

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

Cherry Market #426,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0200977

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that a permanent disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Cherry Market #426 (hereinafter “Cherry Market #426” or “Appellant”) by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1)(i) in its administration of the SNAP, when it imposed a permanent disqualification against Cherry Market #426.

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.

CASE CHRONOLOGY

In a letter dated August 15, 2017, the Retailer Operations Division informed the Appellant that Cherry Market #426 was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270 –282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm." The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i). Per UPS confirmation of delivery, the charge letter was delivered to the Appellant at the store address of record on August 17, 2017.

The Appellant, through counsel, responded to the charges in a letter dated August 21, 2017 which included a request for consideration of a civil money penalty in lieu of a permanent SNAP disqualification. The letter of response also included a request for information and documents from FNS with regard to the agency's case against Cherry Market #426 pursuant to the Freedom of Information Act (FOIA). In a letter dated October 3, 2017, FNS provided a response to counsel's FOIA request. In a letter dated January 17, 2018, the Appellant's counsel filed a FOIA appeal of the documents provided by FNS in response to the FOIA request. The record reflects that FNS provided a response to counsel's FOIA appeal, dated September 18, 2020. On September 25, 2020, the Retailer Operations Division sent a 10 day letter to counsel providing the opportunity to respond to the letter of charges. In a letter dated October 2, 2020, the Appellant, through counsel, provided an additional response to the charge letter of August 15, 2017.

After considering the Appellant's replies and the evidence in the case, the Retailer Operations Division issued a determination letter dated February 10, 2021, informing the Appellant that Cherry Market #426 was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations. The letter also stated that the Appellant was not eligible for a trafficking civil money penalty (CMP) as the Appellant did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked February 20, 2021, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's decision to permanently disqualify the firm from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated March 5, 2021. In an email correspondence of March 25, 2021, the Appellant, through counsel, submitted additional information in support of the request for administrative review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6(e)(1)(i) of the Regulations establish the authority upon which a permanent disqualification may be imposed upon a retail food store or wholesale food concern. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

7 U.S.C. § 2021(b)(3)(B) states, inter alia:

... 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, inter alia:

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

7 CFR § 278.6(e)(1)(i) states:

Disqualify a firm permanently if: Personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, inter alia:

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 § 278.6(f)(1) states, inter alia:

A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

7 CFR § 278.6(i) states, inter alia:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 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 ...

7 CFR § 278.6(b)(2) states, inter alia:

(ii) 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 as specified in § 278.6(i), 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). [Emphasis added].

(iii) 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 penalty. [Emphasis added].

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from September 2016 through February 2017. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were multiple transactions made from the accounts of individual SNAP households in unusually short timeframes; and
- There were excessively large EBT purchase transactions made from SNAP recipient accounts.

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking.

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the replies to the charge letter, in the administrative review request, and in subsequent correspondence, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant denies that trafficking of SNAP benefits took place at the firm.
- With regard to the SNAP transactions documented in charge letter Attachment 1, of the 19 transaction sets noted over a six month period, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), thereby under cutting any claim that the withdrawals were within an unusually short timeframe. Of those 14 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C), the first set containing sales 1, 2 and 3 clearly resulted from employee error. The clerk entered the sale 5 U.S.C. § 552 (b)(6) & (b)(7)(C). He then realized that the sale was for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and entered that amount. Not being sure that the transaction went through he entered it a second time.
- As for the last four transaction sets, the Appellant cannot prevent an individual from using his or her benefits at any time of his or her choosing or in the manner of his or her choosing. There are times when one member of the family lends his account to another

member of the family, which results in multiple short term withdrawals. Also, there are customers who have life issues and are not as organized and skilled as the average individual. The owner has personally observed situations where that person will complete a transaction and shortly thereafter engage in another transaction or a series of transactions because of the person's inability to conceptualize in a clear and rational manner what is needed to sustain him or her through a longer time period. There is nothing out of the ordinary in that scenario.

