

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

Baisley Deli, Inc,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0190671

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 Office of Retailer Operations and Compliance to impose a permanent disqualification against Baisley Deli, Inc. (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Office of Retailer Operations and Compliance 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.

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 July 6, 2016, the Office of Retailer Operations and Compliance charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in December 2015 through May 2016. 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 July 18, 2016, that also included a request for information under the Freedom of Information Act (FOIA), but did not request a CMP or provide any documentation in support of a CMP. The agency responded to the FOIA request by correspondence dated October 12, 2016. Counsel for Appellant appealed the FOIA response on January 3, 2017. It is noted for the record that Appellant's original counsel passed away and was replaced by the current counsel effective December 1, 2016. The agency responded to the FOIA appeal in correspondence dated August 13, 2020. A letter dated August 27, 2020, was issued by the Office of Retailer Operations and Compliance advising current counsel that it had 10 days to submit any additional information following receipt of the FOIA appeal response. This letter was received on August 31, 2020, but no additional information was received.

After giving consideration to the evidence, the Office of Retailer Operations and Compliance notified Appellant by letter dated October 7, 2020, 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 October 9, 2020, the store owner appealed the Office of Retailer Operations and Compliance's assessment and requested administrative review. The appeal was granted. It is noted for the record that this Review Officer confirmed by email dated October 21, 2020, that counsel was still representing the firm and its owner. Although counsel indicated in its response that additional information would be forthcoming, no 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 §278.6(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 six month period of December 2015 through May 2016. This involved four patterns of EBT transaction characteristics indicative of trafficking:

1. There were an unusual number of transactions ending in a same cents value.
2. Multiple transactions were made from individual benefit accounts in unusually short time frames.
3. The majority or all of individual recipient benefits were exhausted in unusually short periods of time.
4. 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.

- Appellant vehemently denies that anyone involved with or employed by the business has engaged in trafficking. All of the transactions are not unusual and are not based on any illegal activity;
- The business is open 24/7 and employs two full-time employees. Sixty-five percent of sales are from SNAP so ownership would not jeopardize this business by engaging in illegal activity;
- Ownership has continuously trained and tested the employees concerning SNAP regulations and requirements. The business has an unblemished record that is evidence of ownership's training and supervision of his employees;
- The store is always well-stocked with staple food items and the vast majority of people that patronize the store are regular customers who do all of their grocery and food shopping in this store. The store sells large volumes of fresh and packaged food products;
- The same cents transactions result from accommodating regular customers by rounding- out the amount of a purchase. They are also reflective of the remaining balance in the customer's Food Stamp account. Also, a large number of these transactions resulted from the store's pricing of frequently purchased items that were on sale;
- The multiple transactions from individual benefit accounts in unusually short time frames were all legitimate transactions by recipients placing orders by telephone and then picking-up their orders at which time they pay for the telephone orders and purchase additional items. Customers also place telephone orders and then purchase items that are to be delivered all of which are charged to the EBT card at or about the same time period;
- The transactions that exhausted a customer's account were all legitimate charges for eligible items purchased by established and frequent customers who do all their major shopping in short time periods;
- The excessively large transactions are legitimate charges for eligible items with many being made by customers in need of such amounts to feed their large families. The household size must be considered by FNS before charging a vendor with trafficking based on a statistic;
- The letter of charges is nothing more than an unsubstantiated general accusation; it has no merit, and to base a decision upon such an accusation is to deprive the vendor of due process. The use of EBT records in sole support of what is claimed as serious unlawful activity is inadequate. It is not based on fact, and the conclusions reached are unfounded and without merit. The EBT transactions should be more carefully reviewed than basing a decision totally upon computer generated reports that only create an unfounded presumption of wrongdoing. USDA only furnishes the vendor a listing of transactions for the six month period and provides nothing concerning the other transactions that occurred in the store. The USDA decision to consider permanently disqualifying a vendor based on this inadequate proof, which will deprive him of his business and cause irreparable injury and damage, is inconclusive and arbitrary; and,

- There are no definitive factual allegations of why these transactions involve or are indicative of trafficking. It appears the disqualification decision is based upon a predetermined standard of EBT activity for this type of firm. If this be the case, then a statistical sampling or survey has been used to erroneously determine that the normal transactions in this store significantly exceed the normal practice for this type of firm. USDA has failed to specifically describe the type of firm operated by this vendor and has failed to investigate and set forth the precise transactions that constitute trafficking. It would be expected and required in so serious a matter that USDA would investigate and evaluate the specific activities in this business that has an unblemished record before deciding on a permanent disqualification.

