

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

Das Foodmart,

Appellant,

v.

Case Number: C0207720

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification against Das Foodmart (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 July 6, 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 May 24, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in August 2017 through January 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant, through counsel, responded to the charges in a letter dated June 1, 2018, that included a request for and documentation in support of a CMP. The Retailer Operations Division notified Appellant by letter dated July 6, 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 July 12, 2018, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. No subsequent correspondence was received.

STANDARD OF REVIEW

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

CONTROLLING LAW

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

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

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

7 CFR §278.6(i) states: "FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . if the firm timely submits to FNS substantial evidence which

demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.”

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

SUMMARY OF THE CHARGES

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

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

APPELLANT’S CONTENTIONS

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 owner has owned the store since 2013 and has been SNAP licensed from 2013 and the store is fully stocked with SNAP eligible items;
- The store is the sole source of groceries for most households since there are no other EBT stores within walking distance. The average household consists of 2-7 individuals which would consume a greater amount of groceries;
- The receipts for nearly all of the transactions in the charge letter are attached proving the legitimacy of the transactions. The receipts show the charge, the items purchased, and the card number. They show no ineligible items sold and there is no indication of trafficking. Stores owners are prohibited by USDA from restricting the number or amount of transactions;
- The EBT card is used multiple times because there are numerous family members with a significant number being unemployed;
- There is a high volume of EBT sales and comparatively low non-EBT sales. The store sells a high volume of meat accounting for the excessively large transactions;

- Under Section 278.6(d), the firm has not violated SNAP law and the transactions are based on the sale of qualified merchandise; and,
- The store owner has ensured full compliance with USDA FNS obligations and meets Criterion 1 for a trafficking CMP by having implemented an effective compliance policy and providing a booklet made in-house to each employee. Criterion 2 is met as the owner provided its attorney all of their receipts as proof of the charges and has clearly shown transparency in their transactions that all prove there have been no trafficking. Criterion 3 is met as both employees have their own SNAP manuals and the firm's training program is a combination of practical training and a review of the manual that takes three to four weeks. Every three-four months the owner meets with the employees and goes over different compliance law to make sure the store is in compliance. Criterion 4 is met as the owner attests that no violations have ever taken place and similarly that there has been no benefit to the owner by any misuse of EBT.

Appellant submitted an affidavit from the owner describing the training program, statements from two employees talking about the training program, letters from six customers on their buying habits, pages of vendor invoices for stock, three pages listing mark-ups for SNAP items, pages of transaction receipts, and photos of store stock 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 July 24, 2014. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an April 26, 2018, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a very small convenience store offering a very limited quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- The store visit report and photos showed no shopping carts or 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 for purchase. The store did have several large boxes of crackers and single serving snacks that were being sold individually (e.g. selling individual tubes of crackers and individual snacks).
- 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 consisted of a night window with a change tray under it set into a security wall. There was a small shelf in front that provided an area approximately 1.0 feet deep and 1.0 feet wide with displays and PIN pads taking up space on both sides leaving extremely limited space for customer purchases. The checkout area had one cash register, no optical scanner, and a POS terminal as confirmed by a store employee.
- The store had a very limited stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, and other drinks as well as many ineligible items.
- The store had no fresh unprocessed meat or poultry, no fresh unprocessed seafood, no frozen unprocessed meat or poultry, no frozen unprocessed seafood, a very limited quantity and variety of processed meats (canned meat or poultry, three packages of bacon, several small packages of lunch meat, two packages of hot dogs, single serving jerky, sausages, and one bag of frozen buffalo wings), no processed seafood except for canned fish, no deli meats, no frozen entrees, no frozen dinners, only two cartons of eggs, an extremely limited selection of fresh fruit and vegetables consisting of one banana and three onions at the checkout, no frozen fruits or vegetables, a very limited selection of single serving nuts, a moderate selection of canned soups, a very limited quantity and variety of canned and packaged staple food items, no deli cheeses, a very limited quantity and variety of packaged cheeses, no yogurt, no sour cream, no margarine, no baby cereals or baby foods, no baby juices, no infant formula, only six loaves of bread, no rolls, no pitas, no tortillas, no tostadas, no corn meal, a very limited selection of cold cereals, only five hot cereals, many single serving noodle soups, a small stock of heat & eat single serving sandwiches, no dry pasta, no dry noodles, no mac&cheese, no tea, no cocoa, and no expensive staple food items.
- Ineligible items included: tobacco, lottery, household products, paper products, pet products, auto products, health and beauty items, ATM, diapers, charcoal, and incense while accessory foods included: candy, spices, condiments, snacks, baked goods, baking mixes, cooking oil, sugar, single serving ice cream, coffee, and un/carbonated drinks.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- The firm's hours of operation were 9 AM-9 PM daily as confirmed by a store employee. The store employee also stated that the firm did not take phone or online grocery orders; did not deliver groceries; and did not round prices up/down.
- Most food items were priced with all visible food prices ending in .x9 cents except for a very few items priced differently such as some snack items (chips) with manufacturer's

pricing of two for \$1.00. 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 has a section to list the four most expensive items costing more than \$5.00 for sale, but there were none as confirmed by a store employee.
- The firm was a not a WIC vendor.
- The store visit report and photos showed marginally stocked display racks and shelves.
- The quantity and variety of the store's staple food inventory was considerably less than that seen during the previous FNS store visit on July 19, 2014. The store was also in better repair and more organized during the 2014 store visit.