- The Appellant has been in business for more than seven years and has loyal customers in the neighborhood. As such, customers are more inclined to stop by the store and return sooner to the store.
- There are clients who do not have reliable means of traveling to the local supermarket and as a result are obligated to shop at the Appellant, walk home with goods, and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) return to the store to complete their shopping. It is simply not worth it for many clients to make a long distance trip to buy a few items when the Appellant is steps away from their door. In addition, there are no other small stores directly in the neighborhood and most of the surrounding small stores in the neighborhood do not participate in SNAP. The photos taken during the store visit verify that the Appellant has a great variety of food products and explain why SNAP customers would routinely shop at the store multiple times during a short period.
- With regard to the SNAP transactions documented in charge letter Attachment 2, there are several explanations for these. First, as noted in the store visit photos, the Appellant is a large store and is well stocked with a substantial variety of quality goods that in some cases are relatively expensive. The store visit photos document the large amount of dry goods and meats that the Appellant stocks and sells. Those are high priced items. Therefore, it is no surprise that some of the transactions that seemed excessively large were in fact ordinary payments for oil, rice, ham and other items covered by SNAP. For example, a sack of rice (\$7.50), two pounds of ham (\$9.00 a pound) and a can of coffee (\$8.00) results in a tab 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for just three items. If a customer adds a bag of potato chips (\$5.00) and two deli sandwiches (\$6.00), 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- 5 U.S.C. § 552 (b)(7)(E). What that means is that the store is right in line with the number of large purchases that would be predicted by the government's own statistical and empirical research.
- Also, the pricing structure in a small grocery store is very different from the pricing in a very large supermarket. The large market counts on volume to make a reasonable return on capital. The small grocery store's business model requires a substantial mark-up on its inventory in order to justify the investment in the store. According to a well-respected study, the National Association of Convenience Stores (NACS) State of the Industry Annual Report, 2022 Data, the typical mark-up for SNAP eligible items in a small store is 65 percent. The owner estimates that the local Naugatuck market supports a mark-up of 100 percent. A mark-up of that size will result in a series of larger than expected sales. A higher price point necessarily produces seemingly excessively large purchases.
- Finally, a review of the transactions in this Attachment reveals that the large sales generally occur in the first few days of the month. Most SNAP recipients will deplete 90 percent of their benefits within three weeks of receiving them. The end result is that during the last week of each month the family is forced to live on 10 percent of its

benefits or go hungry. Not surprisingly, upon his or her benefits at the beginning of the next month the recipient stocks up on his or her larder for the next period of want. That process of replenishing the pantry must of course engender larger than normal purchases.

- The Appellant is located at the nexus of a very busy roadway and a large residential neighborhood. It is located on an intersection of three major roads. Running off the arterial roads are a multitude of small roads crammed with a multitude of multifamily tenements. The store provides the residents in the neighborhood with an alternative to traveling a long distance to large grocery stores and supermarkets. The quantity and variety of food products that the store purveys is comparable to those found in the mega-stores. The closest stores to the Appellant are for all practical purposes solely micro-bodegas, not a grocery store. If a customer does not take advantage of the close proximity of the Appellant he or she will have to hide a considerable distance to reach an establishment that offers the same variety and quality that is found at the Appellant.
- The net effect of the economic distress visited upon the residents in the neighborhood is a food insecurity of almost unimaginable proportions. Fear forces them to buy excessively large amounts of food in one visit to the store or to buy so frequently as to be considered out of the ordinary. This is a fear that the Appellant cannot control.
- The relevant Federal regulations, 7 CFR 271-282, allow a disqualification of the Appellant where there is a . . . clear and repetitive pattern of unusual, irregular, and inexplicable activity. It is black letter law that a vendor ". . . has a property interest in continued participation in the food stamp program and cannot be deprived of this interest without due process." Ibrahim v. US Through Dept. of Agriculture, 650 F. Supp. 163, (Dist. Court, ND New York 1987). It is further undisputed law that an administrative penalty imposed by USDA FNS must be set aside if it is arbitrary or capricious. McGlory v. United States, 763 F.2d 309 (1985); Ramirez v. United States 514 F. supp. 759, 763 (1981).
- The factual predicate for a finding of trafficking does not exist and a permanent disqualification is both unwarranted and a violation of the regulations and case law. A careful review of the evidence and rationale provided by the Appellant demonstrates by a preponderance of the evidence that the disqualification should be reversed. The allegedly unusual, irregular and inexplicable activity is in fact regular, usual and has been appropriately explained.
- A SNAP disqualification would cause hardship to SNAP households because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices.
- The Appellant requests consideration for a civil money penalty in lieu of permanent SNAP disqualification. Pursuant to Section 278.6(i), the firm had an effective compliance program. The owner has owned the business for nearly three and a half years and this is the first time he has been cited for any SNAP violations. The compliance policy and program were in effect since 2014 when the owner first purchased the store. The fact that he has successfully operated the business for almost four years prior to the incidence in question is proof positive of the efficacy of the policy and program that were in effect. During his ownership, the owner has employed one full time employee. Since being authorized he has insured that each individual who has worked the cash register has a firm grasp of what is allowed under SNAP regulations and clearly knows how to handle SNAP transactions. All of the employees are trained shortly after being hired.

