

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

**Big Nick’s Cold Cuts & Italian
Specialties,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0209443

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 Big Nick’s Cold Cuts & Italian Specialties (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 December 21, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may . . . file a written request for review of the administrative action with FNS.”

CASE CHRONOLOGY

By letter dated June 12, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in November 2017 through April 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant

could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant, through counsel, responded to the charges in a letter dated June 22, 2018, which did request a CMP and provided documentation in support of it. Counsel also submitted a Freedom of Information Act (FOIA) request dated June 14, 2018, to USDA FNS. USDA FNS responded to this request in a letter dated July 18, 2018, that was received by counsel on July 19, 2018. A follow-up letter was sent by the Retailer Operations Division to counsel on October 26, 2018, and an additional response to the charges dated November 5, 2018, was sent by Appellant.

The Retailer Operations Division notified Appellant by letter dated December 21, 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 dated January 2, 2019, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. Subsequent correspondence dated February 12, 2019, and February 26, 2019, 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 November 2017 through April 2018. This involved two patterns of EBT transaction characteristics indicative of trafficking:

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

APPELLANT’S CONTENTIONS

The following may represent a summary of Appellant’s contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- Store ownership is not involved in trafficking. The firm has been in business since April 1974 and has stayed in the same neighborhood serving generations of the same customers for nearly 45 years. Many are elderly and do not drive which makes it harder for them to go to supermarkets. It is easy and convenient for them to walk to the store, sometimes several times a day;

- The firm is a small supermarket and deli offering a wide variety of food so purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C) are not unusual. The photos show the broad range of merchandise includes dairy, raw and cooked meats, fresh vegetables, hearth baked breads, cold salads, fresh and dried macaroni, and deli products. The owner also brings in merchandise such as meats and coffee on request. While there are larger groceries a short car ride away, the firm is much more convenient to those who rely on public transportation. Other customers purchase cases of eligible foods such as water, juice, cereal, etc. that cost more than just purchasing one or two of these items;
- The neighborhood around the store has multigenerational households where most of the time there are grandparents caring and shopping for the school-aged children in the household while the children's' parents are responsible for their own food shopping. The owner will often see parents twice a day on their way to and from work. Adding the grandparents into the mix and it is easy to see how an EBT card could be used multiple times in a short period. Recipients also may allow a third party to use their card by soliciting someone on their way to shop at the firm to trade cash or other commodity for the use of their recipient's EBT card. They may also purchase food items and then sell them on the street. This is commonplace in counsel's experience as a criminal defense attorney. The firm is not required to verify a recipient's identification and there is no requirement for firms to monitor card numbers for multiple purchases;
- The main contention FNS has is with the multiple transactions. The charge letter identified 117 transactions from 54 cards over a six month period that equates to about 20 transactions per month. It is important to understand the geographic location of the firm and its accessibility to a commercial district where thousands of residents shop, work, visit doctors, and the like. This section of South Philly has multiple generations of Italian Americans residents who often shop early to buy food for lunch and then again to purchase food for dinner. Broad Street, the main artery separating Philadelphia's east and west sides, is a block away and there are hundreds of businesses, schools, a hospital, and a transportation hub all within a short walk of the store. There are thousands of households within a four block radius. The firm also sells lottery, cigarettes, and candy that lure EBT customers so it is no surprise that an EBT card is used multiple times in a short timeframe;
- Food costs in Philadelphia have never been so high. According to the 2017 Official USDA Food Plans: Cost of Food at Home at Four Levels it costs \$39.60 and \$84.60 per week for an adult's food costs. Weekly food costs vary depending on a variety of factors, however, to classify a purchase 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as "excessively large" when that amount is the cost of a week's worth of food for an adult on the Thrifty Food Plan seems patently unfair. Vendor receipts are included to document the significant amount of provisions purchased by the firm in its daily business as well as photos of the store and a newspaper article;
- Appellant requests a CMP in lieu of a permanent disqualification. The firm is a small family business with the owner and his spouse and son being the only ones processing SNAP transactions. Since being SNAP authorized 14 years ago, the firm has had a regimented training policy for all employees operating the cash register. The owner trains all new hires or employees who will operate the cash register for one-two months. They receive a copy of the SNAP Training Guide for Retailers and view the

