

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

E-Z Pass Gourmet Inc,

Appellant,

v.

Case Number: C0200877

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 decision by the Retailer Operations Division to impose a permanent disqualification against E-Z Pass Gourmet Inc. (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 August 30, 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 August 10, 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 January 2017 through June 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 August 21, 2017, and submitted via fax. The response did not request a trafficking CMP, but did state that store ownership had implemented an effective compliance policy and program and submitted documentation to be considered in support of the CMP. The Retailer Operations Division notified Appellant in a letter dated August 30, 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 September 5, 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 January 2017 through June 2017. This involved four 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. The majority or all of individual recipient benefits were exhausted in unusually short periods of time.
4. 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:

- The charges should be deemed unfounded in that Appellant's employees have not exchanged SNAP benefits for either cash or ineligible items. The allegations of trafficking are based on several EBT transactions alleged to show unusual, irregular, and inexplicable activity when they merely illustrate a typical six-month period at the business in which all transactions were legal and in full compliance with SNAP regulations;
- The business is a somewhat larger convenience/grocery store compared to similar stores in the neighborhood with several aisles packed with a variety of food items and various products and merchandise. All aisles are well stocked as evidenced by attached photographs. The business also sells various expensive items such as Enfamil. There are few grocery stores in this part of Brooklyn [sic] that offer EBT service since most stores are not part of SNAP and this accounts for a larger volume of sales at the store and more higher dollar value transactions;
- Regarding the transactions made too rapidly, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is not difficult for a cashier to complete one EBT transaction and then add-up the items purchased by another customer 5 U.S.C. § 552 (b)(6) & (b)(7)(C). For example, it would be completely unreasonable to suggest that an experienced cashier could not ring-up a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transaction based upon a purchase of six to 10 items 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Two transactions for customers who are lined-up back-to-back can quite easily be completed 5 U.S.C. § 552 (b)(6) & (b)(7)(C) so these allegations are meritless and an unreasonable accusation in an attempt to establish trafficking;
- It is also not unusual for customers to complete a transaction and later realize they forget to purchase something. When this occurs, the customer would obviously need to complete a new EBT transaction,

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These multiple transactions are nothing more than customers returning to make more purchases after forgetting certain items during their initial purchase;

- USDA unreasonably is looking to blame the arguably unwise decisions of its customers on the store itself. These customers exhausted their SNAP benefits within a short period of time, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and the business should not be held responsible or penalized because a customer wants to exhaust their benefits in this manner. These isolated transactions show that customers decided to exhaust their benefits shortly after receiving them around the first of each month and exhausted them within a few days of the first of the month. While these are arguably unwise for the customer, they cannot be used to penalize a store that agrees to accept the customer's purchases. It is unreasonable for USDA to expect the business to deny a sale just because the customer made a purchase earlier in the day;
- The owner and his two cashiers have submitted affidavits in which they affirmatively assert that they have not exchanged SNAP benefits for either cash or ineligible items;
- The isolated "excessively large" transactions are simply common and routine transactions that occur regularly and are quite normal. It is unfair for USDA to make such allegations without ever actually entering the store or observing a typical day at the business;
- The evidence does not satisfy Section 271.2's definition of trafficking that requires some evidence. USDA has not presented any actual or direct evidence of an EBT transaction involving exchanging benefits for either cash or ineligible items. These "unusual" transactions are nothing more than typical authorized and legitimate transactions. Without any direct evidence, it is inappropriate for USDA to find that the business has violated any SNAP regulations;
- Appellant requests that USDA's findings that SNAP violations had occurred and that the business failed to have an effective compliance policy and program to prevent SNAP violations be reviewed and reversed as well as the decision to permanently disqualify the business. The USDA letter dated August 10, 2017, made no allegation that the business lacked an effective compliance policy and program, solely accusing the business of trafficking. It seems that since USDA lacked sufficient evidence to show trafficking, that it is now suggesting additional allegations in an attempt to disqualify the business. There is also nothing to support USDA's assertion that the business did not have an effective compliance policy and program in effect and makes this accusation without having any evidence, documentation, or information to corroborate its claim. Appellant submitted documentation in its response to the charge letter showing it had a comprehensive and ongoing compliance program focused on the prevention of SNAP violations. The program includes a manual given to every employee that clearly explains SNAP rules and regulations and also clarifies accepted and prohibited transactions while using EBT. The program includes regular

