

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

Courthouse Deli and Food Mart,

Appellant,

v.

Case Number: C0199752

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 a permanent disqualification of Courthouse Deli and Food Mart (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Courthouse Deli and Food Mart.

AUTHORITY

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

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified based on an analysis of EBT transaction data from November 2016 through April 2017. This involved the following transaction patterns which are common trafficking indicators:

- There were an unusual number of transactions ending in a same cents value.
- There were multiple purchase transactions made too rapidly to be credible.
- There were multiple transactions made from individual household benefit accounts within unusually short timeframes.

- The majority or all of an individual recipient's SNAP benefits were exhausted in unusually short periods of time.
- Excessively large purchase transactions were made from recipient accounts.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Courthouse Deli and Food Mart for SNAP participation as a convenience store on July 22, 2016. In a letter dated August 15, 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 between the months of November 2016 and April 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In a letter dated August 24, 2017, the Appellant, through counsel, responded to the charge letter by not only requesting a CMP in lieu of disqualification, but also providing a number of contentions related to the allegations listed in the charge letter. A general summary of the Appellant's initial response is that the transactions listed in the charge letter do not equate to trafficking. The Appellant also provided a brief explanation as to why it believed it was eligible for a CMP.

To support its reply, the Appellant, through counsel, provided the following documentation:

- A list of "special items" that the store sells, most ending in an even-dollar amount;
- Ninety-six (96) pages of inventory records from the review period;
- Police reports related to theft committed by the firm's employees, who were eventually fired;
- An "Employment, Confidentiality and Non-Compete Agreement" document, dated May 1, 2017, signed by two of the firm's employees;
- A training checklist; and
- A one-page document entitled "Owner Statement," dated August 24, 2017, in which the owner outlines the characteristics of the store, his hiring and training efforts, and improvements that were made after a rough start to the business.

After considering the Appellant's response and documentation and further reviewing the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated November 2, 2017. This letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but that a CMP was not appropriate in this case because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked November 13, 2017, the Appellant, now through new counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

It should be noted that on December 15, 2017, Appellant's counsel submitted a request for case file information under the Freedom of Information Act (FOIA). The agency's response to this FOIA request was completed on March 1, 2018. On March 27, 2018, Appellant's counsel requested an extension of time for submitting its contentions. An extension to April 6, 2018, was granted by the administrative review officer. On that date, the Appellant, through counsel, submitted its formal written brief outlining its contentions and reasons for requesting an administrative review. The Appellant also included a compact disc containing a number of supporting documents.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 AND REGULATIONS

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

7 U.S.C. § 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 § 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, [or] evidence obtained through a transaction report under an electronic benefit transfer system....** [Emphasis added.]

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.

7 CFR § 271.2 states, in part:

Trafficking means: The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone...

7 CFR § 271.2 states, in part:

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 § 278.6(b)(1) states, in part:

Any firm considered for disqualification...under paragraph (a) of this section...shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification.... The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter...

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(b)(2)(ii) states, in part:

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(b)(2)(iii) states:

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.

7 CFR § 278.6(i) states, in part:

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... In determining the minimum standards of eligibility of a firm for a civil money

penalty in lieu of permanent disqualification for trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:

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

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

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

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

APPELLANT'S CONTENTIONS

The Appellant, through counsel, submitted a very long list of contentions in its request for administrative review. These are summarized below, in relevant part:

- Appellant seeks reversal of the agency's decision to disqualify the firm from SNAP participation.
- There are very few stores in the area which provide all the features of the Appellant firm. The store operates as a convenience store, but it carries almost all items which are available in a larger grocery chain.
- The store is located next to a shelter, where a lot of disabled people reside. This makes it easy for them to shop rather than having to go to multiple stores or walk a mile from the shelter. The store is also located close to other businesses that bring in foot traffic for foods for breakfast, lunch, and dinner.
- Appellant cites demographic statistics of the area.
- Appellant cites FNS report indicating that most SNAP households redeem nearly all of their benefits in the first two weeks of the month. Also cited is a Convenience Store News study that states that small grocery store/convenience store customers are among the most loyal when it comes to their store selection.
- Most visits to the store are made while the customer is on his or her way to work or school or while running errands at night. Most SNAP participants are likely to visit in the morning or late evening.
- SNAP households are more likely to shop regularly at small grocery stores or convenience stores than non-SNAP households.
- It is not uncommon for the Appellants' SNAP customers to make multiple purchases in a short period of time after receiving his or her benefits. Often, these customers realize after they've left the store that they've forgotten an item, or have decided that they want to purchase something that they saw during their first trip to the store. In other instances, multiple members of the same household will shop together and then make their purchases separately (using the same EBT card) in quick succession. In other circumstances, households will go on a spending spree where they make purchase after purchase after purchase without leaving the store, or by returning to the store after a brief absence, thereby reducing their allotment amount in a short period of time.

