

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

Bangladeshi Grocery Plus,

Appellant,

v.

Case Number: C0198163

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 Bangladeshi Grocery Plus (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 March 2, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and its 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 December 4, 2017, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in February 2017 through July 2017. 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 postmarked December 13, 2017, that admitted to the business offering credit accounts, but contained no evidence to be considered in support of the CMP. Upon receipt of Appellant's response, the Retailer Operations Division requested evidence of the existence of credit accounts and in response, Appellant submitted 22 cash register receipts by letter postmarked December 26, 2017. Appellant stated during a January 12, 2018, telephone conversation with the Retailer Operations Division that the business had stopped credit and had no other evidence of credit accounts. Appellant submitted 10 additional invoices for inventory purchases by letter postmarked January 20, 2018. The Retailer Operations Division notified Appellant by letter dated March 2, 2018, that the firm was permanently disqualified from participation as a SNAP retailer 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 postmarked March 13, 2018, Appellant appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. 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 § 278.2(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 six month period of February 2017 through July 2017. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. An excessive number of manual key-entered EBT transactions were made from the business.
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 owner apologizes because didn't know manually key entered transactions were violations. Sometimes a customer's wife will shop and her husband has the card, but she has the number and the owner will charge the card manually. Some customers have broken cards that are charged manually. Other times customers will shop and pay later with their card while others will shop for the whole month and pay when money is added to card;
- The large transactions are because the business sells 1200-1500 pounds of meat every week as shown by the invoices and some customers will buy 30-50 pounds of meat at a time. Some fish is also expensive at \$13.00-\$15.00 per pound and one fish sells for \$45.00-\$50.00;
- The owner would write the credit information on a slip of paper that was destroyed when balance was paid. He stopped allowing credit and has no slips, but was able to reprint the cash register receipts; and,
- The business supports the owner and his family; he requests to be pardoned for the first time and states that these violations will not happen again.

Appellant submitted 19 invoices for inventory purchases, two price lists for meats, and 22 cash register receipts for credit accounts in support of these contentions.

ANALYSIS AND FINDINGS

Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant business 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 business on July 5, 2016, and it is classified as a medium grocery. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a February 20,

2017, 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 business's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The business was a moderately sized international grocery store primarily offering Indian/Bangladesh ethnic foods, including Halal meats, as well as American foods.
- Exterior signage advertised cell phones/associated services and money transfers. Interior signage had prices for chicken, goat, and lamb with the goat and chicken being Halal.
- There was one shopping cart and two small handheld baskets for customer use seen during the visit making it difficult for customers to carry large amounts of food to the checkout area.
- The checkout area was on the top of a glass display case and was approximately four feet wide by 1.5 feet deep with the cash register and a scale on the left and a paper towel dispenser on the right limiting the amount of counter space available to place purchases upon. The small size of the checkout counter would make it problematic to process large orders. The checkout counter had one cash register, one POS terminal, and no optical scanner.
- No food packages, bundles, case sales, or other sales were evident that would explain the unusual transactions and no SNAP eligible cased items were available for purchase; however, the business did sell bulk sizes of rice and soybean cooking oil.
- The business had an overall minimal stock of staple foods offering a minimal quantity and variety of fresh unprocessed meats or seafood, moderate frozen unprocessed meats or seafood, no processed meats or seafood, no canned or potted meat/poultry/fish, no deli meats, no bacon, no sausages, no packaged lunch meats, no jerky, only two dozen eggs, no frozen entrees, no frozen dinners, limited quantities and varieties of fresh vegetables, no fresh fruits, moderate frozen fruits or vegetables, only one bottle of 100 percent fruit juice, no 100 percent vegetable juices, limited varieties of canned or bottled fruit or vegetables, no canned soups, a moderate stock of single serving noodle soups, a limited quantity and variety of canned and packaged staple food items, a moderate variety of flour, a moderate variety of dried beans and other dried vegetables, no hot or cold cereals, very limited varieties of dry pasta, no macaroni & cheese, no sour cream, only one butter, no margarine, no deli cheeses, no packaged cheeses, no baby foods or infant formula, and no cocoa.
- Ineligible items included: tobacco, tobacco accessories, household products, paper products, health and beauty items, money transfer, and cell phones/phone cards while accessory foods included: coffee, tea, spices, cooking oil, sugar, and un/carbonated drinks.
- Signage was in English, but a significant amount of food

- packaging was in other languages.
- There were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- The business's hours of operation were open 10:00 AM-10:00 PM daily.
- Most food items were priced with all visible staple food prices ending in .x9 cents. A price ending in .x9 cents is the most common pricing structure for stores of this type.
- The store was not a WIC vendor and did not stock any baby foods or infant formula.