training video and are tested at the end of the training. The owner also tests his cashiers with mock transactions involving eligible/ineligible items to ensure their knowledge. Any one failing is required to study the manual and watch the video until they are proficient. Cashiers are also trained on how to turn down customers soliciting EBT benefits for cash and receive a copy of the firm's zero tolerance flyer. The SNAP fraud poster is posted prominently to place customers on notice. The owner began documenting all training in 2014 after another small grocer was charged with trafficking. He also visits the FNS web site periodically to keep abreast of any changes. Counsel wholeheartedly believes the firm should qualify for a CMP based on the training program documentation. There is also a petition signed by 100 customers attesting to the quality and integrity of the firm and its employees. There has never been an instance of wrong-doing and the firm has always passed all inspections and tests. SNAP procedures and practices are stringently followed and all employees are tested approximately every six months to confirm they are aware of and following all SNAP guidelines; and,

- The firm is located in a low to middle class neighborhood and many customers rely on SNAP. Without SNAP, the firm may have to close and it would be a devastating blow to the livelihood of three families. Please reconsider this matter and reinstate SNAP so store ownership can help all those who depend on it for their means of support.

Appellant submitted the SNAP Training Guide for Retailers, SNAP training documents, SNAP zero tolerance flyer, FNS SNAP training materials, FNS training expectations notice, a listing of eligible/ineligible items, the Official USDA Food Plans: Cost of Food at Home at Four Levels, invoices for inventory purchases, photos of store stock, a price list of high priced items, a customer petition, and newspaper articles on the firm in support of these contentions.

ANALYSIS AND FINDINGS

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Nevertheless, transactions having such characteristics are sometimes valid and sufficient evidence that support that they were the result of legitimate purchases of eligible food items is provided. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited and to provide evidence that they are legitimate.

The Retailer Operations Division presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant's store during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Store Background and FNS Store Visit

FNS initially authorized the firm on October 20, 2004. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a May 23, 2018, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a very small grocery store offering a moderate quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- The store stocked traditional American brands as well as some ethnic or specialty food items, primarily Italian.
- The store visit report and photos showed no shopping carts or hand baskets for customer use thus severely limiting the amounts of food that could be moved to the checkout.
- No food packages, case sales, bulk items, or other sales were evident that would explain the unusual transactions and no cased eligible items were available for purchase.
- The store visit report specifically noted that the firm was not a specialty store and that there were five deli bundles consisting of deli meats and cheeses for sale, but no fresh meat/seafood bundles or fruit/vegetable boxes for sale. Deli bundle prices were \$21.95, \$13.95, \$10.95, \$7.49, and \$6.49.
- There was a single checkout with an area approximately 1.5 feet wide by 2.0 feet deep for customers to place their purchases. There were many food displays on both sides limiting the available space for purchases. The very small checkout area would make it problematic to process large orders. The checkout area had one cash register, one lottery cash register, a POS terminal, and no optical scanner as confirmed by the firm's owner.
- The firm had a moderate stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, and other drinks as well as ineligible items.
- The firm had a large deli offering a wide assortment of deli meats, cheeses, deli salads, olives, hams, and some cold prepared foods.
- The firm had no fresh unprocessed meat or seafood, a minimal stock of frozen unprocessed meat and seafood, a moderate quantity and variety of processed meats, no canned meat or poultry, some canned fish or seafood, no bacon, hot dogs, deli meats, no packaged lunch meats, sausages, salami, no jerky, a limited stock of frozen entrees and frozen dinners, eggs, a good quantity and variety of fresh fruits and vegetables, a limited stock of frozen vegetables, no frozen fruits, 100 percent fruit drinks, no 100 percent vegetable drinks, no dried beans, no nuts, a limited selection of canned soups, a minimal quantity and variety of canned and packaged staple food items, deli cheese, packaged cheese, cream cheese, single serving yogurt, sour cream, whipped cream, heavy cream, butter, margarine, no canned milk, fresh milk, Lactaid milk, no single serving milk drinks, ½ and ½, bread, rolls, no pitas, no tortillas, no tostadas, corn meal, flour, sugar, rice, hot cereal, cold cereal, single serving Ramen noodle soups, no canned pasta, dry pasta, dry noodles, frozen pasta, pancake mixes, baking mixes, mac&cheese, frozen waffles, frozen mac&cheese, frozen pizza, cooking oil, olive oil, coffee, tea, cocoa, no baby foods, no infant formula, and few expensive staple food items.

