

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

Carrillo Mini Market,

Appellant,

v.

Case Number: C0209785

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 Carrillo Mini Market (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 26, 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 August 6, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in December 2017 through May 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 its representative, responded to the charges in a letter submitted via fax on August 20, 2018, which did not request or provide any documentation in support of a CMP. The Retailer Operations Division notified Appellant by letter dated October 26, 2018, that the firm was permanently disqualified from participation as a SNAP retailer in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter postmarked November 2, 2018, Appellant, through its representative, 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 December 2017 through May 2018. This involved three 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:

- All transactions are legal. Regular customers shop every day and sometimes twice a day buying lots of groceries such as: 12 pack cans of soda at \$7.99, eggs at \$3.49, cold sandwiches at \$1.99-\$4.99, beef jerky at \$0.99-\$8.99, milk at \$2.99 a gallon, frozen burritos up to \$3.99, frozen small pizzas \$5.99 a pack, ice cream at \$0.99-\$5.99, hot dogs at \$1.99 to \$3.99, Hostess at up to \$4.99, Bimbo bakery at up to \$3.99, Bon Appetit at up to \$3.99, tortilla chips at \$1.99-\$4.29, tortillas at \$0.99-\$3.99, breads at \$1.99-\$4.99, as well as cases of Gatorade, cooking oil, sugar, flour, and canned foods;
- These items are the best selling products purchased with EBT and the original receipts may help. The firm buys on a daily basis from its vendor and from large grocery stores like Food 4 Less and Smart & Final; and,
- The firm never misuses EBT as it helps the firm to keep its door open. The firm has started checking ID cards to be sure SNAP EBT card belongs to the same person.

Appellant submitted original invoices for inventory purchases 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 December 4, 2017. The case file shows that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a May 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 typically sized convenience store offering an extremely limited quantity and variety of staple foods and carrying no other unique items or offering any distinctive services. The store stocked traditional American brands as well as a limited variety of canned and packaged Hispanic foods.
- 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, 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 noted that the firm was not a specialty store and that there were no meat bundles or fruit and vegetable boxes for sale.
- There was only one checkout area that was approximately 2.5 feet wide and 1.5 feet deep with displays and a PIN pad taking up space on both sides leaving a very limited area for customers to place their purchases. The very small checkout area would make it problematic to process large orders. The checkout area had one cash register, a POS terminal, and an optical scanner as confirmed by the store cashier.

- The firm had an extremely 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 firm sells cooked hot dogs, hot coffee, and also has a microwave oven for heatable foods such as frozen burritos.
- The firm had no fresh unprocessed meat or seafood, no frozen unprocessed meat or seafood, a very limited quantity and variety of processed meats (canned meat, poultry, fish; and jerky), no deli meats, no packaged lunch meats, no sausages, no bacon, no hot dogs, no frozen entrees, no frozen dinners, several cartons of eggs, no fresh fruit or vegetables, no frozen fruits or vegetables, a limited selection of dried fruit and vegetables, five dried beans, a minimal selection of packaged single serving nuts, an extremely limited selection of canned soups, an extremely limited quantity and variety of canned and packaged staple food items, no deli cheese, only four packaged cheese, no yogurt, no butter, no margarine, several canned milk, fresh milk, single serving milk drinks, no bread, four rolls, no pitas, several packages of tortillas, only four tostadas, no corn meal, flour, only one sugar, rice, only two hot cereals, cold cereal, single serving cold cereal, single serving Ramen noodle soups, canned pasta, three packages of dry pasta, four packages of dry noodles, three pancake mixes, no baking mixes, no mac&cheese, only three frozen burritos, cooking oil, only two coffee, no tea, no cocoa, no baby foods, no infant formula, and very few expensive staple food items.
- Ineligible items included: tobacco, tobacco accessories, lottery, alcohol, hot food, hot drinks, household and paper products, pet products, auto products, health and beauty items, ATM, clothing, hats, sunglasses, cell phones, phone accessories, foam coolers, charcoal, lighter fluid, gift items, and party supplies while accessory foods included: candy, spices, condiments, cooking oil, one small package of sugar, snacks, baked goods, single serving ice cream, two containers of coffee, 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 8 AM-11 PM Monday-Thursday, 8 AM-11:30 PM Friday-Saturday, and 8 AM-10:30 PM Sunday per the cashier. The cashier also stated that the firm did not take phone or online grocery orders; did not deliver groceries; did not round price totals up/down, and had a pricing structure with most product prices ending in .x9 cents.
- Many food items were priced and comments on the FNS store visit report, completed in conjunction with the cashier, 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 three ounce package of jerky priced at \$7.99, a 12 pack of soda priced at \$5.99, 4.4 pound bag of Maseca flour priced at \$5.99, and two 16 or 15.5 ounce cans of Monster energy drinks priced at \$5.00. This listing of the most expensive items was provided by the cashier during the store visit.
- The firm was not a WIC vendor.
- The store visit report and photos noted several empty or minimally stocked shelves.
- It also was noted that the firm had insufficient inventory in one of the four required staple food categories (the dairy category) making the firm ineligible for authorization as a SNAP retailer under Criterion A.

Multiple transactions in unusually short time frames

This Attachment documents 78 individual transactions in 30 sets of two or more transactions conducted by 20 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 24 of the 30 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). One set is comprised of seven individual transactions, two sets are comprised of four individual transactions, and nine sets are comprised of three individual transactions while the remaining 18 sets are comprised of two individual transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by store inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends the multiple transactions are because regular customers shop every day and sometimes twice a day.

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, but one of the transaction sets 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The transaction sets also do not contain the characteristics of a household returning later in the day or sending their child to purchase a forgotten item or two as all of the sets have subsequent transactions 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 convenience store SNAP transaction amount in San Bernardino County during the review period was \$7.01. 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 much smaller and very minimally stocked grocery 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.

