

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

Davis Wine & Spirits,

Appellant,

v.

Case Number: C0208620

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 Davis Wine & Spirits (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 2, 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 25, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in October 2017 through March 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 responded to the charges in a letter dated May 31, 2018. This letter did not request a CMP nor was any evidence submitted to be considered in support of a CMP. The Retailer Operations Division notified Appellant by letter dated July 2, 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 5, 2018, Appellant appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. Subsequent correspondence dated July 26, 2018, was received from Appellant.

STANDARD OF REVIEW

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

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR Part 278.6(a) and Part 278.6(e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking 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 October 2017 through March 2018. This involved three patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from individual benefit accounts in unusually short time frames.
2. The majority or all of individual recipient benefits were exhausted in unusually short periods of time.
3. Excessively large purchase transactions were made from recipient accounts.

APPELLANT’S CONTENTIONS

The following may represent a summary of Appellant’s contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- The firm is in a college town where big corporate stores are limited and students go to convenience stores for their shopping;
- The owners know that USDA found repetitive transactions, but they cannot limit and track customer spending. They make every effort to do proper identification before accepting the benefits. USDA should advise firms if a limit to the number of transactions or the purchase amount should be set. The owners don’t believe the firm should be liable just because a customer decided to use all of their benefits in a single day if there are no limits set by USDA. They cannot stop a customer from making repetitive purchases as long as they are purchasing qualified items. If needed, the firm will set purchase limits agreed to by USDA so this issue can be avoided in the future;
- The large transactions are because the store is near the UC Davis campus and students regularly purchase cases of energy drinks, tea, water, etc.;

- Since the store is a convenience store, most of the purchases are groceries since the store offers EBT. Students and locals tend to buy groceries from the store;
- There were no sales conducted in a manner that would violate federal laws; and,
- Customer statements are submitted from regular customers stating they buy regular food items at the store.

Appellant submitted copies of cash register receipts and two customer statements in support of these contentions.

ANALYSIS AND FINDINGS

Government analyses of stores caught in trafficking violations during on-site investigations has 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 authorized the firm as a convenience store on December 23, 2016. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an April 17, 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 typical liquor and convenience store offering a wide selection of alcoholic beverages including kegs of beer that stocked a minimal quantity and variety of staple foods and carried no unique items or offered any distinctive services.
- The store primarily stocked traditional American brands, but also had a very limited stock of Hispanic (e.g. Goya) products.
- The store visit report and photos showed only one shopping cart and two small hand baskets for use by customers making it difficult for them to carry large amounts of food to the checkout.

- No food packages, bundles, case sales, bulk items, or other sales were evident that would explain the unusual transactions and no cased items were available for purchase other than beverages.
- The store visit report specifically noted 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 area was approximately 2.0 feet deep and 3.0 feet wide with many displays and a PIN pad taking up space on both sides leaving limited space for customers to place their purchases. The small checkout area would make it problematic to process large orders. The checkout area had two cash registers, an optical scanner, and a POS terminal as confirmed by the store owner.
- The store had a minimal stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, and other drinks as well as many ineligible items.
- The store had no fresh unprocessed meat or seafood, no frozen unprocessed meat or seafood, a very limited quantity and variety of processed meats (canned meat/poultry/fish, packaged lunch meats, bacon, hot dogs, and jerky), no processed seafood, no deli meats, a limited stock of single serving frozen entrees, no frozen dinners, no eggs, no fresh fruit or vegetables, no frozen fruit or vegetables, a limited stock of canned soups, a minimal quantity and variety of canned and packaged staple food items, no deli cheeses, a minimal stock of packaged cheeses, no yogurt, no sour cream, limited quantities and varieties of butter and margarine, no baby cereals/foods/juices, no infant formula, only five packages of rice, a limited stock of flour, no corn meal, no breads, only two packages of rolls, only one pack of tortillas, no tostadas, no pita bread, and very few expensive staple food items.
- Ineligible items included: tobacco, alcohol, lottery, health and beauty items, household products, paper products, auto products, candles, and hats while accessory foods included: candy, spices, condiments, snacks, baked goods, coffee, tea, cocoa, cooking oil, sugar, single serving ice cream, ice cream, un/carbonated drinks, and cake mixes.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- The store's hours of operation were open 8 AM-12 AM daily as confirmed by the store owner. The store owner also stated that the store did not take telephone or online orders, did not deliver groceries; and did not round prices up/down.
- Many food items were priced with all visible food prices ending in .x9 cents except for a very few items priced differently such as some Hostess baked goods priced at two for \$3.50, some single serving drinks priced at two for \$5.00, and some Ramen single serving soups priced at two for \$2.50. Comments on the FNS store visit report by the contract reviewer specifically stated that most of the food prices ended in .x9 cents. A price ending in .x9 cents is the most common pricing structure for stores of this type.
- The FNS store visit report listed the four most expensive food items costing more than \$5.00 for sale in the store as being a 22.8 ounce box of Jimmy Dean breakfast sandwiches priced at \$14.99, 24.2 ounce taquitos priced at \$9.99, 10 ounce coconut shrimp priced at \$9.99, and 3.25 ounce beef jerky priced at \$8.99. This listing of the most expensive items was provided by the store owner during the store visit.

