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

Charlie Minimarket,

Appellant,

v.

Case Number: C0203997

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a permanent disqualification of Charlie Minimarket (hereinafter "Appellant") from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Charlie Minimarket.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that "[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."

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified based on an analysis of EBT transaction data from May 2017 through October 2017. This involved the following transaction patterns which are common trafficking indicators:

- There were an unusual number of transactions ending in a same cents value.
- There were multiple transactions made from individual household benefit accounts within unusually short timeframes.
- Excessively large purchase transactions were made from recipient accounts.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Charlie Minimarket for SNAP participation as a small grocery store on February 21, 2017. In a letter dated December 11, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred between the months of May 2017 and October 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In a letter dated December 21, 2017, the Appellant, without counsel, responded to the charge letter in an attempt to "clarify any confusion regarding 3 alleged violations regarding EBT transactions." The Appellant argued that same-cents transactions were due to many, if not all, items ending in an even-dollar value 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Appellant then stated that repetitive transactions from the same household were due to customers shopping at the store multiple times a day because they lack transportation and cannot carry large purchases to their homes in a single trip. As to excessively large transactions, the Appellant argued that the store is located in an area of extreme poverty and the store is one of the only, "if not the only," store that accepts EBT as a form of payment. As soon as SNAP households receive their benefits, they visit Charlie Minimarket and use it as they would a supermarket.

The Appellant did not provide any evidence or documentation in support of its response.

After considering the Appellant's response and documentation and further reviewing the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated January 3, 2018. This letter, received by the Appellant on January 8, 2018, informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but that a CMP was not appropriate in this case because the 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.

In a letter postmarked January 18, 2018, the Appellant, now through its attorney, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

It should be noted that on February 19, 2018, Appellant's counsel submitted a request for case file information under the Freedom of Information Act (FOIA). The agency's response to this FOIA request was completed on March 20, 2018. On April 10, 2018, Appellant's counsel requested an extension of time for submitting its formal brief outlining its contentions. An extension to April 16, 2018, was granted by the administrative review officer.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

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

7 U.S.C. § 2021(b)(3)(B) states, in part:
...[A] disqualification under subsection (a) shall be...permanent upon...the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards...

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

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.

7 CFR § 271.2 states, in part:
Trafficking means: The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone...

7 CFR § 271.2 states, in part:
Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption...

7 CFR § 278.6(b)(1) states, in part:

Any firm considered for disqualification...under paragraph (a) of this section...shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification.... The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter...

7 CFR § 278.6(c) states, in part:
The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(b)(2)(ii) states, in part:
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).

7 CFR § 278.6(b)(2)(iii) states:
If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such a penalty.

7 CFR § 278.6(i) states, in part:
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...

APPELLANT'S CONTENTIONS

The Appellant, through counsel, submitted a long list of contentions in its request for administrative review. These are summarized below, in relevant part:

- Appellant seeks reversal of the January 3, 2018, decision to disqualify the firm from SNAP participation.
- The firm is classified by FNS as a small grocery store and averaged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per SNAP transaction during the six-month review period. During the same period, other small grocers averaged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per transaction, meaning that Charlie Minimarket's

transactions averaged about 5 U.S.C. § 552 (b)(6) & (b)(7)(C) less than the average small grocery store.

