

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

Dream Food Market,

Appellant,

v.

Case Number: C0200459

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 the Dream Food Market (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 September 28, 2017.

AUTHORITY

According to 7 U.S.C. § 2023 and its 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

In a letter dated September 5, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of October 2016 through March 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil

money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant, through counsel, responded to the charges in a letter dated September 14, 2017, requesting a reduced CMP and submitting evidence in support of a trafficking CMP in lieu of a permanent disqualification. The Retailer Operations Division notified Appellant in a letter dated September 28, 2017, that the firm was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6(c) and 278.6(e)(1) for trafficking violations. This determination letter also stated that Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated ". . . you are not eligible for the CMP because you failed to submit sufficient evidence to demonstrate that your firm had established and implemented an effective compliance policy and program to prevent violations of the Supplemental Nutrition Assistance Program."

By letter dated October 3, 2017, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted. No subsequent correspondence 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 of SNAP benefits.

7 U. S. Code § 2021(a)(2) states, "Regulations promulgated under this chapter shall provide criteria for the finding of a violation of, the suspension or disqualification of and the assessment of a civil penalty against a retail food store or wholesale food concern on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, or evidence obtained through a transaction report under an electronic benefit transfer system."

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

evidence obtained through a transaction report under an **electronic benefit transfer system . . .** .” (Emphasis added.)

7 CFR § 278.6(e)(1)(i) reads, in part, “FNS shall . . . [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2. ” Trafficking is defined, in part, in 7 CFR § 271.2, as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone” Trafficking is further defined, in 7 CFR § 271.2, to include “(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.”

7 CFR §278.6(i) states, inter alia: “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, inter alia: “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 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 Part 278.6(b)(1), 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 2016 through March 2017. 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

In the response to the letter of charges and in the request for administrative review, Appellant has stated as its position in the matter the following:

- A reduced CMP that would make USDA whole again is requested in lieu of permanent

disqualification. Appellant further requests that ownership not be fined a punitive amount for no actual violations and each transaction was legitimate and within SNAP regulations [sic]. This is because the USDA investigation revealed the fact that the owner completely and competently trained all his employees and regularly checked on both employees and customers to insure [sic] that no illicit activity was taking place at the business;

- Ownership developed and maintained an effective compliance policy and program as specified by Section 278.6(i)(1) from the moment he was granted access to the SNAP program. Each employee was provided with an Employment and Training Handbook written by USDA. These policies have been in effect since the store began the Food Stamp Program. There are only two employees that take shifts and both were given extensive training by the owner regarding the policies and regulations for Food Stamp and SNAP; and,
- A permanent disqualification would cause major hardship to area Food Stamp households. Ownership had no idea that the charges being made were considered trafficking. The fact that he properly trained employees validates the justification for their SNAP permit to not be taken away.

Appellant submitted a copy of a six page Dream Food Market Employment Handbook with one short paragraph on Food Stamps Guidance; a copy of the 81 page Food Stamp Program Regulations current as of November 1, 2006; affidavits by the owner and the two employees, copies of the driver's licenses for the owner and each employee, three photographs of a homemade sign stating "No Cash Exchange for Food Stamps"; copies of corporation documents; and copies of the 2015 and 2016 Texas Franchise Tax Public Information Reports in support of these contentions.

The preceding 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.

ANALYSIS AND FINDINGS

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 the Appellant business 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

The FNS initially authorized the Appellant business on February 12, 2015, and the business is classified as a convenience store. The file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a June 4, 2017, store visit conducted by a FNS contractor to observe the nature and scope of the firm's

operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the EBT transactions at Appellant's store that formed patterns indicative of trafficking. The store review summary documented the following store size, description, and characteristics:

- The business was a spacious store offering a very limited quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- The business stocked typical mainstream American brand products and no ethnic or unique foods.
- There were no shopping carts and no handheld baskets for customer use seen during the visit making it difficult for customers to carry large amounts of food to the checkout.
- The checkout area was a night window set into a plastic security wall with a shelf in front that was approximately one foot deep with displays and a PIN pad limiting the amount of counter space available to place purchases upon. The extremely small size of the checkout area would make it problematic to process large orders.
- The checkout counter had one cash register, one POS terminal, and no optical scanner as evidenced by the store visit report and photographs.
- No food packages, bundles, bulk products, case sales, or other sales were evident that would explain the unusual transactions and no SNAP eligible cased items were available for sale.
- The store visit report specifically notes that the business is not a specialty store and that there are no meat bundles or fruit and vegetable boxes.
- The store had a very limited stock of staple foods that also included many single serving and pre-packaged items with a large portion of inventory in accessory foods (primarily soda, candy, and other drinks), snacks, single serving noodle soups, canned pasta, and ineligible items.
- The store had no fresh unprocessed meats or seafood, no frozen unprocessed meats or seafood, an extremely limited quantity and variety of processed meats and seafood (canned meat/fish/poultry), no packaged lunch meats, no hot dogs, no bacon, no sausages, no deli meats, no eggs, no jerky, no frozen entrees, no frozen dinners, no fresh fruit or vegetables, no frozen fruits or vegetables, a limited selection of single serving nuts, a very limited selection of canned soups, a minimal quantity and variety of canned and packaged staple food items, no sugar, no rice, no dried beans, no corn meal, no bread or rolls, no tortillas or tostados, no hot cereals, no sour cream, no yogurt, no butter, no deli cheeses, no packaged cheeses, a nearly empty chest freezer with single serving ice cream, no baby foods or infant formula, no hot cereals, no coffee, no tea, no cocoa, and no expensive eligible food items.
- Ineligible items included: tobacco, smoking accessories, lottery, household products, paper products, auto products, health and beauty items, ATM, clothing, hats, incense, sunglasses, charcoal, lighter fluid, office supplies, video gambling, and hot drinks while accessory foods included: candy, spices, condiments, and carbonated/ uncarbonated drinks.
- Signage was in English and while there was a USDA sign welcoming SNAP customers taped to the security wall, there were no other SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.

- Most food items were priced with all visible staple food prices ending in .x9 cents except for a very limited number of items priced differently such as snacks and drinks with manufacturer's pricing of two for \$1.00. 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.
- As confirmed by a store employee, the section of the FNS store visit report that lists the four most expensive eligible food items costing more than \$5.00 for sale in the store was blank as there are no items priced at \$5.00 or higher.
- The store was not a WIC vendor and did not stock any baby foods or infant formula.
- The store visit inventory form, completed in conjunction with store employees, specifically noted that no infant formula or baby food was in stock.
- The business's hours of operation were open 24/7 as confirmed by a store employee, during the store visit.
- The store visit report and photographs showed that many shelves, coolers, and display racks were marginally stocked or empty. They also showed dust on canned and packaged products as well as expired food all indicative of a slow turnover of product.
- The quantity and variety of the store's staple food inventory was significantly less than that seen during the previous FNS store visit on February 8, 2015.

Multiple transactions in unusually short time frames

This Attachment documents 31 individual transactions in 11 sets of two or more transactions conducted by four different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant offers no evidence or rationales to support the legitimacy of the listed transactions other than stating that each transaction was legitimate and within SNAP regulations.

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)**. 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 convenience stores further supporting that trafficking was occurring at the Appellant business during the period under review.

Furthermore, since the Appellant business has only low priced food items with all priced at less than \$5.00, the purchase of the many items with prices ending in .x9 cents needed for the large transactions in this Attachment would most likely not result in a total ending in a same dollar **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. When there are a disproportional amount of transactions

ending in a same cent value, it appears that these transaction amounts are contrived and therefore, in the absence of any compelling rationale to the contrary, are indicative of trafficking.

An analysis of the shopping patterns for the four households listed in this Attachment shows that all of these households have ready access to transportation as evidenced by their shopping at a variety of other larger food stores located nearby and at a distance from Appellant's location with all of the households shopping at a large number of super stores and supermarkets. This analysis further shows that two of the four households conducted only three and six transactions at the Appellant business during the six month period indicating that 50 percent of the households in this Attachment are not regularly shopping at the Appellant business and would therefore not be likely to conduct multiple transactions totaling to large dollar amounts in short periods of time.

FNS records show there is one super store and one supermarket located within 0.84 miles of Appellant's location and three additional super stores/supermarkets within a two mile radius that offer greater quantities and varieties of staple food items at lower prices than would be found at a poorly stocked convenience store that offers no fresh or frozen meats and has no fresh or frozen fruits and vegetables. Additionally, there is fixed route bus service on South Lancaster Road as well as on East Overton Road one block away that would facilitate shopping at other stores. Given the proximity of these larger stores, there is no reason for the attraction to the Appellant business and the volume of violative transactions, especially the large dollar transactions. Appellant has failed to provide any plausible explanations for the irregular shopping patterns exhibited by the households in this Attachment. Also, no explanation or rationale has been offered by Appellant as to why households that are regularly shopping at much larger stores offering a greater quantity and variety of SNAP eligible food stock at lower prices and who apparently have no transportation limitations would be conducting multiple, high dollar value transactions at a convenience store that offers a very limited selection of staple food items and has no shopping carts that would be needed for the large transactions in this Attachment. Common sense dictates that it is improbable that SNAP households, with limited cash resources, would choose to shop at the Appellant business when their SNAP eligible food needs could be met at any of the larger stores they are already regularly shopping at and therefore it is more likely than not that these households were trafficking SNAP benefits at the Appellant business.

