

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

Doug's Beer Outlet & Grocery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0223721

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that a permanent disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Doug's Beer Outlet & Grocery (hereinafter "Doug's Beer Outlet & Grocery" or "Appellant") by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1)(i) in its administration of the SNAP, when it imposed a permanent disqualification against Doug's Beer Outlet & Grocery.

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.

CASE CHRONOLOGY

In a letter dated December 17, 2019, the Retailer Operations Division informed the Appellant that Doug's Beer Outlet & Grocery was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270 –282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm." The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

In a response to the Retailer Operations Division of December 26, 2019, the Appellant replied to the charges therein providing various explanations for the transactions cited in the Charge Letter and stating that it would not do something like this that would jeopardize its way of making a living. The Appellant caught an employee, on tape, running a card like it was a purchase but gave the customer cash in place. The employee was fired on the spot. The Appellant did not know how long that had been going on. After receiving the Charge Letter, the Appellant reviewed the dates and times to find out which employee was working at those times. The employee has since been fired and the Appellant believes that some of the SNAP cards used to make the questionable transactions probably belong to the employee or her relatives. The Appellant did not look over the print outs at the end of the day. As long as the end of day and cash count was correct, the Appellant was happy. The Appellant will do a better job at checking the print out against the EBT slips and following behind employees. If the Appellant is disqualified from the SNAP, it will most likely have to close the store.

After considering the Appellant's reply and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated January 9, 2020, informing the Appellant that Doug's Beer Outlet & Grocery was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations. The letter also stated that the Appellant was not eligible for a trafficking civil money penalty (CMP) as the Appellant did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked January 21, 2020, the Appellant requested an administrative review of the Retailer Operations Division's decision to permanently disqualify the firm from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated February 10, 2020. In a letter postmarked February 28, 2020, the Appellant provided additional information in support of the request for administrative review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6(e)(1)(i) of the Regulations establish the authority upon which a permanent disqualification may be imposed upon a retail food store or wholesale food concern. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

7 U.S.C. § 2021(b)(3)(B) states, inter alia:

... 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, inter alia:

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

7 CFR § 278.6(e)(1)(i) states:

Disqualify a firm permanently if: Personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, inter alia:

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 § 278.6(f)(1) states, inter alia:

A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

7 CFR § 278.6(i) states, inter alia:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 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 ...

7 CFR § 278.6(b)(2) states, inter alia:

(ii) 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 as specified in § 278.6(i), 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). [Emphasis added].

(iii) 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 penalty. [Emphasis added].

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from March 2019 through August 2019. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were multiple transactions made from the accounts of individual SNAP households within a set time period; and
- There were EBT transactions conducted that are large based on the observed store characteristics and recorded food stock.

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking.

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the reply to the Charge Letter, in the administrative review request, and in subsequent correspondence, the Appellant stated the following summarized contentions, in relevant part:

- The store has been in the owners' family for over 40 years. For the past 20+ years, it has been the Appellant's only way of making a living. The owner took over the store from his father when he got old and sick and could not manage the store any more. However, even before he took over the store, he still went and packed coolers and stocked shelves to assist his father. The Appellant would not do something like this that would jeopardize its way of making a living. The Appellant, however, realizes that it is ultimately responsible for its employees' actions.
- With regard to the transactions documented in Charge Letter Attachment 1, the Appellant is classified as a convenience store; however, it is much more than that. The Appellant carries a variety of grocery items. The Appellant is located down the street from a homeless shelter and sometimes residents come in groups of 5 to 8 people, get the items they want, then pay with the same card. They just pass the EBT card back to the next person until each individual has made their purchase. This would explain the same card number being used several times in a row. The Appellant hopes that the SNAP recipients making these questionable transactions are investigated as well.

