

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

Bronson Grocery,

Appellant,

v.

Case Number: C0207682

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 Bronson Grocery (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant on July 10, 2018.

AUTHORITY

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

CASE CHRONOLOGY

By letter dated April 24, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in September 2017 through February 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, requested an extension of time to respond in a phone call made on May 9, 2018, and responded to the charges in a letter dated May 21, 2018. This letter did not request a CMP nor was any evidence submitted to be considered in support of a CMP. The Retailer Operations Division notified Appellant by letter dated July 10, 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 July 16, 2018, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. Subsequent correspondence was received.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR Part 278.6(a) and Part 278.6(e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

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

7 CFR § 278.6(e)(1)(i) states: "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined in part as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". Trafficking includes "Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food".

7 CFR §278.6(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 September 2017 through February 2018. This involved three patterns of EBT transaction characteristics indicative of trafficking:

1. There were an unusual number of transactions ending in a same cents value.
2. Multiple transactions were made from individual benefit accounts in unusually short time frames.
3. Excessively large purchase transactions were made from recipient accounts.

APPELLANT’S CONTENTIONS

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

- The decision to disqualify the store is not based on any actual on site observations, inspections, or statements from any individuals;
- The same cents transactions were most likely the result of account holders buying a number of similar items, staples and candy which result in the same cent value. There are only 237 such transactions which represent a small number of the store’s total transactions over a three period and the vast majority of the same cents transactions occurred over a four month period during which the owner was out of the country;
- The multiple transactions are due to families making more than one trip to the store in any given day or due to various family members using the card. There are only 25 sets of transactions within this five month period, not unusually high for the neighborhood

and the bulk of the multiple transactions numbered two or three over the course of one or two days;

- Counsel has reviewed the records maintained by Appellant and it does not have a system where each purchase is itemized as such programs and procedures are an extreme burden to small groceries. 5 U.S.C. § 552 (b)(6) & (b)(7)(C);
- The decision to permanently disqualify Bronson Grocery is based solely on data without any evidence of intent. It's troubling that the Department would impose such a hardship on small groceries with nothing but statistical analysis to support its claim. The department's reliance on this data is unjust given the realities of the business practice of small groceries;
- There is no fraudulent activity as a lot of families shop at the firm because most do not have transportation to go to a supermarket and the firm provides those things that families need; and,
- A permanent disqualification is extreme considering the undersigned is not aware of any prior action against Bronson Grocery for any violations.

Appellant submitted no evidence or other rationales 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 September 5, 2016. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a March 24, 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 convenience store offering a limited quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- The store primarily stocked traditional American brands, but also had a limited stock of Hispanic (e.g. Goya) products.
- The store visit report and photos showed no shopping carts or hand baskets for use by customers making it difficult for them to carry large amounts of food to the checkout.
- No food packages, bundles, case sales, bulk items, or other sales were evident that would explain the unusual transactions and no cased items were available for purchase.
- The store visit report specifically notes that the firm was not a specialty store and that there were no meat bundles or fruit and vegetable boxes for sale.
- The sole checkout area was an opening approximately 4.0 feet wide by 1.5 feet deep set into a plastic display wall. There were many displays and a PIN pad on the counter and a large ice cream freezer was directly in front of the checkout area that customers must reach over in order to place their purchases onto the checkout counter. The small size of the checkout area would make it problematic to process large orders. The checkout area had one cash register, one POS terminal, and no scanner as confirmed by the store owner.
- The store had a limited stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, and other drinks as well as many ineligible items.
- The store had a large refrigerated deli display case and a small kitchen/food prep area behind the deli case containing a sandwich grill, coffee pot, microwave oven, commercial slicer, and a stainless steel prep table with a shelf over it containing open condiments and seasonings. There was no menu board listing prices for the hot/cold prepared foods.
- The store had no fresh unprocessed meat, an extremely limited selection of fresh unprocessed seafood (several bags of Pollock), no frozen unprocessed meat or seafood except for three bags of frozen shrimp, a very limited quantity and variety of processed meats (canned meat/poultry/ fish, hot dogs, salami, sausages, and a very limited selection of deli meats), no processed seafood except for canned fish, no jerky, no bacon, no packaged lunch meats, no frozen entrees, no frozen dinners, only two cartons of eggs, a very limited selection of fresh fruit and vegetables (two bags of potatoes, one tomato, lettuce, onions, oranges, apples, lemons, avocados, one lime, bananas, and plantains), no frozen fruits or vegetables, a very limited selection of packaged single serving nuts, a very limited selection of canned soups, a limited quantity and variety of canned and packaged staple food items, a very limited selection of deli cheeses, a very limited quantity and variety of packaged cheeses, no yogurt, no sour cream, no butter, only one package of margarine, no baby cereals or foods, no baby juices, 10 containers of infant formula, bread, no rolls, no pitas, no tortillas, no tostadas, only two bags of corn meal, flour, rice, a very limited selection of cold cereals, no hot cereals, many single serving noodle soups, dry pasta, dry noodles, a limited stock of mac&cheese, no tea, and no expensive staple food items.
- Ineligible items included: tobacco, tobacco accessories, alcohol, hot food, hot drinks, household products, paper products, pet products, auto products, health and beauty items, ATM, phone accessories, diapers, lighter fluid, and hats while accessory foods