- employee training;
- It is disingenuous for USDA to characterize the business's compliance policies and programs as ineffective when it is very similar to the compliance policies and policies recommended by USDA on its website. The owner and employees submitted affidavits asserting they had a policy in place and that the policy was implemented in the form of a manual detailing SNAP compliance issues and regular employee training and supervision to ensure that every employee is compliant with all SNAP regulations. USDA has nothing to suggest anything to the contrary. Without any evidence to support its assertion that the business did not have an effective compliance policy and program to prevent SNAP violations is simply inappropriate, unfair, and an abuse of discretion. If the business's disqualification is not reversed, Appellant will be forced to seek a further appeal in the U.S. District Court;
- Regarding the allegations of SNAP violations at the business, the owner confronted his employees and all denied providing either ineligible items or cash as part of an EBT transaction. Each employee cashier also signed an affidavit asserting this. The owner's training, and specifically the training manual, makes it clear that any deviation from SNAP regulations will be grounds for termination. Therefore, if the owner is provided clear evidence that any employee has violated SNAP regulations, he will terminate the employee immediately; and;
- It is requested that the business's SNAP privileges be restored while the review is pending.

Appellant submitted an affidavit by the owner that outlines his training program and denies any violations, affidavits by the two cashiers stating they receive monthly training and have not violated any SNAP regulations, a copy of an undated four-page SNAP Policy and Procedures manual for the business, statements dated 2015 and 2016 signed by the two cashiers acknowledging having been trained, and 11 undated photographs of the business 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 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

The FNS initially authorized the Appellant business on March 20, 2009, and most recently reauthorized the business on October 23, 2014. The business is classified as a combination grocery store. The file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a May 25, 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 small, somewhat disorganized, one aisle store offering a limited quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- The contractor estimated the store size was approximately 600 square feet with no additional storage based on information provided during the store visit.
- There were no shopping carts or 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 counter was approximately three feet by 1.5 feet set into a plastic wall with displays on both sides. The small size of the checkout area would make it problematic to process large orders.
- The checkout counter had one cash register, one point-of-sale (POS) terminal, and no optical scanner.
- The rear of the store consisted of a refrigerated deli display case and a sizeable kitchen area containing a cooktop grill, microwave oven, commercial exhaust hood, commercial slicer, commercial scale, etc. Large menu boards advertised a wide variety of hot/cold sandwiches, hot breakfast items, hot side orders, and cold salads.
- No food packages, bundles, case sales, bulk products, or other sales were evident that would explain the unusual transactions and no SNAP eligible cased items were available for sale.
- The store had a limited stock of staple foods that consisted of many single serving and pre-packaged items with the majority of inventory in accessory foods (primarily soda, candy, and other drinks), snacks, Ramen noodle soups, and ineligible items.
- The business was marginally stocked in the meat/poultry/fish category carrying only deli meats and jerky.
- Dairy items included: fresh milk, single serving milk drinks, canned milk, single serving chip dip, deli cheeses, and single serving ice cream.
- Other refrigerated items included cold, prepared, ready-to-eat salads.