Furthermore, the owner continues to monitor the employees until they exhibit a firm grasp of the precepts noted herein. Finally, the owner was not aware of, did not approve, did not benefit from, and was not in any way involved in the conduct or approval of trafficking violations.

ANALYSIS AND FINDINGS

SNAP Authorization

FNS authorized Cherry Market #426 for participation in the SNAP on January 7, 2014. During the review period of September 2016 through February 2017, Cherry Market #426 was classified as a convenience store. The owner signed a SNAP application for the store and acknowledged he was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible items.

Store Visit Observations

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a March 11, 2017 store visit conducted by a FNS contractor to observe the nature and scope of the firm’s operation, stock, and facilities. This information obtained from the store visit was also used to ascertain if there were justifiable explanations for the firm’s irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Approximately 600 square feet in size with no additional storage outside of public view;
- No shopping carts and no hand-held baskets available for customer use;
- One cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- One small checkout counter area with limited check-out counter space;
- No optical scanners;
- Does not primarily sell one food type such as meat, poultry, dairy, seafood, fruits, baked goods, or vegetables;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals;
- No meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers;
- Had an ATM for customer use;
- Firm was not a WIC Program vendor;

- No fresh or frozen meats, poultry, or seafood in stock;
- Frozen food items included ice cream only which was stocked in a small chest freezer;
- Had a kitchen and prepared, made-to-order sandwiches were sold;
- Had a deli area and had signage in store indicating that deli meats and cheeses were sold by the pound;
- Meat items included units of canned fish, canned/potted meat, bacon, hot dogs, and eggs;
- Dairy included milk, butter/margarine, yogurt, and cheese;
- Had a limited variety and amount of fresh produce stock which included potatoes (3 bags), banana (1 each in poor quality), lettuce and tomatoes (Note: The lettuce and tomatoes were stored in the deli counter and appeared to also be used in the preparation of prepared, made-to-order sandwiches sold at the store);
- Other staple foods available for purchase included such items as juice, pasta, rice, cereal, loaf bread, corn meal, flour, baking mix, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, condiments, sugar, vegetable oil, and coffee; and
- Ineligible nonfood items included tobacco products, health and beauty aids, paper products, household cleaning supplies, automotive supplies, pet food, alcohol, lottery tickets, charcoal, and candles.

The available inventory of SNAP eligible food at the time of the store visit showed food stock that would be typical of a convenience store, where households normally purchase a limited number of items. The SNAP eligible food stocked by the store was generally of a low dollar value, consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food 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.

Charge Letter Attachments

On review, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed. The Retailer Operations Division presented a case that the Appellant trafficked SNAP benefits. Each Attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant during the review period. A singular transaction could appear in more than one Attachment as it can meet the criteria for several different types of flags. As patterns of unusual transactions appear across multiple Attachments the case of trafficking becomes more convincing.