- Ineligible items included: tobacco, lottery, health and beauty items, household products, paper products, and pet products while accessory foods included: candy, spices, condiments, snacks, baked goods, cooking oil, sugar, single serving ice cream, ice cream, coffee, tea, cocoa, baking mixes, and un/carbonated drinks.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- The firm's hours of operation were open 7 AM-6 PM daily per the firm's owner. The owner also stated that the firm did take phone orders, did not take online orders, did deliver groceries if within walking distance, and did not round transaction totals up or down.
- There was some signage listing food prices, but many food items were not individually priced. Comments on the FNS store visit report, completed in conjunction with the firm's owner, specifically stated that most food prices end in .x9 cents. A price ending in .x9 cents is the most common pricing structure for stores of this type.
- The FNS store visit report listed the four most expensive food items costing more than \$5.00 for sale in the store as being deli bundle #5 priced at \$21.95, two pounds of jumbo shrimp priced at \$19.99, deli bundle #2 priced at \$13.95, and two pounds of shrimp priced at \$11.95. This listing of the most expensive items was provided by the firm's owner during the store visit.
- The firm was a not a WIC vendor.

Multiple transactions in unusually short time frames

This Attachment documents 117 individual transactions in 54 sets of two or more transactions conducted by 28 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 54 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by store inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends the neighborhood around the store has multigenerational households where most of the time there are grandparents caring and shopping for the school-aged children in the household while the children's' parents are responsible for their own food shopping. The owner will often see parents twice a day on their way to and from work. Adding the grandparents into the mix and it is easy to see how an EBT card could be used multiple times in a short period. Recipients also may allow a third party to use their card by soliciting someone on their way to shop at the firm to trade cash or other commodity for the use of their recipient's EBT card. They may also purchase food items and then sell them on the street. This is commonplace in counsel's experience as a criminal defense attorney. The firm is not required to verify a recipient's identification and there is no requirement for firms to monitor card numbers for multiple purchases. The main contention FNS has is with the multiple transactions. The charge letter

identified 117 transactions from 54 cards over a six month period that equates to about 20 transactions per month. It is important to understand the geographic location of the firm and its accessibility to a commercial district where thousands of residents shop, work, visit doctors, and the like. This section of South Philly has multiple generations of Italian Americans residents who often shop early to buy food for lunch and then again to purchase food for dinner. Broad Street, the main artery separating Philadelphia's east and west sides, is a block away and there are hundreds of businesses, schools, a hospital, and a transportation hub all within a short walk of the store. There are thousands of households within a four block radius. The firm also sells lottery, cigarettes, and candy that lure EBT customers so it is no surprise that an EBT card is used multiple times in a short timeframe.

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of the store's stock and facilities and are thus indicative of trafficking. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out or of household members/friends shopping together and making separate purchases as 48 of the 54 transaction sets **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that subsequent transaction dollar amounts are substantial in these transaction sets and that all of the sets in this Attachment **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** when the comparable average small grocery store SNAP transaction amount in Philadelphia County during the review period was \$8.85. These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby like type grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review.