- Consumer shopping habits trend towards an increase in the use of convenience stores, small grocers, and ethnic food stores. Appellant cites a report to substantiate this claim.
- The average transaction at the Appellant firm was heavily influenced by the months of December 2016 and January 2017. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The agency's onsite inspection failed to accurately identify the more expensive items in the store, such as bulk chicken, which was listed on the menu board as 20 pieces for \$15.99 or 40 pieces for \$29.99. Appellant lists other bulk chicken prices between \$7.69 and \$30.99.
- As noted on the Krispy Krunchy display case, the store offered a you-buy-we-fry program specifically for SNAP participants. Accordingly, the prices posted were for uncooked food sold to SNAP customers. This should have been included on the store visit report as meat bundles. The report also failed to note that the store carried chicken.
- With the inclusion of these items into the agency's analysis of the store inventory and average transaction, it is reasonable to assume that the store's sale averages are going to exceed the average convenience store transaction. This would also impact the highest projected price point for transactions as well as some of the other ALERT scans which take into consideration price size.
- In the Appellant's original response, it denied that trafficking had occurred and provided invoices and other records which showed that the store was selling chicken and fish in a you-buy-we-fry promotion that existed during the review period.
- To make an evidentiary evaluation, the administrative review officer should look at the evidence offered and make a determination regarding which of the two possibilities is more likely: that the store trafficked in SNAP benefits or that the ALERT system has incorrectly flagged transactions as the result of a difference in business operations, as the Appellant has always maintained.
- Appellant believes it is important to consider the limitations of the ALERT system, as its over-utilization by USDA has created an internal belief that the system is infallibly accurate.
- To support its position that ALERT data is unreliable, Appellant's counsel summarized portions of a deposition he took of a USDA employee in October 2016.
- As reflected in a number of administrative review decisions, the review branch has been under the errant belief that the ALERT system has been proven to be accurate in finding fraud. This is fundamentally untrue and outside the scope of what the system is actually designed to do.
- The ALERT system cannot account for special business practices, differences in demographics, foodstuffs, and geographic areas. These differences are supposed to be caught by the Retailer Operations Division, but the analyst leans too heavily on the ALERT data and often fails to account for differences in shopping habits of participants.
- Appellant further questions whether or not appropriate comparison stores have been selected to provide a baseline set of data against which to compare the Appellant's transactions.
- Appellant cites two court decisions to support its position that ALERT data is unreliable for purposes of disqualification.
- Regarding Attachment 1 (transactions ending in a same-cents value):
 - Nearly all transactions ending in a same cents value are the result of package deals – purchases that involve several items bought together at a discount. There

- are also likely some transactions where the SNAP customer chose to spend a specific amount, with the cents portion being paid in cash, credit, or debit.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transactions are the special promotion of two 12-packs of soda; 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transactions are two of those promotions; 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transactions are for frozen bacon; 5 U.S.C. § 552 (b)(6) & (b)(7)(C) are for Tyson's bones skinless chicken breasts or Gorton's frozen salmon; 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transactions are for energy drinks, other beverages, or ground beef, etc.
 - Using these amounts it is not unreasonable to have a number of combinations purchased together to come to amounts in the vicinity 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
 - 228 of the 551 transactions are for either 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It's illogical that the store would select those figures for trafficking.
 - It is not unreasonable to expect that the majority of Attachment 1 transactions that are not explained by soda purchases to be any combination of the items listed in the special promotions.
 - For same cents transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C), some of those are special orders where SNAP participants request a lot of chicken, such as for parties, or other celebrations. Other large same-cents transactions may be where customers have requested that the store make purchases of meat and groceries for them. Under these circumstances, the store would create round-numbered prices for the entire package rather than calculating purchases to a specific dollar-and-cent amount. This would encourage the larger purchase.
 - A sufficient number of the transactions are satisfied by soda purchases and combinations of the other items to reduce the total number of Attachment 1 transactions beneath the ALERT threshold indicating that the transactions are suspicious.
 - Regarding Attachment 2 (transactions made too rapidly to be credible) and Attachment 3 (multiple transactions in unusually short timeframes):
 - Purchases within the first seven days of receiving benefits are not unusual. Multiple purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C) after receiving SNAP are also not unusual.
 - The Appellant does not contend that the clerk passed the purchases across the counter, rang them up, and process the transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Instead, larger purchase amounts were pre-tabulated by the clerk before the transaction was processed.
 - In some instances, the customer made a small initial purchase to find out how much money was available on the EBT card. This was followed by a larger purchase.
 - It is not uncommon for SNAP households to make several purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This is especially true for homeless persons – a number of whom frequent the store. Because these participants have no job or home to return to, they purchase food and return to the store several times. There was also a period of time when the store employed a number of local homeless persons, which resulted in greater foot traffic from their other homeless friends.