Repeat Transactions by the Same Household (Charge Letter Attachment 1)

This charge letter Attachment documents 19 sets of transactions (54 total transactions) **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits to meet the parameters of this scan. These transactions were conducted by 14 different SNAP households. Multiple transactions conducted

by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

The Appellant contends that of the 19 transaction sets, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), thereby under cutting any claim that the withdrawals were within an unusually short timeframe. As for the last four transaction sets, the Appellant cannot prevent an individual from using his or her benefits at any time of his or her choosing or in the manner of his or her choosing. There are times when one member of the family wants to make a substantial purchase but he or she does not have a car so they divide the purchase into two transactions. Also, there are customers who have life issues and are not as organized and skilled as the average individual.

Although it is not uncommon for customers to have more than one transaction per day and there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions noted in the charge letter 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 Appellant's stock and facilities and are therefore, indicative of trafficking.

5 U.S.C. § 552 (b)(7)(E).

The Appellant contends that the photos taken during the store visit verify that the Appellant has a great variety of food products and explain why SNAP customers would routinely shop at the store multiple times during a short period. However, the report and photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Cherry Market #426 multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. In addition, there was a small checkout area with one cash register and one EBT POS device for ringing-up SNAP transactions. There were no shopping carts or hand-held baskets at the time of the store visit available to customers for transporting food within the store. There were no optical scanners or conveyor belts to expedite high dollar or rapid consecutive purchases.

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 provided no evidence to show that co-shopping is particularly common among SNAP recipients in Naugatuck, Connecticut. If co-shopping truly impacted Cherry Market #426, 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 household in a short period of time. But this is simply not the case.

The Appellant contends that the first transaction set containing sales 1, 2 and 3 clearly resulted from employee error. The clerk entered the sale as 5 U.S.C. § 552 (b)(6) & (b)(7)(C). He then realized that the sale was for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and entered that amount. Not being sure that the transaction went through he entered it a second time. However, the Appellant

did not submit any evidentiary information/documentation to support this contention. Even if the Appellant's contention was correct in that the second and third transactions noted in the first set of three total transactions were a result of clerk error, Attachment 1 includes a total of 54 questionable transactions. The Appellant has not provided any evidence or rationale which validates that the remaining 51 transactions are the result of legitimate food purchases and not trafficking.

The Appellant contends that there are clients who do not have reliable means of traveling to the local supermarket and as a result are obligated to shop at the Appellant, walk home with goods, and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) return to the store to complete their shopping. It is simply not worth it for many clients to make a long distance trip to buy a few items when the Appellant is steps away from their door. The Appellant has been in business for more than seven years and has loyal customers in the neighborhood. As such, customers are more inclined to stop by the store and return sooner to the store. In addition, there are no other small stores directly in the neighborhood and most of the surrounding small stores in the neighborhood do not participate in SNAP.

It is recognized that sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, there are 16 SNAP authorized retailers, including 1 supermarket and 2 super stores, located within a 2.0 mile radius of Cherry Market #426 that can meet the nutritional needs of SNAP customers. Of these 16 authorized stores, there are 3 convenience stores and 1 combination grocery store located within 0.38 miles of the subject firm. Some of the area authorized SNAP stores noted are larger than Cherry Market #426 and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store.

The record indicates that SNAP customers who shopped at Cherry Market #426 during the review period also shopped at other area grocery stores and, therefore, transportation to other stores is not an issue for these customers. Therefore, lack of access to other authorized stores or the availability of other food stores does not appear to be an explanation for the Appellant's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

5 U.S.C. § 552 (b)(7)(E).

Excessively Large Transactions (Charge Letter Attachment 2)

This charge letter Attachment documents 161 SNAP transactions, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transaction amounts are not consistent with the store's observed characteristics and food inventory. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant has provided several contentions with regard to the transactions documented in Attachment 2, including a claim that it is a large store and is well stocked with a substantial variety of quality goods that in some cases are relatively expensive. The store visit photos document the large amount of dry goods and meats that the Appellant stocks and sells. Those are high priced items. Therefore, it is no surprise that some of the transactions that seemed

excessively large were in fact ordinary payments for oil, rice, ham and other items covered by SNAP.