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

ANALYSIS AND FINDINGS

Stores caught in trafficking violations consistently display particular, characteristic transaction patterns including those cited in the charge letter. 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. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

In the absence of 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 evidence trafficking as the most likely explanation. Each Attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm 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 on September 22, 2014. The record indicates that in reaching a disqualification determination, the Office of Retailer Operations and Compliance considered information obtained during a June 2, 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 firm's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a small grocery 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 as well as a very limited stock of Hispanic foods. There were no other ethnic or specialty food items.

- The store visit report and photos showed no shopping carts or handheld 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 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 packages, fish specials, or fruit and vegetable boxes for sale.
- The checkout area consisted of an opening on the top of a high display case with taller display cases on either side leaving a counter area that was approximately 4.0 feet wide and 1.5 feet deep with displays on both sides of the counter leaving a very limited area for customers to place their purchases. The small checkout area would make it problematic to process large orders. The checkout area had one cash register, one POS terminal, and no optical scanner as confirmed by the store clerk.
- There was a small commercial kitchen/food preparation area with posted menu boards listing the available hot/cold foods, breakfast items, sides, and other signage listing specials. It appeared that store staple food stock (deli meats, deli cheeses, fresh vegetables, etc.) were being used in the preparation of the hot/cold prepared foods.
- The firm had a very limited stock of staple foods that also included single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, other drinks, and ineligible items.
- The firm had no fresh or frozen unprocessed meat or seafood, a limited quantity and variety of processed meats and seafood (canned meat, poultry, and fish; hot dogs, bacon, and deli meats), no jerky, no frozen entrees, no frozen dinners, eggs, a very limited stock of fresh fruits and vegetables, no frozen fruit or vegetables, single serving packaged nuts, single serving apple sauce, single serving fruit cocktails, 100 percent fruit juices, no 100 percent vegetable juices, a limited stock of soups, a minimal quantity and variety of canned and packaged staple food items, a limited stock of deli cheese, packaged cheese, no cream cheese, no large yogurt, several single serving yogurt, no single serving yogurt drinks, margarine, butter, no sour cream, fresh milk, no single serving containers of fresh milk, no single serving milk drinks, canned milk, coconut milk, shelf stable milk, no powdered milk, no half & half, no whipped cream, bread, rolls, no tortillas, no tostadas, no pitas, no taco shells, corn meal, flour, no Maseca flour, sugar, rice, cold cereal, single serving cold cereal, hot cereal, canned pasta, single serving pasta, dry pasta, dry noodles, pancake mixes, no mac&cheese, no single serving size mac&cheese, several baking mixes, no heat & eat foods, cooking oil, coffee, tea, cocoa, baby foods, baby cereal, infant formula, baby juices, and very few expensive staple food items.
- Ineligible items included: tobacco, tobacco accessories, many hot prepared food items, household products, paper products, pet products, health and beauty items, and charcoal while accessory foods included: candy, condiments, snacks, baked goods, sugar, spices, cooking oil, baking mixes, ice cream, single serving ice cream, coffee, tea, cocoa, and un/carbonated drinks.
- Business hours were open 24/7 per the store clerk.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.

- Most food items were individually priced and almost all visible prices end in .x9 cents. A price ending in .x9 cents is a common pricing structure for stores of this type.
- The firm was not a WIC vendor. While the firm did stock a limited selection of infant formula and other baby foods, cereals, juices, etc., most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products at a WIC vendor using WIC vouchers, not SNAP EBT at the Appellant firm.

Unusual numbers of transactions ending in a same cents value

This Attachment lists 69 transactions ending in the same cents value of .00 and 59 transactions ending in the same cents value of .50. Transaction amounts 5 U.S.C. § 552 (b)(6) & (b)(7)(C) include an unusually high number of transactions for the exact same amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to that are not supported by store inventory or pricing. When such repetitive patterns are unsupported by special pricing structures, they are a strong indicator of trafficking in SNAP benefits. It is noted that the same household was responsible for two of the three transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) which represents the entire monthly SNAP allotment for this household. It is unusual that a household would spend its entire allotment in a single transaction at a small grocery store with a limited stock of staple foods leaving no funds for additional food purchases until the next month's allotment is posted. The FNS store visit photos revealed no signs posted to indicate special food packages, bundles, case sales, or other sales that would explain the unusual number of transactions ending in these same cents values and no bulk items were available for purchase. The high percentage of same cents transactions combined with the large number of same cents high dollar transactions is irregular and suspicious for this type store.

