

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

Gas Kwick 08,

Appellant,

v.

Case Number: C0199421

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 gas kwick 08 (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant on July 11, 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 April 27, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the

months of October 2016 through March 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant responded to the charges in a letter dated May 2, 2017, but the response neither requested nor contained no any evidence to be considered in support of the CMP. The Retailer Operations Division notified Appellant in a letter dated July 11, 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 July 20, 2017, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted. Counsel requested and was approved for a one day extension of time to reply on August 31, 2017. Subsequent correspondence dated September 5, 2017, 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 charges on review were based on an analysis of SNAP EBT transaction data during the six month period of October 2016 through March 2017. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. There were an unusual number of transactions ending in a same cents value.
2. Excessively large purchase transactions were made from recipient accounts.

APPELLANT'S CONTENTIONS

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

- The business is a medium sized gas station located in the heart of West Tampa and in the center of the Latino community – a good location. A walk-thru by a SNAP inspector that was, at best, cursory in nature may give the impression that the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in monthly SNAP sales is inflated, but in reality the business is selling over one million yearly, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or under as shown in the April 2017 monthly report that shows average SNAP transactions at 5 U.S.C. § 552 (b)(6) & (b)(7)(C);
- Most of the workforce in the area is involved with landscaping or construction and with the hot weather year round these workers have a large affinity for energy drinks. The business sells some Spanish drinks by the case (coconut juice, guava juice, coco pine juice, etc.). Also, when there is a game or event at the stadium a lot of people in the area use their yard for parking and for selling water and energy drinks to the tailgate people. They are the main reason for selling drinks by the case. Cases of 8 ounce Red Bull sell for \$39.89, 12 ounce Red Bull for \$49.89, 16 ounce Rockstar for \$39.89, and 16 ounce Monster for \$39.99. Invoices for Red Bull and Pepsi are attached in support of this. As you can see, running a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) ticket per transaction is not hard. Some scenarios are:
 - A landscaping crew purchases two 12 packs of soda (\$6.29 or 2/\$11.50) plus cases of water (\$10), plus one bag of Jack Links jerky (\$8.49) for a total of 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
 - One case of 12 ounce Red Bull for \$49.89.
 - One case of Monster plus two cases of water totals 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
 - In many cases a family wants to make flan or Crema Leche so they buy two gallons of milk (\$10) plus sugar (\$5, \$2.99 each or 2/\$5) plus flour (\$4.99), plus rice (\$4.99) totals 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
 - One bag of Tostitos (\$4.29) plus salsa (\$3.69) plus a four pack of Red Bull (\$8.99) plus ice cream (\$6.00) totals 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
 - Bustelo coffee (\$10, \$5.29 or 2/\$10) plus two bananas (79 cents or 2/\$1) totals 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
 - Cereal (\$7.89) plus milk (\$4.99) plus bread (\$2.67) plus peanut

butter candy (4/\$4.44) totals 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

- There are a total of 211 transactions listed in the charge letter of which 89 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) exact price for a case of 24 12 ounce cans of Red Bull energy drinks. Accordingly, during the 175 days of the review period, the retailer sold almost a case every other day;
- In addition, 41 of the 63 transactions listed in Attachment 1 are for 5 U.S.C. § 552 (b)(6) & (b)(7)(C). There are only 22 listed transactions that were not purchases of cases of Red Bull;
- Promotional materials for the previously mentioned cases of Red Bull are submitted as well as materials for cases of 24 eight ounce cans of Red Bull 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and cases of 24 16 ounce cans of both Rockstar and Monster energy drinks along with materials for water and sundry products;
- Part of the store's marketing strategy is to provide promotions to boost sales with deals in almost everything. The numbers are rounded to make it more attractive and sometimes a price outside of normal is used such as 3 for \$3.33, 4 for \$4.44, or 5 for \$5.55. Some examples of this are:
 - Ice cream \$6.99 or 2 for \$12.
 - 12 pack of soda \$6.29 or 2 for \$11.50.
 - Coffee \$5.29 or 2 for \$10.
 - Water \$5.49 or 2 for \$10.
 - 20 ounce soda \$1.69 or 2 for \$3.
 - 16 ounce energy drinks \$2.49 or 2 for \$4.
 - Smart Water \$2.45 or 2 for \$4 or 3 for \$5.
 - Small chocolate bar \$1.29 or 3 for \$3.33.
 - 16 ounce soda in cans \$1.19 or 4 for \$4.44.

