

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

E&E Mini Mart,

Appellant,

v.

Case Number: C0211280

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 Country Store (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 October 4, 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 August 13, 2017, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in January 2018 through June 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 letters dated October 23 and September 7, 2018, that did not request or provide any documentation in support of a CMP. The Retailer Operations Division notified Appellant by letter dated October 4, 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 October 11, 2018, Appellant appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. Subsequent correspondence was also received.

STANDARD OF REVIEW

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

CONTROLLING LAW

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

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

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

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

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

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

SUMMARY OF THE CHARGES

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

1. Multiple purchase transactions were made too rapidly to be credible.
2. Multiple transactions were made from individual benefit accounts in unusually short time frames.
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 rapid transactions usually occur in the morning when customers stop by before work or school (students). The line is long so while the first transaction is being entered into the POS terminal, the second customer’s purchase is being rung-up resulting in rapid transactions if both customers are using SNAP. The rapid transactions are also due to a POS malfunction that would occur multiple times throughout the day. Employees would have to re-enter the first transaction and, if busy, would have a second cashier ring-up the next customer and enter their SNAP purchase right after the re-entry was completed;
- The multiple transactions are because customers tend to shop as soon as they receive their benefits and also might come back multiple times in a week or even a day, because of convenience. The firm is located in the heart of the village and in the middle of several schools with most customers walking since close by. There are families shopping before school, during school, and again after school;

- The large purchases are due to customers buying cases and dozens of certain foods such as corned beef, rice, milk, and other canned goods. Households in this area usually have more than eight kids each; and,
- There are many customers who depend on the store and the owner also has many bills to pay so request the \$59,000.00 penalty for violations be lowered and approved for payment in installments.

Appellant submitted itemized register receipts as well as invoices for inventory purchases in support of these contentions.

ANALYSIS AND FINDINGS

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Nevertheless, transactions having such characteristics are sometimes valid and sufficient evidence that support that they were the result of legitimate purchases of eligible food items is provided. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited and to provide evidence that they are legitimate.

The Retailer Operations Division presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant's store during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Store Background and FNS Store Visit

FNS initially authorized the firm on March 24, 2014. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during the June 25, 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 convenience store offering a very limited quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- The store visit report and photos showed four shopping carts and six small hand baskets for use by customers. At least one shopping cart contained store materials and was not available for customer use.
- No food packages, bundles, case sales, bulk items (except rice), or other sales were evident that would explain the unusual transactions and no cased items were available except for drinks.

- 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 counter was approximately 1.5 feet deep and 1.0 foot wide with displays and PIN pads taking up space on both sides reducing the available area for customers to place their purchases. The very small size of the checkout area would make it problematic to process large orders. The checkout counter had one cash register, an optical scanner, and one POS terminal.
- The firm had a very limited stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, and other drinks as well as many ineligible items.
- The store had no fresh unprocessed meat or seafood, very limited quantities and varieties of frozen unprocessed meat or seafood, a limited quantity and variety of processed meats and seafood (canned meat/poultry/fish, hot dogs, bacon, sausages, frozen sausages), no deli meats, no packaged lunch meat, no frozen entrees or frozen dinners, minimal quantities and varieties of fresh fruits and vegetables, extremely limited frozen fruits and vegetables (corn, mixed vegetables, bananas), a very limited stock of packaged nuts, a very limited stock of canned soups, a limited quantity and variety of canned and packaged staple food items, bread, tortillas, no tostadas, no pitas, flour, rice, no uncooked pasta/noodles, cold cereal, hot cereal, baby cereal, a minimal selection of baby foods, infant formula, many single serving noodle soups, a limited quantity and variety of packaged cheese, no deli cheese, no sour cream, margarine, butter, eight yogurt, no mac&cheese, and very few expensive eligible food items.
- Ineligible items included: tobacco, alcohol, hot foods, household products, paper products, auto products, health and beauty items, cell phone accessories, hats, toys, and newspapers while accessory foods included: candy, spices, condiments, snacks, baked goods, baking mixes, cooking oil, sugar, single serving ice cream, ice cream, un/carbonated drinks, tea, and cold ready-to-eat prepared foods.
- Signage was in primarily in English. No SNAP posters of any kind (anti-fraud, eligible items, reporting trafficking, etc.) were visible in the store.
- The firm's hours of operation were 5:30 AM-10:00 PM daily as confirmed by the store cashier. The cashier also stated that the firm did not take phone or online grocery orders, did not delivery 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 carrots priced at \$1.00, green and red peppers priced at \$1.50/\$1.00, and Ligo brand canned fish priced at \$0.75. The FNS store visit report was completed in conjunction with the store cashier and 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. This fact was also supported by the many store visit photos showing staple foods, accessory foods, and ineligible items all with prices ending in .x9 cents.
- There were very few items priced for more than \$5.00 and the FNS store visit report listed the four most expensive items costing more than \$5.00 for sale in the store as being 50 pound bags of rice priced at \$38.99, 12.6 ounce containers of infant formula priced at \$22.99, a case of Aloha Maid brand canned juice priced at \$11.99, and frozen whole chickens priced at \$8.99.