- The store calculates purchases for larger transactions based on what the participant identifies. Then the transaction will be run after the participant has identified his or her items. It is not as though the participants left and came back, but rather that the clerk needed only to enter the dollar amount, process the transaction, and then enter another dollar amount and process the second transaction. The items, having been individually identified, would then be carried out to the car with the help of the clerk or by the participants.
- Other transactions are the result of balance speculation. This is a common method participants use to find out their account balance. They make a small purchase and then make another purchase immediately afterward when they know their remaining balance.
- Because logistics is not at issue, the only issue is whether or not it is likely for these transactions to have occurred. To this regard, *Skyson USA, LLC vs. U.S.* has applicability. In that case, the retailer provided an explanation for how each of the transactions were processed even though the retailer did not maintain receipts (as it is not necessary to do). The retailer also provided specific numbers for how much inventory he purchased, which lined up with the markup margin. In that case, the court found that because the retailer could provide an alternative likely explanation, the permanent disqualification was reversed. Therefore Count 2 and 3 of this case should be dismissed and the disqualification reversed.
- Appellant provides a long explanation of co-shopping and its relevance to the transactions in Attachments 2 and 3. Appellant argues that co-shopping, where both adult members of an average household are about 50 percent responsible for picking up groceries, is on the rise in the United States. This is manifest at the Appellant firm in a couple of ways: 1) different household members will shop separately; and 2) different household members will travel to the store together and then separate their purchases. The first option is statistically preferred by consumers.
- Regarding Attachment 4 (depletion of SNAP balance in an unusually short period of time):
 - There are no regulations that prohibit a SNAP participant from spending their benefits in any particular timeframe, nor are there any regulations which empower a retailer to restrict the purchases of SNAP households in any way.
 - Other factors must be considered, including SNAP participants' preferred purchasing habits.
 - Some households, particularly those who are homeless, cannot make purchases for long term storage. As such, these households are more likely to return to a store several times to purchase individual meals or smaller items.
 - Other households shop compulsively, making multiple purchases once they receive their benefits.
- Regarding Attachment 5 (excessively large transactions):
 - The store has above average inventory as a result of chicken and other items which are several times more expensive than the average convenience store's items. The question for the administrative review officer is whether it's more likely that the store was trafficking or that it was selling the items that are shown on the store shelves and in the written report from the store visit contractor.

- 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These transactions were all special purchases of items at fixed prices. They do not represent regular transactions for the store and should be considered a fluke rather than evidence of trafficking. Certainly if the SNAP participants were really trafficking, there would more than 12 transactions that greatly exceed the price of only a handful of items at the store.
- Average convenience stores don't have a you-buy-we-fry policy, nor do they have items that are listed for sale 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As such, the store's deviation from the state average is expected, as is any deviation from the comparison stores utilized by the Retailer Operations Division.
- The sum total of the Department's information is based upon the ALERT system's data and the subsequent analysis of the data by an analyst who has never been in the store, who may or may not understand how a business is run, and then bases the decision on a mountain of assumptions.
- By the Department's own testimony, ALERT cannot identify fraud. It is designed to identify "suspicious behavior" at most, but the basis for the system is unknown.
- Appellant recognizes the Department's right to utilize redemption data in the disqualification of stores, but the statute does not authorize USDA to rely upon a system that inaccurately accounts for what is "consistent" or "inconsistent." Context is king and is the purpose for developing a reliable data model from which to work.
- Context is based upon the premise that one can compare the data meaningfully to other stores; that FNS has a good feel for what the other stores are doing in their business operations; and that there isn't a different logical explanation for how these transactions occur.
- In this instance, FNS does not have a meaningful comparison store that offers you-buy-we-fry services and thus, does not have any context.
- As for ALERT, the system's conclusions are directly rebutted by the inventory and sales records provided by the Appellant. If the store were trafficking, then the inventory and sales data would be "inconsistent." In this case, the sales data is less than the average markup, showing a consistent error in over-ordering, but not detailing anything even close to trafficking.
- At this point it is more likely that the Department has misidentified legitimate transactions because of an errant assumption about the store's inventory and clientele.

