

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

Houston Ave Ent 2017 Llc,

Appellant,

v.

Case Number: C0213544

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that a permanent disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Houston Ave Ent 2017 Llc (Appellant) by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1)(i) in its administration of the SNAP, when it imposed a permanent disqualification against Houston Ave Ent 2017 Llc on December 18, 2018.

AUTHORITY

7 U.S.C. 2023 and its implementing regulations at 7 CFR § 279.1 provide that “[A] food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS.

CASE CHRONOLOGY

In a letter dated November 13, 2018, the Retailer Operations Division informed the Appellant that Houston Ave Ent 2017 Llc was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270 –282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm."

In responses to the Retailer Operations Division of November 27, 2018 and December 6, 2018, the Appellant, through counsel, replied to the charges therein denying the trafficking allegations

and providing various explanations for the questionable SNAP transactions outlined in the November 13, 2018 Charge Letter.

After considering the Appellant's replies and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated December 18, 2018, informing the Appellant that Houston Ave Ent 2017 Llc was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations.

In a letter postmarked January 7, 2019, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's decision to permanently disqualify the firm from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated February 13, 2019.

STANDARD OF REVIEW

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

CONTROLLING LAW

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

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

... a disqualification under subsection (a) shall be ... permanent upon ... the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards ...

7 CFR § 278.6(a) states, inter alia:

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

7 CFR § 278.6(e)(1)(i) states:

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

7 CFR § 271.2 states, inter alia:

Trafficking means...The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone...

7 CFR § 278.6(f)(1) states, inter alia:

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

7 CFR § 278.6(i) states, inter alia:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations ...

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

(ii) Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence as specified in § 278.6(i), that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1). [Emphasis added].

(iii) If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such penalty. [Emphasis added].

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from April 2018 through September 2018. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were multiple transactions made from individual benefit accounts within a set period of time; and
- There were excessively large purchase transactions made from recipient accounts.

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

APPELLANT'S CONTENTIONS

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

In the replies to the Charge Letter and in the administrative review request, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant denies that trafficking of SNAP benefits took place at the store.
- The owner prides himself on operating the establishment by the law with respect to the products he sells and the services he offers his customers. For example, the Appellant passed an undercover compliance visit concerning the purchase of tobacco products by an under-aged individual. This is the first time that the Appellant has been cited for SNAP violations.
- The Appellant serves an immediate area which includes low income and multi-unit households, including a large government housing project. A significant number of the store's customers are pedestrians who must transport their purchases home on foot as they do not have regular access to a motor vehicle.
- The Appellant is a hybrid model of both a convenience store (i.e., beer, soft drinks, and snacks) and a grocery store (i.e., meat, cheese, infant formula, rice, soup, cereal, and some vegetables with said products offered in both small and large units) in one location. The store offers a broad range of food items with low cost items such as snacks and individual drinks to more expensive items such as bulk sugar, bulk rice, infant formula, and cooking oil. The Appellant is the only store in the neighborhood open 24 hours per day; therefore, it is not unusual for this store to have customers that purchase products **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.
- Most of the SNAP transactions included in Charge Letter Attachment 1 **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** such that the individual handling a transaction on one shift did not handle a transaction made on the shift immediately following thereafter. Thus, for many of the flagged transactions, different employees would have handled some (or all) of the subsequent transactions without any knowledge of the initial transaction. Of the 10 flagged sets, two sets are limited to only two transactions. It is not unreasonable for a customer to forget or fail to purchase a necessary item or items and have to make a second trip to the subject store. Also of note is that neither of the cardholders involved in these particular flagged sets were listed in any of the other sets, thus indicating that such an event was not a regular occurrence or practice by these customers. Of the remaining 17 sets, these occurred over one or more employee shift

changes. A number of the flagged transactions occurred at night or in the early morning hours. During these hours, households are more likely to entertain guests and serve additional food items. Such a practice has a profound effect for the Appellant as it is the only food store in the neighborhood open 24 hours a day. Two of the flagged transaction sets include three and six transactions per set. Since these sets occurred only twice in six months, these are not, in and of themselves, indicative of questionable SNAP transaction activity.

- With regard to the SNAP transactions included in Charge Letter Attachment 2, considering the unique aspects of the neighborhoods immediately surrounding the Appellant and the shopping habits of a typical household, the great majority of these flagged SNAP transactions are not, in fact, excessive. While a statistical analysis of a typical convenience store may indicate that food purchases **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, such is not the case with respect to this store. Given the wide variety of food products offered by the Appellant, especially items sold in bulk packaging, customers can and do purchase food and drink items which, individually and collectively **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. A sample of such items includes, but is not limited to, the following:

○ Jasmine Rice (50 lbs.)	\$37.59
○ Enfamil A.R. Infant Formula	\$29.99
○ Domino Sugar (25 lbs.)	\$28.98
○ Nido Baby Formula	\$28.60
○ Gerber Milk Formula	\$27.28
○ Royal Basmati Rice (20 lbs.)	\$24.07
○ Gerber Smooth Formula	\$23.83
○ Mazola Corn Oil (Large)	\$23.40
○ Similac Infant Formula	\$22.10
○ Organic Olive Oil	\$18.99
○ Enfamil Infant Formula	\$18.99
○ Long Grain Rice (25 lbs.)	\$15.99
○ Frozen Chicken (3.5 lbs.)	\$11.59
○ One (1) Gallon Milk	\$4.99
○ Bacon	\$4.99
○ Cheerios Cereal	\$4.92
○ Frosted Flakes	\$4.73
○ Gerber Graduate Lil Biscuits	\$3.23
○ Half Gallon Milk	\$2.99
○ Beans	\$1.39-2.59
○ Soft Drinks (2 Liter)	\$1.99

- A permanent SNAP disqualification will impose a hardship to area customers as there are limited grocery alternatives.
- FNS did not previously advise the Appellant of the possibility that violations were occurring at the store and the possible consequences of violating the regulations.
- A permanent SNAP disqualification is a harsh penalty. The Appellant requests that FNS reverse its decision to permanently disqualify the firm from the SNAP as it did not intentionally violate the SNAP regulations. Or in the alternative, the Appellant requests

that FNS issue the firm a Warning Letter or impose a shorter period of SNAP disqualification.

- The Appellant requests that FNS impose a civil money penalty in lieu of a permanent SNAP disqualification as the owner was “not aware of, did not approve of, did not benefit from, and/or was not in any way involved in” any conduct that constituted trafficking as defined in the SNAP regulations, nor has he or does he approve of any such conduct.

In support of the Appellant’s contentions, the following documents were submitted to FNS:

- Photos of food stock; and
- Letter dated November 13, 2018 from the Georgia Department of Revenue Alcohol & Tobacco Division regarding an undercover compliance visit.

ANALYSIS AND FINDINGS

Store Characteristics

FNS authorized Houston Ave Ent 2017 Llc as a convenience store on December 28, 2017. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an October 15, 2018 store visit conducted by a FNS contractor to observe the nature and scope of the firm’s operation, stock, and facilities. This information obtained from the store visit was also used to ascertain if there were justifiable explanations for the firm’s irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Approximately 1,040 square feet in size with no additional food storage outside of public view;
- No shopping carts and one hand-held basket available for customer use;
- One cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- Limited check-out counter space and it is surrounded by a Plexiglas barrier;
- No optical scanners;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals;
- No meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers;
- No indication from the store visit report that the firm has a special pricing structure, such as prices ending in \$x.x9 and/or \$x.00;
- Transaction totals are not rounded up or down at the checkout counter;
- The Appellant did not meet the requirements for participation in the SNAP under Criterion A as it was deficient in the dairy products staple food category;
- No expensive (costing \$5.00 and above) food items in stock;

- No fresh or frozen meats, poultry, or seafood;
- No frozen fruits or vegetables;
- Deli meats and cheeses were not sold by the pound;
- Hot foods were not sold;
- Meat items included units of canned/potted meat, eggs, and meat jerky;
- Dairy included milk only;
- Fresh produce stock consisted of a few apples;
- Other staple foods available for purchase include such items as pasta, rice, cereal, flour, baking mix, corn meal, and canned goods;
- Much of the remaining food stock consists of accessory foods such as candy, carbonated and non-carbonated drinks, vegetable oil, sugar, and condiments; and
- Ineligible nonfood items included tobacco products, health and beauty items, paper products, household cleaning supplies, alcohol, gasoline, automotive supplies, incense, and gaming machines.

The available inventory of SNAP eligible food at the time of the store visit showed food stock that would be typical of a convenience store, where households normally purchase a limited number of items. There was little indication that SNAP households would be inclined to regularly visit the store to purchase large quantities of groceries. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of similar sized competitors.

Charge Letter Attachments

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

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Based on this empirical data, and in the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the most likely explanation for "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges is trafficking. Transactions having such characteristics sometimes do have valid explanations that support that they were the result of legitimate purchases of eligible food items. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, the Retailer Operations Division determined that the Appellant's contentions did not outweigh the evidence. The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

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

This Charge Letter Attachment documents 19 sets of transactions (65 total transactions) **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits to meet the parameters of this scan. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions noted in the Charge Letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of the Appellant's stock and facilities and are therefore indicative of trafficking. The photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Houston Ave Ent 2017 Llc multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. The second, third, fourth, fifth, and six transactions in each set are too large to consist of forgotten items.