Additionally, under SNAP regulations there can be multiple benefit households under the same roof each with its own EBT card and SNAP benefits. This provides additional SNAP benefits in a separate EBT account for individuals such as the elderly or disabled living with family members who have their own shopping priorities or needs. During SNAP eligibility interviews, the family structure is carefully evaluated to determine if multiple households may be authorized. This would result in the grandparents and their adult children having their own separate EBT cards. This also would eliminate the possibility of multigenerational household members using the same EBT card and making multiple purchases. While some households may make purchases while going to and from work and others may purchase food in the morning for lunch and then return in the afternoon to purchase food for dinner, it would be expected that these purchases would not exceed **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**e.

Given the moderate staple food stock at the Appellant firm, it is unlikely that any SNAP household would use the firm as their primary grocery store. This was confirmed by the Retailer Operation Division's analysis of shopping patterns for households listed in this Attachment.

Their analysis shows that households have ready access to transportation as evidenced by their shopping at a variety of larger food stores located nearby and at a distance from Appellant's location, including a variety of super stores and supermarkets. Appellant's contentions fail to offer any explanation or rationale as to why households who are shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases totaling to higher dollar values at a moderately stocked store. Common sense dictates that it is improbable that households with limited food dollars would choose to spend large dollar amounts at the Appellant firm if their purchases consisted solely of eligible food items that could be purchased at any of the super stores and/or supermarkets they were already regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant firm.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

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There is no legitimate reason why these households would spend so much of their SNAP allotments at a moderately stocked small grocery store when they clearly had access to and frequently shopped at fully stocked supermarkets and super stores located nearby and at a distance. The more plausible explanation is that all three households cited were trafficking at the firm. Other households analyzed exhibited similar shopping patterns indicative of trafficking.

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

High Dollar Value Transactions

This Attachment lists 466 individual EBT transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar transactions is uncharacteristic for a grocery store offering a moderate stock of staple foods and calls into question the legitimacy of these transactions. The transactions are also substantially higher than the average SNAP transaction amount of \$8.85 for this store type in Philadelphia County. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at 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 transactions remain questionable when considering the proximity of 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, these households 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 91 SNAP retailers located within a one mile radius of the Appellant firm that includes two super stores, three supermarkets, two large grocery stores, and one medium grocery store. There are also three meat specialty stores and a seafood specialty store located within 0.59 miles of Appellant's location. These larger stores and specialty stores would offer greater quantities and varieties of staple food items at lower prices than would be found at a moderately stocked small grocery store primarily offering deli meats, cheeses, salads, pasta, and fresh produce.

The difference in the average SNAP transaction dollar amount and the total SNAP transaction dollar volume for Philadelphia County small grocery stores during the review months and at the Appellant firm is significant. 5 U.S.C. § 552 (b)(7)(E). A comparison of Appellant's SNAP redemptions to that of nearby like type stores having redemptions for the review period shows that none exhibited the same suspicious transaction patterns listed in the charge letter 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 both Attachments do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

The firm also had irregular SNAP transaction data compared to like type stores in Philadelphia County. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This transaction pattern and the unusual spike in both transaction numbers 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 Retailer Operations Division determined there was no credible reason for the firm to have transactions at these dollar levels given the moderate 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 firm is a small supermarket and deli offering a wide variety of food so purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C) are not unusual. The photos show the broad range of merchandise includes dairy, raw and cooked meats, fresh vegetables, hearth baked breads, cold salads, fresh and dried macaroni, and deli products. The owner also brings in merchandise such as meats and coffee on request. While there are larger groceries a short car ride away, the firm is much more convenient to those who rely on public transportation. Other customers purchase cases of eligible foods such as water, juice, cereal, etc. that cost more than just purchasing one or two of these items. Additionally, food costs in Philadelphia have never been so high. According to the 2017 Official USDA Food Plans: Cost of Food at Home at Four Levels it costs \$39.60 to

\$84.60 per week for an adult's food costs. Weekly food costs vary depending on a variety of factors, however, to classify a purchase 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as "excessively large" when that amount is the cost of a week's worth of food for an adult on the Thrifty Food Plan seems patently unfair.

Appellant submitted vendor invoices and receipts to document the significant amount of provisions purchased by the firm in its daily business as well as photos of the store, the Official USDA Food Plans: Cost of Food at Home at Four Levels, photos of store stock, a price list of high priced items, a customer petition, and newspaper articles on the firm.