Excessive Numbers of Manual Key-entered EBT Transactions

This Attachment documents 176 manual key-entered SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** conducted by 140 different households at the Appellant business that is an unusually high number.

Appellant contends the store owner did not know manually key-entered transactions were violations. Sometimes a customer's wife will shop and her husband has the card, but she has the number and the owner will charge the card manually and some customers have broken cards that are also charged manually. Other times customers will shop and pay later with their card while others will shop for the whole month and pay when money is added to their card.

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 device and the clerk must manually key enter the lengthy EBT card number. When the magnetic strip on an EBT card fails, it can no longer be swiped and replacement EBT cards contain different identification numbers. On-site investigations into trafficking at retailers have found it is not uncommon for retailers to have a 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 enters the EBT card number manually as the recipient has the actual EBT card and then enters the PIN. A review of other EBT transactions shows that the Appellant business's POS device was functioning properly as there were swipe transactions before and after manually keyed transactions. A SNAP recipient's EBT card having a worn or malfunctioning strip is the only possible reason, outside of trafficking, for these excessive numbers of manually keyed transactions.

A Retailer Operations Division analysis of the data in this Attachment identified transactions by multiple households that do not fit the pattern of an EBT card having a worn or malfunctioning strip and are therefore indicative of trafficking. The analysis also identified multiple households that conducted only one, two, or three transactions at the Appellant business during the entire six month review period that were all manually keyed even though the household's EBT card was able to be swiped at various other stores, often located at a significant distance

from Appellant's location. In many instances, the recipient's EBT card was swiped at another distant SNAP retailer within minutes before or after a manually keyed transaction at the Appellant business. A pattern of manually keyed and swiped transactions using the same EBT card is indicative of trafficking. Specifically, many transactions were identified in which the recipient's EBT card was swiped at another SNAP retailer located miles away from Appellant's location at approximately the same time that a manually keyed transaction was occurring at the Appellant business with there being insufficient time for the recipient to have been able to travel between the two stores. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The only possible reason for this action would be to determine how much money was debited during the manually keyed transaction at the Appellant business thus further supporting the likelihood of trafficking. The Retailer Operations Division identified multiple households with similar patterns of swiped and manually keyed transactions in this Attachment providing strong evidence of trafficking.

Many of these households did not shop at any other ethnic food stores while others only shopped at stores located eight miles or further away making it questionable as to why they would travel many miles away from their regular shopping areas to conduct high dollar value manually keyed transactions at the Appellant's ethnic food store.

Appellant also contends that extending credit to customers accounted for some of the manually keyed transactions in this Attachment, but offered no explanation as to how credit accounts would influence the number of manually keyed transactions. The issue of credit is discussed more thoroughly later in this decision.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant offered no explanation for these afterhours transactions. It is an indication of trafficking when multiple transactions occur outside of a store's reported business hours.

High Dollar Value Transactions

This Attachment lists 166 individual EBT transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar transactions is uncharacteristic for a medium grocery store offering a minimal stock of staple foods and calls into question the legitimacy of these transactions. The SNAP transactions listed in this Attachment are all substantially higher than the average SNAP transaction amount of \$36.26 for this store type in DeKalb County and for another medium grocery store located one mile away that offers a greater quantity and variety of the same types of ethnic foods and Halal meats, has three checkouts, optical scanners, and more shopping carts. The 166 excessively large SNAP EBT transactions at Appellant's business for the review months represents more than 70.9 percent of all SNAP redemptions at Appellant's business during the period under review. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant business are also shopping at many full-line supermarkets and super stores, located nearby as well as at a significant 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 business. The large dollar transactions remain questionable when considering the proximity of these other SNAP authorized stores that would be better shopping options for consumers. Based on these shopping patterns, transportation does not appear to be an issue for these households. Yet, these recipients continue to shop and spend suspicious high dollar amounts at the Appellant business, where the eligible food stock is limited, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at larger food stores.

The difference in the average SNAP transaction dollar amount and the average SNAP transaction count for DeKalb County medium grocery stores during the review months and at the Appellant business is significant.