Multiple transactions in unusually short time frames

This Attachment documents 30 individual transactions in 14 sets of two or more transactions conducted by 10 different households in a short period of time. Three households were responsible for seven of the 14 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The dollar amounts of subsequent transactions in each set are substantial and nearly equal or exceed the dollar amount of the initial transaction in 13 of the 14 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Two sets are comprised of three individual transactions while the remaining 12 sets are comprised of two individual transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by store inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends the EBT cards are used multiple times because there are numerous family members with a significant number unemployed and the store is the sole source of groceries for most households since there are no other EBT stores within walking distance. The average household consists of two-seven individuals which would require larger amounts of food.

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 convenience store's stock and facilities and are thus indicative of trafficking. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant's contentions also provide no explanation as to why households would conduct up to three sizeable transactions at the Appellant firm within a short period of time.

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 more 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average convenience store SNAP transaction amount in Fulton County during the review period was \$6.72. 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. Additionally, contrary to Appellant's claim of there being no other EBT stores within walking distance, there is a convenience store located directly across the street offering a far greater quantity and variety of staple foods.

The Retailer Operation Division's analysis of shopping patterns for households listed in this Attachment shows 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 very 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). It also conducted 27 transactions at a convenience store located near the Appellant firm. There is no legitimate reason why this household would spend so much of its SNAP allotment at a very minimally stocked convenience store when it clearly had access to and frequently shopped at supermarkets and super stores located nearby and at a distance. The more plausible explanation is that this household was trafficking at the firm. Other households analyzed exhibited similar shopping patterns indicative of trafficking.

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 394 individual EBT transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar transactions is uncharacteristic for a grocery store offering a very limited stock of staple foods and calls into question the legitimacy of these transactions. The transactions are also substantially higher than the average SNAP transaction amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for this store type in Fulton 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. 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.

While households residing in areas with extremely limited grocery store options may conduct high dollar transactions at convenience stores out of necessity, this is not the case when they have better alternatives. FNS records show there are 10 comparably sized or larger SNAP retailers located within a one mile radius of the Appellant firm that includes a well-stocked convenience store across the street, a medium grocery store specializing in fresh meats 0.7 miles away, a meat specialty store 0.83 miles away, and a supermarket located 1.02 miles away that offer greater quantities and varieties of staple food items at lower prices than would be found at a very minimally stocked convenience store offering no fresh or frozen unprocessed meats or seafood and virtually no fresh or frozen produce.

The difference in the average SNAP transaction amount and the total SNAP transaction dollar volume for Fulton County convenience stores during the review months and at the Appellant firm is significant. 5 U.S.C. § 552 (b)(7)(E). A comparison of Appellant's SNAP redemptions to that of nearby like type stores having redemptions for the review period shows that none exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant firm even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is further indication that the transactions in this Attachment and the previous 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 Fulton County. 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 large dollar transactions are considered to be irregular and suspicious based on the firm's food inventory. The Retailer Operations Division determined there was no credible reason for the firm to have transactions at these dollar levels given the very minimal stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

Appellant contends the high dollar value transactions are because the store is the only EBT store within walking distance, SNAP households are larger requiring more grocery spending, the store is fully stocked with SNAP eligible items, and that the store sells a high volume of meat that accounts for the excessively large transactions. Appellant provided receipts for nearly all of the transactions in the charge letter proving the legitimacy of the transactions. The receipts show the charge, the items purchased, and the card number. They show no ineligible items sold and there is no indication of trafficking. Appellant also submitted letters from six customers on their

buying habits, pages of vendor invoices for stock, three pages listing mark-ups for SNAP items, many pages of transaction receipts, and photos of store stock in support of these contentions.

Regarding Appellant's contentions, it is readily apparent from the FNS store visit report and photos that the claim of the Appellant firm selling a high volume of meat is not at all accurate. The store visit report completed in collaboration with a store employee shows no fresh or frozen unprocessed meats, no deli meats, and no items costing \$5.00 or more being offered for sale. As previously discussed, there is also another better stocked SNAP retailer located across the street.