- With regard to the transactions documented in Charge Letter Attachment 2, the Appellant is located in a poor section of town and many of its customers walk to the store to get grocery items they need for about a week so the purchases they make are rather large. Most customers do not have vehicles. The Appellant is also located near a little league ball field. Coaches and/or team mothers come in and purchase snacks, drinks, and other items for the teams. This also explains the large purchases.
- The owners caught an employee, on tape, running a card like it was a purchase but gave the customer cash in place. The employee was fired on the spot. The owners did not know long that had been going on.
- After receiving the Charge Letter, the Appellant had to admit that SNAP violations occurred. The Appellant was unaware that these violations were occurring. The Appellant reviewed the dates and times to find out which employee was working at those times. The employee has since been fired and the Appellant believes that some of the SNAP cards used to make the questionable transactions probably belong to the employee or her relatives.
- The violations would not have happened if the owner's wife was still keeping up the paperwork. However, she had a stroke a while back and the owner has since done his best to keep up the paperwork himself. The Appellant also has health issues. The Appellant did not look over the print outs at the end of the day. As long as the end of day and cash count was correct, the Appellant was happy. The Appellant will do a better job at checking the print out against the EBT slips and following behind employees. The Appellant's daughter has quit her job so that she can help her parents. This will ensure these violations do not happen again.
- The Appellant's daughter is only connected to the business by name only. The owner and his wife both have health issues and put their daughter's name on the business so that if anything happened to either of them, she could take over the business.
- If the Appellant is disqualified from the SNAP, it will most likely have to close the store. Since losing SNAP, the store's sales have been reduced **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** per day. SNAP customers are loyal to the Appellant, but if they cannot purchase items with SNAP benefits at the Appellant firm, they will begin shopping at stores that accept SNAP. If the store is without EBT, the Appellant would not be able to pay employees and the owners, due to health issues, cannot handle 13 hour days.

In support of these contentions, the Appellant submitted the following documents for review:

- Numerous photos of food stock; and
- Health Visit Summary—West Florida Hospital.

ANALYSIS AND FINDINGS

Store Characteristics

FNS authorized Doug's Beer Outlet & Grocery as a convenience store on April 13, 2001. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an October 21, 2019 store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities.

This information obtained from the store visit was also used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Approximately 1,000 square feet in size and approximately 250 square feet of additional storage outside of public view that stocked predominantly drinks;
- No shopping carts and four hand-held baskets available for customer use;
- One cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- One checkout counter area with limited check-out counter space;
- Had optical scanners;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals;
- No meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers;
- No indication from the store visit report that the firm has a special pricing structure, such as prices ending in \$x.x9 or \$x.00;
- Transaction totals are not rounded up or down at the checkout counter;
- Telephone orders were taken;
- Delivery was not offered;
- The four most expensive staple food items in stock were Folgers coffee at \$5.99 per 11.3 ounces (3 units in stock); Kellogg's variety pack cereal at \$5.99 per 10 count (2 units in stock); Coke products at \$5.00 per two 6 packs (cans); and Domino sugar at \$5.29 per 5 pounds (2 units in stock);
- No fresh or frozen meats, poultry, or seafood;
- Frozen foods included ice cream;
- No kitchen; however, hot/boiled peanuts were sold;
- No deli and deli meats and cheeses were not sold by the pound;
- Pre-made/package sandwiches, Hot Pockets, and hamburgers were sold;
- Meat items included units of canned/potted meat, packaged lunch/deli meat, canned fish, hot dogs, bacon, meat jerky, and eggs;
- Dairy included milk, butter, margarine, and cheese;
- No fresh produce;
- Other staple foods available for purchase included such items as juice, pasta, rice, cereal, loaf bread, buns/rolls, flour, corn meal, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, snack foods, cakes/pastries, and condiments; and
- Ineligible nonfood items included tobacco products, health and beauty aids, paper products, household cleaning supplies, automotive supplies, alcohol, household items, clothing, and pet food and supplies.

The available inventory of SNAP eligible food at the time of the store visit showed food stock that would be typical of a convenience store, where households normally purchase a limited number of items. The SNAP eligible food stocked by the store was generally of a low dollar value, consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. There was little indication that SNAP households would be inclined to regularly visit the store to purchase large quantities of groceries. 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.