The FNS store visit report and photos show that the Appellant offers a moderate stock of SNAP eligible foods with no fresh meats, poultry, or seafood, no frozen meats, poultry, or seafood, a minimal variety and amount of fresh produce, no frozen foods other than ice cream, and lacks an abundant depth and breadth of staple foods. The store visit evidence also shows only a few high priced eligible foods in stock that would account for these large amounts and no evidence of a price advantage or custom or special services rendered at the subject store that are not offered at other authorized SNAP stores in the area. These large transaction amounts are not consistent with the Appellant store's inventory.

The store visit report and photos also indicate that there were no signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals, no evidence of meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices, and no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers. The store visit report and photos indicate that Cherry Market #426 is approximately 600 square feet in size with no additional storage area outside of public view. It is irregular for convenience stores to have purchases such as those cited, especially when Cherry Market #426 stocks only a few high priced food items so the majority of the food items stocked at the store are low priced items.

While there is no definition in the SNAP regulations for an excessively large purchase or transaction, FNS makes its determination based on the store type, characteristics and stocked inventory. The burden is on the Appellant to prove transactions FNS identified as large for the store type (in this case, a convenience store) are for legitimate purchases. According to the store visit of March 11, 2017, the subject store did not have inventory to support the numerous large transactions. The Appellant also provided no evidence of continuously purchasing inventory throughout the review period to satisfy the large transactions. The store must have stocked inventory to repetitively generate large sales, which was not evident in the store visit.

5 U.S.C. § 552 (b)(7)(E).

The study referenced by the Appellant indicates that 15.8 % of SNAP purchases are for over 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for all store types, including supermarkets, which have vastly larger stocks than convenience stores like the Appellant. The same study found that 83% of SNAP redemptions are redeemed at supermarkets, so the 16% figure referenced by the Appellant mostly reflects supermarket purchases. Therefore, that figure is not applicable to the Appellant, since a supermarket stock could support the large number 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transactions seen in Attachment 2 due to its much larger stock. In addition, the study noted that the average EBT purchase amount for a convenience store like Cherry Market #426 was \$7.86. Also, the average transaction dollar amount for a convenience store in New Haven County, Connecticut during the review period (September 2016 -- February 2017) was \$8.19 according to ALERT analysis.

The Appellant contends that the pricing structure in a small grocery store is very different from the pricing in a very large supermarket. The large market counts on volume to make a reasonable return on capital. The small grocery store's business model requires a substantial mark-up on its inventory in order to justify the investment in the store. The owner estimates that the local Naugatuck market supports a mark-up of 100 percent. A mark-up of that size will result in a series of larger than expected sales.

5 U.S.C. § 552 (b)(7)(E).

The Appellant contends that the large sales generally occur in the first few days of the month. Most SNAP recipients will deplete 90 percent of their benefits within three weeks of receiving them. Not surprisingly, upon his or her benefits at the beginning of the next month the recipient stocks up on his or her larder for the next period of want. That process of replenishing the pantry must of course engender larger than normal purchases.

Although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefit allotment in just one or two days, especially from a convenience store like the Appellant firm that has a moderate food stock, little fresh produce and does not carry fresh or frozen meats, poultry, or seafood. A February 2011 Final Report entitled "Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program", USDA FNS, revealed that households most often redeemed their benefits at supermarkets and super stores with only 4% of all households never shopping in a supermarket or super store. Thus, when a supermarket or super store is available, it is highly unlikely that a SNAP recipient would conduct multiple transactions within a limited period of time or excessively large SNAP transactions at a convenience store like Cherry Market #426 with a moderate selection of staple foods.