This explains why some tickets end on the same cents (5 U.S.C. § 552 (b)(6) & (b)(7)(C));

- Selling energy drinks by the case is lucrative because not all stores offer this promotion. We thought it would give us a competitive advantage, but because of the inquiry have removed the energy drink sale by case promotion. We think it would be a good idea for an auditor to work the register with us for a few days which would help to clear-up any misconceptions ;
- Cash register reports showing monthly SNAP transaction averages for several months during 2013-2017 are submitted;
- Lastly, statements from a number of customers are submitted showing the times per week they shopped at the retail store as well as the amount of SNAP benefits spent per visit. The purchases shown in Attachment 2 are well within the amounts spent by the retailer's customers; and,
- After the review of this information, you will find that there has been no trafficking under SNAP regulations.

Appellant submitted eight undated photographs of store stock; the owner's May 2, 2017, reply; a one page copy of a 2016 federal tax return; copies of two invoices

dated in April 2017; three pages of cash register reports showing the average SNAP transaction amount; and 13 statements from customers. Appellant submitted no other evidence or documentation in support of these contentions.

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

ANALYSIS AND FINDINGS

The Retailer Operations Division presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant 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 authorized the Appellant business on April 14, 2010, as a convenience store. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during an April 10, 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 very minimally stocked, small convenience store offering a very limited quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- The contractor estimated the store to be about 1,200 square feet with no food stored in a storage area out of public view based on information provided by the store's cashier.
- 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 1.0 feet by 2.5 feet consisting of a counter outside of a night window set into a plastic security wall with displays taking up counter space on both sides. The very small size of the checkout area would make it problematic to process large orders.
- The checkout area had one cash register, one POS terminal, and no scanner as evidenced by the store visit photographs and

- confirmed by the store's cashier.
- No food packages, bundles, case sales, bulk products, or other sales/promotions were evident that would explain the unusual transactions and no SNAP eligible cased items were available for sale.
 - The store had a very 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, and ineligible items.
 - Dairy items included: canned milk (4), milk drinks, fresh milk, margarine/butter (5), single serving sizes of ice cream, ice cream, cheese dip (1), and half and half (1).
 - Meat, poultry, or fish items included: single serving sizes of jerky, canned meat/poultry/fish (8), eggs (2 dozen), and packaged lunch meat (1).
 - There were no fresh vegetables and no frozen fruits or vegetables. Fresh fruit consisted of several bananas for sale at the checkout area.
 - The business had no fresh unprocessed meats or seafood, no frozen unprocessed meats or seafood, a very limited quantity and variety of processed meats (one packaged lunch meat, jerky, and eight cans/pouches of meat/poultry/fish), no processed seafood, no deli meats or cheeses, no packaged cheeses, only one cheese dip, only one salsa dip, no bacon, no hot dogs, no frozen entrees, only two dozen eggs, no yogurt, no sour cream, no fresh vegetables, no fresh fruits except for several bananas at the checkout counter, no frozen fruit or vegetables except for frozen boiled peanuts, no canned fruits or vegetables, only three loaves of bread, no rolls, no tortillas, no hot cereals, only four boxes of cold cereal, no baking mixes, no pancake mixes, no macaroni & cheese, only two packages of flour, only one bag of rice, only three containers of cooking oil (3), no dry pasta or noodles, no baby cereals, no baby juices, no infant formula, no diapers, a very limited quantity and variety of canned and packaged staple food items, no cocoa, no tea, no spices, and no expensive eligible food items.
 - Ineligible items included: tobacco, smoking accessories, alcohol, hot foods, lottery, gasoline, household products, paper products, pet products, auto products, health and beauty items, hats, clothing, phone accessories, newspapers, sunglasses, candles and jewelry while accessory foods included: un/carbonated drinks, candy, condiments, and coffee (4). There were also several types of heat&eat sandwiches and a microwave oven to heat them.
 - Signage was in English.
 - Most food items were priced with the majority of visible prices ending in .x9 cents. There were a very small number of items with a different pricing structure; specifically some of the single serving juices, sodas, and other drinks were priced at two for \$2.00, two for \$3.00, and two for \$4.00. Comments on the FNS store visit report by the contract reviewer specifically stated that most of the food prices ended in .x9 cents. A price ending in .x9 cents is the most common pricing structure for stores of this

type.