Charge Letter Attachments

On review, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed.

Stores caught in trafficking violations consistently display particular characteristics or patterns of transactions, including 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 the 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 the Appellant store during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Repeat Transactions by the Same Household (Charge Letter Attachment 1)

This Charge Letter Attachment documents 14 sets of transactions (41 total transactions) **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits to meet the parameters of this scan. These transactions were completed by 10 different SNAP households. 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.

The Appellant contends that it is located down the street from a homeless shelter and sometimes residents come in groups of 5 to 8 people, get the items they want, then pay with the same card. They just pass the EBT card back to the next person until each individual has made their purchase. This would explain the same card number being used several times in a row. The Appellant hopes that the SNAP recipients making these questionable transactions are investigated as well.

Although it is not uncommon for customers to have more than one transaction per day and there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions noted in the Charge Letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of the Appellant's stock and facilities and are therefore, indicative of trafficking.

These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out, a household making a separate purchase to check their balance followed by another transaction, or a household sharing its SNAP card with other individuals as 13 of the 14 transactions sets occurred 5 U.S.C. § 552 (b)(6) & (b)(7)(C) with most being 5 U.S.C. § 552 (b)(6) & (b)(7)(C) apart. The transaction sets also do not contain the characteristics of a household returning later in the day to purchase a forgotten item or two as all of the sets have subsequent transactions in amounts equaling or exceeding 5 U.S.C. § 552 (b)(6) & (b)(7)(C) 13 of the 14 sets having subsequent transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C), far more than the cost of a forgotten item or two.

The Appellant contends that it is classified as a convenience store; however, it is much more than that. The Appellant carries a variety of grocery items. In support of its contentions, the Appellant submitted numerous photos of food stock. However, the report and photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Doug's Beer Outlet & Grocery multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. The store visit report and photographs as well as the Appellant's food stock photos indicate that the Appellant's food stock is that of a typical convenience store with most of the food products consisting of accessory food items such as snack foods, candy, and drinks and inexpensive staple foods such as canned and packaged goods. In addition, there was a small checkout area which has one cash register and one EBT POS device. There were no shopping carts available to customers for transporting food within the store and there were no conveyor belts to expedite high dollar or rapid consecutive purchases.

It is recognized that sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, there are 15 SNAP authorized retailers, including a supermarket, located within a 1.0 mile radius of Doug's Beer Outlet & Grocery that can meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than Doug's Beer Outlet & Grocery and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store. These larger stores would offer a much greater quantity and variety of foods at lower prices than the Appellant firm and their proximity would make it unlikely that any SNAP recipient would consider the Appellant firm as their primary source for groceries.

The Appellant contends that most of its customers do not have vehicles and walk to the store to purchase food items. However, the record indicates that SNAP customers who shopped at Doug's Beer Outlet & Grocery during the review period also shopped at other area grocery stores and, therefore, transportation to other stores is not an issue for these customers. Therefore,

lack of access to other authorized stores or the availability of other food stores does not appear to be an explanation for the Appellant's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

5 U.S.C. § 552 (b)(7)(E).

Unfortunately, the Appellant has not provided any evidence to show that the transactions listed in this Attachment were legitimate purchases of eligible foods. The arguments presented by the Appellant hold little weight without some kind of evidence to substantiate its claims.

Excessively Large Transactions (Charge Letter Attachment 2)

This Charge Letter Attachment lists 87 SNAP transactions, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These large transaction amounts are not consistent with the store's observed characteristics and food inventory. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant contends that it is located near a little league ball field. Coaches and/or team mothers come in and purchase snacks, drinks, and other items for the teams. This explains the large purchases. However, the food stock and facilities of the Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at convenience stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. The Appellant contends that the large transactions are not the result of trafficking of SNAP benefits. However, it is rare for a convenience store such as Doug's Beer Outlet & Grocery to have purchases like those included in this Attachment to the Charge Letter.