In support of its contentions, Appellant submitted the following documentation:

- A copy of all invoice documentation that was previously provided to the Retailer Operations Division. The Appellant also provided 11 additional receipts from the review period, primarily for beverages, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP eligible foods.
- 26 color photographs of the store's inventory, both food and nonfood.
- A summary of a USDA "Profile of SNAP Households" for Massachusetts Congressional District 3, showing that 14.9 percent of households in the district receive SNAP benefits.
- A copy of the Massachusetts Monthly Benefits Issuance Schedule, showing that benefits are available to participants between the 1st and 14th of each month, depending on the last digit of their Social Security number.

- A 49-page report produced by FNS entitled, “Foods Typically Purchased by Supplemental Nutrition Assistance Program (SNAP) Households,” dated November 2016. This shows that meat, poultry, and seafood products are the top expenditure for SNAP households. Sweetened beverages were the second highest expenditure.
- A listing of store specials. This is the same list that was submitted by the Appellant in response to the charge letter.

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. However, in reaching a decision, full attention was given to all evidence and contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The primary issue for consideration in a case based on suspicious SNAP redemption data is whether or not the Retailer Operations Division adequately established that the Appellant firm engaged in the violation of trafficking. In other words, did the Retailer Operations Division, through a preponderance of the evidence, establish that it is more likely true than not true that the irregular and unusual transactions cited in the charge letter were the result of trafficking?

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm’s EBT transactions, but also information obtained from an April 15, 2017, store visit which was conducted by an FNS contractor to observe the nature and scope of the firm’s operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm’s irregular SNAP transaction patterns. The store visit report and photographs documented the following store size, description, and characteristics:

- Courthouse Deli and Food Mart is a convenience store, approximately 1,800 square feet in size, operating in Lowell, Massachusetts.
- At the time of the contractor’s visit, the firm had no shopping carts or shopping baskets for customer use. This is not uncommon for convenience stores. Customers shopping in such stores generally do not purchase more food than they can carry in their arms.
- The store visit photographs show one cash register for SNAP purchases and agency records reflect the use of one EBT point-of-sale device.
- The store appears to use optical scanners to process transactions.
- The store’s staple food stock is marginal in each of the four staple food categories. The store’s inventory of staple food appears to be less than most nearby convenience stores.
- The report also indicates that the store sells SNAP-eligible, non-staple accessory food items, such as carbonated and uncarbonated drinks, snacks, candy, and condiments. The store also sells ineligible, nonfood items, including tobacco products, lottery tickets, and other miscellaneous household merchandise.
- Additionally, the store sells hot and cold prepared food items, such as made-to-order sandwiches, paninis, and salads, as well as hot chicken and seafood meals. There is a large sign indicating that the various chicken and seafood offerings are sold in a you-buy-

we-fry fashion, meaning the food is sold cold and then heated up by the retailer after purchase.

- The checkout area consists of a small countertop, perhaps 24 inches by 24 inches in size. The constricted checkout area is not suitable for conducting large or rapid transactions as there is very little space on the counter to place more than a few small items at a time and little room for customers to maneuver with large amounts of groceries.
- There is no indication from the store visit report that the firm has a special pricing structure, although most prices appear to end in 9. There are also no indications that the firm has special food packages for sale or that items are sold in bulk.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a convenience store, where households normally purchase a limited number of items. There was no indication that SNAP households would be inclined to regularly visit the store to purchase large quantities of groceries, especially considering the absence of shopping carts and baskets, the constricted checkout area, and the limited number of staple foods. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of similar-sized competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: There were an unusual number of transactions ending in a same cents value. This attachment lists 473 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Appellant, through counsel, has argued that nearly all transactions ending in a same cents value are the result of even-dollar package deals or some combination of special deals. The Appellant provided a list of these deals that the store supposedly offers, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

While the Appellant's contentions could well be true, it should be noted that the contractor's store visit report shows no evidence that such deals even existed during the review period. For example, there are no posted signs that would indicate that a customer could obtain such bargains. The Appellant also offered no evidence, such as itemized cash register receipts, to help prove that the transactions in Attachment 1 were legitimate purchases of eligible food. Without such evidence, this review has little option but to side with the Retailer Operations Division, as the transactions listed in Attachment 1 are sufficiently unusual to reasonably conclude that trafficking is a likely cause.