- The deli meats and cheeses were available for sale by the pound and were also used in the preparation of the hot/cold, prepared, ready-to-eat foods.
- There were no fresh or frozen fruit and vegetables with the exception of bananas.
- There were no fresh unprocessed meats or seafood, no frozen unprocessed meats or seafood, a limited quantity and variety of processed meats (deli meats and jerky), no processed seafood, no packaged lunch meats, no eggs, no frozen entrees, no frozen dinners, no yogurt, no sour cream, no butter/ margarine, no fresh fruits or vegetables except for bananas, no frozen fruits or vegetables, a limited quantity and variety of canned and packaged staple food items, no tea, no infant formula, limited baby foods (cereal only), no baking mixes, no flour, no corn meal, no hot cereals, no dry pasta or noodles, no bread/tortillas/rolls except for those being used for hot/cold prepared foods, and no expensive eligible food items.
- Ineligible items included: tobacco, hot ready-to-eat foods, household products, paper products, pet products, health and beauty items, ATM, smoking accessories, and diapers while accessory foods included: candy, condiments, cocoa, coffee, and carbonated/ uncarbonated drinks.
- The store was not a WIC vendor.
- Signage in the store was in English.
- Many food items were not priced and those items with prices all ended in .x9 cents, as noted by the FNS reviewer, except for some snack items priced at .50 cents. A price ending in .x9 cents is the most common pricing structure for stores of this type.
- The FNS store visit report listed the most expensive items for sale in the store 5 U.S.C. § 552 (b)(6) & (b)(7)(C), based on responses provided by a store employee during the store visit, as being a 10.3 ounce container of coffee priced at \$5.99, a 1.1 quart bottle of Pedialyte priced at \$6.99, deli cheese priced at \$6.99 per pound, and deli meat priced at \$9.99 per pound.
- Store hours were confirmed by the contracted reviewer with a store employee during the FNS store visit as being open 24/7.
- The FNS store visit report and photographs showed some marginally stocked shelves with stock fronted to give the appearance of greater inventory and the same products located on different shelves instead of being grouped together indicating a certain level of disorganization.
- The quantity and variety of the store's staple food inventory was less than that seen during the previous FNS store visit on October 22, 2014.

Rapid Transactions

This Attachment documents 67 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). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant contends that most of the transactions made too rapidly 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and that it is not difficult for a cashier to complete one EBT transaction and then add-up the items purchased by another customer 5 U.S.C. § 552 (b)(6) & (b)(7)(C). For example, it would be completely unreasonable to suggest that an experienced cashier could not ring-up a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transaction based upon a purchase of six to 10 items 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Two transactions for customers who are lined-up back-to-back can be quite easily completed 5 U.S.C. § 552 (b)(6) & (b)(7)(C) so these allegations are meritless and an unreasonable accusation in an attempt to establish trafficking.

Based on the very limited number of items for sale at the Appellant business 5 U.S.C. § 552 (b)(6) & (b)(7)(C), it is likely that a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C) would consist of more than 10 items. This said, while a competent cashier might be able to ring-up a smaller order within a period 5 U.S.C. § 552 (b)(6) & (b)(7)(C), SNAP benefit transactions involving legitimate food purchases require many other steps: 1) the customer waiting for the previous customer to pick-up their purchases and leave the checkout area; 2) the customer making multiple trips bringing items to the checkout counter for large purchases since the business has no shopping carts or hand baskets; 3) the cashier separating eligible from ineligible items; 4) the cashier handling individual items to determine the price, which in this case involved manual keying of amounts, since there is no scanner; 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 most 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 transacted the longer the time period between transactions. Limited counter space as well as manually key-entering multi-digit EBT card numbers adds additional time to transactions.

The Appellant business processed transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C), markedly faster than supermarkets typically process purchases, yet the Appellant business has only one checkout counter, no optical scanner, and none of the logistical tools such as conveyor belts, rotating bagging platforms, or order separators that are routinely used in rapid throughput operations.

Examples of these unusual and suspicious transactions include:

- 5 U.S.C. § 552 (b)(6) & (b)(7)(C),
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

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 that the Appellant business has limited checkout counter space and no scanner. 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 business, 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 293 individual transactions in 119 sets of two or more transactions conducted by 78 different households in a short period of time. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). One transaction set is comprised of five individual transactions, 11 sets are comprised of four individual transactions, 30 sets are comprised of three individual transactions, and the remaining 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 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 contends that the Appellant business is a somewhat larger convenience/grocery store and it is also not unusual for customers to complete a transaction and later realize they forget to purchase something.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These multiple transactions are nothing more than customers returning to make more purchases after forgetting certain items during their initial purchase.

The household transactions listed in this Attachment do not contain the characteristics associated with a recipient purchasing a forgotten item right after checking-out or households returning to purchase a forgotten item or two since 23 of the sets 5 U.S.C. § 552 (b)(6) & (b)(7)(C) which would not be sufficient time for a household to complete the first transaction, go back and find the missing item(s), and then complete a second transaction. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Also, why would households need to conduct two, three, or four additional transactions to purchase a forgotten item or two? 5 U.S.C. § 552 (b)(6) & (b)(7)(C). For example, households may shop and later return to the store to pick-up a forgotten item. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