- While the firm did stock a minimal selection of baby foods and infant formula, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers, not SNAP EBT.
- The store visit photos showed several marginally stocked coolers and display racks as well as an empty refrigerator.

Rapid Transactions

This Attachment documents 14 sets of back-to-back transactions made in rapid order at the same POS terminal. The irregular transaction data cited in this Attachment shows all of the transaction sets were conducted 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Guam issues SNAP benefits from the first to the tenth of each month and 12 of the 14 sets in this Attachment occurred on or before the tenth day. The same household conducted both of the transactions in only one of the 14 sets. The dollar amount of the second transaction equaled or exceeded 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in 78.6 percent (11) of the 14 sets with the second transaction exceeding 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in three sets.

Appellant contends the rapid transactions usually occur in the morning when customers stop by before work or school (students). The line is long so while the first transaction is being entered into the POS terminal, the second customer's purchase is being rung-up resulting in rapid transactions if both customers are using SNAP. The rapid transactions are also due to a POS malfunction that would occur multiple times throughout the day. Employees would have to re-enter the first transaction and, if busy, would have a second cashier ring-up the next customer and enter their SNAP purchase right after the re-entry was completed;

Appellant offered no evidence in support of its claim of a POS terminal malfunction being responsible for some of the rapid transactions. A review of FNS transaction data for the Appellant firm shows no duplicate, rejected, or voided transactions that would result from such a malfunction. Also, a review of the transaction sets shows that while seven sets occurred in the morning, only two were early enough that students would have been able to complete the purchase without being late for school. Accordingly, none of Appellant's contentions offer a credible explanation for these transactions.

Based on the very limited number of expensive items for sale at the Appellant firm costing more than \$5.00, it is likely that a transaction in the amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C) would consist of more than 10 items. SNAP benefit transactions involving legitimate food purchases require many steps: 1) the customer waiting for the previous customer to pick-up their purchases and leave the checkout area; 2) the customer possibly making multiple trips bringing items to the checkout counter for large purchases since the firm has only four shopping carts and at least one was not available for use; 3) the cashier separating eligible from ineligible items; 4) the cashier handling individual items to determine the price; 5) the cashier weighing individual items if sold by weight; 6) the cashier entering prices into a register or adding machine, once for eligible foods and once for ineligible items, which is typical for larger purchases; 7) the cashier handling manufacturers cents-off coupons, if applicable; 8) the cashier bagging the items for carry-out; 9) the cashier informing the customer of the totals (one for eligible foods and one for non-eligible

items, if applicable, which for large purchases includes most transactions); 10) the cashier pressing the “SNAP transaction key” on the POS device/card reader; 11) the customer swiping their EBT card; 12) the customer entering their required PIN; 13) the cashier entry of the purchase amount; 14) the cashier confirming the customer has a sufficient benefit balance; 15) the transaction being processed by the system and receiving approval; 16) the cashier printing the EBT and cash register receipts; 17) the cashier accepting an alternate form of payment for nonfoods and possibly handling cash change; and 18) the customer removing products from the checkout area so the next customer in line can begin the next transaction. All or most of these steps are inherent in legitimate large SNAP purchases. One can readily surmise that while such transactions may be completed in succession, performing these processes on large transactions is not done rapidly. The amount of time required is generally proportional to the dollar amount of the transaction; typically, the larger the dollar amount the longer the time period between transactions. The very limited counter space as well as manually key-entering lengthy EBT card numbers adds additional time to transactions.