The FNS store visit report and photos of October 21, 2019 show that J & D Market LLC offers a moderate stock of SNAP eligible foods with no fresh meats, poultry, or seafood, no frozen meats, poultry, or seafood, no fresh produce, and lacks an abundant depth and breadth of staple foods. The store visit inventory report and photos also show only a few expensive eligible foods in stock that would account for these large amounts as well as showing the store has limited checkout counter space and no shopping carts in which to transport the large number of items required to make up these large transaction amounts. Without these, it is unlikely that such large dollar value transactions could be for actual food purchases and more likely they are trafficking.

The store visit report and photos also indicate that there were no signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals, no evidence of meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices, and no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers. There is no evidence of a price advantage or custom or special services rendered at the subject store that are not offered at other authorized SNAP stores in the area. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar sized competitors. These large transaction amounts are also not consistent with the Appellant store's inventory.

5 U.S.C. § 552 (b)(7)(E).

While the Appellant firm may be located in a neighborhood with households that qualify for SNAP benefits, these factors are not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not displayed in other similarly stocked stores. If specific household needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would also present themselves at nearby firms as well. But this is simply not the case.

As noted previously, there are 15 SNAP authorized retailers, including a supermarket, located within a 1.0 mile radius of Doug's Beer Outlet & Grocery that can meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than Doug's Beer Outlet & Grocery and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store. These larger stores would offer a much greater quantity and variety of foods at lower prices than the Appellant firm and their proximity would make it unlikely that any SNAP recipient would consider the Appellant firm as their primary source for groceries.

The Appellant contends that it is located in a poor section of town and many of its customers walk to the store to get grocery items they need for about a week so the purchases they make are rather large. Most customers do not have vehicles. This also explains the large purchases. However, an analysis of the shopping patterns for all of the SNAP households listed in this Attachment shows that the majority of the households shopping at Doug's Beer Outlet & Grocery have access to transportation and that all are regularly shopping at a variety of larger stores, including super stores and/or supermarkets, located nearby and at several miles distance from the Appellant's location. While Doug's Beer Outlet & Grocery does offer some staple food items, SNAP recipients are already shopping at other larger SNAP retailers located in proximity to the Appellant's business offering a greater quantity and variety of products, including fresh meats/seafood and produce, at lower prices.

5 U.S.C. § 552 (b)(7)(E).

The Appellant contends that the owner's daughter is only connected to the business by name only. The owner and his wife both have health issues and put their daughter's name on the business so that if anything happened to either of them, she could take over the business. However, the Appellant's SNAP application lists 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as a co-owner of the Appellant firm. Even if 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was not involved in the operation or management of the subject store, she is still ultimately responsible for any SNAP violations committed there. It should be noted that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was present at the subject store on October 21, 2019 when the store visit was conducted and signed the store visit consent form as "owner" of the Appellant firm.

The USDA employs a computerized fraud detection tool to identify EBT transactions that form patterns that have characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. The Retailer Operations Division analyzes the transaction data and patterns along with other documentation such as, information from the

onsite store visit report including photographs of stock and the store layout, an analysis of recipient shopping behavior, and comparisons with similar store types in local area, to render a determination as to whether or not the questionable transaction patterns were, more likely than not, the result of trafficking. The regulations at 7 CFR § 278.6(a) 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, and that such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through, inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Based on the discussion above and in the absence of credible evidence for 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 letter of charges evidence trafficking as the most likely explanation. Nevertheless, transactions having such characteristics do sometimes have valid explanations that support that they were the result of legitimate purchases of eligible food items, and this is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, however, the Retailer Operations determined that the Appellant’s contentions did not outweigh the evidence. Assertions that the firm has not violated program regulations, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations.

In summary, the store’s layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding those of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts and a sufficient number of hand-held baskets support the Retailer Operations Division’s determination. It is not plausible that the store’s customers are carrying large amounts of food around the store without the benefit of shopping carts and/or a sufficient number of hand-held baskets. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on the preponderance of the evidence, the irregular transaction patterns cited in this Attachment are more likely than not the result of trafficking in SNAP benefits.