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

Information obtained during the FNS store visit on April 26, 2018, shows that the Appellant firm offers a very limited 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, household products, paper products, pet products, auto products, health and beauty items, ATM, diapers, charcoal, and incense 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. The firm has an extremely small checkout area and no shopping carts thereby making it difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. Therefore, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of carts and more likely that the amounts were contrived.

A detailed analysis of invoices submitted for inventory purchases was conducted by the Retailer Operations Division and the dollar amount of eligible food purchases compared to the firm's SNAP redemptions for the review period. Seven invoices were not used as they were undated or dated outside of the review period. Some invoices were handwritten with illegible product descriptions, but the purchases were included to give the benefit of the doubt to the retailer. This invoice analysis confirms that no expensive foods or high volumes of meats were purchased and shows that the majority of products purchased were snack foods and soda.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Accordingly, the invoices for store inventory purchases are insufficient to account for Appellant's volume of SNAP redemptions and indicates that the transactions were not for legitimate food purchases.

A review of Appellant's undated photos shows that the majority are similar to those taken during the FNS store visit and confirm the store offers a very limited stock of staple foods that includes many single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, and other drinks as well as many ineligible items. Some of the photos show greater quantities of stock than in the FNS photos as well as some additional items that were not evident in the FNS photos such as infant formula, baby cereal, and loose potatoes. The store visit report and photos show none of these items and the store employee confirmed there were no items costing more than \$5.00 available for purchase at the time of the store visit. The price list submitted by Appellant also contains seven items priced at more than \$5.00 that were not mentioned by the store employee as being available for purchase and were not seen in the FNS photos. These facts support that Appellant's photos were staged and the price list fabricated in an effort to avoid the permanent disqualification and therefore are of no evidentiary value.

The many transaction receipts were also analyzed by the Retailer Operations Division.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The average quantity of items purchased was 24 with the greatest quantity being 53. Appellant provided no explanation as to how the customers could have carried the large numbers of items being purchased to the checkout without shopping carts or even hand baskets. That the firm has a night window with only an area approximately one square foot in size to place purchases upon would also make it difficult and time consuming to complete a large purchase. Additionally, that these households were shopping at super stores and supermarkets prior to, just after, or even in between suspicious transactions at the Appellant firm casts doubt on their legitimacy. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). There is no reasonable explanation other than trafficking that satisfactorily explains why a single person household would expend more than half of their monthly benefits at a convenience store with very limited staple foods while spending much smaller amounts at a super store and a medium grocery store on the same day. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The six customer statements were analyzed and exact matches found for four households while the other two households had different names associated with them. The six households had 82 transactions at the Appellant firm during the review period, but only six were listed in the charge letter. That one household had only one transaction at the Appellant firm, another two, and a third had no transactions despite statements claiming to shop at the firm daily or at least several times per week casts substantial doubt on the legitimacy of the statements. None of the statements claim the Appellant firm is their primary grocery and this was confirmed by a review of their SNAP transactions during this period. These facts combined with the fact that none mention conducting multiple transactions in unusually short time frames or conducting high dollar value transactions at the Appellant firm show that the statements provide no evidence to support Appellant's contentions or explain the irregular SNAP transaction patterns.

It is further noted that SNAP redemptions at the firm fluctuated unusually following receipt of the charge letter on May 25, 2018. The average SNAP transaction dollar amount decreased 38.49 percent from April 2018 to June 2018 while the volume of SNAP redemptions decreased

40.4 percent over the same timeframe. A pronounced decrease in SNAP redemptions following receipt of the charge letter is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

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

Other Contentions

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. 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 or for mitigating the impact of those charges.

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

Contrary to Appellant's contention, the three criteria from SNAP regulations at section 278.6(d) are not bases to be met in order for a firm to be disqualified, but are those areas FNS considers in determining the appropriate level of sanction for firms that have violated SNAP regulations.

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." SNAP regulations at 7 CFR § 271.2, define trafficking as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". SNAP regulations at 7 CFR § 278.6(a) clearly state that "FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence

obtained through a transaction report under an electronic benefit transfer system”. In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant firm during the review period. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the review period. All of the transactions were then reviewed and analyzed by the Retailer Operations Division staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photos from the FNS store visit, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant firm during the review period. This analysis also included a review of the firm to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

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

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

CIVIL MONEY PENALTY

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

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because Appellant failed to submit 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 submitted handwritten statements by the owner and two employees describing the firm’s training program, but Appellant did not submit a copy of the firm’s SNAP compliance policy and program or any dated training curricula and records of training sessions.

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 two Attachments of EBT transaction data, the inadequacy of the store’s staple food stock as observed during the store visit to support large transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type and larger stores in the county and state.

The retailer has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is

more likely true than not true that program violations did, in fact, occur as charged. 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

December 6, 2018