

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

Cotton Street Food Mart 3,

Appellant,

v.

Case Number: C0207417

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification against Cotton Street Food Mart 3 (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant on September 27, 2018.

AUTHORITY

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

CASE CHRONOLOGY

By letter dated July 31, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in October 2017 through March 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant

could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant, through counsel, responded to the charges in a letter dated August 11, 2018, that did not request or provide any documentation in support of a CMP. The Retailer Operations Division notified Appellant by letter dated September 27, 2018, that the firm was permanently disqualified from participation as a SNAP retailer in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter dated October 8, 2018, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. No subsequent correspondence was received.

STANDARD OF REVIEW

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

CONTROLLING LAW

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

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

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

7 CFR §278.6(i) states: “FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.”

7 CFR §278.6(b)(2)(ii) states: “Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in §278.6(i). This information and evidence shall be submitted within 10 days, as specified in §278.6(b)(1).” Part 278.6(b)(2)(ii) further states that if a firm fails to request a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the specified 10 days, the firm shall not be eligible for such a penalty.

SUMMARY OF THE CHARGES

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges on review were based on an analysis of SNAP EBT transaction data during the six month period of October 2017 through March 2018. This involved three patterns of EBT transaction characteristics indicative of trafficking:

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

APPELLANT’S CONTENTIONS

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

- The store runs specials on meat and other frozen items with even numbered prices and very often customers will purchase these items alone. Some of the same cents transactions are the result of pure coincidence. The firm is in the process of gathering receipts that will show even numbered non-SNAP transactions;
- The multiple transactions list a total of 12 accounts charged on the same day within a six month period and do not indicate any wrongdoing. The firm is a corner store in a residential area within walking distance for most customers. The owner cannot recall these particular transactions, but it is clear they involve customers returning after forgetting to purchase certain items and/or needing additional items. The first transaction could be from a customer making two purchases because of the weight of the items;

- Most, if not all, of the excessively large transactions are related to purchases of frozen specials and/or the meat plans. These plans include prices that, if combined with other items, could and do result in a larger than usual transaction. Only 14 exceed 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and there are no USDA transaction price limits;
- The firm is a busy store that grossed over 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in sales in 2017 and purchased 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of goods. Fourteen sales exceeding 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is a surprisingly small number considering that sales are over 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per month.
- Since receiving the July 31, 2018, charge letter, training has been conducted for all managers and employees. Evidence showing the training materials used as well as a training acknowledgement form signed by attendees is attached. There will be refresher training every six months and all new employees will be trained before their first day of work; and,
- Store ownership is sorry for not including this information in the initial response and understands that the firm will not be reinstated as a SNAP retailer until the administrative review is complete.

Appellant submitted copies of the firm's meat plans flyer, 2017 federal corporate tax return, SNAP Reporting Abuse poster, SNAP retailer notice on charging tax, SNAP product eligibility determination letter, SNAP Training Expectations notice, SNAP Training Guide for Retailers, a 2007 summary on restricting the use of Food Stamp benefits, and three SNAP Training Acknowledgement forms dated in August & October 2018 in support of these contentions.

ANALYSIS AND FINDINGS

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Nevertheless, transactions having such characteristics are sometimes valid and sufficient evidence that support that they were the result of legitimate purchases of eligible food items is provided. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited and to provide evidence that they are legitimate.

The Retailer Operations Division presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant's store during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Store Background and FNS Store Visit

FNS initially authorized the firm on January 21, 2015. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a January 20, 2018, store visit conducted by a FNS contractor to observe the nature and

scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a moderately sized grocery store offering a minimal quantity and variety of staple foods and carrying no other unique items or offering any distinctive services.
- The store stocked traditional American brands as well as a variety of canned and packaged Hispanic foods, primarily Goya products. There were no other ethnic or specialty food items.
- The store visit report and photos showed no shopping carts and only six small hand baskets for customer use thus severely limiting the amounts of food that could be moved to the checkout.
- No case sales, bulk items, or other sales were evident that would explain the unusual transactions and no cased items were available for purchase.
- The firm had a large, refrigerated meat case and a walk-in cooler. There was a flyer advertising four meat plans priced at \$29.99, \$59.99, \$89.99, and \$119.99 as well as family packs of fish, hamburger patties, pork chops, pork ribs, and cuts of chicken priced at \$21.99-\$32.99. However, the quantity and variety of fresh meats, poultry, and fish on hand in the meat case and cooler were minimal at the time of the store visit and would not be sufficient to fill many meat plans or family packs.
- The report specifically noted that the firm was not a specialty store and that there were no fruit and vegetable boxes for sale.
- The checkout area was approximately 3.0 feet wide and 1.5 feet deep with a large ice cream freezer directly in front that customers would have to reach over in order to place their purchases on the counter. The counter area included newspapers, a PIN pad, and various displays that would make it problematic to process large orders. The checkout counter had a cash register, no optical scanner, and a POS terminal as confirmed by the manager.
- The firm had a minimal stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in soda, snacks, and other drinks as well as many ineligible items.
- There was a deli counter and a small kitchen/food prep area containing a sandwich grill, cooktop grill, four burner stove, full-size oven, microwave oven, toaster oven, sandwich prep table, stainless steel prep table, small heated foods display case, small refrigerated deli case, and a chest freezer. There was also a flyer listing a variety of hot and cold sandwiches, burgers, hot breakfast foods, sides, and salads.
- The firm had minimal quantities and varieties of fresh unprocessed meats and seafood, no frozen unprocessed meats or seafood, a minimal quantities and varieties of processed meats (canned meat, poultry, fish; a limited selection of deli meats; packaged lunch meats; hot dogs; one pack of bacon; and jerky), no sausages, no frozen entrees, only one frozen dinner (meat loaf), eggs, a moderate selection of fresh fruit and vegetables, no frozen fruits or vegetables, no packaged nuts, a limited selection of canned soups, a limited quantity and variety of canned and packaged staple food items, a very limited selection of deli cheeses, several packaged cheeses, several single serving yogurt, sour cream, butter, margarine, canned milk, fresh milk, single serving milk drinks, coconut milk, light cream, bread, rolls, no pitas, several packages of

tortillas, no tostadas, corn meal, flour, sugar, rice, dried beans, cold cereal, single serving cold cereal, hot cereal, many single serving Ramen noodle soups, canned pasta, dry pasta, dry noodles, pancake mixes, baking mixes, mac&cheese, a very limited selection of frozen breakfast items, one frozen pie, cooking oil, coffee, tea, cocoa, a moderate selection of baby foods, infant formula, and few expensive staple food items other than the meat plans and family packs.

- Ineligible items included: tobacco, lottery, household products, paper products, health and beauty items, ATM, hot food, hot drinks, clothing, hats, and video games while accessory foods included: candy, spices, condiments, cooking oil, sugar, snacks, single serving ice cream, baking mixes, coffee, tea, cocoa, and un/carbonated drinks.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- The firm's hours of operation were open 8:00 AM-8:00 PM per the store manager. The manager also stated that the firm did not take phone or online grocery orders, did not deliver groceries, did not round price totals up/down, and had a pricing structure with most product prices not ending in .x9 cents.
- Most food items were priced with all visible food prices ending in .x9 cents except for a very few items priced differently such as Pop Tarts priced at two for \$5.00 and Del Gruso spaghetti sauce priced at two for \$3.00. The FNS store visit report was completed in conjunction with the store manager and specifically stated that most of the food prices ended in .x9 cents. A price ending in .x9 cents is the most common pricing structure for stores of this type. This fact was also supported by the many store visit photos showing staple foods, accessory foods, and ineligible items all with prices ending in .x9 cents.
- The FNS store visit report listed the four most expensive food items costing more than \$5.00 for sale in the store as being Meat Plan #4 priced at \$119.99, Meat Plan #3 priced at \$89.99, Meat Plan #2 priced at \$59.99, and a 10 pound box of tilapia fish priced at \$32.99. This listing of the most expensive items was provided by the store manager during the store visit.
- While the firm did stock a minimal selection of baby foods and infant formula, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers, not SNAP EBT.
- The store visit photos and report showed several marginally stocked shelves, an empty three-door reach-in cooler, and a minimally stocked fresh meat case.

Unusual numbers of transactions ending in a same cents value

This attachment lists 1,056 transactions with 771 transactions ending in the same cents value of .00 cents and 285 transactions ending in the same cents value of .50 cents. Transaction amounts include 28 transactions for amounts equaling or exceeding 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits. The FNS store report and photographs revealed no signs posted to indicate special food packages, bundles, case sales, or other sales that would explain the unusual number of transactions ending in these same cents values and no bulk items were available for purchase. While the firm purportedly offers

four meat packages, all have prices ending in .99 cents and would not account for these transactions. The high percentage of same cent transactions combined with the large number of same cents high dollar transactions is irregular and suspicious for this type store.