- The firm was not a WIC vendor.
- The store visit photos showed minimally stocked shelves and coolers with stock fronted to give the appearance of more product as well as dust on many food items indicative of a slow turnover of stock.
- The quantity and variety of the store's staple food inventory was better during the last FNS store visit conducted on December 30, 2016.

Multiple transactions in unusually short time frames

This Attachment documents 42 individual transactions in 17 sets of two or more transactions conducted by 13 different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant provides no explanation or reasoning to support the legitimacy of the multiple transactions in this Attachment other than to say that they cannot limit and track customer spending. They cannot stop a customer from making repetitive purchases as long as they are purchasing qualified items. If needed, the firm will set purchase limits agreed to by USDA so this issue can be avoided in the future.

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 the 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 numerous households would conduct three or four 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. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby like type grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review.

The Retailer Operation Division's analysis of the shopping patterns for households listed in this Attachment shows that they have ready access to transportation as evidenced by their shopping at a variety of larger food stores located nearby and at a distance from Appellant's location, including a variety of super stores and supermarkets. Appellant's contentions fail to offer any explanation or rationale as to why households who are regularly shopping and spending large

dollar amounts at many larger and better stocked stores would conduct multiple purchases totaling to high dollar values at a minimally stocked convenience store. All 13 household's average transaction amount at the Appellant firm was more than double that of the state and county transaction averages for convenience stores with five household's average also exceeding their average transaction at large grocery stores, supermarkets, and superstores. Additionally, all 13 households spent a greater volume of their SNAP benefits at this minimally stocked convenience store than they spent at the larger stores. 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.

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.

Near Depletions of SNAP Benefit Accounts

This Attachment lists a total of 49 EBT transactions in 22 sets of one or more transactions involving 15 households during which the majority, if not all, of the household's monthly SNAP benefits were depleted in a short period of time. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Depleting a household's SNAP allotment in one or a few transactions, or within one day, leaving little or no benefits for the rest of the month, is inconsistent with the normal shopping behavior of SNAP benefit households.

SNAP benefits are intended to supplement the food budget for recipient households whose net income is at or below the Federal Poverty Level. A government report on SNAP shopping patterns indicates that after the first day of benefit issuance, on average, 79.1 percent of a household's allotment remains unspent. Even after seven days, 42 percent of benefits still remain unspent. It typically takes two weeks to deplete 78.1 percent of one's benefits. This report further revealed that households most often redeemed their benefits at supermarkets and super stores with only four percent of households never shopping in a supermarket. Participating households typically made several (just over nine on average) relatively small purchases (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) with SNAP benefits each month. Making single or multiple transactions of large dollar amounts or cumulatively large dollar amounts, and/or depleting substantial amounts of one's allotment in a period of hours, leaving a marginal amount or no benefits at all for the rest of the month, is inconsistent with typical shopping behavior of SNAP benefit households. Rather, transactions over a short period of time of large value, or large cumulative value, in which SNAP benefits are exhausted are an indicator of trafficking.

The FNS store visit report shows this is a liquor and convenience store offering a minimal quantity and variety of staple foods items as well as many accessory foods and ineligible items.

The store visit report shows that the firm does not have the depth of inventory necessary to support large numbers of high dollar value transactions. The store is also located in an urban area with scheduled fixed route bus service available nearby and there are two supermarkets and a medium grocery store located in proximity to the Appellant firm that are better stocked. The Retailer Operations Division analysis of shopping patterns for these households shows that they are already regularly shopping at a variety of larger stores located nearby as well as at a distance. For example, six of the 15 households listed in this Attachment shopped at a super store, supermarket, and/or a large grocery store within one day of their transactions at the Appellant firm. Based on these options, it is unlikely that most SNAP households who are shopping at larger stores that would offer a much greater quantity and variety of food products at lower prices would choose this store as a destination for making large household food purchases.

Appellant failed to provide any explanations for the irregular shopping patterns exhibited by the households listed in this Attachment or why they would deplete or exhaust their SNAP benefits in a short period of time with some conducting up to five multiple transactions within a span **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Appellant only states that the owners don't believe the firm should be liable just because a customer decided to use all of their benefits in a single day.

