

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

Caruso Grocery,

Appellant,

v.

Case Number: C0210427

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 Caruso 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 November 15, 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 October 10, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in February through July 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant, through counsel, responded to the charges in a letter dated October 22, 2018, which did request a CMP, but provided no documentation in support of it. The Retailer Operations

Division notified Appellant by letter dated November 15, 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 November 26, 2018, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. Subsequent correspondence dated December 31, 2018, 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 February through July 2018. This involved two patterns of EBT transaction characteristics indicative of trafficking:

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

APPELLANT’S CONTENTIONS

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

- The firm is 1,500 SF and is located in a highly populated, but economically depressed area. The firm is operated by its manager and run by employees hired by the manager; it had gross revenues of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in 2017. The transactions during the review period were consistent with the firm’s tax records and vendor purchases;
- The vast majority of customers walk to the store as they do not have transportation and many make large purchases in addition to smaller transactions. The area is not served by large retailers. The firm does not maintain cash receipt records and only has the transaction record in the charge letter. Appellant cited transactions for three households as examples of a regular customer base;
- The firm offers meat discounts to bulk buyers that include \$49.99 and \$99.99 packages of meat, poultry, and fish. It also offers meat buys of \$18.99, \$57.99, \$20.99, \$21.99, \$26.99, \$29.99, and \$39.99;
- Each of the firm’s employees receives the SNAP Training Guide for Retailers within 30 days of employment; and,
- A disqualification would likely cause the firm to close.

Appellant submitted an affidavit by the owner, the firm’s 2017 corporate federal tax return, 10 photos of various signs advertising meat specials, and 92 pages of inventory invoices 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 August 11, 2015. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a June 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 moderately sized convenience store offering a minimal quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- The store stocked traditional American brands and there were no ethnic or specialty food items.
- 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 eligible items were available for purchase except for drinks.
- The store visit report specifically noted that the firm was not a specialty store and that there were meat bundles, but no fruit and vegetable boxes for sale.
- Meat package prices were \$18.99, two at \$57.99, \$20.99, \$21.99, \$26.99, \$29.99, \$39.99, \$49.99, and \$99.99. Although the firm advertised 10 different meat packages ranging from \$18.99-\$99.99, the quantity/variety of in stock meats did not appear to be sufficient to fill these packages.
- There was a single checkout area on top of a glass display case that had a limited area approximately 2.5 feet wide by 1.5 feet deep for customers to place their purchases. There were displays on both sides further limiting the available space for purchases. The small checkout area would make it problematic to process large orders. The checkout area had two cash registers, a POS terminal, and no optical scanner as confirmed by the firm's vice president.

- The firm had a minimal 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 had a kitchen/food prep area that included a heated foods display case, a refrigerated display case that primarily contained processed meats and a very limited quantity and variety of fresh fruits and vegetables, two deep fat fryers, cooktop grill, oven/stove, microwave oven, stainless steel shelving and prep tables, commercial slicer, commercial scale, commercial exhaust hood, and a chest freezer. Signs advertised a variety of hot prepared foods.
- The firm had no fresh unprocessed meat or seafood, a minimal stock of frozen unprocessed meat and seafood, an extremely limited quantity and variety of processed meats (three cans of meat, canned poultry, canned fish, two packages of bacon, three packages of hot dogs, two packages of lunch meat, and one tube of deli meat), no sausages, an extremely limited stock of frozen entrees and frozen dinners, eggs, a limited quantity and variety of fresh fruits and vegetables (four lettuce, six green peppers, five lemons, seven tomatoes, onions, and potatoes), no frozen fruits, a very limited stock of frozen vegetables (okra, peas, corn, and beans), four fruit cups, 100 percent fruit drinks, no 100 percent vegetable drinks, several packages of dried beans, packaged single serving nuts, a limited selection of canned soups, a very limited quantity and variety of canned and packaged staple food items, no deli cheese, several packages of cheese, no yogurt, no sour cream, butter, margarine, canned milk, no fresh milk, no single serving milk drinks, one loaf of bread, three packages of rolls, no pitas, no tortillas, no tostadas, no corn meal, four small bags of flour, sugar, rice, hot cereal, cold cereal, single serving Ramen noodle soups, canned pasta, dry pasta, no dry noodles, pancake mixes, baking mixes, mac&cheese, frozen French fries, frozen burritos, frozen pizza, cooking oil, only one coffee, only two boxes of tea, no cocoa, no baby foods, no infant formula, and very few expensive staple food items.
- Ineligible items included: tobacco, alcohol, hot food, health and beauty items, household and paper products, auto products, pet products, ATM, newspapers, one bag of charcoal, and one can of lighter fluid while accessory foods included: candy, spices, condiments, snacks, baked goods, cooking oil, sugar, single serving ice cream, one coffee, two small boxes of tea, baking mixes, and un/carbonated drinks.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- The firm's hours of operation were open 6:30 AM-9:30 PM Monday-Saturday and 9 AM-5 PM Sunday per the firm's vice president. The firm's vice president also stated that the firm did take phone orders, did not take online orders, did not deliver groceries, and did not round transaction totals up or down.
- Most food items were priced and comments on the FNS store visit report, completed in conjunction with the firm's vice president, 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 meat bundle priced at \$99.99, a meat bundle priced at \$49.99, a meat bundle priced at \$39.99, and a meat bundle priced at \$29.99. This

listing of the most expensive items was provided by the firm's vice president during the store visit.