included: candy, spices, condiments, snacks, baked goods, baking mixes, cooking oil, sugar, ice cream, single serving ice cream, coffee, cocoa, and uncarbonated 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 8 AM-11 PM daily as confirmed by the store owner. The owner also stated that the firm did not take phone or online grocery orders; did not deliver groceries; and did not round prices up/down.
- Most food items were priced with all visible food prices ending in .x9 cents except for a very few items priced differently such as three bags of frozen shrimp priced at \$18.00 each. Comments on the FNS store visit report 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 a 12.0 ounce container of infant formula priced at \$19.99, a 2.0 pound package of shrimp priced at \$18.00, a 40 ounce multipack of coffee priced at \$14.99, and a 1.0 gallon container of cooking oil priced at \$6.49. This listing of the most expensive items was provided by the store owner during the store visit.
- The firm was a not a WIC vendor. While the firm did stock 10 containers of infant formula, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers, not SNAP EBT.
- The quantity and variety of the store's staple food inventory was slightly less than that seen during the previous FNS store visit on August 22, 2016.

Unusual numbers of transactions ending in a same cents value

This attachment lists 237 transactions with 241 transactions ending in the same cents value of .15 cents and 59 transactions ending in the same cents value of .85 cents.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits. The FNS store report and photographs revealed no signs posted to indicate special food packages, bundles, case sales, or other sales that would explain the unusual number of transactions ending in these same cents values and no bulk items were available for purchase. The high percentage of same cent transactions combined with the large number of same cents high dollar transactions is irregular and suspicious for this type store.

Appellant contends the same cents transactions were most likely the result of account holders buying a number of similar items, staples, and candy which result in the same cent value. There are only 237 such transactions which represent a small number of the store's total transactions over a three month period and the vast majority of the same cents transactions occurred over a four month period during which the owner was out of the country.

The inventory report and photos from the 2018 FNS store visit show the Appellant firm offered a minimal stock of staple foods that included a very limited number of expensive staple food items making it questionable that such a large number of high dollar SNAP transactions could be for

legitimate food purchases. The store visit report specifically notes that Appellant's pricing structure has the majority of food prices ending in .x9 cents and this fact is reinforced by numerous photos of store stock. The purchase of several items with prices ending in .x9 cents would most likely not result in a total ending in a same cents value of .15 or .85 cents as multiples of nine seldom have a value ending in these amounts making it statistically impossible that this many store transactions would end in this amount with legitimate food purchases. This is further supported by the number of high dollar value transactions in the third Attachment that do not end in .15 or .85 cents.

