

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

Bray & Bray,

Appellant,

v.

Case Number: C0202388

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 Bray & Bray (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 October 11, 2017.

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

In a letter dated September 6, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of March 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, through its representative, contacted the Retailer Operations Division by telephone on September 11, 2017, and admitted to the business offering credit accounts, but did not request a trafficking CMP or submit evidence in support of one. The Retailer Operations Division, by letter dated September 11, 2017, requested evidence of the existence of credit accounts at the business. Appellant, through its representative, responded to their request with documents submitted via fax on September 15, 2017, but the response contained no cover letter or other explanation regarding the documents submitted. The Retailer Operations Division notified Appellant in a letter dated October 11, 2017, that the firm was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6(c) and 278.6(e)(1) for trafficking violations. This determination letter also stated that Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated “. . . you are not eligible for the CMP because you failed to submit sufficient evidence to demonstrate that your firm had established and implemented an effective compliance policy and program to prevent violations of the Supplemental Nutrition Assistance Program.”

By letter postmarked October 20, 2017, Appellant, through its representative, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted. No subsequent correspondence was received from counsel.

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 of SNAP benefits.

7 U. S. Code § 2021(a)(2) states, “Regulations promulgated under this chapter shall provide criteria for the finding of a violation of, the suspension or disqualification of and the assessment of a civil penalty against a retail food store or wholesale food concern on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, or evidence obtained through a transaction report under an electronic benefit transfer system.”

In addition, 7 CFR § 278.6(a) states, in part, “FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system”

7 CFR § 278.6(e)(1)(i) reads, in part, “FNS shall . . . [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2. ” Trafficking is defined, in part, in 7 CFR § 271.2, as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone” Trafficking is further defined, in 7 CFR § 271.2, to include “(5) 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, inter alia: “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, inter alia: “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 consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in Part 278.6(b)(1), 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 five month period of March 2017 through July 2017. This involved one pattern of EBT transaction characteristics indicative of trafficking:

1. Excessively large purchase transactions were made from recipient accounts.

APPELLANT'S CONTENTIONS

In the response to the letter of charges, in the response regarding documentation of credit accounts, and in the request for administrative review, Appellant has stated as its position in the matter the following:

- The representative stated that the business was not trafficking, but was extending credit to SNAP customers;
- The representative didn't know what he was doing and his mother and sister didn't know. They should not have to close the store because of something he did. They saved their money to open the store with no help from any body and now everything they saved for is gone. The mother is 94 years old and the sister is 67. They have never been arrested and have no bad things on their record; and,
- An administrative review and a CMP are requested. The representative does not know what one is, but the letter said he could request one.

Appellant submitted 10 invoices for inventory purchases; three client statements attesting to receiving credit; and 13 pages listing food items, prices, and dates/dollar amounts in support of these contentions.

The preceding 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.

ANALYSIS AND FINDINGS

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 the Appellant business during the review period.

Store Background and FNS Store Visit

The FNS initially authorized the Appellant business on July 24, 2013, and the business is classified as a convenience store. The file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a July 26, 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 EBT transactions at Appellant's store that formed patterns indicative of trafficking. The store review summary documented the following store size, description, and characteristics:

- The business had moved from its previous location 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to 2717 Pine Avenue in Niagara Falls. The business is a small addition, approximately 180 SF, added to the front of a single family home.
- The business was an extremely small grocery store offering a very limited quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- The business stocked typical mainstream American brand products and did not offer any ethnic foods.
- Exterior signage advertised tobacco and ATM.
- There were no shopping carts or handheld baskets for customer use seen during the visit making it difficult for customers to carry large amounts of food to the checkout.
- The checkout area was the top of a small storage unit that contained the cash register, PIN pad, and displays leaving an area approximately one foot wide by one and one-half feet deep to place purchases upon. The very small size of the checkout counter would make it problematic to process large orders.
- The checkout area had one cash register, no optical scanner, and one point-of-sale (POS) terminal as evidenced by the store visit report and photographs.
- No food packages, bundles, case sales, bulk products, or other sales were evident that would explain the unusual transactions and no SNAP eligible cased items were available for sale.
- The store had an extremely limited stock of staple foods that also included many single serving and pre-packaged items with a large portion of inventory in accessory foods, snacks, and ineligible items.
- The store had no fresh unprocessed meats or seafood, no frozen unprocessed meats or seafood, a very limited quantity and variety of processed meats and seafood (canned meat/fish/poultry, jerky, one bacon, two hot dogs, two packaged lunch meats), no deli meats, only one dozen eggs, no sausages, no frozen entrees, no frozen dinners, no fresh fruit or vegetables, no frozen fruits or vegetables, no nuts, no 100 percent vegetable juices, only two cans of soup, an extremely limited quantity and variety of canned and packaged staple food items, no flour, no corn meal, no baking mixes, no sour cream, no yogurt, only one canned milk, only one fresh milk, no deli cheeses, only two packaged cheeses, no ice cream, no baby foods or infant formula, only five hot cereals, only four cold cereals, no dry pasta/noodles, no baked goods, and no expensive eligible food items.
- Ineligible items included: tobacco, smoking accessories, household products, paper products, health and beauty items, ATM, hats, sandals, phone accessories, and fireworks (sparklers) while accessory foods included: candy, condiments, spices, one box of tea, four containers of coffee, and carbonated/ uncarbonated drinks.
- The store was not a WIC vendor and did not stock any baby foods or infant formula.
- Signage in the store was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- Most food items were priced with all visible staple food prices ending in .x9 cents. Comments on the FNS store visit report by the contract reviewer specifically stated that most of the food prices ended in .x9 cents. A price ending in .x9 cents is the most common pricing structure for stores of this type.
- As confirmed by a store owner, the section of the FNS store visit report that lists the four most expensive eligible food items costing more than \$5.00 for sale in the store was blank as there were no items priced at \$5.00 or higher.