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. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

High Dollar Value Transactions

This Attachment lists 83 individual EBT transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar transactions is uncharacteristic for a convenience store of this size offering a very limited stock of staple foods and calls into question the legitimacy of these transactions. The SNAP transactions listed in this Attachment are all substantially higher than the average SNAP transaction amount of \$6.55 for this store type in Dallas County. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This is unusual and indicative of trafficking.

The record shows that within a one mile radius of Appellant's store there are 11 comparably sized or larger SNAP authorized retailers with an additional 35 SNAP retailers located within two miles. The evidence under review shows that SNAP households shopping at the Appellant business are also shopping at other nearby stores, as well as 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 business. The large dollar transactions remain questionable when considering the proximity of these other SNAP authorized stores that would be better shopping options for consumers. Based on these 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 business, where the eligible food stock is limited,

5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at larger food stores.

Evidence shows that the difference in the average SNAP transaction dollar amount, the total SNAP transaction dollar volume, and the SNAP transaction count for Dallas County convenience stores during the review months and at the Appellant business is significant. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The unusually high number of SNAP transactions is an indication that the business may be dividing larger transactions into multiple smaller transactions in an effort to circumvent detection as previously discussed. A comparison of Appellant's SNAP redemptions to that of nearby convenience stores that had redemptions for the review period shows similar differences. Additionally, none of these nearby stores exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant business 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 SNAP 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.

Appellant again offers no evidence or rationales to support the legitimacy of the listed transactions other than stating that each transaction was legitimate and within SNAP regulations.

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 business. It would make 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 business since its cost of goods would be higher than that of larger stores such as supermarkets or super stores.

Information obtained during the FNS store visit on June 4, 2017, shows that the Appellant business offers a very limited quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Most of the inventory for sale consists of inexpensive snacks and beverages as well as ineligible items. Since the Appellant business offers no fresh unprocessed meats or seafood, no frozen unprocessed meats or seafood, an

extremely limited quantity and variety of processed meats and seafood (canned meat/fish/poultry), no packaged lunch meats, no hot dogs, no bacon, no sausages, no deli meats, no eggs, no jerky, no frozen entrees, no frozen dinners, no fresh fruit or vegetables, no frozen fruits or vegetables, a limited selection single serving nuts, a very limited selection of canned soups, a minimal quantity and variety of canned and packaged staple food items, no sugar, no rice, no dried beans, no corn meal, no bread or rolls, no tortillas or tostados, no hot cereals, no sour cream, no yogurt, no butter, no deli cheeses, no packaged cheeses, a nearly empty chest freezer with single serve ice cream, no baby foods or infant formula, no hot cereals, no coffee, no tea, no cocoa, and has no expensive eligible food items, these patterns are deemed to be suspicious. The fact that: tobacco, smoking accessories, lottery, household products, paper products, auto products, health and beauty items, ATM, clothing, hats, incense, sunglasses, charcoal, lighter fluid, office supplies, video gambling, and hot drinks are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts. The business carries no special foods or offers any unique services that are not also available at other nearby grocery stores making it unlikely that SNAP recipients with available transportation would make this business their grocery store of choice. **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

Increasing food prices make it even more unlikely that SNAP recipients, with limited food benefits, would want to spend a considerable part of their benefits in a convenience 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 scanners and conveyor belts to facilitate processing purchases quickly.

Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions and no evidence was provided of SNAP eligible store stock via receipts of products taken into inventory for the relevant review months. While the state tax reports do show legitimate sales, they do not provide any evidence to rebut the trafficking charges. Additionally, the Appellant business has an extremely small checkout area and does not have shopping carts, hand baskets, or a scanner 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. Based on this discussion, Appellant did not provide adequate evidence to support the legitimacy of the excessively large transactions in this Attachment.

It is further noted that SNAP redemptions at the Appellant business fluctuated significantly following the receipt of the charge letter on September 6, 2017. **5 U.S.C. § 552 (b)(6) & (b)(7)(C).** A pronounced decrease in SNAP transactions immediately following the store visit and 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

Appellant contends that there were no actual violations and each transaction was legitimate and within SNAP regulations.

