

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

Cottonwood Market,

Appellant,

v.

Case Number: C0203219

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 Cottonwood Market (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant on December 12, 2017.

AUTHORITY

According to 7 U.S.C. § 2023 and its 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

In a letter dated November 2, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of April 2017 through September 2017. 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 responded to the charges in a letter dated November 7, 2017, but the response neither requested nor contained any evidence to be considered in support of the CMP. The Retailer Operations Division notified Appellant in a letter dated December 12, 2017, that the firm was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6(c) and 278.6(e)(1) for trafficking violations. This determination letter also stated that Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated ". . . you are not eligible for the CMP because you failed to submit sufficient evidence to demonstrate that your firm had established and implemented an effective compliance policy and program to prevent violations of the Supplemental Nutrition Assistance Program."

By letter dated December 18, 2017, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted. Subsequent correspondence dated January 17, 2018, was received from Appellant.

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 of SNAP benefits.

7 U. S. Code § 2021(a)(2) states, "Regulations promulgated under this chapter shall provide criteria for the finding of a violation of, the suspension or disqualification of and the assessment of a civil penalty against a retail food store or wholesale food concern on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, or evidence obtained through a transaction report under an electronic benefit transfer system."

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

7 CFR § 278.6(e)(1)(i) reads, in part, "FNS shall . . . [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined, in part, in

7 CFR § 271.2, as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone” Trafficking is further defined, in 7 CFR § 271.2, to include “(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.”

7 CFR §278.6(i) states, inter alia: “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, inter alia: “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 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 Part 278.6(b)(1), 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 April 2017 through September 2017. This involved two patterns of EBT transaction characteristics indicative of trafficking:

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

APPELLANT’S CONTENTIONS

In the response to the letter of charges, in the request for administrative review, and in the subsequent correspondence, Appellant has stated as its position in the matter the following:

- The owner is 100 percent sure the accusations are false as there is no real convincing evidence and it is based on assumptions, not the real facts. He also denies trafficking and has always followed SNAP rules. The accusations are based on two parts:
T5 U.S.C. § 552 (b)(6) & (b)(7)(C);
- The store now carries everything that a supermarket carries from meats to produce to dairy and now a selection of whole grain foods. Due to the rise in the cost of living it is more

expensive to purchase items and therefore FNS should not be surprised at large purchases since there are no large chain stores nearby;

- The store owner states that he has cash register tapes that will substantiate the sales on the charge letter reports;
- Statements from customers are enclosed along with total sales papers, invoices for some of the meat purchases, and photos of the store; and,
- There is insufficient evidence to disqualify the store.

Appellant submitted 12 pages of invoices, a one page profit and loss statement, four preprinted statements from customers, and 14 pages of cash register and EBT POS receipts with POS dates in November and December 2017 in support of these contentions.

The preceding 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.

ANALYSIS AND FINDINGS

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 the Appellant business 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

The FNS most recently reauthorized the business on December 12, 2011, and the business is classified as a small grocery store. The file also indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an August 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 was then used to ascertain if there were justifiable explanations for the EBT transactions at Appellant's store that formed patterns indicative of trafficking. The store review summary documented the following store size, description, and characteristics:

- The business was a small store offering a minimal quantity and variety of staple foods and carrying no unique eligible food items.
- The business stocked a very limited quantity and variety of Hispanic foods (e.g. La Costena, etc.) typically found in stores as well as many American brands.
- Exterior signage advertised beer, wine, ATM, fresh coffee, Carniceria, carne fresca, fresh produce, and check cashing.

- A store employee stated that the business did not allow telephone or online orders and did not have delivery service.
- There were no shopping carts or handheld baskets for customer use seen during the visit making it difficult for customers to carry large amounts of food to the checkout.
- The checkout area was an opening approximately 1.5 feet deep by 1.5 feet wide between two walls of plastic storage with displays taking up counter space on both sides and a chest type ice cream freezer directly in front of it that customers must reach over in order to place their purchases on the counter. The small size of the checkout area would make it problematic to process large orders.
- The checkout counter had one cash register, one POS terminal, and no optical scanner as evidenced by the store visit report and photographs.
- No food packages, bundles, bulk products, case sales, or other sales were evident that would explain the unusual transactions and no SNAP eligible cased items were available for purchase except for beverages.
- The store visit report specifically notes that the business was not a specialty store and that there were no meat bundles or fruit and vegetable boxes for sale.
- The store had a minimal stock of staple foods that also included many single serving and pre-packaged items with a large portion of inventory in accessory foods (primarily candy and drinks), snacks, and ineligible items.
- The store had an extremely limited stock of fresh unprocessed meats, no fresh unprocessed seafood, no frozen unprocessed meats or seafood, a very limited quantity and variety of processed meats and seafood, no frozen entrees, no frozen dinners, an extremely limited stock of fresh fruit and vegetables, no frozen fruits or frozen vegetables, no dried beans, a minimal quantity and variety of canned and packaged staple food items, only four sour cream, no yogurt, no butter, no baby foods, no baby cereals, and very few expensive eligible food items.
- Ineligible items included: tobacco, alcohol, lottery, household products, paper products, auto products, pet products, health and beauty items, sunglasses, BBQ supplies, and hats while accessory foods included: candy, spices, condiments, coffee, cocoa, cooking oil, sugar, and carbonated/ uncarbonated drinks.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- The business's hours of operation were 8:00 AM-10:00 PM daily as confirmed by a store employee during the store visit.
- Most food items were not priced with all visible staple food prices ending in .x9 cents. Comments on the FNS store visit report by the contract reviewer 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.

