

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

Country Food Store,

Appellant,

v.

Case Number: C0192961

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the permanent disqualification of Country Food Store (Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

AUTHORITY

7 USC § 2021 and the 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 October 6, 2016, the Retailer Operations Division charged 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 February 2016 through July 2016. 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 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).

In response to the charge letter, on October 14, 2016, Appellant, through counsel, requested documents under the Freedom of Information Act (FOIA). The FOIA Office responded to the FOIA on December 8, 2016. Counsel appealed the FOIA response by letter dated December 29, 2016. The FOIA office issued its response to the appeal on August 12, 2020. On August 26, 2020, the Retailer Operations Division on provided counsel with ten days to provide its final response to the charges. On November 8, 2020, counsel provided Appellant's response. Appellant denied trafficking and explained that the transactions were normal based on the unique circumstances of the store.

After considering the evidence and the retailer's reply, the Retailer Operations Division issued a determination letter dated December 17, 2020. The determination letter informed Appellant that it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that Appellant was not eligible for a trafficking CMP because Appellant failed to 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 dated December 28, 2020, Appellant, through counsel, appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action 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, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) and (e)(1) 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 USC § 2021(b)(3)(B) states, in part:

... a disqualification under subsection (a) shall be ... permanent upon ... the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards ...

7 CFR § 271.2 states, in part, that, eligible foods means:

Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption.

7 CFR § 271.2 defines trafficking, in part, as:

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(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**, . . .” (emphasis added)

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).

7 CFR § 278.6(e)(1) reads, in part:

FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

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.

SUMMARY OF THE CHARGES

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

- There were an unusual number of transactions ending in a same cents value.
- There were multiple transactions made from the accounts of individual SNAP households within a set time period.
- There were excessively large purchase transactions made from recipient accounts.

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.

APPELLANT'S CONTENTIONS

In its December 28, 2020, administrative review request, and subsequent correspondence submitted on February 22, 2021, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- Appellant has operated as a standalone convenience store for the past 22 years.
- Most of the store's clients walk to and from the store.
- Appellant provides many specialty items including milk, butter, eggs, cheese, lunchmeat, canned meat, rice, pasta, cereal, bread, coffee, candy, cookies, chips, ice cream, juice, and water.
- Customers make multiple daily trips.
- Appellant provided seven affidavits from customers stating that they spend 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per day and visit multiple times.
- Appellant is located on a main transportation route where there are at least eight bus stops within 0.1 mile and within walking distance from the Department of Children and Families and an elementary school.
- SNAP household's shopping habits are different than those of non-SNAP households.
- SNAP households buy sweetened beverages, frozen prepared foods, and prepared desserts at a much higher rate than traditional consumers.
- The onsite inspection found the store was sufficiently stocked to satisfy the purchase amounts of the charge letter.
- Not noted in the store visit report was the fact that many of the drinks and convenience foods are sold by the case or in multiples for round numbers.
- The prices lend themselves to transactions that end in whole dollars or when combined transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The inventory receipts substantiate that there was adequate food to cover the transactions.
- There was a confirmation bias where the Department started with a theory that trafficking exists because the ALERT scan then the automatic hypothesis is that trafficking is occurring.
- When relevant factors are disregarded or devalued (like prior negative RIB investigations or other information presents), the statistical analysis is flawed.
- The same cent transactions are the result of specials that the store runs on certain products and the result of discounted pricing for customers who are regulars or when circumstances warranted it.
- The specials are contained in the Promotion List.
- The store clerks are giving autonomy in rounding or estimating some transactions

because of the customer's loyalty or when business circumstances warrant it.