While SNAP households do tend to make larger purchases in the days immediately following receipt of their monthly allotment, the behavior by households in this Attachment is contrary to the documented shopping patterns of SNAP households, as previously discussed, who typically make just over nine transactions each month consisting of relatively small dollar amounts. Also, no explanation or rationale has been offered by Appellant as to why households that are regularly shopping at larger stores offering a greater variety and quantity of SNAP eligible food stock at lower prices and who apparently have no transportation limitations would be conducting high dollar value transactions at a store that offers a minimal selection of staple food items and has only one shopping cart that would be needed for the large transactions in this Attachment. Based on this discussion, trafficking is the only feasible explanation for the irregular shopping patterns.

The Retailer Operations Division's analysis of the shopping patterns for households listed in this Attachment identified an unusual transaction conducted by a household responsible for three of the transaction sets in this Attachment. This household conducted 48 separate transactions at nine different SNAP retailers during the review period with all, but one of these transactions being swiped. It conducted one manually keyed transaction **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** at a convenience store located more than 23 miles away in Sacramento less than five minutes after completing a swiped transaction at the Appellant firm in the amount **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The manually keyed transaction was in the exact amount as this household's remaining SNAP benefits for the month. Since it would be impossible for this household to have travelled more than 23 miles in less than five minutes, this transaction is an example of trafficking. It is further noted that the store in Sacramento where the manually keyed transaction was located is owned by one of the same owners that owns the Appellant firm. Manually keyed transactions are those in which the magnetic strip on the EBT card is not being read by the store's POS terminal when swiping the card and the clerk must manually enter the lengthy EBT card number into the POS terminal. When the magnetic strip on an EBT card fails, it can no longer be swiped and replacement EBT cards contain different identification numbers. This household used the same EBT card throughout the review period.

On-site investigations into trafficking at retailers have found it is not uncommon for retailers to have the SNAP recipient's PIN and EBT card number in order to facilitate trafficking SNAP benefits in exchange for cash without the need for the recipient to be physically present. The retailer manually enters the EBT card number as the recipient has the actual EBT card and then enters the PIN. A review of transactions involving these two firms identified at least one other household with the same pattern of swiped and manual transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. A pattern of manually keyed and swiped transactions using the same EBT card is indicative of trafficking.

It should be noted that this Attachment is not targeting excessively large transactions per se. It represents a pattern whereby 15 households within the review months, almost depleted, or did deplete their entire monthly SNAP benefit allotments, in a single or a few transactions, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. As previously noted, this is not typical shopping behavior exhibited among SNAP recipients.

High Dollar Value Transactions

This Attachment lists 110 individual EBT transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The substantial number of high dollar transactions is uncharacteristic for a store of this size offering a minimal stock of staple foods and calls into question the legitimacy of these transactions. The SNAP transactions listed are also substantially higher than the average SNAP transaction amount of \$7.57 for this store type in Yolo County. This is unusual and indicative of trafficking.

Contrary to Appellant's claim, 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 eligible foods items for better prices than customers can find at the Appellant firm. While households residing in areas with extremely limited grocery store options may conduct high dollar value transactions at convenience stores out of necessity, this is not the case when better alternatives exist. FNS records show 11 comparable or superior SNAP retailers located within a 1.0 mile radius that includes two supermarkets, a medium grocery store, and a small grocery store. The medium grocery store is located approximately five blocks from Appellant's location. These large dollar transactions remain questionable when considering the proximity of the 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. It is also noted that the Appellant firm is located on a street with scheduled fixed route bus service that would facilitate shopping at other stores.

The difference in the average SNAP transaction dollar amount and the total SNAP transaction dollar volume for Yolo County convenience stores during the review months and at the Appellant firm is significant. Appellant's average SNAP transaction dollar amount is 85.2 percent larger than that of Yolo County convenience stores while its SNAP transaction dollar

volume is 47.72 percent larger than like type stores. A comparison of Appellant's SNAP redemptions to that of nearby like type stores having redemptions for the review period shows that none exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant firm even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is a further indication that the transactions in this Attachment and the others do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

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

Appellant contends the excessively large transactions are because the store is near the UC Davis campus and students regularly purchase cases of energy drinks, tea, water, etc.