- The FNS store visit report listed the four most expensive items for sale in the store as being a five pound bag of frozen peanuts at \$9.99, an 18 pack box of Redline Energy drinks at \$9.99, beef jerky at \$6.99, and ice cream at \$5.99 based on responses provided by the store's cashier during the visit.
- The store was not a WIC vendor.
- Store hours were 6:00 AM-12:00 AM daily as confirmed by the store cashier during the store visit.

Unusual numbers of transactions ending in a same cents value

This attachment lists 63 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These 63 transactions include 45 transactions ending in the same cents value **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits. The FNS store report and photographs revealed no signs posted to indicate special food packages, bundles, case sales, or other sales/promotions that would explain the unusual number of transactions ending in these same cents values and no bulk items were available for purchase. The high percentage of same cent transactions combined with the large number of high dollar transactions is irregular and suspicious for this type store.

Appellant contends the same cents sales are because most of the workforce in the area is involved with landscaping or construction and with the hot weather year round these workers have a large affinity for energy drinks. The business sells some Spanish drinks by the case (coconut juice, guava juice, coco pine juice, etc.). Also, when there is a game or event at the stadium a lot of people in the area use their yard for parking and for selling water and energy drinks to the tailgate people. They are the main reason for selling drinks by the case. Cases of 8 ounce Red Bull sell for \$39.89, 12 ounce Red Bull for \$49.89, 16 ounce Rockstar for \$39.89, and 16 ounce Monster for \$39.99. There are a total of 211 transactions listed in the charge letter of which 89 transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C) exact price for a case of 24 twelve ounce cans of Red Bull energy drinks. Accordingly, during the 175 days of the review period, the retailer sold almost a case every other day. In addition, 41 of the 63 transactions listed in Attachment 1 are **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** again for cases of Red Bull **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in Attachment 1. There are only 22 listed transactions that were not purchases of cases of Red Bull.

Promotional materials for the previously mentioned cases of Red Bull are submitted as well as materials for cases of 24 eight ounce cans of Red Bull for \$39.89 and cases of 24 16 ounce cans of both Rockstar and Monster energy drinks along with materials for water and sundry products. Appellant provided examples of possible transactions ending in various amounts including some ending **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Additionally, part of the store's marketing strategy is to provide promotions to boost sales with deals in almost everything. The numbers are rounded to make it more attractive and sometimes a price outside

of normal is used such as 3 for \$3.33, 4 for \$4.44, or 5 for \$5.55. Appellant provided several examples that explain why some tickets end on the same cents (5 U.S.C. § 552 (b)(6) & (b)(7)(C)). Appellant provided several photographs showing 24 pack cases of energy drinks and water throughout the store in support of these contentions.

The inventory report and photographs from the April 10, 2017, FNS store visit show the business offered a very limited quantity and variety of SNAP eligible food items with the majority of its inventory in snacks, accessory foods and ineligible items. Additionally, the business carried no expensive eligible food items making it questionable that such a large number of high dollar value SNAP transactions could be for legitimate food purchases. Many food items at the Appellant business were priced with the majority of visible prices ending in .x9 cents which is the most common pricing structure for stores of this type. While there were a small number of single serving juices, sodas, and other drinks priced at two for \$2.00, two for \$3.00, and two for \$4.00, the limited quantities of these items would not account for the high dollar value transactions listed in this Attachment. No food packages, bulk products, bundles, case sales, or other sales/promotions of eligible items were evident during the store visit that would explain these unusual same cents transactions. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). When there are a disproportional amount of transactions ending in a same cent value, it appears that these transaction amounts are contrived and therefore, in the absence of any compelling rationale to the contrary, are indicative of trafficking. The photographs submitted by Appellant showing 24 pack cases of energy drinks and water located throughout the store were compared to the numerous photographs taken during the FNS store visit. The photographs taken during the FNS store visit show no 24 pack cases of energy drinks or water available for sale anywhere in the store. The three page store visit questionnaire completed by the contract reviewer includes a section where the four most expensive items available for sale at the store based on information provided by the store's cashier are listed. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It seems highly unlikely that the contract reviewer could miss numerous expensive 24 pack cases of energy drinks or water that were prominently placed throughout the store or that the store's cashier would neglect to mention these items when asked about the most expensive items sold by the store. Based on the photographic evidence as well as the pricing cited in the store questionnaire it is readily apparent that Appellant's contentions and photographs related to the sale of energy drinks and water were fabricated in an attempt to avoid the trafficking charges.