- The store is well stocked with staple foods and also offers fresh sliced deli meats and fresh produce.
- Despite its small size, the store offers five shopping baskets and four shopping carts, which means that customers have the ability to gather a substantial amount of food and transport it from the shelves to the cash register without logistical difficulty.
- The store also takes telephone orders from local customers for pickup or delivery.
- Appellant offers demographic information about the area surrounding the firm as well as national SNAP benefit redemption data. The Appellant also provided data related to shopping trends and habits of customers, both SNAP users and non-SNAP users. The data comes from three reports and one article:
    - "Benefits Redemption Patterns in the Supplemental Nutrition Assistance Program: Final Report" (Food and Nutrition Service, February 2011)
    - "Foods Typically Purchased by SNAP Households" (Food and Nutrition Service, November 2016)
    - "U.S. Grocery Shopping Trends, 2016" (Food Marketing Institute and The Hartman Group, Inc., 2016)
    - "Know Your Core, Protect Your Core" (Convenience Store News for the Single Store Owner, April 2016)
- The store has sufficient variety and quantity of inventory to meet the needs of several households all at once without having to replenish inventory.
- Inventory pricing, despite what was indicated by the onsite inspector, does have a number of items that sell for .00 or.50 at the end of the price. The inspector's photos do not have price tags on them. The report also does not identify who the inspector got its information from, but does note that the store does not have a menu or price list posted or available. However, the Appellant stated in its response to the charges that the firm employs a pricing structure where some of the items, albeit not all, end in a full dollar value 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This pricing was done to aid in streamlining transactions given that the firm is a high volume store.
- When making an evidentiary evaluation, FNS should look at the evidence offered and make a determination regarding which of the two possibilities is more likely: that the store trafficked in SNAP benefits, or that the agency's ALERT system has incorrectly flagged transactions as the result of a difference in business operations, as the Appellant always maintained.
- Appellant believes it is important to consider the limitations of the ALERT system, as its over-utilization by USDA has created an internal belief that the system is infallibly accurate.
- To support its position that ALERT data is unreliable, Appellant's counsel summarized portions of two deposition he took of a USDA employee in October 2016 and November 2017.
- Appellant further questions whether or not appropriate comparison stores have been selected to provide a baseline set of data against which to compare the Appellant's transactions. The case information produced in the Appellant's FOIA request did not disclose the comparison stores utilized by the program specialist. However, given that Charlie Minimarket operates atypically than the prototypical New Jersey grocery store

(i.e. higher transaction volume, lower transaction average), it is unlikely that FNS was able to locate a sufficient number of stores that would be suitable for comparison.

- Appellant cites two court decisions to support its position that ALERT data is unreliable for purposes of disqualification.
- Regarding Attachment 1 (unusual number of transactions ending in s same-cents value):
    - The store utilizes a pricing structure where a number of items at the store end in 50 cents or an even-dollar amount. These prices are intended to make purchases easier to calculate and faster to process. Additionally, if the SNAP participants were to make purchases that end in a dollar, and then add a single small item that ends in .99, the total transaction would end in .99.
    - The store takes telephone orders in which it can custom-price the order. Some of the orders may be rounded (to reflect bulk prices) to either 99 or 50 cents, based on the clerk's preference.
    - The store has an older cash register and does not keep its receipts, which do not detail the purchases anyway. There is no requirement for the stores to maintain their receipts, and even if they did, they would not be particularly useful in a matter such as this.
    - The transactions listed in Attachment 1 represent 7.3 percent of the store's total transactions during the review period. If the department has flagged the transactions due to quantity rather than ratio, the obvious flaw is that Charlie Minimarket conducts more than double the typical small grocer's average monthly transactions.
    - If the problem is the ratio to non-same-cent transactions, then such a ratio appears because of the pricing of some items and the special ordering done over the phone which results in a constructed price point rather than a random number.
    - A number of repeated values correlate to specific items in the store's inventory, including $21.99 (Enfamil), $16.99 (Enfamil), and $9.99 (Mazola oil). Transactions for these amounts are for individual purchases of these items. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Eliminating the number of single-item purchases from the second portion of Attachment 1 would materially reduce the number of transactions and reduce the overall ratio of these transactions to the sum total.
    - The Transactions in Attachment 1 are not the result of trafficking, but rather a partial pricing structure, higher transaction volume, and special orders.
- Regarding Attachment 2 (multiple transactions from one household in unusually short periods of time):
    - Appellant contends that co-shopping, where both adult members of an average household are about 50 percent responsible for picking up groceries, is on the rise in the United States. This is manifest at the Appellant firm in a couple of ways: 1) different household members will shop separately using the same account; and 2) different household members will travel to the store together and then separate their purchases. The first option is statistically preferred by customers.
    - What was once a single shopping trip in the 1990s is now two or three trips conducted by separate members of the household for different purposes.
    - It is not unexpected that SNAP participants will spend their money quickly after receiving their benefits.