A more detailed analysis of the shopping patterns for the households listed in this Attachment by the Retailer Operations Division identified a household that conducted a set of three manually keyed transactions at the Appellant business on May 6- 7, 2017, and a second set of three manually keyed transactions at the Appellant business on May 8, 2017. In the middle of each of these two sets, this household conducted a swiped transaction at the same national chain super store located 682 miles away in Georgia. Manually keyed transactions are those in which the magnetic strip on the back of the EBT card is not being read by the store's POS device and the clerk must manually key enter the lengthy EBT card number. When the magnetic strip on an EBT card fails, it can no longer be swiped and replacement EBT cards contain different identification numbers. On-site investigations into trafficking at retailers have found it is not uncommon for retailers to have a SNAP recipient's PIN and EBT card number in order to facilitate trafficking SNAP benefits in exchange for cash without the need for the recipient to be physically present. The retailer enters the EBT card number manually as the recipient has the actual EBT card and then enters the PIN. A review of other EBT transactions on the dates of these manual transactions shows that the Appellant business's POS device was functioning properly as there were swipe transactions before and after the manual transactions. Since it would be physically impossible for the cardholder to travel more than 682 miles in the time between these transactions it is likely than not that the manually key-entered transactions were, in fact, trafficking.

Near Depletions of SNAP Benefit Accounts

This Attachment lists a total of 60 EBT transactions in 21 sets of one or more transactions involving 18 households during which the majority, if not all, of the household's monthly SNAP benefits were depleted in a short period of time. There are three sets comprised of five transactions, four sets comprised of four transactions, two sets comprised of three transactions, 11 sets comprised of two transactions, and one set comprised of a single transaction. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Depleting a household's entire SNAP allotment in one or a few transactions, or within one day, leaving little or no benefits for the rest of the month, is inconsistent with the normal shopping behavior of SNAP benefit households.

SNAP benefits are intended to supplement the food budget for recipient households whose net income is at or below the Federal Poverty Level. A government report on SNAP shopping patterns¹ indicates that after the first day of benefit issuance, on average, 79.1 percent of household's allotment remains unspent. Even after seven days, 42 percent of benefits still remain unspent. It typically takes two weeks to deplete 78.1 percent of one's benefits. This report further revealed that households most often redeemed their benefits at supermarkets and super stores with only four percent of households never shopping in a supermarket.

Participating households typically made several (just over nine on average) relatively small purchases (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) with SNAP benefits each month. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant contends that the USDA is unreasonably looking to blame the arguably unwise decisions of its customers on the store itself. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These isolated transactions show that customers decided to exhaust their benefits shortly after receiving them around the first of each month and exhausted them within a few days of the first of the month. While these are arguably unwise for the customer, they cannot be used to penalize a store that agrees to accept the customer's purchases.

An analysis of the shopping patterns for the 18 households listed in this Attachment shows that these households have ready access to transportation as evidenced by their shopping at a variety of other larger food stores, including many super stores and supermarkets, located nearby and at a distance from Appellant's location. The FNS store visit shows this is a small store offering a limited quantity and variety of staple foods items as well as a large variety of the accessory foods and ineligible items typically found in convenience stores. It is unlikely that most SNAP households would choose this store as a destination for making large household food purchases if they had the ability to shop at larger stores. A review of the 21 transaction sets listed in this Attachment shows that 18 of the 21 sets were conducted by 15 households with SNAP allotments

5 U.S.C. § 552 (b)(6) & (b)(7)(C) for the transaction months listed.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). It seems improbable that 15 single person households with very limited food dollars would be purchasing large quantities of eligible food products in up to five multiple transactions in a short period of time that would exhaust the majority or all of their monthly SNAP benefits at a store with limited staple food items available for purchase. The multiple transactions combined with the improbably large number of single person households make it unlikely that Appellant's explanation of poor judgment by the households involved

¹ "Benefit Redemptions in the Supplemental Nutrition Assistance Program", report prepared by Mathematica Policy Research for the Food and Nutrition Service, February 2011.

is plausible and more likely that the transactions listed in this Attachment were not for eligible food items, but were trafficking.

It should be noted that this Attachment is not targeting excessively large transactions per se. It represents a pattern whereby 18 households within the review months, almost depleted, or did deplete their entire monthly SNAP benefit allotments, in a single or a few transactions, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As previously noted, this is not typical shopping behavior exhibited among SNAP recipients.