Appellant contends the same cents transactions result from accommodating regular customers by rounding-out the amount of a purchase. They are also reflective of the remaining balance in the customer's Food Stamp account and a large number of these transactions resulted from the store's pricing of frequently purchased items that were on sale.

Appellant failed to provide any evidence to support the above claims and Appellant's claims would not be relevant to the transactions ending in .50 cents. Appellant also fails to specify whether amounts are rounded up or down. Rounding a transaction down does not make any sense from a business perspective and households would not allow a firm to round the amount up. Since the advent of SNAP EBT, SNAP purchases are debited from a household's available balance by the exact amount of the purchase unlike when coupons were used that were in whole dollar amounts. Because of this, even if a household were to spend their remaining SNAP account balance at the Appellant firm, it would be extremely unlikely that the amount would end in .00 or .50 cents.

The FNS store visit report, completed in conjunction with a store employee on June 2, 2016, includes many photos of the store's stock and layout. These photos show that most food items were individually priced and almost all visible prices end in .x9 cents. The purchase of multiple items with prices ending in .x9 cents would not result in a transaction total ending in a same cents value of .00 or .50 cents as multiples of .x9 (e.g. .09, .18, .27, etc.) seldom have a value

ending in .00 or .50 cents making it statistically impossible that this many store transactions would end in .00 or .50 cents with legitimate food purchases. The purchase of a single item with a price ending in .x9 cents would also make it impossible for any transaction totals to end in .00 or .50 cents. Additionally, a review of the 433 transactions in Attachment four shows that there are many transactions that do not end in .00 or .50 cents thus further refuting Appellant's claims.

While some of the transactions in this Attachment may have been for legitimate staple food purchases, particularly those in the lowest dollar amounts, there is insufficient evidence that these repeating same cent transactions are legitimate. When many transactions end in a same cents amount, it appears that these transaction amounts are contrived and therefore, in the absence of compelling evidence to the contrary, are suggestive of trafficking. As such, the transactions in this Attachment have not been adequately documented as legitimate.

Multiple transactions in unusually short time frames

This Attachment documents 145 individual transactions in 67 sets of two or more transactions conducted by 34 different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The dollar amounts of subsequent transactions in each set are substantial and nearly equal or exceed the dollar amount of the initial transaction in 43 of the 67 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Eleven sets are comprised of three transactions while the remaining 56 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 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 contends the multiple transactions from individual benefit accounts in unusually short time frames were all legitimate transactions by recipients placing orders by telephone and then picking-up their orders at which time they pay for the telephone orders and purchase additional items. Customers also place telephone orders and then purchase items that are to be delivered all of which are charged to the EBT card at or about the same time period.

Regarding Appellant's contentions, no evidence was submitted in support of the firm allowing grocery orders to be placed by phone or that the firm offers delivery services. The numerous FNS store visit photos were scrutinized and no signage referencing either phone orders or delivery being available was found that supports either of these claims. Even if there were phone orders, it does not make sense that two separate transactions would be rung-up when it would be more likely that the phone order and any additional purchases would be combined into a single transaction. Additionally, Appellant states that the firm is open 24/7 and is staffed by two employees. It is highly unlikely that only two employees could staff a busy small grocery store that is open 24/7 especially considering that at least two employees would be needed to operate the cash register and to work in the commercial kitchen preparing the hot and cold made-to-order foods. Lastly, most of the transaction sets in this Attachment 5 U.S.C. § 552 (b)(6) & (b)(7)(C) making Appellant's claims even less believable.

SNAP households have no limits on the number of times they may use their benefits or the dollar amount of eligible food they may purchase. The SNAP transactions at the Appellant firm are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of the firm'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 households making a separate purchase to check their balance followed by another transaction as all, but two of the 67 transaction sets 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The transaction sets also do not contain the characteristics of a household returning later in the day to purchase a forgotten item or two as all of the sets have subsequent transactions in amounts 5 U.S.C. § 552 (b)(6) & (b)(7)(C), far more than the cost of a forgotten item or two. Appellant offers no explanation as to why households would conduct multiple sizeable transactions at a store with a very limited stock of staple foods within a short period of time when they are also shopping at the many comparably sized or larger food stores located nearby that includes two super stores, two supermarkets, a large grocery store, and nine small grocery stores within 0.74 miles of Appellant's location with many additional super stores and supermarkets located within 2.00 miles. The nearest super store and the large grocery store are both approximately 10 blocks away while the nearest small grocery store is within two blocks of Appellant's location. The availability of many larger SNAP stores nearby combined with the firm's very limited staple food stock makes it unlikely that any household would consider the Appellant firm as their primary source for groceries.