- The firm was a not a WIC vendor.
- The store visit report and photos showed many empty or marginally stocked shelves with product fronted to give the appearance of greater quantities. There was thick dust on canned goods and bottles and the firm also had canned foods with expiration dates of 2015 and 2016 all indicative of a slow turnover of stock.
- The quantity and variety of the store's staple food inventory was significantly less than that seen during the previous FNS store visit on November 28, 2017.

Multiple transactions in unusually short time frames

This Attachment documents 141 individual transactions in 57 sets of two or more transactions conducted by 29 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 38 of the 57 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Two sets are comprised of five individual transactions, four sets of four, and 13 sets of three while the remaining 38 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 provided no documentation and offered no explanation to support the legitimacy of the multiple transactions listed in this Attachment.

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of the store's stock and facilities and are thus indicative of trafficking. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out or of household members/friends shopping together and making separate purchases as 52 of the 57 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 in amounts 5 U.S.C. § 552 (b)(6) & (b)(7)(C), far more than the cost of a forgotten item or two.

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 East Baton Rouge County during the review period was \$7.17. 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. For example, there is a medium grocery store located less than one mile away that offers a much greater quantity and variety of staple foods as well as a wide selection of fresh and frozen meats, including and meat bundled packages. Yet the number and dollar volume of SNAP transactions at this firm were significantly less than those at the Appellant firm. The medium grocery store also did not exhibit the same pattern of multiple transactions in unusually short time frames or of high dollar value transactions further supporting the suspicious nature of transactions at the Appellant firm and the likelihood of trafficking.

Given the minimal staple food stock at the Appellant firm, it is unlikely that any SNAP household would use the firm as their primary grocery store. This was confirmed by the Retailer Operation Division's analysis of shopping patterns for households listed in this Attachment. Their analysis shows that households have ready access to transportation as evidenced by their shopping at a variety of larger food stores located nearby and at a distance from Appellant's location, including a variety of super stores and supermarkets. Appellant's contentions fail to offer any explanation or rationale as to why households who are shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases totaling to high dollar values at a minimally stocked store. Common sense dictates that it is improbable that households with limited food dollars would choose to spend large dollar amounts at the Appellant firm if their purchases consisted solely of eligible food items that could be purchased at any of the super stores and/or supermarkets they were already regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant firm.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

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

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

High Dollar Value Transactions

This Attachment lists 427 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 \$7.17 for this store type in East Baton Rouge County. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores, located nearby as well as at a distance from Appellant's location that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the Appellant firm. These high dollar transactions remain questionable when considering the proximity of other stores that would be better shopping options for consumers. Based on their shopping patterns, transportation does not appear to be an issue for these households. Yet, these 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 stores out of necessity, this is not the case when they have better alternatives. FNS records show there are nine comparably sized or larger SNAP retailers located within a one mile radius of the Appellant firm that includes a medium grocery store and a large grocery store. There are also three supermarkets located 1.16-1.72 miles away. These larger stores would offer greater quantities and varieties of staple food items at lower prices than would be found at a minimally stocked convenience store offering no fresh unprocessed meats or seafood and a limited quantity and variety of fresh produce.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for East Baton Rouge County convenience stores during the review months and at the Appellant firm is significant. 5 U.S.C. § 552 (b)(7)(E). A comparison of Appellant's SNAP redemptions to that of nearby like type or larger stores having redemptions for the review period shows that none exhibit the same suspicious transaction patterns listed in the charge letter even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is further indication that the transactions in both Attachments do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

The firm also had irregular SNAP transaction data compared to like type stores in East Baton Rouge County. A comparison of Appellant's redemption data to County convenience stores using ten dollar increments shows that Appellant's transaction count and dollar volume greatly exceeded that of like type stores in all ranges 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at which point transactions stop. It is worth noting that East Baton Rouge County convenience stores begin averaging less than one transaction in each range 5 U.S.C. § 552 (b)(6) & (b)(7)(C) while the Appellant firm does not stop having transactions until after 5 U.S.C. § 552 (b)(6) & (b)(7)(C) range, more than twice that of comparable stores. The Appellant firm also has unusual spikes in

the number and dollar volume of transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) over the same period. This transaction pattern and the unusual spikes in both transaction numbers and dollar volume do not appear in the transaction patterns or in the transaction count and dollar volume averages for other like type stores. These large dollar transactions are considered to be irregular and suspicious based on the firm's food inventory. The Retailer Operations Division determined there was no credible reason for the firm to have transactions at these dollar levels given the minimal stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

Appellant contends the high dollar value transactions are due to the firm being located in a highly populated, but economically depressed area; the vast majority of customers walking to the store as they do not have transportation and many make large purchases in addition to smaller transactions; that the area is not served by large retailers; that the firm does not maintain cash receipt records and only has the transaction record in the charge letter; and Appellant cited transactions for three households as examples of a regular customer base. The firm offers meat discounts to bulk buyers that include \$49.99 and \$99.99 packages of meat and it also offers meat buys of \$18.99, \$19.99, \$20.99, \$21.99, \$26.99, \$29.99, and \$39.99. Appellant submitted an affidavit by the owner, the firm's 2017 corporate federal tax return, 10 photos of various signs advertising meat specials, and 92 pages of inventory invoices in support of these contentions.