- Customers are not always provided with a round number prices but the clerk at his or her discretion can chose to round the sale prices to half or whole dollar to expedite the transaction.
- This practice is not widely utilized and therefore there is no bassline for comparison.
- Co-shopping is on the rise, where both adults are responsible for the groceries.
- Different households will shop separately using the same account.
- Different participants will travel to the store together to make purchases and then separate their purchases to track what each party has used from the benefit account.
- Appellant's inventory greatly exceeds those around it and it has a greater quality and variety than your average small grocery.
- The stores convenience is another important factor to consider when evaluating repeat transactions. Customers are more likely to return for quick shopping trips than an average convenience store with an inferior inventory and a further distance from their homes.
- Transportation inconsistency is another reason why the store's transactions appear that way they do if they have transportation to another store it is not dependable.
- The inventory offered by the store is of such variety that it's reasonable to assume that a customer could satisfy all of their needs on a single shopping trip.
- The households conducting the large transactions likely have a larger amount of SNAP household members.
- The largest transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is not very large.
- Other nearby stores do not have the inventory variety that Appellant does.
- The other stores are stacked together and therefore more direct competition between them which causes a reduction in the flow of SNAP participants and a smaller portion of overall SNAP business.
- Appellant requests a CMP and relies on the firm's compliance history since it became authorized as evidence of its effective compliance policy and program.

In support of its contentions, counsel submitted the following documents:

- Seven customer affidavits;
- Sixty-three pages of receipts and invoices;
- Know your Core, Protect Your Core, Convenience Store News for the Single Store Owner April 2016;
- U.S Grocery Shopping Trends, 2016 by Food Marketing Institute;
- Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program in Fiscal Year 2017 Final Report by Insight Policy Research issued in September 2020;
- Food Typically Purchased by Supplemental Nutrition Assistance Program Households by USDA, Food and nutrition Service, Office of Policy Support November 2016;
- Profile of SNAP Households in 2018 Massachusetts dated December 2020; and
- Promotion list.

The preceding may represent only a brief summary of the Appellant's contentions presented 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.

ANALYSIS AND FINDINGS

Store Visit

FNS authorized Country Food Store as a convenience store on June 25, 2009. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a July 25, 2016, 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 irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Country Food Store is approximately 2,275 square feet.
- There were a couple of shopping baskets for customer use.
- There were two cash registers and two point of sale (POS) devices.
- There were no meat bundles, seafood specials, or fruits/vegetables in boxes.
- There was no fresh unprocessed meat, poultry, or fish.
- There were packages of deli meat, hot dogs, kielbasa, and bacon.
- There was no fresh produce.
- Dairy included milk, cheese, sour cream, and butter.
- Frozen food included chicken, pizza, dinners, burritos, vegetables, and ice cream.
- Other staple foods available for purchase were eggs, juice, rice, bread, beans, cereal, pasta, and limited selection of canned goods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included tobacco, lottery, household items, and pet food.

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. Given the available inventory, there was very little sign that the firm would be likely to have SNAP redemption patterns that differed significantly from those of similar-sized competitors, especially competitors that sell similar or identical food items.

Charge Letter Attachment

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 firm during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

Charge Letter Attachment 1. There were an unusual number of transactions ending in a same cents value. During the review period, there were 855 SNAP transactions ending in a

same cents value 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits that meet the parameters of this attachment. When such patterns are unsupported by special pricing structures, they are a strong indicator of trafficking in SNAP benefits.

The photographs from the store visit shows a variety in pricing including snack cakes prices - \$0.99 and \$1.29; cream - \$2.19; milk \$1.99 and \$3.99; chocolate milk - \$2.25; frozen pizza - \$1.99; granola bars two for \$1.00; Combos snack item - \$1.59; juice - \$1.99; noodles- \$0.75 and two for \$1.00; and bread/rolls two for \$5.00. It is possible that some of the smaller transactions are the result of purchasing some same cent items and this could explain some of the lower dollar same cent transactions. However, the larger transactions cited in the charge letter would most likely consist of the purchase of several relatively inexpensive items and it is unlikely that these purchases would routinely total to an amount ending in same cents.

Appellant submitted a price list with some handwritten specials for low dollar even cents amounts. The Retailer Operations Division determined that the specials were likely from a distributor and not Appellant's advertised specials. However, even if Appellant passed on these savings for the even cents amounts to its customers, it does not adequately explain the different amounts listed on this Attachment. There would need to be several items purchased and these items would likely be purchased with other items that are priced differently resulting in a transaction total with a different cents amount.