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 subsequent transaction dollar amounts are substantial in these transaction sets and that all of the sets in this Attachment total 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average small grocery store SNAP transaction amount in Queens County during the review period was \$12.69. 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 review period.

The Office of Retailer Operations and Compliance's analysis of shopping patterns for Attachment households shows they have ready access to transportation as evidenced by their shopping at a variety of comparably sized or larger food stores located nearby and at a distance from Appellant's location, including super stores and supermarkets. The analysis also shows these households shopped at the Appellant firm and a super store and/or supermarket 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and inexplicably often spent more at the Appellant firm than at the super stores and/or supermarkets. Appellant failed to offer any explanation or rationale as to why households who are regularly shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases often totaling to comparable or higher dollar amounts at a store with a very limited stock of staple foods. There is no legitimate reason why households would spend so much of their SNAP allotment at the Appellant firm when they clearly had access to and frequently shopped at super stores and supermarkets. 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 the more plausible explanation is that these households were trafficking SNAP benefits at the Appellant firm.

For example, one morning a household made two purchases (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at the Appellant firm and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) after the second transaction traveled 0.41 miles to a nearby supermarket and spent 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C) later, this household again made two purchases (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) at the Appellant firm 5 U.S.C. § 552 (b)(6) & (b)(7)(C). In a span 5 U.S.C. § 552 (b)(6) & (b)(7)(C) this household spent a total 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in four separate transactions at the Appellant firm while spending 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at a nearby supermarket in between the purchases at the Appellant firm. Conducting multiple transactions totaling to large dollar amounts at a small grocery store with a very limited stock of staple foods while spending significantly less at a much larger store offering a far better selection of foods at better prices is a suspicious shopping pattern that is indicative of trafficking.

A second household received its SNAP allotment 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and in the very early morning hours made two purchases (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at the Appellant firm and later the same day spent 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at a supermarket located 0.59 miles away. It is noted that based on the SNAP allotment 5 U.S.C. § 552 (b)(6) & (b)(7)(C) that this is a single person household. It is unusual that a single person household would spend almost 94 percent of its monthly SNAP allotment in two transactions at the Appellant firm leaving almost no money for food purchases until the next month's allotment.

A third household spent 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at the Appellant firm and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) later spent 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at a supermarket specializing in fresh meats located 1.82 miles away. This household returned to the Appellant firm 5 U.S.C. § 552 (b)(6) & (b)(7)(C) later and made two purchases (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). In a span 5 U.S.C. § 552 (b)(6) & (b)(7)(C) this household spent 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in three separate transactions at the Appellant firm while having spent 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at a supermarket located at a distance in between the purchases at the Appellant firm. The following month, this same household spent 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at the Appellant firm in a swiped transaction and later the same day spent 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in a manually keyed transaction also at the Appellant firm for a total 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The very next day the household spent 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at the supermarket specializing in fresh meats located 1.82 miles away before returning to the Appellant firm and spending an additional 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in a swiped transaction. In the span 5 U.S.C. § 552 (b)(6) & (b)(7)(C) this household spent a total 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in three separate transactions at the Appellant firm while spending 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at a nearby supermarket located at a distance in between the purchases at the Appellant firm. Conducting multiple transactions totaling to large dollar amounts at a small grocery store with a very limited stock of staple foods while spending

significantly less at a much larger store offering a far better selection of foods at better prices is a suspicious shopping pattern that is indicative of trafficking. The manually keyed transaction was the only one out of more than 70 purchases by this household during the review period. A review of other EBT transactions on the dates of the manual transaction show that Appellant's POS device was functioning properly as there were swiped transactions before and after the manually keyed transaction. This household's suspicious and irregular pattern of conducting multiple transactions totaling to large dollar amounts at a small grocery store with a minimal stock of staple foods while spending significantly less at much larger stores offering a far better selection of foods at better prices continued throughout the review period.