It does not matter if the store owner was in or outside of the country or whether the owner was involved in day-to-day store operations. Both the FNS SNAP retailer application and retailer reauthorization application contain a certification page whereby applicants must confirm their understanding of and agreement with SNAP retailer requirements in order to complete the application/reauthorization process. Store ownership did certify its understanding and agreement to abide by program rules and regulatory provisions when it initially applied to become a SNAP retailer in 2016. Therefore, the store owner remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time regardless of the amount of time the owner is present at the subject firm.

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

Multiple transactions in unusually short time frames

This Attachment documents 55 individual transactions in 25 sets of two or more transactions conducted by 24 different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). One set is comprised of five individual transactions and two sets are comprised of three individual transactions while the remaining 22 sets are comprised of two individual transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant contends the multiple transactions are due to families making more than one trip to the store in any given day or due to various family members using the card. There are only 25 sets of transactions within this five month period, not unusually high for the neighborhood and the bulk of the multiple transactions numbered two or three over the course of one or two days.

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of a convenience store's stock and

facilities and are thus indicative of trafficking. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out or of household members/friends shopping together and making separate purchases as all of the transaction sets occur almost three hours apart. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant's contentions also provide no explanation as to why households would conduct up to five sizeable transactions at the Appellant firm within a short period of time.

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 convenience store SNAP transaction amount in New Haven County during the review period was \$7.96. These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby like type grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review.

The Retailer Operation Division's analysis of shopping patterns for households listed in this Attachment shows they have ready access to transportation as evidenced by their shopping at a variety of larger food stores located nearby and at a distance from Appellant's location, including a variety of super stores and supermarkets. 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 high dollar values at a minimally stocked store. Common sense dictates that it is improbable that households would choose to spend large dollar amounts at the Appellant firm if their purchases consisted solely of eligible food items that could be purchased at any of the super stores and/or supermarkets they were already regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant firm.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant offered no explanation as to why a household would travel away from its regular shopping area to shop at a minimally stocked convenience store when it would have to travel past other larger grocery stores it patronized to do so. There is no legitimate reason why this household would spend so much of its SNAP allotment at a minimally stocked convenience store when it clearly had access to and frequently shopped at supermarkets and super stores located nearby and at a distance. The more plausible explanation is that this household was trafficking. Other households analyzed exhibited similar shopping patterns indicative of trafficking. It is also worth noting that none of the households analyzed shopped at the Appellant firm every month of the six month review period indicating that the firm is neither a preferred store nor one that is most convenient for many households thus further supporting that SNAP households were trafficking at the Appellant firm.

There may be legitimate reasons why a SNAP household might return to a store during a short period of time, but the examples in this Attachment indicate a series of SNAP purchases that total to large dollar amounts. Multiple transactions over a short period of time, especially those of high dollar values, are indicative of attempts to obscure trafficking by dividing a 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 484 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 minimal 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 \$7.96 for this store type in New Haven 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. The high dollar value transactions remain questionable when considering the proximity of these other stores that would be better shopping options for consumers. Based on their shopping patterns, transportation does not appear to be an issue for these households. Yet, these recipients continue to shop and spend suspicious high dollar amounts at the Appellant firm, where the eligible food stock is limited, often on the same day, or within 24-48 hours of their purchases at larger food stores.

While households residing in areas with extremely limited grocery store options may conduct high dollar value transactions at convenience stores out of necessity, this is not the case when they have better alternatives. FNS records show there were 12 larger SNAP retailers located within a one mile radius of the Appellant firm during the review period as well as 36 convenience stores and a meat specialty store. The 12 larger stores includes a super store, a supermarket, a large grocery store, four medium grocery stores, and five small grocery stores that would offer greater quantities and varieties of staple food items at lower prices than could be found at a minimally stocked convenience store. One small grocery store and the meat specialty store are located within three blocks of Appellant's location while the nearest medium grocery store is less than six blocks away.