Appellant contends the firm runs specials on meat and other frozen items with even numbered prices and very often customers will purchase these items alone. Some of the same cents transactions are the result of pure coincidence. The firm is in the process of gathering receipts that will show even numbered non-SNAP transactions. No receipts were ever provided.

The inventory report and photos from the 2018 FNS store visit show the firm offered a minimal stock of staple foods that included few expensive staple food items on the day of the visit making it questionable that such a large number of high dollar SNAP transactions could be for legitimate food purchases. The visit report, completed in conjunction with the store manager, specifically notes that the firm's pricing structure has the majority of food prices ending in .x9 cents and that the firm does not round price totals up or down. The firm's pricing structure is further supported by the many store visit photos showing staple and accessory foods with prices ending in .x9 cents. No meat and/or frozen food specials with prices ending in .00 cents were evident in the store visit photos and no evidence of these was offered by Appellant. The purchase of several items with prices ending in .x9 cents would most likely not result in a total ending in a same cents value of .00 or .50 cents as multiples of nine seldom have a value ending in these amounts making it statistically impossible that this many store transactions would end in these amounts with legitimate food purchases.

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

Multiple transactions in unusually short time frames

This Attachment documents 27 individual transactions in 12 sets of two or more transactions conducted by 11 different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The dollar amounts of subsequent transactions in each set are substantial and nearly equal or exceed the dollar amount of the initial transaction in six of the 12 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). One set is comprised of four individual transactions while the remaining 11 sets are comprised of two individual transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by store inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends the multiple transactions list a total of 12 accounts charged on the same day within a six month period and do not indicate any wrongdoing. The firm is a corner store in a residential area within walking distance for most customers. The owner cannot recall these particular transactions, but it is clear they involve customers returning after forgetting to purchase certain items and/or needing additional items. The first transaction could be from a customer making two purchases because of the weight of the items.

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of a small grocery store's stock and facilities and are thus indicative of trafficking. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out or of household members/friends shopping together and making separate purchases as 10 of the 12 sets 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The transaction sets also do not contain the characteristics of a household returning later in the day or sending their child to purchase a forgotten item or two as all of the sets have subsequent transactions in amounts exceeding 5 U.S.C. § 552 (b)(6) & (b)(7)(C), far more than the cost of a forgotten item or two.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that subsequent transaction dollar amounts are substantial in these transaction sets and that all of the sets in this Attachment 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average small grocery store SNAP transaction amount in Berks County during the review period was \$9.87. These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby like type grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review.

The Retailer Operation Division's analysis of the shopping patterns for households listed in this Attachment shows that they have ready access to transportation as evidenced by their shopping at a variety of larger food stores located nearby and at a distance from Appellant's location, including a variety of super stores and supermarkets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Other households had similar shopping patterns which brings- up the question of why would households who are regularly shopping at numerous larger and better stocked stores, both nearby and at a distance, elect to conduct multiple purchases at a minimally stocked small grocery store that carries no unique foods or offers any special services. Appellant's contentions fail to offer any explanation or rationale for these unusual and suspicious shopping patterns. Common sense dictates that it is improbable that households with limited cash resources would choose to travel these distances if their purchases consisted solely of eligible food items that could be purchased at any of the super stores, supermarkets, or other larger stores they were already regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant business and the multiple transactions were attempts by to obscure trafficking by dividing a large dollar value transaction into a series of smaller dollar value

transactions. This is a method used by stores to avoid high dollar transactions that cannot be supported.

It is also unusual and suspicious that a review of this household's 52 transactions at the Appellant firm over the review period shows that all 52 were manually keyed transactions when its transactions at six other SNAP retailers were all swiped. Manual transactions are those in which the magnetic strip on the household's EBT card is not being read by the store's POS device when the card is swiped and the clerk must manually key enter the lengthy EBT card number. A review of other EBT transactions at the firm on the dates of the manual transactions show that Appellant's POS device was functioning properly as there were swipe transactions immediately before and after the manual transactions. When the magnetic strip on an EBT card fails, it can no longer be swiped and replacement EBT cards contain different identification numbers. It is an indication of trafficking when the same card is used for both manual and swipe transactions. In cases of trafficking, the manual transactions occur when a household gives a retail store its EBT card number as well as the PIN so that store employees can manually key enter the card number and then enter the PIN without needing to have the actual EBT card.