- 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The agency's argument, then is that it is unlikely for a SNAP household to return to the store to make a second purchase. Where this assumption comes from is not clear.
- If these transactions were to occur at a 5 U.S.C. § 552 (b)(6) & (b)(7)(C), the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) would not be charged with trafficking. FNS would argue that the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is bigger and more well-stocked, so the participant would be likely to return because the store can serve more of their needs. However, Charlie Minimarket serves significant quantities of all of the foods listed on FNS's report that addresses the types of foods typically purchased by SNAP households. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) does not serve a materially larger variety or quantity of the eligible food items than the Appellants do, so if these transactions are not suspicious at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), they should not be viewed as suspicious at the Appellant store either.
- The 77 transactions in Attachment 2 represent less than 1 percent of the store's overall transactions, and almost half do not even occur on the same day. The second half of Attachment 2 should be disregarded because the transactions are consistent with established shopping habits of SNAP participants.
- The remaining transactions often involve co-shopping, supplemental shopping trips, or adjustments for transportation logistics.
- These are not trafficking transactions and there is nothing to indicate otherwise. The Department is jumping at shadows with respect to these allegations.

- Regarding Attachment 3 (excessively large transactions):
  - 7 U.S.C. 2018 (b)(6) & (b)(7)(c).
  - USDA is accusing a high-volume store, with low average transaction values, of having too many high value transactions – but clearly not enough of them to impact the store's bottom line significantly enough to even make the store average.
  - 7 U.S.C. 2018 (b)(6) & (b)(7)(c), just .24 percent of the store's total transactions over six months.
  - 7 U.S.C. 2018 (b)(6) & (b)(7)(c), as well as five handheld shopping baskets and four shopping carts, which means that the logistics of the transactions cannot be reasonably called into question.
  - Because logistics are not the issue, it is whether or not SNAP households are likely to make such purchases.
  - FNS should look at statistics and studies which indicate that primary grocery shopping at smaller stores is on the rise. Co-shopping also increases overall shopping expenditures.
  - The firm offers all of the items – in sufficient quantity and variety – to satisfy all of a SNAP household's needs.
  - These transactions are not trafficking, but are special orders, co-shopping, occasional reliance on the store as a primary grocer, "or the general aberration and statistical outlier to the average whole."
  - That FNS segregated these transactions from the remainder is of little consequence as most other small grocers are likely to have the same number (or greater) of similar transactions.

- The sum total of the Department's information is based upon transaction patterns and the subsequent analysis of the data by an analyst who has never been in the store, who may or may not understand how a retail food business is run, and then bases the decision on a mountain of assumptions.
- By the Department's own testimony, ALERT cannot identify fraud. It is designed to identify "suspicious behavior" at most, but the basis for the system is unknown.
- Appellant recognizes the Department's right to utilize redemption data in the disqualification of stores, but the statute does not authorize FNS to rely upon a system that inaccurately accounts for what is "consistent" or "inconsistent."
- Context is based upon the premise that one can compare the data meaningfully to other stores; that FNS has a good feel for what the other stores are doing in their business operations; and that there isn't a different logical explanation for how these transactions occur.
- ALERT's conclusions are directly rebutted by the inventory and sales records provided. If the store were trafficking, then the inventory and sales data would be inconsistent. At this point, it is more likely that FNS has misidentified legitimate transactions because of an errant assumption about the store's inventory and clientele.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all evidence and contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The primary issue for consideration in a case based on suspicious SNAP redemption data is whether or not the Retailer Operations Division adequately established that the Appellant firm engaged in the violation of trafficking. In other words, did the Retailer Operations Division, through a preponderance of the evidence, establish that it is more likely true than not true that the irregular and unusual transactions cited in the charge letter were the result of trafficking?