Charge Letter Attachment 2: Multiple purchase transactions were made too rapidly to be credible. This attachment lists 22 sets of transactions (44 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Considering the fact that this store has just one cash register, one EBT point-of-sale device, no shopping carts or baskets, and a cramped checkout area, and considering the number of low-priced items that it would typically take to add up to the dollar amounts found in this attachment, it is unlikely that legitimate transactions could have occurred in such short periods of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). In short, it does not seem to be logistically possible for the households in Attachment 2 and the store's staff to conduct the following action steps:

- Transport a large number of food items by hand to the checkout area;
- Place each item on the limited counter space for processing;
- Bag the merchandise and move it off the counter space area; and
- Process the sale on the EBT point-of-sale terminal mere seconds after the completion of a separate transaction.

The Appellant, through counsel has claimed that such transactions are not the result of a clerk passing the purchases across the counter, ringing them up, and processing the transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Instead, it claims that the larger purchase amounts were pre-tabulated by the clerk before the transaction was processed.

Unfortunately, this claim is nothing but conjecture. The Appellant has offered no evidence of any kind to support this argument. Such evidence might have included itemized cash register receipts to prove what was purchased during each transaction. Without this evidence, it is reasonable to conclude that the transactions in this attachment were likely due to trafficking.

Charge Letter Attachment 3: Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment lists 40 sets of transactions (202 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E).

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), an extraordinary amount for a minimally-stocked convenience store.

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

These sorts of transactions are so far removed from what is typical shopping behavior – in any kind of store – that trafficking seems very likely, if not obvious.

On pages 6, 8 and 9 of this document is a list of contentions presented by Appellant's counsel that relate to the transactions in Attachment 3. These contentions include customers returning to the store to purchase forgotten items; homeless persons making multiple purchases because they have no home or job to return to; account balance inquiries followed shortly by a regular purchase; and co-shopping. However, none of these contentions is supported by any evidence, such as cash register receipts, that would indicate that the transactions were legitimate purchases. While it is true that FNS cannot require a firm to maintain records of individual transactions, because of the extraordinarily unusual patterns found in Attachment 3, none of the contentions presented by Appellant's counsel is plausible without some kind of evidence to substantiate the claim. Anecdotal contentions do little to convince this review that the transactions identified in Attachment 3 were anything other than trafficking.

Charge Letter Attachment 4: In a series of transactions, the majority or all of an individual recipient's benefits were exhausted in unusually short periods of time. This attachment lists 39 sets of SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(7)(E). It makes little sense that a household would spend almost the entirety of its SNAP allotment in a single transaction or in a series of rapid transactions at this store.

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Attachment 4 is littered with similar examples.

Appellant's counsel has argued that regulations do not prevent a person from spending all or most of his or her benefits in such timeframes. The Appellant further contends that some households shop compulsively, making multiple purchases once they receive their benefits. Finally, the Appellant claims that some households, particularly those who are homeless, cannot make purchases for long term storage. As such, these households are more likely to return to a store several times to purchase individual meals or smaller items.

It is true that regulations do not govern or mandate how a SNAP household spends its benefit allotment, including how many times a household may use its EBT card at a particular location or how large an individual transaction can be. However, the transactions noted in the charge letter are questionable not because they exceed any limits for use, but because they display patterns of use that are inconsistent with the store's documented physical characteristics and food inventory. It should be further noted that the transactions identified in the charge letter are not marginally abnormal, but decidedly so, especially in comparison with other nearby SNAP-authorized stores of similar size. This review does not contend that frequent or large EBT transactions are overtly suspicious when they occur on an occasional or intermittent basis, but when such transactions form questionable patterns on a consistent basis over a substantial period of time, such activity is considered highly irregular, and a firm's intent to comply with program regulations is called into question.