Manually keyed transactions are those in which the magnetic strip on the back of the EBT card is not being read by the store's POS terminal by swiping the EBT card and the clerk must manually key enter the lengthy EBT card number into the POS terminal which requires more time than when an EBT card is able to be swiped. When the magnetic strip on an EBT card fails, it can no longer be swiped and replacement EBT cards contain different identification numbers. This household used the same EBT card throughout the period under review and had no other manually keyed transactions. On-site investigations into trafficking at retailers have found it is not uncommon for retailers to have the SNAP recipient's PIN and EBT card number in order to facilitate trafficking SNAP benefits in exchange for cash without the need for the recipient to be physically present. The retailer manually key enters the EBT card number as the recipient has the actual EBT card and then enters the PIN. A pattern of manually keyed and swiped transactions using the same EBT card is indicative of trafficking.

It is highly unlikely that the Appellant firm stocked any eligible food items that would not be available at the super stores, supermarkets, and the other larger grocery stores these households were regularly shopping at and these stores would also likely have significantly lower food prices yet these households continued to spend large dollar amounts at a small grocery store with a very limited stock of staple foods. Other households analyzed exhibited similar shopping patterns indicative of trafficking. There is no legitimate reason why these households would spend so much of their SNAP allotments at the Appellant firm when they clearly had access to and frequently shopped at nearby and distant supermarkets and super stores.

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.

Near Depletions of SNAP Benefit Accounts

This Attachment lists a total of 86 EBT transactions in 56 sets of one or more transactions involving 34 households during which the majority, if not all, of the household's monthly SNAP benefits were depleted in a short period of time. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The monthly SNAP allotment for a single person household during the review period

5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is highly unusual that all of the 27 highest transaction set totals listed in this Attachment were conducted by single person households each receiving a monthly allotment 5 U.S.C. § 552 (b)(6) & (b)(7)(C) thereby establishing that numerous single person households were spending their entire monthly SNAP allotment at the Appellant firm. Depleting a household's SNAP allotment, particularly in a single person household, in one or a few transactions, or within one day, leaving little or no benefits for the rest of the month, is inconsistent with the normal shopping behavior of SNAP households. SNAP benefits are intended to supplement the food budget for recipient households whose net income is at or below the Federal Poverty Level. A government report on SNAP shopping patterns indicates that after the first day of benefit issuance, on average, 79.1 percent of a household's allotment remains unspent. Even after seven days, 42 percent of benefits still remain unspent. It typically takes two weeks to deplete 78.1 percent of one's benefits. This report further revealed that households most often redeemed their benefits at supermarkets and super stores with only four percent of households never shopping in a supermarket. Participating households typically made several (just over nine on average) relatively small purchases (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) with SNAP benefits each month. Making single or multiple transactions of large dollar amounts or cumulatively large dollar amounts, and/or depleting substantial amounts of one's allotment 5 U.S.C. § 552 (b)(6) & (b)(7)(C), leaving a marginal amount or no benefits at all for the rest of the month, is inconsistent with typical shopping behavior of SNAP benefit households. Rather, transactions over a short period of time of large value, or large cumulative value, in which SNAP benefits are exhausted are an indicator of trafficking.

The FNS store visit report shows this is a small grocery store offering a very limited quantity and variety of staple foods as well as a variety of accessory foods and ineligible nonfood items. The report shows that the firm does not carry any unique items or offer any distinctive services that cannot be found at a number of larger grocery stores located nearby and at a distance. The firm is also located in an urban area with scheduled fixed route bus service available nearby that would facilitate shopping at other stores. Additionally, there are two super stores, two supermarkets, a large grocery store, and nine small grocery stores within 0.74 miles of Appellant's location. These larger stores would offer a much greater quantity and variety of eligible foods at lower prices than Appellant's. The Office of Retailer Operations and Compliance analysis of shopping patterns for households in this Attachment shows that they are regularly shopping at a variety of larger stores located nearby as well as at a distance. Based on these options, it is unlikely that most SNAP households who are shopping at larger stores that would offer a much greater selection of food items at lower prices would choose this firm as a destination for making large household food purchases.

Appellant offered no documentation or explanation to support the legitimacy of the listed transactions in this Attachment other than to state that the transactions were all legitimate charges for eligible items purchased by established and frequent customers who do all their major shopping in short time periods.

SNAP households have no limits on the number of times they may use their card or how much eligible food they may purchase. These transactions are questionable because they are inconsistent with normal spending habits attributable to a store with this level and type of eligible food stock, and facilities. Therefore, this atypical behavior is indicative of trafficking.

It should be noted that this Attachment is not targeting excessively large transactions per se. It represents a pattern whereby 34 households within the review months, almost depleted, or did deplete their entire monthly SNAP benefit allotments, in a single or a few transactions, during the course of some hours, all on the same day. As previously noted, this is not typical shopping behavior exhibited among SNAP recipients.