Counsel reports that the store would often round off purchases as a customer loyalty initiative for large purchases. The Retailer Operations Division reviewed the purchases of three households that conducted some of the same cent transactions and found that these loyal customers may have an even cent transactions but the other large dollar transactions were not even cents. Moreover, each of these three households shopped at other larger stores and therefore were likely not shopping at Appellant for any savings such as rounding down. Given that the frequent same cent transactions end in three different amounts both round numbers and 99 cents, it is dubious that this was a customer loyalty initiative. There seems no rhyme or reason to who or when this either rounding or random price adjusting is applied. Consequently, when many transactions end in a same cents amount, it appears that these transaction amounts are contrived and in the absence of compelling evidence to the contrary, are suggestive of trafficking.

Appellant failed to provide a credible explanation for the same cent transactions listed on Charge Letter Attachment #1.

Charge Letter Attachment 2. Multiple transactions were made from individual benefit accounts in a set timeframe. This attachment documents 28 sets of transactions conducted by nine different households 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits that meet the parameters of this scan. 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.

Although it is not uncommon for customers to have more than one transaction per day, 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 Appellant's stock and facilities and are therefore indicative of trafficking. The photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Appellant multiple times during a short period or purchase such a large volume of items, there being no great variety of products or price advantage. The second and third transactions in each set are too large to consist of forgotten items.

Counsel explains that co-shopping results in a higher number of transactions that occur in a shorter period of time than expected. Co-shopping may occur but it is unlikely the reason that Appellant has more frequent large transactions by the same household than other similar stores during the review period. This would manifest itself in these households conducting similar transaction patterns at other retailers that they shop, but this is not the case. The Retailer Operations Division determined that none of the nine households that conducted the transactions on the Attachment conducted any similar transactions sets at any other stores. Similarly, the Retailer Operations Division compared Appellant two similarly stocked or superiorly stocked nearby convenience stores. There was only one similar type of transaction set conducted at one of the two stores during the review period. It is unlikely that households would be more likely to co-shop at Appellant than at other similar nearby stores.

Counsel also explains that these transactions are supported by the customer statements. The customer statements are discussed below. However, the transaction history of these households shows that they have access to other authorized stores and conducted SNAP transactions at supermarket and super stores.

Appellant has not offered any evidence to show that the transactions listed in Attachment 2 were purchases of eligible food only.

Charge Letter Attachment 3: Excessively large purchase transactions were made from recipient accounts. This attachment lists 313 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant's average SNAP transaction amount was 42% higher than the average SNAP transaction at a convenience store in Massachusetts. Appellant's total SNAP redemption dollar volume was 5 U.S.C. § 552 (b)(7)(E) greater than the average for convenience stores in the State and Appellant conducted 5 U.S.C. § 552 (b)(7)(E) more SNAP transactions than the average for convenience stores. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar-sized competitors. These large transaction amounts are not consistent with the store's inventory, considering Appellant is a convenience store offering limited eligible food stock with no fresh meat or produce.

Counsel reports that Appellant sells many drinks and convenience foods that are sold by the case or in multiples for round numbers. There were some cases of soda and water visible in the store visit photographs but in limited amounts. There is no convincing evidence to suggest that these cases of beverages explain the high number of larger than normal SNAP transactions at a convenience store.

Counsel contends that the inventory offered by the store is of such variety that it's reasonable to assume that a customer could satisfy all of their needs on a single shopping trip. As indicated,

Appellant did not have any fresh produce or fresh meat. The evidence does not support that Appellant's eligible food stock could satisfy all of the customers shopping needs.

The Retailer Operations Division determined that there are 28 authorized firm located within a one mile radius of Appellant, including 22 other convenience stores, three small groceries, one medium grocery, and two super stores. Counsel explains that the other nearby conveniences stores are located quite close to each other and therefore their transaction patterns would not be similar to Appellant because of the stiffer competition amongst them. However, the evidence shows that Appellant is located very close to another store as well and therefore would also experience some customer preference and customer division. Similarly, even if there was a significant difference in nearby stores, this explanations does little to explain how Appellant is significantly different than the average for the convenience stores in the State.