The Appellant contends that the net effect of the economic distress visited upon the residents in the neighborhood is a food insecurity of almost unimaginable proportions. Fear forces them to buy excessively large amounts of food in one visit to the store or to buy so frequently as to be considered out of the ordinary. This is a fear that the Appellant cannot control. While the Appellant firm may be located in a neighborhood with households that qualify for SNAP benefits, these factors are not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not displayed in other similarly stocked stores. If specific household needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would also present themselves at nearby firms as well. But this is simply not the case.

The Appellant contends that the closest stores to the subject firm are for all practical purposes solely micro-bodegas, not a grocery store. If a customer does not take advantage of the close proximity of the Appellant he or she will have to hide a considerable distance to reach an establishment that offers the same variety and quality that is found at the Appellant.

As noted previously, it is recognized that sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, there are 16 SNAP authorized retailers, including 1 supermarket and 2 super stores, located within a 2.0

mile radius of Cherry Market #426 that can meet the nutritional needs of SNAP customers. Of these 16 authorized stores, there are 3 convenience stores and 1 combination grocery store located within 0.38 miles of the subject firm. Some of the area authorized SNAP stores noted are larger than Cherry Market #426 and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store.

5 U.S.C. § 552 (b)(7)(E).

The store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding those of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts and hand-held baskets support the Retailer Operations Division's determination. It is not plausible that the store's customers are carrying large amounts of food around the store without the benefit of shopping carts and/or hand-held baskets. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping.

The USDA employs a computerized fraud detection tool to identify EBT transactions that form patterns that have characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. The Retailer Operations Division analyzes the transaction data and patterns along with other documentation such as, information from the onsite store visit report including photographs of stock and the store layout, an analysis of recipient shopping behavior, and comparisons with similar store types in local area, to render a determination as to whether or not the questionable transaction patterns were, more likely than not, the result of trafficking. The regulations at 7 CFR § 278.6(a) 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, and that such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through, inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Based on the discussion above and in the absence of credible evidence for 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 letter of charges evidence trafficking as the most likely explanation. Nevertheless, transactions having such characteristics do sometimes have valid explanations that support that they were the result of legitimate purchases of eligible food items, and this is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, however, the Retailer Operations determined that the Appellant's contentions did not outweigh the evidence. Assertions that the firm has not violated program regulations, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations. As noted herein, the Appellant has the burden of providing credible, relevant evidence, which 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 not true. This burden has not been met.

Due Process/Case Laws

The Appellant contends that relevant Federal regulations, 7 CFR 271-282, allow a disqualification of the Appellant where there is a . . . clear and repetitive pattern of unusual, irregular, and inexplicable activity. It is black letter law that a vendor ". . . has a property interest in continued participation in the food stamp program and cannot be deprived of this interest without due process." Ibrahim v. US Through Dept. of Agriculture, 650 F. Supp. 163, (Dist. Court, ND New York 1987). It is further undisputed law that an administrative penalty imposed by USDA FNS must be set aside if it is arbitrary or capricious. McGlory v. United States, 763 F.2d 309 (1985); Ramirez v. United States 514 F. supp. 759, 763 (1981).

The Appellant, through counsel, replied to the charges in writing, denying the charge of trafficking and offering various explanations and evidences for the questionable transactions. After considering the evidence of the case and the Appellant's replies, the Retailer Operations Division determined that a permanent disqualification was warranted. The action was not arbitrary or capricious as it followed the agency's due process procedures which are two-fold in nature. First, the retailer is afforded an opportunity to reply to the charges as specified by the Retailer Operations Division; the Appellant, through counsel, has availed itself of this first aspect of the due process procedures in the form of written replies to the Retailer Operations Division. The second level of due process involves an administrative review, of which the Appellant, through counsel, has likewise availed itself and in the process of which the Appellant was granted an additional three (3) weeks within which additional information may be provided in support of the request for review.