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm's EBT transactions, but also information obtained from a November 8, 2017, store visit which was conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report and photographs documented the following store size, description, and characteristics:

- Charlie Minimarket is a small grocery store/corner market, roughly 1,000 square feet in size, operating in Paterson, New Jersey.
- At the time of the contractor's visit, the firm had four shopping carts and five handheld shopping baskets for customer use.
- The store visit photographs show one cash register and agency records reflect the use of one EBT point-of-sale terminal for SNAP purchases.

- The store does not appear to use optical scanners to process transactions.
- The store's staple food stock is sufficient in each of the four staple food categories. The store's inventory of staple food appears to be typical of a small grocery store or corner market.
- The report indicates that the store sells SNAP-eligible, non-staple accessory food items, such as carbonated and uncarbonated drinks, snacks, candy, and condiments. The store also sells ineligible, nonfood items, including tobacco products, cleaning supplies, and other miscellaneous household merchandise.
- Additionally, the store sells hot and cold prepared food items, including made-to-order sandwiches. There is no price list available, but one sign shows that steak sandwiches sell for $4.00 each.
- The store also sells deli meat and cheese by the pound. These items are also used by the firm for the making of sandwiches.
- There is no indication from the store visit report that the firm has a special pricing structure, as most prices appear to end in 9. The report also states that the store does not round transaction totals up or down at checkout.
- There is no indication from the report that the firm has special food packages for sale or that items are sold in bulk. The most expensive SNAP-eligible food item in the store is a 22.2-ounce can of Enfamil infant formula, while a 12.5-ounce can sells for $16.99. It should be noted that infant formula is part of the WIC food package. The vast majority of SNAP households containing infants are also eligible for participation in WIC, so it is not very common for SNAP households to purchase expensive infant formula with their SNAP benefits, when they can instead use WIC vouchers to fill that need.
- Other expensive food items include a gallon of Mazola corn oil for $9.99 per gallon, and 96 ounces of vegetable oil for $7.49.

The available inventory of SNAP-eligible food at the time of the store visit showed food stock that would be typical of a small grocery store, where households normally purchase a limited number of items. There was little indication that SNAP households would be inclined to regularly visit the store to purchase large quantities of groceries. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of similar-sized competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: There were an unusual number of transactions ending in a same cents value. This attachment lists 427 transactions ending in .50,
5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E).

The Appellant, through counsel, has argued that the store utilizes a pricing structure where a number of items end in 50 cents or an even-dollar amount. In its original reply to the charge letter, the Appellant stated that "we tend to price many, if not all, of our items to end in a full dollar value or .50 cents." The Appellant, through counsel, claims that these prices are intended to make purchases easier to calculate and faster to process. The Appellant also states that the firm takes telephone orders which are custom-priced, sometimes rounded to either .50 or .99, depending on the clerk's preference.

Unfortunately, these arguments make little sense. First, the contractor's store visit report contradicts the claim that store prices end in 50-cent or even-dollar amounts. The report indicates that most prices end in 9. The report, which was completed with the assistance of store personnel, further stated that the store does not engage in the practice of rounding. Second, even rudimentary cash registers do the calculation for the cashier. And because SNAP customers pay with an EBT card rather than paper food stamps, there is no distinguishable advantage to rounding transactions to .50 or .99 at the point of sale. Additionally, it is very odd that a clerk's preference on telephone orders would be to custom-price an order to end in either .50 or .99. This review can think of no valid rationale for such a practice.

It should be further noted that hundreds of transactions from the review period did not end in either .50 or .99. If .50 or .99 was such an advantage to either the firm or to the customer, then it stands to reason that most, if not all, transactions would end in .50 or .99. In this case, most transactions did not end in .50 or .99. However, an unusually large percentage did.

It is likely that not every single transaction listed in Attachment 1 is a trafficking transaction. It is probable that some of the transactions are legitimate purchases of eligible food. Unfortunately, the Appellant has not provided any evidence at all to support its claim and to demonstrate that the transactions were legitimate. Without such evidence, this review has little option but to side with the Retailer Operations Division, as the transactions listed in Attachment 1 are sufficiently unusual to reasonably conclude that trafficking is a likely cause.

