced power outages or structural damage that would have resulted in food spoilage or loss. A review of FNS records show that D-SNAP benefits were issued in Wharton from October 9 through October 15, 2017. Records also show that while the Texana Health and Human Services Office was temporarily closed due to the flooding, it reopened on September 5, 2017, and was able to issue replacement SNAP benefits. Recipients were also allowed to use SNAP benefits for the purchase of hot foods through October 31, 2017. While it is understandable that neighbors help neighbors in times of crisis and that rules may be temporarily forgotten, the review period did not begin until December 1, 2017, three months after the flooding and many weeks after the Texana Center had reopened and D-SNAP benefits were issued. Bus service had also been restored although the shopping analysis for households listed in this Attachment shows that transportation does not appear to have been an issue for them. Appellant's contentions pertaining to credit will be discussed 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 store stock. A shopping pattern analysis by the Retailer Operations Division shows that households in this Attachment are regularly shopping at much larger stores, and conducting high dollar value transactions, 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 is higher than that of larger stores such as supermarkets or super stores.

Higher 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 store that does not address all of their food 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 also offer store brand products at lower prices, 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. The firm also has an extremely small checkout area and no shopping carts or baskets making it very difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. The fact that the firm carries a very limited stock of staple food items also makes it extremely unlikely that the high dollar value transactions in this Attachment were for the purchase of eligible food items and more likely that the amounts were contrived.

A detailed analysis of the invoices/receipts submitted for inventory purchases was conducted by the Retailer Operations Division and the dollar amount of eligible food purchases compared to SNAP redemptions at the firm for the period under review. Invoices/receipts dated prior to or after the review period and duplicate invoices/receipts were excluded as were any ineligible items listed. The invoice analysis confirms that no expensive foods or high volumes of meats were purchased and shows that the majority of products purchased were snack foods, drinks, and ineligible items. The invoices/receipts provided contained 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of eligible food purchases and after applying a 40 percent markup, typical for this type of store, would produce potential eligible food sales of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). SNAP redemptions for the review period totaled

5 U.S.C. § 552 (b)(6) & (b)(7)(C). A 20 percent markup for credit/cash purchases was applied to the SNAP redemptions amount in order to project total food purchases resulting in a figure of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in eligible food purchases for the review period. This amount exceeds the potential eligible foods estimated amount showing that Appellant's documentation for inventory purchases, while sufficient to account for SNAP redemptions, is insufficient to account for Appellant's sales volume. Since the invoices/receipts do not support the sales volume for the review period, they do not explain the suspicious high dollar value transactions in this Attachment.

It is further noted that SNAP redemptions at the Appellant firm fluctuated unusually following receipt of the charge letter on April 23, 2018. The average SNAP transaction dollar amount decreased 85.6 percent from April 2018 to June 2018 while the volume of SNAP redemptions at the Appellant firm decreased 89.07 percent during the same period of time. The number of SNAP transactions also decreased 24.14 percent from April 2018 to June 2018. A pronounced decrease in SNAP redemptions following receipt of the charge letter is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

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

Credit Contentions

Appellant contends the firm allows credit accounts, a violation of SNAP regulations at Section 278.2(f), because the owner was not aware of this prohibition when the transactions occurred.

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 owners signed the certification page of the online SNAP retailer application to begin operating as a SNAP retailer, they confirmed they understood and agreed to abide by program rules and regulatory provisions. They 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 same web site used by the owners to submit the online SNAP retailer application. 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 its employees using these materials, it is inconceivable that they could not have been aware that credit accounts violate SNAP regulations.

The owners' 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.

Appellant was not able to provide any documentation to support the existence of credit accounts at the Appellant business 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. A record of participation in SNAP with no previously documented instance of violations or 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 or for mitigating the impact of those charges.

The owners and the firm were charged with trafficking based on a computer analysis of the store's transactions for the review period. 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 staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photos 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 firm 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. 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 request a CMP or to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

Based on the above discussion and the evidence under review, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division's decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

The Retailer Operations Division 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

February 6, 2019