

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

Country Store,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0202794

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 Country Store (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 May 23, 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 November 22, 2017, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in 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, through counsel, responded to the charges in a letter dated December 4, 2017, that requested a trafficking CMP if found guilty of trafficking and included a Freedom of Information Act (FOIA) request. A determination letter was erroneously issued on January 31, 2018, and rescinded on February 1, 2018, by the Retailer Operations Division. The FOIA request was administratively closed on May 1, 2018, for failure to pay the FOIA fee.

The Retailer Operations Division notified Appellant by letter dated May 23, 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 June 2, 2018, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. Counsel also inquired about the FOIA request. The FOIA fee was paid and the FOIA response received by counsel on August 24, 2018. Subsequent correspondence was also received from counsel.

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 April 2017 through September 2017. This involved three patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple purchase transactions were made too rapidly to be credible.
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 owners deny trafficking;
- The neighborhood around the firm is a very depressed area and the majority of customers walk to and from the store;
- The owners have installed new video/camera equipment to record sales transactions and is available to USDA for review. Also, every employee has been and will continue to be trained on SNAP and will abide by all SNAP rules and regulations;
- Declarations by a representative group of customers support the legitimacy of transactions;

- In the event a determination is made that the firm is guilty of trafficking, we believe the firm meets all requirements for consideration of a CMP in lieu of disqualification. The firm has not received any sanctions or warnings of violations committed by employees and has established and implemented an effective compliance policy and program to prevent Program violations which were in effect prior to any alleged violations. Additionally, no owner was ever involved in any transactions that might be considered trafficking and the owners have informed store employees that participation in any activities that violate program standards may be considered grounds for termination. The firm is committed to adhering to all SNAP regulations and will do all within its power to enforce compliance with program standards; and,
- Any SNAP or WIC disqualification would constitute a severe hardship on the many long- standing customers who rely on the firm to fulfill their ongoing needs. SNAP sales account for 42 percent of total sales as documented by the firm’s accountant. The accountant also states that there are no other grocery stores within three to five miles and that the firm will go out of business and several employees will lose their jobs if SNAP is lost.

Appellant submitted 37 preprinted form letter customer declarations, a letter from Southwest Accounting Services showing that 42 percent of sales are SNAP, and a seven page declaration (petition) signed by customers stating that they only made legitimate transactions 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 November 25, 2009, and the firm was reauthorized on May 26, 2015. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a July 19, 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 firm's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a typical small grocery store offering a minimal quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- The store primarily stocked traditional American brands, but also had a limited stock of Hispanic products.
- Large menu boards advertised a variety of hot/cold prepared foods, cold salads, and hot breakfast items. Prices were also posted for deli meats/cheeses sold by the pound.
- The store visit report and photos showed no shopping carts and only three small hand baskets for use by customers making it difficult for them to carry large amounts of food to the checkout.
- No food packages, bundles, case sales, bulk items, or other sales were evident that would explain the unusual transactions and no cased items were available except for drinks.
- The store visit report specifically notes that the firm was not a specialty store and that there were no meat bundles or fruit and vegetable boxes for sale.
- The sole checkout counter was approximately 2.5 feet deep and 2.5 feet wide with displays and PIN pads taking up space on both sides reducing the available area for customers to place their purchases. The small size of the checkout area would make it problematic to process large orders. The checkout counter had one cash register, no optical scanner, and one POS terminal.
- 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, candy, snacks, baked goods, and other drinks as well as many ineligible items.
- There was a large deli display case with a prep area behind it that included a commercial heavy duty slicer, prep tables, microwave oven, and a sandwich prep station. Per a store employee, store staple food stock such as deli meats, deli cheeses, and vegetables were being used in the preparation of the hot/cold ready-to-eat prepared foods.
- The store had extremely limited quantities and varieties of fresh unprocessed meat/poultry, no fresh unprocessed seafood, no frozen unprocessed meat/poultry/seafood, a minimal quantity and variety of processed meats and seafood (minimal deli meats, minimal processed chicken/pork/fish, hot dogs, four packages of bologna lunch meats, eight sausages), no bacon, minimal frozen entrees and frozen dinners, minimal quantities and varieties of fresh fruits and vegetables, a very limited selection of frozen fruits and vegetables, a limited stock of packaged nuts, a limited stock of canned soups, a minimal quantity and variety of canned and packaged staple food items, no bread or rolls, tortillas, tostadas, flour, rice, dried beans, a limited stock of uncooked pasta/noodles, a very limited selection of cold cereal, no hot cereal, many single serving noodle soups, a minimal selection of baby foods/cereal and infant formula, a limited quantity and variety of deli cheese and packaged cheese, sour cream, only one variety of margarine, only two packages of butter, single serving yogurt, a very limited selection of mac&cheese and single serving mac&cheese, and very few expensive eligible food items.