As for the assertion that some of the Attachment 4 transactions may be the result of homeless persons making repetitive purchases because they do not have facilities for long-term storage, this argument is not believable in any respect. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). In the examples noted above, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). That amount of food 5 U.S.C. § 552 (b)(6) & (b)(7)(C) would, without question, necessitate storage of some kind. It would also almost certainly require shopping carts or baskets to help carry that volume of merchandise. As noted earlier, Courthouse Deli and Food Mart has no shopping carts or baskets.

Quite simply, the Appellant's contentions are neither credible nor persuasive. As such, this review finds that the transactions in Attachment 4 are more likely than not the result of trafficking.

Charge Letter Attachment 5: Excessively large purchase transactions were made from recipient accounts. This attachment lists 180 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with a convenience store in the state of Massachusetts. The Retailer Operations Division has determined that during

the review period, the average SNAP transaction amount for a convenience store in Massachusetts was \$7.79. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Given that the Appellant firm does have a small inventory of staple foods, and given that it claims to sell meals in a you-buy-we-fry manner, it is possible that there would be an occasional purchase where the transaction amount is high, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As such, there may well be some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 5. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from nearby, similar-sized competitors, especially considering the lack of shopping carts and baskets, the very limited staple food inventory, and the constricted checkout area. The substantial number of high-dollar transactions in a six-month period calls into question the legitimacy of these transactions.

7 U.S.C. 2018 (b)(6) & (b)(7)(c). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering the firm's minimal inventory, and considering the fact that the firm has no shopping carts or baskets, this review finds it much more likely that SNAP households wishing to legitimately spend large portions of their allotment at one time would choose to do so at a nearby superstore or supermarket where there is a much greater variety of inventory as well as shopping carts and shopping baskets to help customers transport large amounts of merchandise. According to agency records, there are currently 59 comparable or larger SNAP-authorized stores located within a one-mile radius of the Appellant firm, including a superstore, a supermarket, and two large grocery stores.

The Appellant, through counsel, has argued that the store has above average inventory in comparison to other convenience stores. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

This review does not find these arguments to be sufficiently persuasive to convince this review that trafficking did not occur. First, the inventory at Courthouse Deli and Food Mart is substantially less than even very nearby convenience stores. Second, the Appellant has offered no evidence whatsoever that the transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were for special items at fixed prices. Third, the Appellant has provided no documentation to show how much of its merchandise was purchased in a you-buy-we-fry manner. As such, there is no way for this review to confirm the Appellant's claim that a deviation from the state average is to be expected.

The transactions identified in the charge letter are highly unusual and substantially different from comparable stores in the area. As noted earlier, in an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that trafficking did not occur. Unfortunately the Appellant's evidence in this case is not close to this standard. Compelling evidence might have included store records such as itemized cash register receipts or other accounting documentation to verify that the specific transactions listed in the charge letter were legitimate purchases of eligible food. Without such evidence, it is reasonable for this review to conclude that the transactions listed in the charge letter were, more likely than not, the result of trafficking violations committed by the Appellant.

Based on the above analysis, it is the determination of this review that Courthouse Deli and Food Mart likely trafficked in SNAP benefits during the review period. The attachments furnished with the charge letter adequately identify the irregular patterns of SNAP transactions which indicate that trafficking was likely taking place. Conversely, the Appellant has failed to provide a rational explanation to why such patterns might exist. As there are multiple unexplained patterns of irregular transactions, the case of trafficking is convincing.

Trafficking Case based on EBT Data

The Appellant, through counsel, has submitted a large number of contentions related to the Retailer Operations Division's use of a fraud detection system known as ALERT. The Appellant contends that FNS both over-utilizes this system and believes that the system is infallibly accurate. The Appellant further argues that a determination of trafficking based on the use of ALERT is little more than assumption and guesswork.

With regard to these contentions, this review acknowledges that a conclusion of trafficking cannot be drawn from EBT data alone, nor would it be possible to do so in a case based primarily on inconsistent redemption data. It is noted that FNS employs a computerized fraud detection tool to identify EBT 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 analyze the transaction data and patterns with other factors, such as observations from a store visit, an analysis of customer shopping behavior, and a comparison with similar stores in the area, and then render a determination as to whether or not the questionable transactions were, more likely than not, the result of trafficking. The legality of this method is identified in 7 CFR § 278.6(a) which 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, [or] evidence obtained through a transaction report under an electronic benefit transfer system**" [Emphasis added.]