- The FNS store visit report listed the four most expensive items costing more than \$5.00 for sale in the store as being hot links 5 pounds priced at \$14.99, coffee 32 oz. priced at \$7.99, Coke 12 pack priced at \$7.49, and cold cereal 21.7 oz. priced at \$5.99. The listing of the most expensive items was provided by a store employee during the store visit.
- The store was not a WIC vendor. While the business did stock a limited quantity of infant formula, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers at WIC vendors, not SNAP EBT.
- The store visit report and photographs showed that several shelves were marginally stocked.
- The quantity and variety of the store's staple food inventory was less than that seen during the previous FNS store visit on February 13, 2016.

Multiple transactions in unusually short time frames

This Attachment documents 41 individual transactions in 17 sets of two or more transactions conducted by 10 different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). 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.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends the short time frames are because customers returned to purchase items they forgot in the first trip.

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, of household members/friends shopping together and making separate purchases, or of a household making a payment toward their credit account followed or preceded by a purchase as all of the 17 transaction sets occur over a period 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C). For households living nearby making multiple trips to the store due to walking, it would be expected that the transactions would be somewhat similar in dollar amount in order to balance the weight of purchases since the business carries few expensive items yet nine of the 17 transaction sets differ in dollar amount

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that the subsequent transaction dollar amount is for a substantial amount in all of these transaction sets and that they nearly equal or exceed the dollar amount of the first transaction in 11 of the 17 sets.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). 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 business during the period under review.

Furthermore, since the Appellant business primarily has only low priced food items priced at less than \$5.00, the purchase of the many items with prices ending in .x9 cents needed for the large transactions in this Attachment 5 U.S.C. § 552 (b)(6) & (b)(7)(C). When there are a disproportional amount of transactions ending in a same cent value, it appears that these transaction amounts are contrived and therefore, in the absence of any compelling rationale to the contrary, are indicative of trafficking.

An 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 other larger food stores located nearby and at a distance from Appellant's location with all of the households shopping at a large number of super stores and supermarkets. Appellant offered no explanation as to why households who are shopping and spending large dollar amounts at numerous larger and better stocked stores would 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 would choose to spend large dollar amounts at a minimally stocked grocery store if their purchases consisted solely of eligible food items that could be purchased at any of the super stores and/or supermarkets they were already regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant 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. This is further reinforced by the fact that seven of the 10 households in this Attachment shopped at a super store, supermarket, large grocery store, and/or medium grocery store on the same day that they conducted multiple, large transactions at the Appellant business.

The analysis also identified households that conducted transactions well before or well after store business hours including a household that shopped at a super store located 2.25 miles away from Appellant's location 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is an indication of potential trafficking when there are numerous transactions occurring outside of the store's reported business hours.

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 50 individual EBT transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The substantial number of high dollar transactions is uncharacteristic for a small grocery store of this size offering a minimal stock of staple foods and calls into question the legitimacy of these transactions. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The 50 excessively large SNAP EBT transactions at Appellant's business for the review months represents more than 12 percent of all SNAP redemptions at Appellant's business during the period under review. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant business are also shopping at many full-line supermarkets and super stores, located nearby as well as at a significant 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 business. The large dollar transactions remain questionable when considering the proximity of these other SNAP authorized stores that would be better shopping options for consumers. Based on these 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 business, 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, 14 of the 24 households listed in this Attachment shopped at a super store, supermarket, large grocery store, and/or medium grocery on the same day that they conducted large transactions at the Appellant business.

Evidence shows that the difference in the average SNAP transaction dollar amount, the total SNAP transaction dollar volume, and the SNAP transaction count for Kern County small grocery stores during the review months and at the Appellant business is significant. **5 U.S.C. § 552 (b)(7)(E)**. A comparison of Appellant's SNAP redemptions to that of nearby small grocery stores that had redemptions for the review period shows similar differences. Additionally, none of these nearby stores exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant business 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 a further indication that the SNAP transactions in this Attachment and the others do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

Appellant contends that the business carries everything that a supermarket carries from meats to produce to dairy and now a selection of whole grain foods. Due to the rise in the cost of living it is more expensive to purchase items and therefore FNS should not be surprised at large purchases since there are no large chain stores nearby. The store owner also states that he has cash register tapes that will substantiate the sales on the charge letter reports. Appellant submitted 12 pages of invoices for some of the meat purchases, a one page profit and loss statement, four preprinted statements from customers, photographs, and 14 pages of cash register

and EBT POS receipts with POS dates in November and December 2017 in support of these contentions.