It is important to state that this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is to determine whether Appellant demonstrates, by a preponderance of the evidence, that the disqualification should be reversed. In this case, therefore, if Appellant demonstrates by a preponderance of the evidence that it did not engage in trafficking with SNAP benefits, then such transactions will be considered legitimate and the disqualification reversed. If this is not demonstrated, the case is to be sustained. 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. Regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, ownership is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time. Additionally, a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

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 . . . [d]isqualify 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, either directly, indirectly, in complicity or collusion with others, or acting alone . . .” SNAP regulations at 7 CFR § 278.6(a) clearly state, in part, 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** . . .” (Emphasis added). In the present case, the data presented in the Attachments is solely based on the SNAP electronic benefit transfer transactions conducted at the Appellant business during the period under review. 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 period under review. 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 photographs from the FNS store visit on June 4, 2017, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for

recipient households conducting transactions at the Appellant business during the review period. This analysis also included a review of the business 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 letter of charges evidence trafficking as the most likely explanation for the questionable transactions listed in the charge letter Attachments. It is herein determined that Appellant has not provided 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 was due primarily to trafficking in SNAP benefits.

The evidence under review shows SNAP activity indicative of trafficking. Neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto 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.

CIVIL MONEY PENALTY

Appellant contends the store owner developed and maintained an effective compliance policy and program as specified by Section 278.6(i)(1) from the moment he was granted access to the SNAP program. Each employee was provided with an Employment and Training Handbook written by USDA. These policies have been in effect since the store began the Food Stamp Program. There are only two employees that take shifts and both were given extensive training by the owner regarding the policies and regulations for Food Stamp and SNAP. A reduced CMP that would make USDA whole again is requested in lieu of permanent disqualification.

Appellant further requests that ownership not be fined a punitive amount for no actual violations and each transaction was legitimate ad within SNAP regulations [sic]. This is because the USDA investigation revealed the fact that the owner completely and competently trained all his employees and regularly checked on both employees and customers to insure [sic] that no illicit activity was taking place at the business. Appellant submitted a copy of the six page Dream Food Market Employment Handbook that included one paragraph on Food Stamps Guidance; a

copy of the 81 page Food Stamp Program Regulations dated November 1, 2006; affidavits by the owner and the two employees, copies of the driver's licenses for the owner and each employee, three photographs of a homemade sign stating "No Cash Exchange for Food Stamps"; and copies of the Appellant's 2015 and 2016 Texas Franchise Tax Public Information Reports in support of these contentions.

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.

To be considered eligible for a trafficking CMP a firm must establish, by substantial evidence, its fulfillment of each of the following criteria:

- Criterion 1: The firm shall have developed an effective compliance policy as specified in Section 278.6(i)(1).
- Criterion 2: The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm.
- Criterion 3: The firm had developed and instituted an effective personnel training program as specified in Section 278.6(i)(2).
- Criterion 4: Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations. Or it is the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm.

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 . . .**" (Emphasis added).

The six page Dream Food Market Employment Handbook with one small paragraph on Food

Stamps Guidance submitted by Appellant does not constitute an effective compliance policy as it lacks substance and detail, it also is undated and does not show that the store owner had a compliance program in effect to monitor store transactions for possible violations prior to the issuance of the charge letter. The 81 page Food Stamp Program Regulations dated November 1, 2006, is grossly outdated and was never intended to be used to train store employees and therefore does not constitute acceptable evidence that an effective training program was in operation prior to the violations. Upon authorization, all SNAP retailers receive a standard authorization package from FNS that includes the SNAP Training Guide for Retailers and other training materials to be used in training both store employees and store ownership. The package also includes a SNAP Training Expectations notice that provides detailed guidance on what materials are to be used for training as well as acceptable documentation for training. Since store ownership made no mention of any of the FNS training materials and did not provide acceptable documentation of employee training it is clear that no effective SNAP training program has been implemented by the store owner. Additionally, the three photographs submitted by Appellant showing homemade signs are staged as none of these signs are visible in the many photographs taken during the FNS store visit. Therefore, 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).

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

CONCLUSION

The Retailer Operations Division has presented a case that Appellant has likely trafficked in SNAP benefits. The Retailer Operations Division's 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 that are 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 by the Retailer Operations Division. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, Retailer Operations properly determined that Appellant was not eligible for a trafficking CMP according to the terms of 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

February 1, 2018