Although the firm makes good use of the space available, the Appellant's claim that the firm is a small supermarket can hardly be used for a store with only 400 SF of floor space. At this size, the firm is small even when compared to other convenience stores and small grocery stores. A review of FNS store visit reports and photos from 2017 and 2018 did not note any cased or bulk foods being sold so the Appellant's assertion that customers purchase cases of eligible foods such as water, juice, cereal, etc. is without merit. Additionally, no evidence was offered by Appellant that store ownership brings-in merchandise such as meats and coffee on request. The 2017 Official USDA Food Plans report and the customer petition have no probative value as they provide no explanation for the suspicious shopping patterns exhibited by these households. Appellant's price list of high priced items is also questionable. FNS store visit reports include a section completed in conjunction with store personnel listing the four most expensive items offered for sale. Store ownership provided information for this section during both the September 2017 and the May 2018 store visit reports. As previously stated, the May 2018 report lists the deli combo #5 at \$21.95 and a two pound package of jumbo shrimp priced at \$19.99 as being the only two items offered for sale costing more than \$13.95. This directly challenges the legitimacy of the price list of high priced items that includes numerous items priced from \$12.95 per pound, per quart, or each up to \$64.95. The September 2017 store visit report, also completed with information from the store owner, was comparable as it listed only two items priced higher 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is unbelievable that the store owner would forget about the many expensive items listed on the price list on two separate occasions and more likely than not that the price list of expensive items was fabricated in order to justify the high dollar transactions listed in this Attachment and avoid the permanent disqualification. The newspaper articles do not offer any explanation for the high dollar transactions in this Attachment as they primarily talk about the firm's deli products, rolls, and fresh produce.

Many SNAP retail stores are located in highly populated and economically depressed areas yet these stores do not exhibit the same unusual patterns as the Appellant firm. The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of store and store stock. A shopping pattern analysis by the Retailer Operations Division shows that households in this Attachment appear to have no transportation limitations as they 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.

Information obtained during the FNS store visit on May 23, 2018, shows that the Appellant firm offers a moderate quantity and variety of SNAP eligible staple food items, many accessory foods, and ineligible items. Much of the inventory for sale consists of inexpensive snacks, candy, condiments, drinks, and single serving foods as well as ineligible items. The fact that tobacco, lottery, health and beauty items, household products, paper products, and pet products, 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 EBT receipts for the period under review to document the legitimacy of these excessively large transactions. The firm also has a very small checkout area and no shopping carts thereby making it difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. Therefore, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of carts and more likely that the amounts were contrived.

A detailed analysis of invoices submitted for inventory purchases was conducted by the Retailer Operations Division and the dollar amount of eligible food purchases compared to the firm's SNAP redemptions for the review period. It was difficult to identify to which store (Big Nick's Cold Cuts or Lil' Nick's Deli) some of the invoices were for since both firms have similar names and the same address. FNS only excluded invoices that were either clearly for Lil' Nick's or undated. Any ambiguities, such as invoices for "Nick's", were included in the total to give the benefit of the doubt to the retailer. The remaining invoices and receipts were totaled and a 40 percent markup applied to generate an estimate of potential sales. A 20 percent deduction was made for cash and credit/debit card purchases. The resulting amount was greater than the firm's SNAP redemptions for the same period of time. While the inventory was sufficient to cover SNAP redemptions, it provides no explanation for the suspicious patterns in the charge letter or the inexplicable drop in SNAP redemptions and the number of suspicious transactions following the receipt of the FNS charge letter on June 13, 2018.

SNAP redemptions at the Appellant firm fluctuated unusually following the receipt of the FNS charge letter on June 13, 2018. The average SNAP transaction dollar amount decreased 26.03 percent from May 2018 to September 2018 while the volume of SNAP redemptions decreased 35.05 percent and the number of SNAP transactions decreased 12.16 percent over the same period of time. A pronounced decrease 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 redemptions. The months of July and August 2018 were not used for comparison purposes since the firm was closed for nine days each of these months.