The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of store and the store's stock. An analysis of shopping patterns by the Retailer Operations Division shows that households in this Attachment are all regularly shopping at much larger stores, and conducting transactions of large dollar amounts, yet are conducting comparable or higher dollar value transactions at the Appellant business. It would make 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 business since its cost of goods would be higher than that of larger stores such as supermarkets or super stores.

Information obtained during the FNS store visit on August 11, 2017, shows that the Appellant business 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, beverages, and single serving foods as well as many ineligible items. Since the Appellant business offers an extremely limited stock of fresh unprocessed meats, no fresh unprocessed seafood, no frozen unprocessed meats or seafood, a very limited quantity and variety of processed meats and seafood, no frozen entrees, no frozen dinners, an extremely limited stock of fresh fruit and vegetables, no frozen fruits or frozen vegetables, no dried beans, a minimal quantity and variety of canned and packaged staple food items, only four containers of sour cream, no yogurt, no butter, no baby foods, no baby cereals, and very few expensive eligible food items, these patterns are deemed to be suspicious. The fact that tobacco, alcohol, lottery, household products, paper products, auto products, pet products, health and beauty items, sunglasses, BBQ supplies, and hats are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts. The business carries no special foods or offers any unique services that are not also available at other nearby grocery stores making it unlikely that SNAP recipients with available transportation would make this business their grocery store of choice. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Increasing food prices make it even more unlikely that SNAP recipients, with limited food benefits, would want to spend a considerable part of their benefits in a small grocery store that does not address all of their food shopping 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 would also offer store brand products at lower prices, offer weekly specials, and have shopping carts and checkouts with scanners and conveyor belts to facilitate processing purchases quickly. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). While Appellant stated that these were just a sampling of invoices, they total to a small dollar amount and substantiate that the store does not do a large volume of business as Appellant contends. The photos submitted by Appellant reflect the same information found in the NS store visit photographs so provide no new evidence. The profit and loss statement also provides no evidentiary basis for the unusual and suspicious transactions as there is no documentation to support the dollar amounts provided. The four customer statements provided are identical, preprinted form letters stating that the individual lives nearby, shops at the Appellant business, and that the business is very convenient. There is no documentation that the individuals actually live nearby, are SNAP recipients, or that they actually shop at the Appellant

business as no identifying information was provided. Additionally, Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions. The 14 pages of cash register and EBT POS receipts submitted were not itemized and were all dated outside of the period under review. While Appellant does state that the cash register receipts have different dates as the register had not been programmed, it offers no explanation for why all of the receipts provided are dated well after the period under review. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Accordingly, these receipts provide no basis to substantiate the transactions in this Attachment.

The Appellant business has a very small checkout area and does not have shopping carts, hand baskets, or a scanner 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.

It is further noted that SNAP redemptions at the Appellant business fluctuated unusually following receipt of the charge letter on November 3, 2017. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). A pronounced decrease in SNAP transactions immediately following receipt of the charge letter is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

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

Other Contentions

Regarding Appellant's contentions that the accusations are false and that there is no real convincing evidence to disqualify the store, it is important to state that this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is to determine whether Appellant demonstrates, by a preponderance of the evidence, that the disqualification should be reversed. In this case, therefore, if Appellant demonstrates by a preponderance of the evidence that it did not engage in trafficking with SNAP benefits, then such transactions will be considered legitimate and the disqualification reversed. If this is not demonstrated, the case is to be sustained. 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. Regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, ownership is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time. Additionally, a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

The owner and the business were charged with trafficking based on a computer analysis of the store's transactions for the months of April 2017 through September 2017. 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.

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 . . . [d]isqualify 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, either directly, indirectly, in complicity or collusion with others, or acting alone . . .” SNAP regulations at 7 CFR § 278.6(a) clearly state, in part, 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 . . .**” (Emphasis added). In the present case, the data presented in the Attachments is solely based on the SNAP electronic benefit transfer transactions conducted at the Appellant business during the period under review. 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 period under review. 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 photographs from the FNS store visit on August 11, 2017, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant business during the review period. This analysis also included a review of the business 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 in the charge letter Attachments. 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 evidence under review shows SNAP activity indicative of trafficking. Neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto 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 request a trafficking CMP or to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

Appellant made no mention of how the business met any of the four criteria in either its response to the charge letter or in the request for administrative review and no documentation or other evidence of any kind, including written statements, was subsequently received from Appellant in support of a trafficking CMP. Therefore, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division’s decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

The Retailer Operations Division has presented a case that Appellant has likely trafficked in SNAP benefits. The Retailer Operations Division’s 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 that are consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in two Attachments of EBT transaction data, the inadequacy of the store’s staple food stock as observed during the store visit to support large transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that

likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type and larger stores in the county and state.

The retailer has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged by the Retailer Operations Division. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, Retailer Operations properly determined that Appellant was not eligible for a trafficking CMP according to the terms of 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 2, 2018