- Ineligible items included: tobacco, lottery, hot foods, household products, paper products, health and beauty items, ATM, candles, jewelry, and cell phone accessories while accessory foods included: candy, spices, condiments, snacks, baked goods, baking mixes, cooking oil, sugar, single serving ice cream, ice cream, un/carbonated drinks, coffee, and cold ready-to-eat prepared foods.
- Signage was in primarily in English with a small number of signs in Spanish. No SNAP posters of any kind (anti-fraud, eligible items, reporting trafficking, etc.) were visible in the store.
- The firm's hours of operation were 8:00 AM-9:00 PM daily as confirmed by a store employee. The individual also stated that the firm did not take telephone or online grocery orders, did not delivery groceries, and did not round prices up/down.
- Many food items were priced with all visible food prices ending in .x9 cents. Comments on the FNS store visit report specifically stated that most food prices end 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 also listed the four most expensive items costing more than \$5.00 for sale in the store as being infant formula at \$22.99, coffee at \$12.99, frozen processed chicken at \$9.99, and cold cereal at \$5349. This listing of the most expensive items was provided by a store employee during the store visit.
- The firm was a WIC vendor. 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 photographs showed many empty or marginally stocked shelves, display racks, deli case, and coolers. The store was better stocked during the last store visit conducted on May 17, 2015.

Rapid Transactions

This Attachment documents 34 sets of back-to-back transactions made in rapid order at the same POS terminal. The irregular transaction data cited in this Attachment shows all of the transaction sets were conducted within a span 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Arizona issues SNAP benefits from the first to the thirteenth of each month and seven of the 34 sets in this Attachment occurred after the thirteenth day of the month. The same household conducted both of the transactions in only three of the 34 sets. The dollar amount of the second transaction equaled or exceeded 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in 82.4 percent (28) of the 34 sets with the second transaction exceeding 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in 20 sets. Lastly, five of the transaction sets occurred well after the firm's reported business hours of 8:00 AM-9:00 PM.

Appellant provided no documentation or explanation to support the legitimacy of the listed transactions in this Attachment.

Based on the very limited number of expensive items for sale at the Appellant firm costing more than \$5.00, it is likely that a transaction in the amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C) would consist of more than 10 items. SNAP benefit transactions involving legitimate food purchases require many steps: 1) the customer waiting for the previous customer to pick-up their purchases and leave the checkout area; 2) the customer making multiple trips bringing items to the checkout counter for large purchases since the firm has no shopping carts and only three small

hand baskets; 3) the cashier separating eligible from ineligible items; 4) the cashier handling individual items to determine the price, which in this case involves manual keying of amounts since there is no scanner; 5) the cashier weighing individual items if sold by weight; 6) the cashier entering prices into a register or adding machine, once for eligible foods and once for ineligible items, which is typical for larger purchases; 7) the cashier handling manufacturers cents-off coupons, if applicable; 8) the cashier bagging the items for carry-out; 9) the cashier informing the customer of the totals (one for eligible foods and one for non-eligible items, if applicable, which for large purchases includes most transactions); 10) the cashier pressing the “SNAP transaction key” on the POS device/card reader; 11) the customer swiping their EBT card; 12) the customer entering their required PIN; 13) the cashier entry of the purchase amount; 14) the cashier confirming the customer has a sufficient benefit balance; 15) the transaction being processed by the system and receiving approval; 16) the cashier printing the EBT and cash register receipts; 17) the cashier accepting an alternate form of payment for nonfoods and possibly handling cash change; and 18) the customer removing products from the checkout area so the next customer in line can begin the next transaction. All or most of these steps are inherent in legitimate large SNAP purchases. One can readily surmise that while such transactions may be completed in succession, performing these processes on large transactions is not done rapidly. The amount of time required is generally proportional to the dollar amount of the transaction; typically, the larger the dollar amount the longer the time period between transactions. The very limited counter space as well as manually key-entering lengthy EBT card numbers adds additional time to transactions.

The Appellant firm processed transactions well in excess **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, markedly faster than supermarkets typically process purchases, yet the Appellant firm does not have an optical scanner or any of the logistical tools such as conveyor belts, rotating bagging platforms, or order separators that are routinely used in rapid throughput operations. It is therefore improbable that large dollar value transactions for the purchase of legitimate food items which would consist of a substantial number of lower priced items based on Appellant’s stock could be processed in the times listed in this Attachment given the facilities at the firm. The large transaction dollar amounts and the short interval between transactions in this Attachment demonstrate the improbability of these being legitimate eligible food purchases and suggest trafficking as the most likely explanation. Additionally, it is an indication of potential trafficking when there are numerous transactions occurring outside of the firm’s reported business hours.