For example, one of the households analyzed conducted two transactions (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) at the Appellant firm and returned the following morning to spend another 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). During the review period this household shopped at three super stores and two supermarkets located nearby and up to 3.09 miles away. That this household conducted a very small transaction at a super store 5 U.S.C. § 552 (b)(6) & (b)(7)(C) after a much larger transaction at the Appellant firm is indicative of trafficking. There is no legitimate reason why this household would spend so much of its SNAP allotment at an extremely poorly 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 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 232 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 an extremely limited 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 \$7.01 for this store type in San Bernardino 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, 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 convenience or convenience stores out of necessity, this is not the case when they have better alternatives. FNS records show there are 23 comparably sized or larger SNAP retailers located within a one mile radius of the Appellant firm that includes one super store, two supermarkets, one large grocery store, and one medium grocery store. The closest super store is located just 176 yards or less than two blocks from Appellant's location. All of these larger stores would offer greater quantities and varieties of staple food items at lower prices than would be found at an extremely poorly stocked convenience store.

The difference in the total SNAP transaction dollar volume and the average SNAP transaction amount for San Bernardino County convenience stores during the review months and at the Appellant firm is significant. Appellant's SNAP transaction dollar amount is double that of San Bernardino County convenience stores while the firm's average SNAP transaction dollar volume is 41.04 percent larger than the County average. 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 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 San Bernardino County. A comparison of Appellant's redemption data to San Bernardino County convenience stores using ten dollar increments shows that Appellant's transaction count and dollar volume are significantly less than the average of like type stores in the lowest ranges (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) where typically the majority of convenience store transactions occur, but then significantly exceeds the average in the remaining ranges 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at which point transactions stop. It is worth noting that San Bernardino County convenience stores begin averaging less than one transaction in each range after the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) range while the Appellant firm does not stop having transactions until the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) range, approximately three times more than that of comparable 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 extremely 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 regular customers buy lots of groceries such as: 12 pack cans of soda at \$7.99, eggs at \$3.49, cold sandwiches at \$1.99-\$4.99, beef jerky at \$0.99-\$8.99, milk at \$2.99 a gallon, frozen burritos up to \$3.99, frozen small pizzas \$5.99 a pack, ice cream at \$0.99-\$5.99, hot dogs at \$1.99 to \$3.99, Hostess at up to \$4.99, Bimbo bakery at up to \$3.99, Bon Appetit at

up to \$3.99, tortilla chips at \$1.99-\$4.29, tortillas at \$0.99-\$3.99, breads at \$1.99-\$4.99, as well as cases of Gatorade, cooking oil, sugar, flour, and canned foods. These items are the best selling products purchased with EBT and the original receipts may help. The firm buys on a daily basis from its vendor and from large grocery stores like Food 4 Less and Smart & Final. Appellant submitted original invoices and receipts for inventory purchases in support of these contentions.

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. This is especially true when Appellant is purchasing food stock from two of these same stores.

Information obtained during the FNS store visit on May 24, 2018, shows that the Appellant firm offers an extremely limited quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Much of the inventory for sale consists of inexpensive snacks, candy, condiments, drinks, and single serving foods as well as many ineligible items. The FNS store visit report and photos also show the firm stocks a very limited quantity and variety of 12 pack cans of soda, only three frozen burritos, no frozen pizzas, only single serving sizes of ice cream, no uncooked hot dogs, no bread, no cases of Gatorade, only one bag of sugar, and an extremely limited stock of canned foods refuting Appellant's claims. It is also noted that the most expensive pack of jerky during the FNS store visit was priced at \$7.99, not the \$8.99 claimed by Appellant. Additionally, the fact that tobacco, tobacco accessories, lottery, alcohol, hot food, hot drinks, household and paper products, pet products, auto products, health and beauty items, ATM, clothing, hats, sunglasses, cell phones, phone accessories, foam coolers, charcoal, lighter fluid, gift items, and party supplies 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 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 the invoices and receipts submitted for inventory purchases was conducted by the Retailer Operations Division and the dollar amount of eligible food purchases plus

markup compared to the firm's SNAP redemptions for the period April-May 2018. Appellant submitted invoices and receipts for the months of April through October 2018. Since only April and May 2018 fall within the review period, only these months were analyzed. The analysis excluded ineligible items on individual invoices and receipts and also excluded Core-Mark invoice 1291959 as the actual purchase price of the food items could not be determined. A standard 40 percent markup was applied to the invoice total of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) resulting in potential eligible food sales of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). SNAP redemptions for the same two months amounted to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) showing that the firm had insufficient food inventory to support its SNAP redemptions. Including the excluded Core-Mark invoice would still result in the firm having insufficient inventory. The fact that some of the food items listed in the invoices and receipts would have been purchased using cash or credit further increases the amount of the deficiency. The review of invoices and receipts also shows that most of the eligible food items purchased were inexpensive accessory foods such as snacks, soda and other beverages, and candy. Insufficient inventory is an indication of trafficking.

SNAP redemptions at the Appellant firm fluctuated unusually following receipt of the charge letter on August 7, 2018. The average SNAP transaction dollar amount decreased 39.38 percent from July to September 2018 while the volume of SNAP redemptions decreased 65.73 percent and the number of SNAP transactions decreased 43.45 percent during this same period. 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

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. When the store owner signed the certification page of the SNAP retailer authorization application to become a SNAP retailer in 2017, 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.

That the firm has started checking identification cards to be sure SNAP EBT card belongs to the same person also constitutes a violation of SNAP rules. That store ownership and management have implemented this policy shows that neither read the FNS training materials provided to all SNAP retailers upon their authorization.

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.

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 any 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 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

May 6, 2019