The Appellant firm processed transactions well in excess **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, markedly faster than supermarkets typically process purchases, yet the Appellant firm does not have any of the logistical tools such as conveyor belts, rotating bagging platforms, or order separators that are routinely used in rapid throughput operations. It is therefore improbable that large dollar value transactions for the purchase of legitimate food items which would consist of a substantial number of lower priced items based on Appellant’s stock could be processed in the times listed in this Attachment given the facilities in place at the firm. The large transaction dollar amounts and the short interval between transactions in this Attachment demonstrate the improbability of these being legitimate eligible food purchases and suggest trafficking as the most likely explanation.

Based on this discussion, as well as the stock and facilities present at the Appellant firm, it is unbelievable that these large dollar value transaction sets could occur in the short periods of time listed if they involved legitimate eligible food purchases. It is therefore more likely that the transactions listed in this Attachment are attributable to trafficking.

Multiple transactions in unusually short time frames

This Attachment documents 100 individual transactions in 43 sets of two or more transactions conducted by 32 different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The dollar amounts of subsequent transactions in each set are substantial and nearly equal or exceed the dollar amount of the initial transaction in 32 of the 43 sets. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. One set is comprised of six individual transactions, one set has four individual transactions, and eight sets have three individual transactions while the remaining 33 sets are comprised of two individual transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by store inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends the multiple transactions are because customers tend to shop as soon as they receive their benefits and also might come back multiple times in a week or even a day, because of convenience. The firm is located in the heart of the village and in the middle of several schools with most customers walking since close by. There are families shopping before school, during school, and again after school.

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. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out or of household members/friends shopping together and making separate purchases as 37 of the 43 sets **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The transaction sets also do not contain the characteristics of a household returning later in the day or sending their child to purchase a forgotten item or two as all of the sets have subsequent transactions in amounts exceeding **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, far more than the cost of a forgotten item or two.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that subsequent transaction dollar amounts are substantial in these transaction sets and that all of the sets in this Attachment total **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** when the comparable average convenience store SNAP transaction amount in Guam during the review period was \$11.13. 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. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Other households had similar shopping patterns which brings-up the question of why would households who are regularly shopping at numerous larger and better stocked stores, both nearby and at a distance, elect to conduct multiple purchases at a minimally stocked convenience store that carries no unique foods or offers any special services. Appellant's contentions fail to offer any explanation or rationale for these unusual and suspicious shopping patterns. Common sense dictates that it is improbable that households with limited cash resources would choose to travel these distances if their purchases consisted solely of eligible food items that could be purchased at any of the super stores, supermarkets, or other larger stores they were already regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant business and the multiple transactions were attempts by to obscure trafficking by dividing a large dollar value transaction into a series of smaller dollar value

transactions. This is a method used by stores to avoid high dollar transactions that cannot be supported.

There may be legitimate reasons why a SNAP household might return to a store during a short period of time, but the examples in this Attachment indicate a series of SNAP purchases that total to large dollar amounts. Multiple transactions over a short period of time, especially those of high dollar values, are indicative of attempts to obscure trafficking by dividing a large dollar value transaction into a series of smaller dollar value transactions and are a method which violating stores use to avoid high dollar transactions that cannot be supported.

High Dollar Value Transactions

This Attachment lists 98 individual EBT transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The substantial number of high dollar transactions is uncharacteristic for a grocery store offering a very limited stock of staple foods and calls into question the legitimacy of these transactions. The transactions are also substantially higher than the average SNAP transaction amount of \$11.13 for this store type in Guam. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores, located nearby as well as at a distance from Appellant's location, that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the Appellant firm. These high dollar transactions remain questionable when considering the proximity of 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.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for Guam convenience stores during the review months and at the Appellant firm is significant. **5 U.S.C. § 552 (b)(7)(E)**. The unusually high number of SNAP transactions combined with the low average SNAP transaction dollar amount is an indication the firm 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 like type stores having redemptions for the review period shows that none exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant firm even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is further indication that the transactions in this Attachment do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