High Dollar Value Transactions

This Attachment lists 260 individual EBT transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Based on the FNS store visit report, the Appellant business had a limited stock of staple foods that consisted of many single serving and pre-packaged items with the majority of inventory in accessory foods (primarily soda, candy, and other drinks), snacks, Ramen noodle soups, and ineligible items. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

Appellant contends that the business is a somewhat larger convenience/grocery store compared to similar stores in the neighborhood with several aisles packed with a variety of food items and various products and merchandise. All aisles are well stocked as evidenced by attached photographs. The business also sells various expensive items such as Enfamil. There are few grocery stores in this part of Brooklyn [sic] that offer EBT service since most stores are not part of SNAP and this accounts for a larger volume of sales at the store and more higher dollar value transactions. The isolated “excessively large” transactions are simply common and routine transactions that occur regularly and are quite normal. It is unfair for USDA to make such allegations without ever actually entering the store or observing a typical day at the business.

The record shows that within a one-half mile radius of Appellant’s location in the Bronx there are 83 SNAP authorized retailers including: one super store, two supermarkets, 10 medium grocery stores, and 35 small grocery stores. The super store is only 0.05 miles or less than 100 yards from Appellant’s location and both supermarkets are located 0.18 miles away. This directly contradicts Appellant’s allegation that there are few grocery stores in this part of Brooklyn [sic] that offer EBT service. The evidence under review shows that SNAP households shopping at the Appellant business are also shopping at other nearby stores, as well as at full-line supermarkets and super stores, located nearby and at a distance from Appellant’s location that offer a greater variety and quantity 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.

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. The analysis of shopping patterns by the Retailer Operations Division shows that households in this Attachment are regularly shopping at 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 May 25, 2017, shows that the Appellant business offers a limited quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. There is no apparent legitimate reason for the high transaction amounts at Appellant's store given the limited stock of staple foods and the fact that: tobacco, hot prepared ready-to-eat foods, household products, paper products, pet products, health and beauty items, ATM, smoking accessories, and diapers are not eligible for purchase with SNAP benefits. 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. The FNS store visit also showed that the Appellant business does not consist of several aisles packed with a variety of food items and various products and merchandise as claimed by Appellant. In fact, the business consists of a single aisle and no Enfamil was available for purchase on the day of the store visit as confirmed by a store employee. The Appellant business is not a WIC vendor and since most SNAP households with infants or small children are WIC participants they would not be purchasing infant formula or baby food at the Appellant business using SNAP benefits, but would be purchasing them using WIC vouchers at WIC authorized businesses. The most expensive items available for purchase sale at the Appellant business 5 U.S.C. § 552 (b)(6) & (b)(7)(C), based on responses provided by a store employee during the store visit, consisted of a 10.3 ounce container of coffee priced at \$5.99, a 1.1 quart bottle of Pedialyte priced at \$6.99, deli cheese priced at \$6.99 per pound, and deli meat priced at \$9.99 per pound. A transaction i5 U.S.C. § 552 (b)(6) & (b)(7)(C) may not be unusual, irregular or inexplicable if conducted at a full-line supermarket or superstore; however, this same transaction value seems unusual, irregular, or inexplicable if conducted at a small store with a limited stock of staple foods.

Since the Appellant business carries no fresh unprocessed meats or seafood, no frozen unprocessed meats or seafood, a limited quantity and variety of processed meats (deli meats and jerky), no processed seafood, no packaged lunch meats, no eggs, no frozen entrees, no frozen dinners, no yogurt, no sour cream, no butter/margarine, no fresh fruits or vegetables except for bananas, no frozen fruits or vegetables, a limited quantity and variety of canned and packaged staple food items, no tea, no infant formula, limited baby foods (cereal only), no baking mixes, no flour, no corn meal, no hot cereals, no dry pasta or noodles, no bread/tortillas/rolls except for those being used for hot/cold prepared foods, and offers no expensive eligible food items, these patterns are deemed to be suspicious. The FNS store visit report and photographs showed some marginally stocked shelves with stock fronted to give the appearance of greater inventory and the same products located on different shelves instead of being grouped together indicating a certain level of disorganization. It is further noted that the quantity and variety of the store's staple food inventory was less than that seen during the previous FNS store visit on October 22, 2014. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). No explanation was provided by Appellant for this unusual and improbable lack of correlation between inventory availability and SNAP redemptions.