Charge Letter Attachment 2: Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment lists 31 sets of transactions (77 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E).

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

That these sorts of repetitive transactions occurred at a small store like Charlie Minimarket is highly unusual and an indication that trafficking was likely taking place.

The Appellant, through counsel, has provided several contentions related to Attachment 2, including a claim that the transactions are the result of co-shopping, where one household member shops at the store and then later in the day other household members shop at the same store using the same EBT card.

As to whether or not co-shopping actually affected the Appellant firm during the review period, this argument is little more than conjecture. The Appellant has offered no evidence at all to show that co-shopping is particularly common among SNAP recipients in Paterson, New Jersey. If co-shopping truly impacted Charlie Minimarket as the Appellant suggests, it would stand to reason that co-shopping would affect other nearby firms as well. This would manifest itself in comparable firms having similar transaction patterns – multiple transactions from the same households in short periods of time. But this is simply not the case.

The Appellant has also argued that if these transactions were to occur at a 5 U.S.C. § 552 (b)(6) & (b)(7)(C), the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) would not be charged with trafficking. According to the Appellant, FNS would argue that the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is bigger and better-stocked, so the SNAP participant would be likely to return because the store can serve more of their needs. However, the Appellant contends that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) does not serve a materially larger variety or quantity of the eligible food items than Charlie Minimarket, so if these transactions are not suspicious at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), they should not be viewed as suspicious at the Appellant store either.

It should be noted that at no point in this review has the Appellant firm been mistaken for a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) store. While Charlie Minimarket may carry some of the same foods as a superstore, it does not carry a materially similar variety or quantity of eligible foods. The Appellant has also offered no evidence to supports its assertion that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) would not be charged with trafficking if unusual and inexplicable transactions were discovered there.

Unfortunately, the Appellant has not offered evidence of any kind to show that the transactions listed in Attachment 2 were legitimate purchases of eligible food. The arguments presented by Appellant's counsel hold little weight without some kind of evidence to substantiate its claims. Anecdotal contentions do little to convince this review that the transactions identified in Attachment 2 were anything other than trafficking.

Charge Letter Attachment 3: Excessively large purchase transactions were made from recipient accounts. This attachment lists 227 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with a small grocery store in the state of New Jersey. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a small grocery store in New Jersey was $10.86. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Given that the Appellant firm does have a moderate inventory of staple foods, and given that the firm does have a handful of shopping baskets and shopping carts for customer use, it is possible that there would be an occasional purchase where the transaction amount is high. As such, there may well be some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 3. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from nearby, similar-sized competitors. The substantial number of high-dollar transactions in a six-month period calls into question the legitimacy of these transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Many of these large transactions are highly suspicious when viewed with other SNAP activity by the households in question. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C) – at a store with no bulk items for sale, with a very small checkout counter, and no optical scanners – it seems unlikely that the two transactions could have

occurred in such a short period of time. This sequence of events calls into question the legitimacy of the transaction that occurred at Charlie Minimarket. Unfortunately, the Appellant has offered no evidence to demonstrate that this transaction, or any transaction, was a valid purchase of eligible food.

The Appellant, through counsel, argues that the store's average SNAP transaction is roughly 5 U.S.C. § 552 (b)(6) & (b)(7)(C) less than the average small grocery store transaction during the same time period.

With regard to this contention, it is true that the average size of all transactions at the Appellant firm is smaller than the average transaction at small grocery stores in the state of New Jersey. However, the firm is not charged with trafficking based on average transaction size. Instead, the Retailer Operations Division has identified a pattern of transactions that is significantly different from transactions at similar stores, including other small grocery stores in the immediate vicinity.