Based on this discussion, as well as the stock and facilities present at the Appellant firm, it is unbelievable that these large dollar value transaction sets could occur in the short periods of time listed if they involved legitimate eligible food purchases. It is therefore more likely that the transactions listed in this Attachment are attributable to trafficking.

Multiple transactions in unusually short time frames

This Attachment documents 83 individual transactions in 36 sets of two or more transactions conducted by 27 different households in a short period of time. Individual transaction amounts **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. It is unusual and suspicious that 12 of the 83 individual transactions end in .00 cents accounting for more than 14.4 percent of the transactions and are

not supported by store inventory or pricing. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The dollar amounts of subsequent transactions in each set are substantial and they nearly equal or exceed the dollar amount of the initial transaction in 24 of the 36 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). One set is comprised of four individual transactions, nine sets are comprised of three individual transactions, and the remaining 26 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 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. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant again provided no documentation or explanation to support the legitimacy of the listed transactions in this Attachment.

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 all of the 36 transaction sets 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These transaction sets also do not contain the characteristics of a household returning later in the day to purchase a forgotten item or two as all of the 36 sets have subsequent transactions in amounts exceeding 5 U.S.C. § 552 (b)(6) & (b)(7)(C) with 20 sets having subsequent transactions 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 total 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average small grocery store SNAP transaction amount in Maricopa County during the review period was \$25.62. 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. Appellant's contentions fail to offer any explanation or rationale as to why households who are shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases totaling to high dollar values at a minimally stocked store. Common sense dictates that it is improbable that households would choose to spend large dollar amounts at the Appellant firm 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 firm.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Manually keyed transactions are those in which the magnetic strip on the EBT card is not being read by the store's POS terminal when swiping the card and the clerk must manually enter the lengthy EBT card number into the POS terminal which requires more time than when a card is able to be swiped. When the magnetic strip on an EBT card fails, it can no longer be swiped and replacement EBT cards contain different identification numbers. This household used the same EBT card throughout the review period. On-site investigations into trafficking at retailers have found it is not uncommon for retailers to have the SNAP recipient's PIN and EBT card number in order to facilitate trafficking SNAP benefits in exchange for cash without the need for the recipient to be physically present. The retailer manually enters the EBT card number as the recipient has the actual EBT card and then enters the PIN. A review of other EBT transactions on the date of this manual transaction show that Appellant's POS terminal was functioning properly as there swiped transactions immediately before and after the manually keyed transaction. A pattern of manually keyed and swiped transactions using the same EBT card is indicative of trafficking. This household conducted 119 swiped transactions at 27 stores located 0.72-12.95 miles away from Appellant's location that included nine super stores and one supermarket. It conducted nine transactions at the Appellant firm, only one of which was a manually keyed transaction. Appellant offered no explanation as to why this household would conduct large transactions at Appellant's small grocery store before and/or after conducting substantial transactions at larger stores that included super stores and supermarkets when they would offer a greater quantity and variety of eligible food items at lower prices.

FNS store visit reports contain specific questions that are asked of store employees during store visits. These include questions such as whether transaction totals are ever rounded up or down and what pricing structure is in place. The July 19, 2017, store visit report explicitly states that the firm does not round transaction totals. As evidenced by both the store visit photos and the detailed store visit report, the firm's pricing structure has most, if not all items, with prices ending in .x9 cents. In this Attachment alone, 14.4 percent of the individual transactions end in .00 cents. 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 cents as multiples of nine seldom end in 00 making it statistically impossible that this many store transactions would end in these amounts with legitimate food purchases. This indicates that the transaction amounts were contrived.

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 151 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 of this size offering a minimal stock of staple foods and calls into question the legitimacy of these transactions. The SNAP transactions listed are also substantially higher than the average SNAP transaction amount of \$25.62 for this store type in Maricopa 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. Contrary to the statement by Appellant's accountant, the FNS retail store database showed one super store and three medium grocery stores located 0.34, 0.68, 0.73, and 0.74 miles away with an additional four super stores and two supermarkets 1.44-1.99 miles away during the review period. The high dollar value transactions remain questionable when considering the proximity of these 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.