High Dollar Value Transactions

This Attachment lists 433 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The substantial number of high dollar transactions is uncharacteristic for a store offering a very limited stock of staple foods and calls into question the legitimacy of these transactions. The transactions are substantially higher than the average SNAP transaction amount of \$12.69 for this store type in Queens County. This is unusual and indicative of trafficking as previously discussed.

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 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. These high dollar value transactions remain questionable when considering the proximity of the 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. Yet, they 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.

While households residing in areas with extremely limited grocery store options may conduct high dollar transactions at small grocery stores out of necessity, this is not the case when they have better alternatives. FNS records show there are 14 comparably sized or larger SNAP retailers located within a 0.74 mile radius of the Appellant firm that includes two super stores, two supermarkets, a large grocery store, and nine small grocery stores. The nearest super store and the large grocery store are both approximately 10 blocks away while the nearest small grocery store is within two blocks of Appellant's location. There are also additional supermarkets and super stores located further away. These many larger stores would offer greater quantities and varieties of staple food items at lower prices than would be found at a small grocery store with a very limited stock of staple foods.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for Queens County small grocery stores during the review months and at the Appellant firm is significant. Appellant's average SNAP transaction dollar volume is **5 U.S.C. § 552 (b)(7)(E)** larger than that of Queens County small grocery stores while its total SNAP transaction count is **5 U.S.C. § 552 (b)(7)(E)** larger and its average SNAP transaction amount is only 8.9 percent larger than the County average. The extremely high number of SNAP transactions and the extremely high dollar volume combined with the relatively low average transaction amount is an indication the firm may be dividing larger transactions into multiple smaller transactions in an effort to circumvent detection as previously discussed. 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 Office of Retailer Operations and Compliance considered all of these to be indicators of unusual and suspicious activity.

The firm also had irregular SNAP transaction data compared to like type stores in Queens County. A comparison of Appellant's redemption data to the average for County small grocery stores using ten dollar increments shows that Appellant's transaction count and dollar volume was significantly higher than that of like type stores in all ranges 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at which point transactions stop. It is unusual that like type Queens County small grocery stores begin averaging less than one transaction in each range 5 U.S.C. § 552 (b)(6) & (b)(7)(C), significantly less than that of the Appellant firm. The Appellant firm also has unusual spikes in the number and dollar volume of transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) range over the same period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This transaction pattern and the unusual spikes in both transaction number and dollar volume do not appear in the transaction patterns or 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 Office of Retailer Operations and Compliance 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 the excessively large transactions are legitimate charges for eligible items with many being made by customers in need of such amounts to feed their large families. FNS must consider the household size before charging a vendor with trafficking based on a statistic.

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 Office of Retailer Operations and Compliance shows that Attachment households are regularly shopping at much larger stores, and conducting high dollar transactions, yet are conducting comparable or higher dollar 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.

The FNS store visit shows that the firm offers a very limited stock of staple foods that also includes many single serving and pre-packaged items with a significant portion of inventory in drinks, candy, and snacks as well as many ineligible items. The fact that tobacco, tobacco accessories, hot prepared foods, hot drinks, household products, paper products, pet products, and charcoal are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts.

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 corresponding 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 months. The firm also has a very small checkout area and no shopping carts or handbaskets thereby making it extremely 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 improbable that the high dollar transactions in this Attachment were for the purchase of eligible food items and more likely that the amounts were contrived.

It is further noted that SNAP redemptions at the Appellant firm fluctuated unusually following the store visit on June 2, 2016. The volume of SNAP redemptions at the Appellant firm decreased 24.7 percent from June 2016 to July 2016 while the average dollar amount of SNAP transactions decreased 41.07 percent and the number of SNAP transactions increased 28.62 percent. A pronounced fluctuation in SNAP redemptions following the 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.

Other Contentions

Regarding Appellant's denial of trafficking, the purpose of this review is to either validate or to invalidate the earlier decision of the Office of Retailer Operations and Compliance and is limited to what circumstances were at the basis of the action at the time such action was made. 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. When store ownership signed the certification page of the SNAP retailer authorization application, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. 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. Additionally, a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

The ownership 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 Office of Retailer Operations and Compliance 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 Office of Retailer Operations and Compliance 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 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 Office of Retailer Operations and Compliance 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 request a CMP or provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Office of Retailer Operations and Compliance's decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

The Office of Retailer Operations and Compliance 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 four 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 Office of Retailer Operations and Compliance 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

January 14, 2021