5 U.S.C. § 552 (b)(7)(E). The unusually high number of SNAP transactions is an indication the firm may be dividing larger transactions into multiple smaller transactions in an effort to circumvent detection as previously discussed. A comparison of Appellant's SNAP redemptions to that of nearby like type stores having redemptions for the review period shows that none exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant firm even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is further indication that the transactions in this Attachment and the previous do not represent legitimate food purchases. The 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 New Haven County. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These unusual spikes in both transaction numbers

and dollar volume do not appear in the transaction count and dollar volume averages for other like type stores. These large dollar transactions are considered to be irregular and suspicious based on the firm's food inventory. The Retailer Operations Division determined there was no credible reason for the firm to have transactions at these dollar levels given the limited stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

Appellant contends that Counsel has reviewed the records maintained by the firm and it does not have a system where each purchase is itemized as such programs and procedures are an extreme burden to small groceries. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is readily apparent from the FNS store visit report and photos that the Appellant firm is a very small convenience store that offers a limited quantity and variety of staple foods and carries no unique items or offers any distinctive services. Much of the inventory for sale consists of inexpensive snacks, candy, condiments, drinks, and single serving foods as well as many ineligible items. The fact that tobacco, tobacco accessories, alcohol, hot food, hot drinks, household products, paper products, pet products, auto products, health and beauty items, ATM, phone accessories, diapers, lighter fluid, and hats are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts. Given the many larger and better stocked stores located nearby, the Appellant firm is not likely to be the primary grocery store for any SNAP household and instead serves only as a location for convenience purchases by households in the immediate area who need to purchase a small number of inexpensive items. Accordingly, the large dollar value transactions in this Attachment are therefore more likely to be indicators of trafficking than legitimate food purchases.

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

Higher food prices make it even more unlikely that SNAP recipients, with very limited food benefits, would want to spend a considerable part of their benefits in a store that does not address all of their food needs when they are already shopping at larger, fully-stocked stores that would offer a greater variety of foods at lower prices. Many of these stores also offer store brand products at lower prices, weekly specials, and have shopping carts and checkouts with built-in scanners and conveyor belts to facilitate processing purchases quickly. Additionally, Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions and no evidence was provided of SNAP eligible store stock via receipts of products taken into inventory for the relevant review months. The firm has a 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.

It is further noted that SNAP redemptions at the Appellant firm fluctuated unusually following receipt of the charge letter on April 25, 2018. The average SNAP transaction dollar amount at the Appellant firm decreased 42.19 percent and the volume of SNAP redemptions decreased 45.17 percent from April 2018 to May 2018. A pronounced decrease in SNAP redemptions following receipt of the charge letter is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

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

Other Contentions

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. A record of participation in SNAP with no previously documented instance of violations or assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges or for mitigating the impact of those charges.

The owners and the firm were charged with trafficking based on a computer analysis of the store's transactions for the review period. The charges do not derive from the use of a confidential informant or independent investigator who visited the store and made illegal purchases to support findings of trafficking, but by a computer program used by SNAP Administrators. While traditional undercover operations are still in use by USDA, for many years federal regulations have also authorized the use of evidence consisting of EBT transaction data in investigations of SNAP retail stores to determine if trafficking is occurring and U.S. District Courts have long upheld the validity of EBT transaction data.

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." SNAP regulations at 7 CFR § 271.2, define trafficking as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". SNAP regulations at 7 CFR § 278.6(a) clearly state that "FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such

disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system”. In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant firm during the review period. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the review period. All of the transactions were then reviewed and analyzed by the Retailer Operations Division staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photos from the FNS store visit, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant firm during the review period. This analysis also included a review of the firm to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

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

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

CIVIL MONEY PENALTY

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

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

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

CONCLUSION

The Retailer Operations Division presented a case that Appellant has likely trafficked in SNAP benefits. Their analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in three 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

December 11, 2018