The difference in the average SNAP transaction dollar amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for Maricopa County small grocery stores during the review months and at the Appellant firm is significant. Appellant's SNAP transaction dollar volume is **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** larger than that of Maricopa County small grocery stores and its average SNAP transaction dollar amount is 41.39 percent smaller than the County average while its average SNAP transaction count is **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** larger than like type stores. The unusually high number of SNAP transactions is an indication the firm may be dividing larger transactions into multiple smaller transactions in an effort to circumvent detection as previously discussed and would therefore also account for the significantly lower average SNAP transaction amount. 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 a further indication that the 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.

The firm also had irregular SNAP transaction data compared to like type stores in Maricopa County. A comparison of Appellant's redemption data to Maricopa County small grocery stores using ten dollar increments shows that Appellant's transaction count and dollar volume are significantly higher (more than quadruple in some ranges) than those of like type Maricopa County stores in all ranges **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** at which point they stop.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These unusual spikes in both transaction numbers and dollar volume do not appear in the transaction count and dollar volume averages for other like type stores. These high dollar transactions are considered to be irregular and suspicious based on the Appellant store's food inventory. The Retailer Operations Division determined there was no credible reason for the Appellant firm to have transactions at those high 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 therefore also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

Appellant again provided no documentation or explanation to support the legitimacy of the listed transactions in this Attachment.

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 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 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 FNS store visit on July 19, 2017, shows that the Appellant 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 tobacco, lottery, hot foods, household products, paper products, health and beauty items, ATM, cell phone accessories, candles, and jewelry are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts.

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 review months. The firm also has a small checkout area and no shopping carts making it difficult to facilitate the great quantities of eligible food items required to make up these high 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

This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. There is no provision in SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to findings of program violations. Therefore, while the owners have installed new video/camera equipment to record sales transactions and trained every employee to abide by all SNAP rules and regulations are positive steps, they do not provide any valid basis for dismissing the charges, or for mitigating the penalty imposed. While store ownership may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, the ownership is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. Both the SNAP retailer and reauthorization applications contain a certification page whereby applicants must confirm their understanding of and agreement with SNAP retailer requirements in order to complete the application/reauthorization process. Store ownership did certify its understanding and agreement to abide by program rules and regulatory provisions when it initially applied to become a SNAP retailer and again when it applied for reauthorization. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time. A record of participation in SNAP with no previously documented instance of violations or 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 the impact of those charges.

Appellant contends both the 37 preprinted customer declarations and the seven page customer petition stating that the customers shopped at the Appellant firm and conducted legitimate transactions listed in the charge letter Attachments prove the transactions were not trafficking. Contrary to Appellant's opinion, it would be unusual for a SNAP recipient to admit to trafficking and even more unusual for a store owner to submit a statement from a recipient who admitted to trafficking making the value of these statements questionable. This is supported by a review showing that only one of the 97 names listed on the petition included with Appellant's September 27, 2018, letter, conducted transactions at the Appellant firm during the review period that were listed in the charge letter. This individual had transactions in all three Attachments and has a home of record that is approximately 5.0 miles away from the firm meaning that he was traveling 10 miles round trip from his home past numerous super stores and supermarkets to shop at a minimally stocked small grocery store. This unbelievable behavior is indicative of trafficking and supports that trafficking was occurring at the Appellant firm.

A review of the 37 customer declarations shows that only four customers had transactions listed in the charge letter Attachments. One of these customers had only one transaction listed in the charge letter's first Attachment and is not indicative of trafficking. The transaction history for another of the four customers was reviewed by the Retailer Operations Division during its initial analysis and shows that it is a one-person household based on a monthly allotment **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and is homeless, elderly, or disabled as evidenced by

participation in the SNAP restaurant meals program. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is unlikely and suspicious that a one-person household with little or no access to cooking or storage facilities would be conducting high dollar value transactions at a small grocery store located miles away from the area where it regularly shops and is exhausting its benefits within days of receipt. The remaining two customers also had irregular high dollar value transactions at the Appellant firm. In summary, neither the customer declarations nor the petition provide any evidentiary value by showing that all the transactions listed in the charge letter were not indicative of trafficking.

The owner and the firm 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 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 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 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.

It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm or to ownership resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. Furthermore, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, ownership’s contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

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

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.

SNAP regulations are explicit in what constitutes substantial evidence. Specifically, 7 CFR § 278.6(i)(2) states in relevant part, “As specified in Criterion 3 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with part 278 of current FNS regulations and current FSP policy on the proper acceptance and handling of food coupons.” This section goes on to state, “As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation.” This section further states, “A firm which seeks a civil money penalty in lieu of permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted...”

Appellant did not submit a copy of the firm’s SNAP compliance policy and program and also submitted no documentation for any SNAP training activities.

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).

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

November 6, 2018