The firm also had irregular SNAP transaction data compared to like type stores in Guam. A comparison of Appellant's redemption data to Guam convenience stores using ten dollar increments shows that Appellant's transaction count and dollar volume significantly exceed the

average of like type stores in all ranges 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This transaction pattern and the unusual spikes in both transaction numbers and dollar volume do not appear in the transaction patterns or in the transaction count and dollar volume averages for other like type stores. These large dollar transactions are considered to be irregular and suspicious based on the firm's food inventory. The Retailer Operations Division determined there was no credible reason for the firm to have transactions at these dollar levels given the minimal stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

Appellant alleges the large purchases are due to customers buying cases and dozens of certain foods such as corned beef, rice, milk, and other canned goods. Households in this area usually have more than eight kids each. Appellant submitted additional itemized register receipts as well as invoices for inventory purchases in support of these contentions.

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

Information obtained during the FNS store visit on June 25, 2018, shows that the 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. The fact that SNAP benefits cannot be used for tobacco, alcohol, household products, paper products, auto products, health and beauty items, cell phone accessories, hats, toys, and newspapers also provides no justification for the high transaction amounts.

Higher food prices make it even more unlikely that SNAP recipients, with very limited food benefits, would want to spend a considerable part of their benefits in a store that does not address all of their food needs when they are already shopping at larger, fully-stocked stores that would offer a greater variety of foods at lower prices. Many of these stores also offer store brand products at lower prices, weekly specials, and have shopping carts and checkouts with built-in scanners and conveyor belts to facilitate processing purchases quickly.

The Retailer Operations Division conducted a detailed analysis of the itemized cash register receipts provided by Appellant with the determination that they were more likely than not fabricated. This determination is based on the several inconsistencies including that the receipt transaction numbers are not in chronological sequence. The receipts all contain a transaction number that is assigned sequentially by the firm's system. The analysis shows that the transaction numbers on the receipts provided by Appellant are not in a chronological order as

evidenced by transactions occurring later having a lower transaction number than transactions completed hours or days earlier. Additionally, duplicate receipts were identified that showed different items purchased with each receipt having a different transaction number. There were also two receipts with the incorrect transaction dates further supporting that the receipts were fabricated in an attempt by Appellant to avoid the permanent disqualification and they therefore have no credible value.

Appellant provided five invoices for the six month review period with one of the invoices being for purchases made one month after the review period had ended. Due to the extremely small number of invoices provided, the Retailer Operations Division was unable to conduct an analysis.

It is further noted that SNAP redemptions at the Appellant firm fluctuated unusually following receipt of the charge letter on August 16, 2018. The volume of SNAP redemptions at the Appellant firm increased 5 U.S.C. § 552 (b)(7)(E) percent from August 2018 to September 2018 while the number of SNAP transactions increased 5 U.S.C. § 552 (b)(7)(E) percent over the same period. A pronounced change 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

The purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division and is limited to what circumstances were at the basis of the action at the time such action was made. 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. When the store owner signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, she confirmed she understood and agreed to abide by program rules and regulatory provisions. She also agreed to accept responsibility on behalf of the firm for violations of the SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. 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 owner and the firm were charged with trafficking based on a computer analysis of the store's transactions for the review period. The charges do not derive from the use of a confidential informant or independent investigator who visited the store and made illegal purchases to support findings of trafficking, but by a computer program used by SNAP Administrators. While traditional undercover operations are still in use by USDA, for many years federal regulations have also authorized the use of evidence consisting of EBT transaction data in investigations of SNAP retail stores to determine if trafficking is occurring and U.S. District Courts have long upheld the validity of EBT transaction data.

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." SNAP regulations at 7 CFR § 271.2, define trafficking as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". SNAP regulations at 7 CFR § 278.6(a) clearly state that "FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system". In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant firm during the review period. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the review period. All of the transactions were then reviewed and analyzed by the Retailer Operations Division staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photos from the FNS store visit, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant firm during the review period. This analysis also included a review of the firm to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

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

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

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 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 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, ownership’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

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

CONCLUSION

The Retailer Operations Division presented a case that Appellant has likely trafficked in SNAP benefits. Their analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in 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 Guam.

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

April 9, 2018