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 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. The Appellant business has a very small checkout area, no shopping carts or baskets, and no scanner thereby making it difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. Additionally, 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. Accordingly, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of many carts and thus more likely 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.

Other Contentions

Appellant states that the charges should be deemed unfounded as the Appellant's employees have not exchanged SNAP benefits for either cash or ineligible items. The allegations of trafficking are based on several EBT transactions alleged to show unusual, irregular, and inexplicable activity when they merely illustrate a typical six-month period at the business in which all transactions were legal and in full

compliance with SNAP regulations. The owner and his two cashiers have submitted affidavits in which they affirmatively assert that they have not exchanged SNAP benefits for either cash or ineligible items. The evidence also does not satisfy Section 271.2's definition of trafficking that requires some evidence. USDA has not presented any actual or direct evidence of an EBT transaction involving exchanging benefits for either cash or ineligible items. These "unusual" transactions are nothing more than typical authorized and legitimate transactions. Without any direct evidence, it is inappropriate for USDA to find that the business has violated any SNAP regulations. Appellant also requests that the business's SNAP privileges be restored while the review is pending.

Regarding Appellant's denial of violations, this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which, as noted above, 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.

As mentioned in my September 14, 2017, administrative review acknowledgement letter, SNAP regulations do not allow those businesses that have been permanently disqualified to continue to accept SNAP benefits during the administrative review process. Specifically, SNAP regulations at section 279.4(a) state that, ". . . permanent disqualifications for trafficking shall not be held in abeyance and shall be effective immediately as specified in 278.6(b)(2). . . ."

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 May 25, 2017, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for the recipient households conducting transactions at the Appellant business during the review period. This analysis 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 requests that the USDA’s findings that SNAP violations had occurred and that the business failed to have an effective compliance policy and program to prevent SNAP violations be reviewed and reversed as well as the decision to permanently disqualify the business. The USDA letter dated August 10, 2017, made no allegation that the business lacked an effective compliance policy and program, solely accusing the business of trafficking. It seems that since USDA lacked sufficient evidence to show trafficking, that it is now suggesting additional allegations in an attempt to disqualify the business.

Appellant has misread the August 10, 2017, charge letter and the August 30, 2017, determination letter. The Appellant firm was permanently disqualified from SNAP for trafficking SNAP benefits for cash, not for a failure to establish and implement an effective compliance policy and program to prevent SNAP violations. As referenced in the charge letter, the eligibility criteria to be eligible to receive a trafficking CMP in lieu of permanent disqualification include the establishment and implementation of an effective compliance policy and training program to prevent SNAP violations as discussed below.

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. Additionally, there are 83 SNAP authorized stores located within a one-half mile radius of Appellant’s business that includes two supermarkets, one super store, 10 medium grocery stores, 35 small grocery stores, and specialty stores offering seafood, meats, and fresh produce. The super store is only 0.05 miles or less than 100 yards from Appellant’s location and both supermarkets are located 0.18 miles away. The many nearby stores appear readily accessible to SNAP recipients and offer a variety of staple foods comparable to, or better than, those offered by Appellant. Appellant does not carry any unique items or foods that cannot be found at other stores. Some degree of inconvenience to SNAP benefit users is inherent in the disqualification from SNAP of any participating food store as the normal shopping pattern of such SNAP benefit holders may be altered. The Appellant business is also serviced by the NYC Metro subway and bus service with scheduled bus service on Crotona Avenue one block east of Appellant’s location.

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 request a trafficking CMP or 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).

Furthermore, Appellant received a SNAP Training Expectations Notice in May 2015 listing the minimum requirements for an acceptable SNAP training program. The SNAP Policy and Procedures manual submitted by Appellant was undated and lacks substance and detail.

Although all three affidavits state that monthly training is conducted, no training records were provided. There also is no documentation showing dates of employment for the two employees or any training documentation for the store owner. Additionally, no mention was made of the training resources provided by FNS that are to be included in a SNAP training program. 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).

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 four 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, the Retailer Operations Division 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

December 7, 2017