5 U.S.C. § 552 (b)(7)(E). A comparison by the Retailer Operations Division of Appellant's SNAP redemptions to that of other nearby medium grocery stores, including an international foods store offering a greater quantity and variety of the same ethnic foods, shows similar differences. Additionally, none of these nearby stores exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant business even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is a further indication that the SNAP transactions in this Attachment and the others do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

Appellant contends the large transactions are because the business sells 1200-1500 pounds of meat every week as shown by the invoices and some customers will buy 30-50 pounds of meat at a time. Some fish is also expensive at \$13.00-\$15.00 per pound and one fish sells for \$45.00- \$50.00.

The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of store and the store's stock. An analysis of shopping patterns by the Retailer Operations Division shows that households in this Attachment are regularly shopping at much larger stores, and conducting transactions of large dollar amounts, yet are conducting comparable or higher dollar value transactions at the Appellant business. It would make no sense for a household that regularly shops at much larger stores and apparently has no transportation limitations to spend large dollar amounts at the Appellant business since its cost of goods would be higher than that of larger stores such as supermarkets or super stores.

Information obtained during the FNS store visit on February 20, 2017, shows that the Appellant business offers a minimal quantity and variety of SNAP eligible staple food items. Increasing food prices make it even more unlikely that SNAP recipients, with very limited food benefits, would want to spend a considerable part of their benefits in a store that does not address all of their food shopping needs when they are already shopping at larger, fully-stocked stores that would offer a greater variety of foods at lower prices. Many of these stores would also offer store brand products at lower prices, offer weekly specials, and have shopping carts and checkouts with built-in scanners and conveyor belts to facilitate processing purchases quickly. Additionally, Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions. The Appellant business has a small checkout area and only one shopping cart thereby making it difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. Therefore, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of carts and more likely that the amounts were contrived.

A review of the 19 meat invoices submitted for inventory purchases was conducted by the Retailer Operations Division. This review found that only 13 of the invoices were dated within the review period. A detailed analysis that included applying the prices from Appellant's price lists to the quantities purchased in order to produce a figure representing potential eligible food sales was then conducted and the figure compared to SNAP redemptions at the Appellant business. This showed that the potential meat sales volume accounted for only 71.77 percent of SNAP redemptions for the review period. Since Appellant did not submit invoices for other items offered by the business, it is possible that there was sufficient inventory to account for SNAP redemptions during the review period. No information was submitted for cash/credit/debit sales so a determination as to whether store inventory was sufficient to account for all transactions could not be produced. While it appears that the Appellant business had sufficient inventory to account for SNAP redemptions, sufficient inventory alone does not explain the suspicious patterns of SNAP transactions outlined in the charge letter.

It was also noted during the analysis that the numbering on the invoices from Ayan Halal Meat appears to be out of sequence. Invoice #517151 is dated February 14, 2017, and invoice # 517153 is dated February 18, 2017, a difference of two invoice numbers over a four day period. However, invoice #517155, also a difference of two invoice numbers, is dated almost a month later on March 14, 2017. It is suspicious that invoice numbers that are two digits apart occur four days apart and also almost a month apart. The fourth invoice #517156 is dated the very next day, March 15, 2017, while the fifth invoice #517196 that is 40 numbers apart is dated almost a month later on April 11, 2017. It is also suspicious that the sixth invoice #517159 is dated April 15, 2017. Since invoices are printed with sequential numbering, it is questionable that invoice #517196 is dated earlier than invoice

#517159. These unexplained differences suggest the likelihood that these invoices may have been fabricated in order to support the high dollar value transactions.

It is further noted that SNAP redemptions at the Appellant business decreased following receipt of the charge letter on December 16, 2017.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). If, as Appellant's response contends, the transactions cited in the attachments to the charge letter were due to purchases of large amounts of food items and the manual entry of card numbers when the cards were not present, one would have expected that the number of transactions in these ranges would remain steady following receipt of the charge letter as the households would still have the same need to purchase items from the business as they did before the charge letter was issued. However, as indicated, this was clearly not the case.

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 business 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 took place. Appellant further maintains that the owner conducted manually keyed transactions without an EBT card being present because he also did not know this was a requirement.