The Retailer Operations Division determined that the transaction pattern of Appellant exceeded two nearby convenience stores, as seen on the table herein. The data from these nearby stores provided adequate evidence to demonstrate that the transaction patterns at the Appellant firm were highly unusual and indicative of possible trafficking violations.

5 U.S.C. § 552 (b)(7)(E)

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Retailer Operations Division considered this an indicator of trafficking considering Appellant's available inventory.

Counsel explains that customers without cars cannot always shop at larger stores because they are depending on others to drive them. When they do not have transportation, they visit Country because it is more convenient to walk to and from. The Retailer Operations Division examined three households identified in the charge letter to analyze their shopping patterns at Country Food Store compared to their shopping patterns at other SNAP authorized stores. The recorded address for the households was 2.54, 2.34, and 3.35 miles from appellant. These three households account for 74 of the listed questionable SNAP transactions. However, despite this access to better stocked stores, each of the four households conducted excessively large transactions at Country Food Store 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of shopping at a supermarket or super store. It is questionable as to why households would conduct large transactions at Appellant, when these households had just visited or planned to visit larger stores with a better selection of fresh meat and produce and likely better prices.

Customer Statements

With the administrative review request, counsel submitted seven customer statements. The Retailer Operations Division reviewed the transaction history of these SNAP households. Four of the households could not be located in the State database. One of the households did not conduct any SNAP transactions at Appellant during the review period. The Retailer Operations Division found that three of the households that submitted statements conducted some of the transactions listed on the Charge Letter attachments; however the transactions pattern was questionable. For example, one of the customers (5 U.S.C. § 552 (b)(6) & (b)(7)(C).) conducted three SNAP transactions at Appellant on May 11, 2016, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and

also shopped at a supermarket transacting less 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Similarly, another household (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) conducted two transactions on May 9, 2016, each in the exact amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and within minutes. Lastly, a third household (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) transacted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on February 7, 2016, at Appellant and about 5 U.S.C. § 552 (b)(6) & (b)(7)(C) later transacted less 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at a supermarket. The customer statements are unconvincing and not sufficient evidence that the transactions listed on the Charge Letter were for eligible food items only.

Invoice Analysis

Counsel asserts that the store visit report found that the store was sufficiently stocked to justify the transactions listed in the charge letter. This is not an accurate assumption. The store visit report showed that the store met eligibility criteria for authorization. However, the contractor did not make any determinations regarding the store's stock and whether it was sufficient to satisfy large dollar transactions.

During the initial determination, counsel submitted inventory invoices/receipts. The Retailer Operations Division analyzed the invoices submitted by the firm and determined that they did not cover Appellant's SNAP redemptions for the review period. Furthermore, even if there was sufficient food stock at Appellant to mathematically support high dollar transactions, there does not appear to be anything that would reasonably attract SNAP households to shop there and spend substantial amounts of their SNAP benefits. The Retailer Operations Division does not deny that there is food being sold in the store. It is not unusual for violating stores to conduct largely legitimate SNAP transactions while conducting a smaller number of trafficking transactions with a few trusted households. However, the invoices provided in this case do not account for Appellant's SNAP redemptions and other cash and credit sales during the review period.

Foods Typically Purchased by SNAP Households

Counsel refers to a report issued by the Food and Nutrition Service, Office of Policy support in November 2016 titled *Foods Typically Purchased by Supplemental Nutrition Assistance Program (SNAP) Households*. Counsel provides information from this report as evidence that the shopping pattern of SNAP households is unique and thus explains unusual shopping patterns. However, the report actually found that SNAP households and non-SNAP households purchased similar foods. In fact, protein foods represented the largest expenditure for both household types and more was proportionality spent on fruits and vegetables than on solid fats and added sugars, grains, and dairy. In addition, both types of households commonly purchased items that are commonly referred to as less healthy including sweetened beverages, prepared desserts, and salty snacks. Thus, this report contradicts statements made by counsel such as "SNAP household's shopping habits are different than those of non-SNAP households" and "SNAP participants buy sweetened beverages, frozen prepared foods and prepared desserts at a much higher rate than traditional customers."