The purpose of the administrative review process is to ensure that firms aggrieved by FNS's adverse actions have the opportunity to have their position fairly considered by an impartial reviewing authority prior to that adverse action becoming final. The Appellant has been duly given, and has taken, the opportunity to present to USDA through the administrative review process whatever evidence and information it deems as pertinent in support of its position that the Retailer Operations Division's adverse action should be reversed. Therefore, any evidence and information that the Appellant presented to the Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to the Appellant's right to a fair and thorough review. The Appellant has exercised its opportunity to reply to the charge letter and its administrative review rights, and by doing so has availed itself of the full complement of the agency's statutory obligations with regard to due process.

With regard to the case laws cited by the Appellant, it is beyond the scope and authority of this review to determine the applicability of same. This review is limited to consideration of whether or not the Retailer Operations Division duly adhered to the Food and Nutrition Act of 2008, as amended, and the implementing regulations, and whether or not the action taken is sustainable by a preponderance of the evidence. Therefore, the application of any judicial precedent is better addressed via judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

Customer Hardship

With regard to the Appellant's contentions that a SNAP disqualification will impose a hardship on area SNAP customers, 7 CFR § 278.6(f) of the SNAP regulations provides for civil money penalty assessments in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs. However, this regulation also sets forth the following specific exception to such assessments there under: "A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification". Therefore, since this case involves a permanent disqualification action, the civil money penalty provision is not applicable to the present case.

CIVIL MONEY PENALTY

In the August 15, 2017 charge letter the Appellant was informed by the Retailer Operations Division that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000 in lieu of permanent disqualification of a firm for trafficking. Per Section 278.6(i) of the SNAP regulations, four criteria must be met in order to be considered for a trafficking civil money penalty. If requesting a trafficking CMP, an Appellant must meet each of the four criteria listed and provide the documentation as specified within ten days of the Appellant's receipt of their charge letter. As specified in 7 CFR § 278.6(i), in determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following four criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in 7 CFR § 278.6(i)(1);

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter;

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in 7 CFR § 278.6(i)(2); and

Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations.

In the reply to the charge letter of August 21, 2017, the Appellant, through counsel, requested consideration for a civil money penalty in lieu of permanent SNAP disqualification. The Appellant contends that pursuant to Section 278.6(i), the firm had an effective compliance program. The owner has owned the business for nearly three and a half years and this is the first time he has been cited for any SNAP violations. The compliance policy and program were in effect since 2014 when the owner first purchased the store. The fact that he has successfully operated the business for almost four years prior to the incidence in question is proof positive of the efficacy of the policy and program that were in effect. During his ownership, the owner has employed one full time employee. Since being authorized he has insured that each individual who has worked the cash register has a firm grasp of what is allowed under SNAP regulations and clearly knows how to handle SNAP transactions. All of the employees are trained shortly after being hired. Furthermore, the owner continues to monitor the employees until they exhibit

a firm grasp of the precepts noted herein. Finally, the owner was not aware of, did not approve, did not benefit from, and was not in any way involved in the conduct or approval of trafficking violations.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking civil money penalty in lieu of a disqualification under 7 CFR § 278.6(i) 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. **5 U.S.C. § 552 (b)(7)(E).**

With regard to the Appellant's contention that the owner has owned the business for nearly three and a half years and this is the first time he has been cited for any SNAP violations, a record of participation in the 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.

Therefore, the Retailer Operations Division's decision not to impose a civil money penalty in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record, upon which charges of violations are based, together with observations made during the store visit and an analysis of customer shopping behaviors, provide substantial evidence that questionable transactions during the focus period have characteristics and display patterns that are not consistent with legitimate sales of eligible food to SNAP benefit customers at a store of this type, size and makeup. Rather, the characteristics are indicative of illegal trafficking in program benefits. The Appellant's contentions do not outweigh this evidence.

The record has yielded no indication of error or discrepancy in the reported findings by the Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Therefore, the decision to impose a permanent disqualification from participation in the SNAP against Cherry Market #426 is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that 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 you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, FNS is 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

April 15, 2021