It is important to state that this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is to determine whether Appellant demonstrates, by a preponderance of the evidence, that the disqualification should be reversed. In this case, if Appellant demonstrates by a preponderance of evidence that it did not engage in trafficking SNAP benefits, then such transactions will be considered legitimate and the disqualification reversed. If not demonstrated, the case is to be sustained. 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 their impact. Regardless of whom the ownership of a store may utilize to handle store business or their involvement in store operations, ownership is accountable for the proper training of staff and the monitoring and handling of SNAP transactions. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time. 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.

While store ownership may or may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom the

ownership of a store may utilize to handle store business or their degree of involvement in store operations, the ownership is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. When the owner signed the certification page of the SNAP retailer application to begin operating as a SNAP retailer, he confirmed he understood and agreed to abide by program rules and regulatory provisions. He agreed to accept responsibility on behalf of the firm for violations of the SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. This certification page specifically includes 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 business allowed credit accounts, a clear violation of SNAP regulations and rules. Additionally, the SNAP Retailer Training Guide and the SNAP retailer training video, provided to all retailers upon initial authorization and upon reauthorization, both cite credit accounts as violating SNAP regulations as well as the requirement that manually keyed transactions may not be conducted unless the store's POS terminal or the client's card is not working making it difficult to believe that store ownership was not aware that offering credit or allowing manually keyed transactions without the EBT card being present violate SNAP regulations.

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

In support of the admission to accepting SNAP benefits for payment on credit accounts, a program violation, Appellant submitted 22 cash register receipts purporting to be from credit accounts. Appellant further stated that no additional documentation of credit is available since the business stopped allowing credit.

The credit documents submitted by Appellant do not provide a detailed or itemized breakdown of what food items were purchased, when they were purchased, or how many purchases were made during the month. No specific details such as the

customer's full name, address, SNAP account number, SNAP EBT card serial number, or dates and dollar amounts of credit purchases or payments were included with this evidence. A review of the 22 receipts shows that the times listed on 19 receipts were after the transaction times listed by the POS terminal when the charges were submitted for payment. This means that the EBT accounts for 19 transactions were charged well before the merchandise was rung-up by the cash register and is an indication that the receipts may have been fabricated. The differences in the times varies from minutes to several hours so the difference cannot be attributed to the cash register having an incorrect time since if this were the case, the differences would be consistent. Accordingly, the documents offered by Appellant do not provide evidence that the store permitted credit accounts during the review period. Since Appellant was unable to account for any of the transactions outlined in the letter of charges, 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

The owner and the business were charged with trafficking based on a computer analysis of the store's transactions for the months of February 2017 through July 2017. 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.

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 business 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 photographs from the FNS store visit, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant business during the review period. This analysis also included a review of the business to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

Based on this empirical data, and in the absence of sufficient evidence for the legitimacy of such transaction patterns, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the charge letter evidence trafficking as the most likely explanation for the questionable transactions listed in the charge letter Attachments. It is herein determined that Appellant did not provide a preponderance of evidence demonstrating that the transactions contained in the charge letter were more likely due to eligible food sales than not. Under review, the evidence more substantially supports a conclusion that the transaction activity in the charge letter Attachments is due primarily to trafficking in SNAP benefits.

The evidence under review shows SNAP activity indicative of trafficking. Neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto 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.

Regarding the owner’s request to be pardoned for the first time and his assurance that violations will never happen in the future, FNS records show that the owner

and the business, under a different FNS store number, received a six month disqualification in 2016 for allowing the purchase of ineligible nonfood items using SNAP benefits. The owner's reply to these charges also included a promise that no violations would happen in the future. Additionally, the owner's SNAP retailer application dated May 18, 2016, answered "NO" to question #13a that asked if the owner had ever been denied, withdrawn or suspended, or been fined for SNAP license violations. Providing false information on SNAP retailer applications is a serious violation of federal regulations.

It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm or to ownership resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. Furthermore, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, ownership's contention that the business supports him and his family does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

Appellant did not request a trafficking CMP in lieu of a disqualification nor did it make any mention of how the business met any of the four criteria needed to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. No documentation or other evidence was received from Appellant in support of a

trafficking CMP. Therefore, Appellant failed to meet the regulatory standard for a trafficking CMP required by 7 CFR §278.6(i).

CONCLUSION

The Retailer Operations Division presented a case that Appellant has likely trafficked in SNAP benefits. Their analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in two Attachments of EBT transaction data, the inadequacy of the store's staple food stock as observed during the store visit to support large transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type and larger ethnic and non-ethnic stores.

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

June 5, 2018