- The business's hours of operation were 7:30 AM-8:30 PM daily as confirmed by a store owner during the store visit.
- The store visit photographs showed that many shelves were marginally stocked and the report noted that a reach-in cooler was broken.
- The quantity and variety of the store's staple food inventory was significantly less than that seen during the previous FNS store visit on July 18, 2013.

High Dollar Value Transactions

This Attachment lists 71 individual EBT transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is unusual and suspicious that 69 of the 71 transactions in this Attachment end in the same cents amounts 5 U.S.C. § 552 (b)(6) & (b)(7)(C) based on the store's pricing structure of almost all food prices ending in .x9 cents. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar transactions is atypical for a very poorly stocked convenience store of this size 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 \$7.13 for this store type in Niagara County. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant business are also shopping at other nearby stores, as well as at full-line supermarkets and super stores, located nearby as well as at a distance from Appellant's location that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the Appellant 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.

5 U.S.C. § 552 (b)(7)(E). A comparison of Appellant's SNAP redemptions to that of nearby convenience stores that had redemptions for the review period shows similar differences. Additionally, none of these nearby stores exhibit the same suspicious transaction pattern 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 do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

This store also had irregular SNAP transaction data as compared to like type convenience stores. A comparison of Appellant's SNAP redemption data with that of Niagara County convenience stores using 5 U.S.C. § 552 (b)(6) & (b)(7)(C) increments shows that Appellant's transaction count and dollar volume ranges are substantially less than the average of like type stores 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at which point redemptions begin to significantly exceed the County average. This is unusual since the lowest ranges are typically where the vast majority of

convenience store transactions occur. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These unusual spikes in both transaction numbers and dollar volume do not appear in the transaction count and dollar volume averages for other Niagara County convenience stores. These high dollar transactions are considered to be irregular and suspicious based on the Appellant store's food inventory. The Retailer Operations Division determined there was no credible reason for the Appellant business to have transactions at those high dollar levels given the extremely limited stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and therefore also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

Appellant contends the multiple transactions are the result of the store owners granting customers credit and submitted 10 invoices for inventory purchases; three client statements attesting to receiving credit; and 13 pages listing food items, prices, and dates/dollar amounts in support of this contention. Credit will be addressed more fully in the next section.

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 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. Additionally, the transactions listed in this Attachment do not contain the characteristics associated with a household making payments on a credit account.

Information obtained during the FNS store visit on July 26, 2017, shows that the Appellant business offers an extremely limited quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Since the Appellant business carries no fresh unprocessed meats or seafood, no frozen unprocessed meats or seafood, a very limited quantity and variety of processed meats and seafood (canned meat/fish/poultry, jerky, one bacon, two hot dogs, two packaged lunch meats), no deli meats, only one dozen eggs, no sausages, no frozen entrees, no frozen dinners, no fresh fruit or vegetables, no frozen fruits or vegetables, no nuts, no 100 percent vegetable juices, only two cans of soup, an extremely limited quantity and variety of canned and packaged staple food items, no flour, no corn meal, no baking mixes, no sour cream, no yogurt, only one canned milk, only one fresh milk, no deli cheeses, only two packaged cheeses, no ice cream, no baby foods or infant formula, only five hot cereals, only four cold cereals, no dry pasta/noodles, no baked goods, and offers no expensive eligible food items, these patterns are deemed to be suspicious. The fact that: tobacco, smoking accessories, household products, paper products, health and beauty items, ATM, hats, sandals, phone accessories, and fireworks (sparklers) are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts. The business carries no special foods or offers any unique services that are not also available at other nearby grocery stores making it unlikely that SNAP recipients with available transportation would make this business their grocery store of choice. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C). When there are a disproportional amount of transactions ending in a same cent value, it appears that these transaction amounts are contrived and therefore, in the absence of any compelling rationale to the contrary, are indicative of trafficking. Additionally, this Attachment includes four high dollar value transactions occurring after the store's reported closing time of 8:30 PM. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is an indication of trafficking when high dollar value transactions are occurring well outside of the store's reported business hours.