Benefit Redemptions Patterns in SNAP

Counsel explains that SNAP customers will make significant grocery purchases from Appellant within 48 hours of received their monthly benefit allotment. Counsel refers to a study conducted *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program Final Report* (2011). This government report on SNAP shopping patterns indicates that on average SNAP households have less than one-quarter of their benefits left by the middle of the month. On the day the issuance was distributed, the average household redeemed more than a fifth of its benefit. By the first week, the average household had redeemed over half of its benefit, and by the second week, over three-quarters of it. Counsel explains that the shopping habits of households shopping at Appellant are consistent with this study. However, the question that needs to be answered is not why are these households redeeming large amounts of their benefits on certain days but rather why are these household redeeming large amounts of their benefits at Appellant.

Previous RIB Investigation and Confirmation Bias

Counsel contends that the fact that Appellant refused to provide cash during two previous RIB investigation is evidence that the firm does not traffic SNAP benefits. The available evidence shows that there were two previous RIB investigations. The fact that Appellant refused to traffic to an unknown undercover investigator does not evidence that Appellant always enforces the SNAP rules and regulations. The refusal might simply evidence that Appellant personnel do not commit SNAP violations with unknown personnel; or that the unidentified clerk did not wish to commit SNAP violations at the given time. The firm's refusals to sell ineligible items during the investigation do not explain the unusual transactions and patterns listed in the charge letter.

Evidence

Appellant makes multiple contentions regarding the agency's ALERT system. Counsel argues that FNS's reliance on ALERT leads to confirmation bias and causes the agency to disregard or interpret evidence in such a way that unreasonably favors the agency's hypothesis that trafficking is occurring. The ALERT system is a computerized fraud detection tool to identify SNAP transactions that form patterns having characteristics indicative of trafficking. However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still conduct an extensive analysis of the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether the questionable transactions were, more likely than not, the result of trafficking.

The legality of this method is supported by 7 CFR §278.6(a) which 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.]

The documentation and evidence provided by the Retailer Operations Division was thoroughly examined. From all indications, the Retailer Operations Division obtained the EBT data (provided by ALERT), found it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough investigation before concluding that trafficking was likely occurring.

Appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed and that the transactions detailed in the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. Appellant offered little credible evidence to prove that the transactions listed in the charge letter were legitimate purchases of eligible food. In the absence of compelling information or documentation weighed in comparison to the evidence provided by the Retailer Operations Division, the evidence weighs in favor of the Retailer Operations Division's determination that SNAP-benefit trafficking substantially produced the transaction activity at issue in the present case.

Appellant submitted inventory receipts and recipient affidavits and contends that these documents are precisely what the Department has stated it looks for from retailers to demonstrate their innocence by a preponderance of the evidence. However, the documents submitted in this case did not demonstrate by a preponderance of evidence that the transactions were for eligible food items only. Each administrative review is based on the unique evidence presented in each case.

Case Law

Appellant cites some case law which it claims supports its position and contentions. It should be noted that considerations of legal precedent through case law is beyond the scope of this review. Instead this administrative review is limited to whether the Retailer Operations Division appropriately followed the Food and Nutrition Act of 2008, as amended, and the regulations promulgated under the Act, and whether the action taken is sustainable by a preponderance of the evidence. Therefore, any application of a perceived judicial precedent would best be addressed in a judicial review in a court of law.

CIVIL MONEY PENALTY

Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i) even though it was informed of the right to do so in the charge letter. SNAP regulations at 7 CFR § 278.6(b)(2)(iii) 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 § 278.6(b)(1), the firm **shall not be eligible** for such a penalty." [Emphasis added.]

Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy

and program prior to the violations. In conclusion, the Retailer Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

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. 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 occur as charged by the Retailer Operations Division. The determination to impose a permanent disqualification against Appellant is sustained.

The Retailer Operations Division also determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations. Under review, the denial of a trafficking CMP was deemed correct and proper.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. If a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant's owners 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, 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

May 3, 2021