While some of the transactions in this Attachment may have been for legitimate staple food purchases, particularly those in the lower dollar amounts, there is insufficient evidence that these repeating same cent transactions are legitimate. When many transactions end in a same cents amount, it appears that these transaction amounts are contrived and therefore, in the absence of compelling evidence to the contrary, are suggestive of trafficking. As such, the transactions in this Attachment have not been adequately documented as legitimate and therefore

do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

High Dollar Value Transactions

This Attachment lists 148 individual EBT transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The substantial number of high dollar transactions is atypical for a convenience store and calls into question the legitimacy of these transactions. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Based on the inventory and pricing structure at the Appellant business, it seems implausible that there would be large numbers of high dollar value transactions in the same exact amounts and suggests that these amounts may have been contrived in an effort by store employees to obscure trafficking. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant business are also shopping at other nearby stores such as the three super stores and the 10 medium grocery stores located within a one mile radius of the Appellant business as well as at other full-line supermarkets and super stores located at a further distance from Appellant's location that offer a greater variety and quantity of SNAP eligible foods items for better or comparable prices than the 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)**.

Evidence also shows that the difference in the total SNAP transaction dollar volume, the average SNAP transaction amount, and the SNAP transaction count for Hillsborough County convenience stores during the review months and at the Appellant business is significant. **5 U.S.C. § 552 (b)(7)(E)**. Additionally, none of these nearby stores exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant business even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is a further indication that the SNAP transactions in this Attachment and the others do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

Regarding the high dollar value transactions, Appellant contends the business is a medium sized gas station located in the heart of West Tampa and in the center of the Latino community – a good location. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Appellant also repeated the same contentions previously made for Attachment 1

regarding the sale of large numbers of 24 pack cases of energy drinks and water. Appellant submitted eight undated photographs of store stock; the owner's May 2, 2017, reply to the Retailer Operations Division; a one page copy of a 2016 federal tax return; copies of two invoices for inventory purchases dated April 26, 2017; three pages of cash register reports showing the monthly average SNAP transaction amount for different months; and 13 statements from customers 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 the store's stock. An analysis of shopping patterns by the Retailer Operations Division shows that households in this Attachment are regularly shopping at much larger stores, and conducting transactions of large dollar amounts, yet are conducting comparable or higher dollar value transactions at the Appellant business. It would make no sense for a household that regularly shops at larger stores and apparently has no transportation limitations to spend large dollar amounts at the Appellant business since its cost of goods would be higher than that of larger stores such as supermarkets, super stores, or medium grocery stores.

Appellant's contentions regarding the sale of large quantities of 24 pack cases of energy drinks and water were discussed and refuted in the previous section. The FNS store visit could hardly be called a walk-thru or cursory, at best, as it includes the completion of a three page comprehensive questionnaire with interview questions answered by the store cashier, a detailed food inventory report listing the quantity and variety of foods in stock, a diagram of the store's layout that includes listing where specific foods and other items are located, and 36 dated color photographs. 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. The two invoices provided were both dated April 26, 2017, which is outside of the period under review and therefore provide no basis for either the store inventory or the transactions conducted during the period under review. Appellant's cash register printouts showing average SNAP transaction amounts for various months from October 2010 to March 2017 and the 2016 tax return provide no basis for dismissal of the current charges of violations or for mitigating their impact. The 13 signed customer statements were analyzed by the Retailer Operations Division. These form letter statements do not contain SNAP household account numbers, SNAP EBT card serial numbers, or the customer's address and some also had illegible writing making it impossible to definitively match 11 of the 13 statements to Florida SNAP recipients due to there being multiple recipients with similar names. The two statements that could be matched to SNAP recipients show great exaggeration in both the numbers of weekly transactions and the average purchase amount thereby questioning the validity and accuracy of the statements. Based on

this discussion, Appellant did not provide adequate evidence to support the legitimacy of the excessively large transactions in this Attachment.

It is further noted that SNAP redemptions at the Appellant business dropped significantly after receipt of the charge letter on April 28, 2017.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). A pronounced decrease in SNAP transactions immediately 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.

Other Contentions

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.

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 April 10, 2017, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant business during the review period. 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. 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 and second chances are not an authorized option.

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 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.

Appellant made no mention of how the business met any of the four criteria in either its response to the charge letter or in the request for administrative review and no documentation or other evidence of any kind, including written statements, was subsequently received from Appellant in support of a trafficking CMP. 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 two Attachments of EBT transaction data, the inadequacy of the store's staple food stock as observed during the store visit to support large transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type and larger stores in the county and state.

The retailer has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did

in fact occur as charged by the Retailer Operations Division. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, 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

October 26, 2017