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

High Dollar Value Transactions

This Attachment lists 157 individual EBT transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The substantial number of high dollar transactions is uncharacteristic for a grocery store offering a minimal stock of staple foods and calls into question the legitimacy of these transactions. The transactions are also substantially higher than the average SNAP transaction amount of \$9.87 for this store type in Berks County. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores, located nearby as well as at a distance from Appellant's location, that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the Appellant firm. These high dollar transactions remain questionable when considering the proximity of other stores that would be better shopping options for consumers. Based on their shopping patterns, transportation does not appear to be an issue for these households. Yet, these recipients continue to shop and spend suspicious high dollar amounts at the Appellant firm, where the eligible food stock is limited, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of their purchases at larger food stores.

Specifically, two-thirds of the charge letter households shopped at a super store, supermarket, or a large grocery store on the same day or within one day of conducting a transaction listed in the FNS charge letter.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for Berks County small grocery stores during the review months and at the Appellant firm is significant. 5 U.S.C. § 552 (b)(7)(E). The unusually high number of SNAP transactions combined with the low average SNAP transaction dollar amount is an indication the firm may be dividing larger transactions into multiple smaller transactions in an effort to circumvent detection as previously discussed. A comparison of Appellant's SNAP redemptions to that of nearby like type stores having redemptions for the review period shows that none exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant firm even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is further indication that the transactions in this Attachment do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

The firm also had irregular SNAP transaction data compared to like type stores in Berks County. A comparison of Appellant's redemption data to Berks County small grocery stores using ten dollar increments shows that Appellant's transaction count and dollar volume significantly exceed the average of like type stores in all ranges 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at which point transactions stop. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This transaction pattern and the unusual spikes in both transaction numbers and dollar volume do not appear in the transaction patterns or in the transaction count and dollar volume averages for other like type stores. These large dollar transactions are considered to be irregular and suspicious based on the firm's food inventory. The Retailer Operations Division determined there was no credible reason for the firm to have transactions at these dollar levels given the minimal stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

Appellant contends that most, if not all, of the excessively large transactions are related to purchases of frozen specials and/or the meat plans. These plans include prices that, if combined with other items, could and do result in a larger than usual transaction. Only 14 exceed 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and there are no USDA transaction price limits.

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

Information obtained during the January 20, 2018, store visit on shows that the firm offers a minimal quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Much of the inventory for sale consists of inexpensive snacks, candy,

condiments, drinks, and single serving foods as well as many ineligible items. The fact that SNAP benefits cannot be used for tobacco, lottery, household products, paper products, health and beauty items, ATM, hot food, hot drinks, clothing, hats, or playing video games also provides no justification for the high transaction amounts. The store visit inventory report and photos show that the quantity and variety of fresh meats, poultry, and fish on hand in the meat case and walk-in cooler were minimal at the time of the store visit and would not have been sufficient to fill many of the meat plans or family packs. Additionally, as previously discussed, no frozen specials were evident during the store visit and no evidence of them was provided.

Higher food prices make it even more unlikely that SNAP recipients, with very limited food benefits, would want to spend a considerable part of their benefits in a store that does not address all of their food needs when they are already shopping at larger, fully-stocked stores that would offer a greater variety of foods at lower prices. Many of these stores also offer store brand products at lower prices, weekly specials, and have shopping carts and checkouts with built-in scanners and conveyor belts to facilitate processing purchases quickly. Additionally, Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions and no evidence was provided of SNAP eligible store stock via receipts of products taken into inventory for the relevant months. The firm has a small checkout area and no shopping carts thereby making it difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. Therefore, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of carts and more likely that the amounts were contrived.

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

Other Contentions

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

valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

Appellant's contentions relating to the firm being located in a low income neighborhood within walking distance for most customers is not contested as the majority of SNAP retailers are located in similar neighborhoods. That the Appellant firm is a busy store grossing over **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in 2017 is also not contested; however, a high sales volume does not preclude a firm from trafficking and therefore does not constitute significant evidence in the matter under review.

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

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

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

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

CIVIL MONEY PENALTY

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

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

Based on the above discussion and the evidence under review, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division’s decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i). That store ownership claims to have conducted employee training months after the violative transactions fails to meet the regulatory standard.

CONCLUSION

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

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

RIGHTS AND REMEDIES

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

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

ROBERT T. DEEGAN
Administrative Review Officer

April 5, 2019