Contrary to Appellant's household observations cited in its response to the charge letter, the first household referenced had eight transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C), the second household had 10 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and the third household had eight transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

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

Information obtained during the FNS store visit on June 24, 2018, shows that the Appellant firm offers a minimal 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 fact that tobacco, alcohol, hot food, health and beauty items, household and paper products, auto products, pet products, ATM, newspapers, charcoal, and lighter fluid are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts.

The FNS store visit inventory report and its many photos show that the firm had no fresh unprocessed meat or seafood and that the quantity and variety of frozen unprocessed meat or seafood was minimal at the time of the store visit and would not have been sufficient to fill many of the meat plans thus refuting Appellant's contentions that the high dollar transactions are due to meat purchases. It is also noted that the firm's minimal staple food stock combined with the lack of any other higher priced foods would mean that the high dollar transactions in this Attachment would have to include at least one of the meat plans. It is not realistic that large numbers of SNAP households would be purchasing multiple meat plans costing hundreds of dollars each month and more likely that the high dollar transactions were due to trafficking. Although Appellant's photos do show the same signs evident in the FNS store visit photos advertising 10 different meat packages, the quantity and variety of available meat, fish, and deli products does not appear to be sufficient to fill these packages. Additionally, the store visit report and photos showed many empty or marginally stocked shelves with product fronted to give the appearance of greater quantities. There was thick dust on canned goods and bottles and the firm also had canned foods with expiration dates of 2015 and 2016 all indicative of a slow turnover of stock. The quantity and variety of the store's staple food inventory was also significantly less than that seen during the previous FNS store visit on November 28, 2017. Additionally, as previously discussed, there is a better stocked medium and large grocery store located just minutes away.

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 small checkout area and no shopping carts thereby making it difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. Therefore, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of carts and more likely that the amounts were contrived.

A detailed analysis of invoices submitted for inventory purchases was conducted by the Retailer Operations Division and the dollar amount of eligible food purchases compared to the firm's SNAP redemptions for the review period. The 92 invoices were reviewed and one duplicate as well as invoices dated outside of the review period (January and August) were excluded. Given that the firm sells a variety of hot prepared foods, it is likely that a significant portion of these purchases were used in the preparation of hot foods; however, the Retailer Operations Division did not reduce the amount in order to give the benefit of the doubt to the firm. A standard 40 percent markup was used and shows that the invoices would account for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in potential sales which is significantly less than the SNAP redemptions of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) during the review period. Accordingly, the invoices were insufficient to account for the volume of SNAP redemptions and indicate that the transactions were not for legitimate food purchases.

Appellant's corporate tax returns do not provide a detailed breakdown of sales or of eligible and ineligible items and therefore offer no relevant evidence related to the suspicious transactions at the Appellant firm.

It is further noted that SNAP redemptions at the Appellant firm fluctuated unusually following receipt of the charge letter on October 11, 2018. The average SNAP transaction dollar amount remained relatively constant from September 2018 to October 2018 while the volume of SNAP redemptions at the Appellant firm increased 22.73 percent and the number of SNAP transactions increased 21.71 percent during this same period. A pronounced fluctuation 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

The purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division and is limited to what circumstances were at the basis of the action at the time such action was made. In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. While store ownership may or may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom store ownership may utilize to handle store business or their degree of involvement in store operations, the owner is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. When the store owner signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, he confirmed he understood and agreed to abide by program rules and regulatory provisions. He also agreed to accept responsibility on behalf of the firm for violations of the SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. Additionally, a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

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

investigations of SNAP retail stores to determine if trafficking is occurring and U.S. District Courts have long upheld the validity of EBT transaction data.

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.” SNAP regulations at 7 CFR § 271.2, define trafficking as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food”. SNAP regulations at 7 CFR § 278.6(a) clearly state that “FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system”. In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant firm during the review period. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the review period. All of the transactions were then reviewed and analyzed by the Retailer Operations Division staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photos from the FNS store visit, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant firm during the review period. This analysis also included a review of the firm to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

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

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act,

which reads, in part, that disqualification “shall be permanent upon the first occasion of a disqualification based on trafficking by a retail food store.” In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option under existing regulations.

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

CIVIL MONEY PENALTY

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

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

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

No training documentation of any kind was presented by Appellant.

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

CONCLUSION

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

The retailer has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a trafficking CMP according to Section 278.6(i) of the SNAP regulations.

RIGHTS AND REMEDIES

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

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

ROBERT T. DEEGAN
Administrative Review Officer

May 28, 20057