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 Retailer Operations Division 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. While store ownership may or may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom store ownership may utilize to handle store business or their degree of involvement in store operations, the owner is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. When the store owner signed the certification page of the SNAP retailer authorization application to become a SNAP retailer and again when he submitted reauthorization applications, he confirmed he understood and agreed to abide by program rules and regulatory provisions. He also 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. 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 owner and the firm were charged with trafficking based on a computer analysis of the store's transactions for the review period. The charges do not derive from the use of a confidential informant or independent investigator who visited the store and made illegal purchases to support findings of trafficking, but by a computer program used by SNAP Administrators. While traditional undercover operations are still in use by USDA, for many years federal regulations have also authorized the use of evidence consisting of EBT transaction data in investigations of SNAP retail stores to determine if trafficking is occurring and U.S. District Courts have long upheld the validity of EBT transaction data.

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." SNAP regulations at 7 CFR

§ 271.2, define trafficking as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food”. SNAP regulations at 7 CFR § 278.6(a) clearly state that “FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system”. In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant firm during the review period. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the review period. All of the transactions were then reviewed and analyzed by the Retailer Operations Division staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photos from the FNS store visit, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant firm during the review period. This analysis also included a review of the firm to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

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

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon the first occasion of a disqualification based on trafficking by a retail food store.” In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option under existing regulations.

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 the 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 firm may incur economic hardship based on the assessment of an administrative penalty 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.

SNAP regulations are explicit in what constitutes substantial evidence. Specifically, 7 CFR § 278.6(i)(2) states in relevant part, "As specified in Criterion 3 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with part 278 of current FNS regulations and current FSP policy on the proper acceptance and handling of food coupons." This section goes on to state, "As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation." This section further states, "A firm which seeks a civil money penalty in lieu of permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted..."

Appellant submitted a one-page handwritten training summary sheet for each employee, a typed listing of employee names and employment start dates, two copies of a SNAP Training Expectations notice sent to store owners by FNS, an undated typed homemade Zero Tolerance sign, a SNAP Retailer Notice concerning sales tax sent to store owners by FNS, a SNAP Provisions of the Agricultural Act of 2014 notice sent to store owners by FNS, a two-page typed homemade listing of eligible/ineligible products, a SNAP abuse poster, and two editions of the SNAP Retailer Training Guide as documentation in support of a trafficking CMP.

Appellant did not submit a copy of the firm's SNAP compliance policy and program, and no documentation of employee identity or employment such as payroll records or other documentation was provided. Also, no explanation was offered of how store ownership met each of the four criteria to be eligible for a trafficking CMP. An examination of the two-page typed homemade listing of eligible/ineligible products shows that it lists many unusual items (e.g. alcohol, bow & arrows, dry ice, fertilizer, livestock, etc.) not stocked by the firm. This listing did not include items such as household and paper products regularly stocked by the firm making it questionable as where it came from since it does not reflect the firm's merchandise and would therefore have no value for training staff. Appellant also contends that the owner posted the SNAP fraud poster prominently to place customers on notice and also requires employees to pass a test at the end of their training. Additionally, the owner tests the cashiers with mock transactions involving eligible/ineligible items and requires remedial training for any failing to correctly apply SNAP rules and regulations. A review of photos from the September 26, 2017, and the May 23, 2018, FNS store visits show no SNAP signage of any kind posted at the firm. The October 6, 2018, store visit photos do show two handwritten signs posted near the checkout area stating that EBT-Food Stamps are for food only and not for cigarettes. No documentation of the test required at the end of the training or documentation of employee performance on this test as well as the mock transaction testing was provided. Lastly, the owner's immediate family comprises the majority of store employees making it likely that some or most of the suspicious transactions listed in these Attachments were conducted by them. Since SNAP redemptions are deposited into the owner's commercial account, a direct benefit from trafficking was received.

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

CONCLUSION

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

The retailer has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Based on the

discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a trafficking CMP according to Section 278.6(i) of the SNAP regulations.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

June 6, 2019