Information obtained during the FNS store visit on April 17, 2018, shows that the Appellant firm offers a minimal quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Much of the inventory for sale consists of inexpensive snacks, candy, condiments, drinks, and single serving foods as well as many ineligible items. Since the firm offers no fresh unprocessed meat or seafood, no frozen unprocessed meat or seafood, a very limited quantity and variety of processed meats (canned meat/poultry/fish, packaged lunch meats, bacon, hot dogs, and jerky), no processed seafood, no deli meats, a limited stock of single serving frozen entrees, no frozen dinners, no eggs, no fresh fruit or vegetables, no frozen fruit or vegetables, a limited stock of canned soups, a minimal quantity and variety of canned and packaged staple food items, no deli cheeses, a minimal stock of packaged cheeses, no yogurt, no sour cream, limited quantities and varieties of butter and margarine, no baby cereals/foods/juices, no infant formula, only five packages of rice, a limited stock of flour, no corn meal, no breads, only two packages of rolls, only one pack of tortillas, no tostadas, no pita bread, and very few expensive staple food items, these patterns are deemed to be suspicious. The fact that tobacco, alcohol, lottery, health and beauty items, household products, paper products, auto products, candles, and hats are not eligible for use or 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 shopping needs when they are already shopping at larger, fully-stocked stores that would offer a greater variety of foods at lower prices. Many of these stores would also offer store brand products at lower prices, offer weekly specials, and have shopping carts and checkouts with built-in scanners and conveyor belts to facilitate processing purchases quickly.

Additionally, Appellant furnished no itemized cash register and corresponding EBT receipts for the period under review to document the legitimacy of these excessively large transactions and no evidence was provided of SNAP eligible store stock via receipts of products taken into inventory for the relevant review months. The firm has a small checkout area and only one shopping cart 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 multiple carts and more likely that the amounts were contrived. It is also noted that the store visit photos and report show minimally stocked shelves and coolers with stock fronted to give the appearance of more product as well as dust on many food items indicative of a slow turnover of stock. Additionally, the quantity and variety of the store's staple food inventory was better during the last FNS store visit conducted on December 30, 2016.

Appellant provided 65 itemized cash register receipts without their corresponding EBT receipts to substantiate the legitimacy of the transactions listed in the charge letter Attachments. All 65 receipts indicate a "cash" sale which is unusual since the firm has a more advanced point of sale system that includes an optical scanner. Two of the receipts identified transactions conducted well outside of the firm's operating business hours. It is an indication of potential trafficking when there are transactions occurring outside of a store's reported business hours. Tax was charged on 43 of the 65 receipts even though none of the itemized purchases were for nonfood items. This is unusual given the firm's wide selection of ineligible items and the high dollar value of purchases. Two of the receipts were for the same transaction amount on the same day, but contain slightly different times, different register transaction numbers, and the items purchased are listed differently indicating that the register receipts may have been fabricated. This is further supported by the Retailer Operations Division analysis of the receipts that identified numerous unexplained differences between the register transaction numbers on the cash register receipts and the FNS record of SNAP transaction at the Appellant firm. For example, one household has two multiple transactions listed in the first Attachment. The register receipts provided by Appellant show consecutive transaction numbers while FNS records show there were four other SNAP transactions in between the transaction times.

Two customer statements were also provided to support Appellant's contentions, but only one included SNAP account information. A review of the charge letter Attachments shows no transactions by this household on either of the first two Attachments and only a single transaction on Attachment 3 **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. A review of the SNAP transactions for this household during the review period shows it conducted one transaction at a farmers market and 18 at five different supermarkets and a super store providing no evidence to substantiate the unusual, irregular, and inexplicable transactions listed in the charge letter.

It is further noted that SNAP redemptions at the Appellant firm decreased following receipt of the charge letter on May 29, 2018. The volume of SNAP redemptions at the Appellant firm decreased 20.44 percent from May 2018 to June 2018 while the number of SNAP transactions decreased 18.73 percent during the same period. 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 owner and the firm were charged with trafficking based on a computer analysis of the store's transactions for the months of October 2017 through March 2018. The charges do not derive from the use of a confidential informant or independent investigator who visited the store and made illegal purchases to support findings of trafficking, but by a computer program used by SNAP Administrators. While traditional undercover operations are still in use by USDA, for many years federal regulations have also authorized the use of evidence consisting of EBT transaction data in investigations of SNAP retail stores to determine if trafficking is occurring and U.S. District Courts have long upheld the validity of EBT transaction data.

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." SNAP regulations at 7 CFR § 271.2, define trafficking as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". SNAP regulations at 7 CFR § 278.6(a) clearly state that "FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system". In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant firm during the review period. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the review period. All of the transactions were then reviewed and analyzed by the Retailer Operations Division staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photos from the FNS store visit, a

transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant firm during the review period. This analysis included a review of the firm to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

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

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

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.

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). Accordingly, the Retailer Operations Division's decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

The Retailer Operations Division presented a case that Appellant has likely trafficked in SNAP benefits. Their analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in three Attachments of EBT transaction data, the inadequacy of the store's staple food stock as observed during the store visit to support large transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type and larger stores in the county and state.

The retailer has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a trafficking CMP according to Section 278.6(i) of the SNAP regulations.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

ROBERT T. DEEGAN
Administrative Review Officer

November 23, 2018