Increasing food prices make it even more unlikely that SNAP recipients, with limited food benefits, would want to spend a considerable part of their benefits in a convenience 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 scanners and conveyor belts to facilitate processing purchases quickly. Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions. An analysis of the 10 invoices for inventory purchases submitted by Appellant was conducted by the Retailer Operations Division. This analysis showed that only six invoices were dated within the period under review and that they were for the months of March 2017 through May 2017. A 100 percent markup was applied to the total dollar amount of these six invoices in order to produce a figure representing potential eligible food sales. The potential sales figure was then compared to SNAP redemptions at the Appellant business for the same three months and showed that it was less than 25 percent of the redemptions thereby confirming the inadequacy of store inventory for the relevant review months. Additionally, the Appellant business has an extremely small checkout area and does not have shopping carts, hand baskets, or a scanner 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. Based on this discussion, Appellant did not provide adequate evidence to support the legitimacy of the excessively large transactions in this Attachment.

It was further noted that SNAP redemptions at the Appellant business dropped following the FNS store visit on July 26, 2017. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). A pronounced decrease in SNAP transactions immediately following the store visit is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

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

Credit and Other Contentions

Appellant contends the business allows credit accounts, a violation of SNAP regulations at Section 278.2(f). Appellant further maintains that the transactions were legitimate SNAP purchases.

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. 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 store owners signed the certification page of the SNAP retailer application to begin operating as a SNAP retailer, they confirmed they understood and agreed to abide by program rules and regulatory provisions. They agreed to accept responsibility 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 making it difficult to believe that store ownership was not aware that offering credit violated SNAP regulations.

The admission that the business extended 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); this Section includes a like disqualification period for the sale of ineligible items by management personnel. 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 letter of charges. 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 regards to Appellant's admission to accepting SNAP benefits for payment on credit accounts, a program violation, Appellant submitted documentation consisting of three client statements attesting to receiving credit and 13 pages listing food items, prices, and dates/dollar amounts in support of the credit contention. An analysis of the shopping patterns for the three households providing statements shows that these households conducted only two, eight, and 13 transactions

at the Appellant business throughout the five month period under review showing that they are not regularly shopping there. It is unlikely that store ownership would extend credit to customers who do not regularly shop at the business. The household with two transactions typically had benefits remaining in her account to the end of the month and therefore would have had no need to receive credit. This household also shopped at several other stores over a period of days before conducting the two transactions at the Appellant business that would not be typical for customers needing to pay back credit accounts. The household with eight transactions also shopped at several other stores over a period of days before going to the Appellant business and had multiple high dollar value transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** during the months of May 2017 and July 2017 that are not consistent with her statement. While it is possible that store ownership may have allowed credit for a select few customers, there are 26 households listed in the charge letter while only three of these households allegedly received credit making it more likely than not that trafficking was occurring at the Appellant business.

Since the evidence submitted supporting the claim of credit accounts did not address all of the charge letter transactions, the Retailer Operations Division evaluated the suspicious SNAP transactions listed in the letter of charges to determine if they indicated trafficking. Their determination was that the transactions showed clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity indicative of trafficking.

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 . . . [d]isqualify 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, either directly, indirectly, in complicity or collusion with others, or acting alone . . .” SNAP regulations at 7 CFR § 278.6(a) clearly state, in part, 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 . . .**” (Emphasis added). In the present case, the data presented in the Attachment is solely based on the SNAP electronic benefit transfer transactions conducted at the Appellant business during the period under review. 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 period under review. 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 on July 26, 2017, 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. 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 Attachment. 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 Attachment 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.

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 made no mention of how the business met any of the four criteria in either its response to the charge letter or in the request for administrative review and no documentation or other evidence of any kind, including written statements, was subsequently received from Appellant in support of a trafficking CMP. Therefore, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division’s decision not to impose

a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

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 store 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, Appellant'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.

CONCLUSION

The Retailer Operations Division has presented a case that Appellant has likely trafficked in SNAP benefits. The Retailer Operations Division's 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 that are consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in one Attachment 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 by the Retailer Operations Division. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, Retailer Operations properly determined that Appellant was not eligible for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations.

RIGHTS AND REMEDIES

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

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

ROBERT T. DEEGAN
Administrative Review Officer

February 5, 2018