Prior to a disqualification determination, the accused firm is given an opportunity to reply to the charges and provide any information it deems appropriate in justifying as legitimate the transaction activity detailed in the charge letter.

It should be noted that this reviewer has thoroughly examined the documentation and information provided by the Retailer Operations Division and found no evidence to suggest that the agency simply churned out numerical data and declared it to be trafficking. From all indications, the Retailer Operations Division obtained the EBT data, 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.

It is important to restate here that in an appeal of adverse action, the onus is on the Appellant to prove by a preponderance of the evidence that the administrative action should be reversed. Despite having a specific list of questionable transactions presented to the firm, it offered no

relevant evidence, such as itemized cash register receipts, to prove that the transactions listed in the charge letter were legitimate purchases of eligible food.

Inventory Evidence

The Appellant has contended that the conclusions made by FNS's fraud detection system are directly rebutted by the inventory and sales records provided by the Appellant. The Appellant argues that if the store were trafficking, then the inventory and sales data would be "inconsistent." The Appellant claims that in this case, the sales data is less than the average markup, showing a consistent error in over-ordering, but not detailing anything even close to trafficking.

This review is very perplexed by this contention. In no way are the trafficking allegations "directly rebutted" by the firm's "inventory and sales records." The inventory records provided by the Appellant show that the total amount of SNAP-eligible food purchased by the firm during the review period was 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Appellant offered no markup information. So assuming that the firm's retail markup was around 40 percent, the total amount of inventory available for sale was 5 U.S.C. § 552 (b)(6) & (b)(7)(C). However, the firm's SNAP redemptions during the same period totaled 5 U.S.C. § 552 (b)(6) & (b)(7)(C). While it is possible that the Appellant did not submit all of its inventory records, this information suggests that the firm did not carry enough inventory to even cover its SNAP transactions, which is a strong indication that trafficking may have occurred.

The Appellant's claim of consistent "over-ordering" seems preposterous, as the evidence suggests a distinct level of "under-ordering." The Appellant also did not submit any sales records as it seems to claim.

Further, the Appellant's inventory records show a large number of tobacco items purchased. Based on the firm's inventory records, it seems just as likely that SNAP customers were using their benefits to purchase tobacco products as they were to purchase eligible food items. In other words, the Appellant's inventory and sales records do not, by any degree, rebut the allegations of trafficking. If anything, the inventory records appear to confirm the allegations.

Other Documentation

As to the other documentation provided by the Appellant, including the reports and references to articles, this review finds such resources to be of little relevance, as they offer no explanation for the specific transactions listed in the charge letter and provide no insight as to whether the topics presented actually impacted the store in question.

The most credible contentions provided in this case were not from either attorney, but from the store owner, who submitted a statement in the original response to the charge letter. In his notarized statement, the owner admitted that he was rarely in the store during the review period. He also acknowledged that he made some hiring mistakes, including hiring personnel who were homeless drug addicts and shoplifters. He stated that he eventually realized these employees were

“stealing cash from my store, using EBT money illegally, [and] keeping the change to themselves by charging customers prices that end in .00 cents...”

This statement gives a much clearer picture and probably a much more accurate portrayal of store circumstances as they existed during the review period compared with the description offered by Appellant’s counsel. The owner’s statement implies a culture of dishonesty and lawlessness among the employees who were managing the store. Accordingly, this review finds that trafficking almost certainly occurred at the Appellant store. None of the explanations or documentation provided by Appellant’s counsel convinces this review otherwise.

Civil Money Penalty

As noted earlier, the Retailer Operations Division determined that the firm was not eligible for a civil money penalty in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and training program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a civil money penalty to be considered, a firm must not only notify FNS that it desires the agency to consider a CMP in lieu of permanent disqualification, but it must also submit appropriate documentation within designated timeframes. In this case, the Appellant did request a civil money penalty in its reply to the charge letter, but it provided no evidence which would indicate that prior to the commission of the violations the firm had a compliance policy or training program of any kind. Therefore, in accordance with 7 CFR § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking cannot be granted in this case.

CONCLUSION

An analysis of the Appellant’s EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify Courthouse Deli and Food Mart from SNAP participation. This data provided ample evidence for this review to conclude that the questionable transactions and patterns listed in the charge letter were more likely than not the result of trafficking violations committed by the Appellant. Likewise, the Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

Based on a review of all available information in this case, the decision to impose a permanent disqualification against the Appellant, Courthouse Deli and Food Mart, under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

May 24, 2018