Employee Committed Violations

The Appellant contends that the owners caught an employee, on tape, running a card like it was a purchase but gave the customer cash in place. The employee was fired on the spot. The owners did not know long that had been going on. After receiving the Charge Letter, the Appellant had to admit that SNAP violations occurred. The Appellant was unaware that these violations were occurring. The Appellant reviewed the dates and times to find out which employee was working at those times. The employee has since been fired and the Appellant believes that some of the SNAP cards used to make the questionable transactions probably belong to the employee or her relatives.

These contentions cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. As owners of the store, the Appellant is liable for all violative transactions that occur at Doug’s Beer Outlet & Grocery. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper

handling of SNAP benefit transactions. Prior to becoming authorized to participate in the SNAP on April 13, 2001, the Appellant completed and submitted a SNAP Application for Retail Stores. The SNAP Application contained a section indicating that the person(s) signing the Application understood and agreed to ensure that store employees follow the SNAP rules and regulations and that the person(s) accepts responsibility for any SNAP violations that may occur at the store that were committed by any of the store's employees. The SNAP Application also included a section that contained a statement which acknowledged that the person(s) signing the Application was aware that violations of program rules could result in fines, legal sanctions, withdrawal, or disqualification of the store. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. The Appellant admitted that a store employee(s) committed SNAP violations by exchanging SNAP benefits for cash.

Trafficking is defined in 7 CFR § 271.2 of the SNAP regulations which states that 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... The Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement 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, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. The Appellant's implied contention that the SNAP violations were committed by a store employee without its knowledge, consent, or approval cannot be accepted as a valid basis for diminishing the penalty. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of USDA.

Corrective Action

The Appellant contends that the responsible employee has since been fired and that the violations would not have happened if the owner's wife was still keeping up the paperwork. However, she had a stroke a while back and the owner has since done his best to keep up the paperwork himself. The Appellant also has health issues. The Appellant did not look over the print outs at the end of the day. As long as the end of day and cash count was correct, the Appellant was happy. The Appellant will do a better job at checking the print out against the EBT slips and following behind employees. The Appellant's daughter has quit her job so that she can help her parents. This will ensure these violations do not happen again. In support of its contentions, the Appellant submitted a Health Visit Summary—West Florida Hospital.

While FNS is sympathetic to the owner's/family's health issues, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that it has taken or will take corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Financial Hardship

The Appellant contends that if the firm is disqualified from the SNAP, it will most likely have to close the store. Since losing SNAP, the store's sales have been reduced **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** per day. SNAP customers are loyal to the Appellant, but if they cannot purchase items with SNAP benefits at the Appellant firm, they will begin shopping at stores that accept SNAP. If the store is without EBT, the Appellant would not be able to pay employees and the owners, due to health issues, cannot handle 13 hour days.

However, there is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, the Appellant's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

As previously indicated, the January 9, 2020 Determination Letter advised the Appellant of the ineligibility for consideration for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations. The letter of charges dated December 17, 2019 advised the Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The regulations specify that such documentation must, in part, establish that there was an effective compliance policy and training program and that both were in effect and implemented prior to the occurrence of violations. The letter indicates that no information was provided by the Appellant for consideration; therefore, on review the Retailer

Operations Division's determination that the Appellant firm is ineligible for the imposition of civil money penalties in lieu of disqualification is affirmed.

CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record, upon which charges of violations are based, together with observations made during the store visit and an analysis of customer shopping behaviors, provide substantial evidence that questionable transactions during the focus period have characteristics and display patterns that are not consistent with legitimate sales of eligible food to SNAP benefit customers at a store of this type, size and makeup. Rather, the characteristics are indicative of illegal trafficking in program benefits. The Appellant's contentions do not outweigh this evidence.

The record has yielded no indication of error or discrepancy in the reported findings by the Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Therefore, the decision to impose a permanent disqualification from participation in the SNAP against Doug's Beer Outlet & Grocery is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that 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 you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, FNS is 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

April 9, 2020