The transactions identified in the charge letter are highly irregular and substantially different from comparable stores in the area. As noted earlier, in an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that trafficking did not occur. Unfortunately the Appellant did not submit any evidence except for general reports and studies that do not address any of the specific transactions listed in the charge letter. Without relevant evidence from the Appellant, it is reasonable for this review to conclude that the transactions listed in the charge letter were, more likely than not, the result of trafficking violations committed by the Appellant.

Based on the above analysis, it is the determination of this review that Charlie Minimarket likely trafficked in SNAP benefits during the review period. The attachments furnished with the charge letter adequately identify the irregular patterns of SNAP transactions which indicate that trafficking was likely taking place. Conversely, the Appellant has failed to provide a rational explanation to why such patterns might exist. As there are multiple unexplained patterns of irregular transactions, the case of trafficking is convincing.

Trafficking Case based on EBT Data

The Appellant, through counsel, has submitted several contentions related to the Retailer Operations Division's use of a fraud detection system known as ALERT. The Appellant contends that FNS both over-utilizes this system and believes that the system is "infallibly" accurate. The Appellant further argues that a determination of trafficking based on the use of ALERT is little more than assumption and guesswork.

With regard to these contentions, this review acknowledges that a conclusion of trafficking cannot be drawn from EBT data alone, nor would it be possible to do so in a case based primarily on inconsistent redemption data. It is noted that FNS employs a computerized fraud detection tool to identify EBT transactions that form patterns having characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. The Retailer Operations Division must still analyze the transaction data and patterns

with other factors, such as observations from a store visit, an analysis of customer shopping behavior, and a comparison with similar stores in the area, and then render a determination as to whether or not the questionable transactions were, more likely than not, the result of trafficking. The legality of this method is identified in 7 CFR § 278.6(a) which states, in part, "FNS may disqualify any authorized retail food store … if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. **Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, [or] evidence obtained through a transaction report under an electronic benefit transfer system** …." [Emphasis added.]

Prior to a disqualification determination, the accused firm is given an opportunity to reply to the charges and provide any information it deems appropriate in justifying as legitimate the transaction activity detailed in the charge letter.

It should be noted that this reviewer has thoroughly examined the documentation and information provided by the Retailer Operations Division and found no evidence to suggest that the agency simply churned out numerical data and declared it to be trafficking. From all indications, the Retailer Operations Division obtained the EBT data, found it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough investigation before concluding that trafficking was likely occurring.

It is important to restate here that in an appeal of adverse action, the onus is on the Appellant to prove by a preponderance of the evidence that the administrative action should be reversed. Despite having a specific list of questionable transactions presented to the firm, it offered no relevant evidence, such as itemized cash register receipts, to prove that the transactions listed in the charge letter were legitimate purchases of eligible food.

The Appellant, through counsel, has stated that ALERT's conclusions are directly rebutted by the inventory and sales records provided. The Appellant argues that if the store were trafficking, then its inventory and sales data would be inconsistent.

Unfortunately, this contention makes no sense at all because the Appellant did not provide any inventory and sales records. This review has no way of knowing if the firm's inventory and sales data is consistent or not.

Civil Money Penalty

As noted earlier, the Retailer Operations Division determined that the firm was not eligible for a civil money penalty in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and training program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a civil money penalty to be considered, a firm must not only notify FNS that it desires the agency to consider a CMP in lieu of permanent disqualification, but it must also submit appropriate documentation within designated timeframes. In this case, the Appellant did not request a civil money penalty in its

reply to the charge letter and it provided no evidence which would indicate that the firm had a compliance policy or training program of any kind. Therefore, in accordance with 7 CFR § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking cannot be granted in this case.

CONCLUSION

An analysis of the Appellant's EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify Charlie Minimarket from SNAP participation. This data provided sufficient evidence for this review to conclude that the questionable transactions and patterns listed in the charge letter were more likely than not the result of trafficking violations committed by the Appellant. Likewise, the Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

Based on a review of all available information in this case, the decision to impose a permanent disqualification against the Appellant, Charlie Minimarket, under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. If a judicial review is desired, the complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON July 3, 2018
Administrative Review Officer