The Appellant has provided several contentions regarding the SNAP transactions included in Charge Letter Attachment 1, including a claim that most of these SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** such that the individual handling a transaction on one shift did not handle a transaction made on the shift immediately following thereafter. Thus, for many of the flagged transactions, different employees would have handled some (or all) of the subsequent transactions without any knowledge of the initial transaction. With regard to this contention, the fact that different employees may have handled the SNAP transactions included in this Charge Letter Attachment does not validate that the transactions were for legitimate purchases of staple foods and not the result of trafficking. That different employees may have handled the transactions in the Attachment indicates that more than one employee was most likely involved in the trafficking of SNAP benefits during the review period.

FNS acknowledges the Appellant's contention that it serves an immediate area which includes low income and multi-unit households, including a large government housing project. However, while there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, the SNAP transactions noted in this Charge Letter Attachment are questionable because they display characteristics of use inconsistent with the nature and extent of the store's stock and facilities and are indicative of trafficking. Although it is not uncommon for customers to conduct more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts.

The Appellant contends that it is a hybrid model of both a convenience store (i.e., beer, soft drinks, and snacks) and a grocery store (i.e., meat, cheese, infant formula, rice, soup, cereal, and some vegetables with said products offered in both small and large units) in one location. The Appellant also contends that being the only neighborhood store open 24 hours increases the firm's food sales. However, the store visit report and photos indicate that Houston Ave Ent 2017 Llc is not set up to provide for all of one's food needs with no fresh or frozen meats, poultry, or

seafood, no frozen fruits or vegetables, only one variety of fresh produce in a limited quantity, and lacks an abundant depth and breadth of staple foods. In fact, most of the store's shelves were scantily filled or empty and stocked only a few food items. The store's coolers were primarily stocked with alcoholic beverages and drinks. Also, there were no expensive (costing \$5.00 and above) staple foods in stock. The store visit observations also indicate that there is no evidence of a price advantage or custom or special services rendered at the subject store that are not offered at other authorized SNAP stores in the area.

The Appellant contends that it offers more expensive food items for sale such as bulk sugar, bulk rice, infant formula, and cooking oil. However, the store visit report and photos of October 15, 2018 indicate that there were no signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals, no evidence of meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices, and no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers. In addition, there were no expensive (costing \$5.00 and above) staple foods in stock. The store visit report and photos indicate that Houston Ave Ent 2017 Llc is approximately 1,040 square feet in size with no additional storage area outside of public view. It is irregular for convenience stores to have purchases such as those cited, especially when, as indicated by the store visit report and photos, Houston Ave Ent 2017 Llc does not stock any high priced food items so all of the food items stocked at the store are low priced items.

Sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, there are 13 SNAP authorized retailers (including a supermarket) located within a 1.0 mile radius of Houston Ave Ent 2017 Llc that can meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than Houston Ave Ent 2017 Llc and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store. The Appellant contends that a significant number of the store's customers are pedestrians who must transport their purchases home on foot as they do not have regular access to a motor vehicle. However, the record indicates that SNAP customers who shopped at Houston Ave Ent 2017 Llc during the review period also shopped at other area grocery stores and, therefore, transportation to other stores is not an issue for these customers. Therefore, lack of access to other authorized stores does not appear to be an explanation for Houston Ave Ent 2017 Llc's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

No banking records, no Federal business tax submissions, or state sales tax forms were advanced to support that the Appellant was not trafficking. The owner provided no recipient affidavits to attest to shopping behaviors of flagged households at the Appellant. No vendor invoices of eligible foods were provided to support the Appellant's SNAP redemption volume. No itemized cash register tapes were advanced for review.

Unfortunately, the Appellant has not provided any evidence to show that the transactions listed in Attachment 1 were legitimate purchases of eligible foods. The arguments presented by the Appellant hold little weight without some kind of evidence to substantiate its claims.

Excessively Large Purchase Transactions (Charge Letter Attachment 2)

This Charge Letter Attachment lists 452 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These large transactions are not consistent with a convenience store in Bibb County, Georgia. During the review period, the average transaction amount for a convenience store in Bibb County, Georgia was \$6.15. The average transaction in Attachment 2 is more than 4.5 times larger than the average purchase amount for this store type. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar sized competitors. These large transaction amounts are also not consistent with the store's inventory. There were no fresh or frozen meats, poultry, or seafood and the store's fresh produce stock consisted of a few apples. Most of the food products in Houston Ave Ent 2017 Llc consisted of accessory food items such as snack foods, candy, and drinks and inexpensive staple foods such as canned and packaged goods. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant contends that regarding the SNAP transactions included in Charge Letter Attachment 2, considering the unique aspects of the neighborhoods immediately surrounding the Appellant and the shopping habits of a typical household, the great majority of these flagged SNAP transactions are not, in fact, excessive. While a statistical analysis of a typical convenience store may indicate that food purchases **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, such is not the case with respect to this store. Given the wide variety of food products offered by the Appellant, especially items sold in bulk packaging, customers can and do purchase food and drink items which, individually and collectively **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. In support of these contentions, the Appellant provided a list of food items with prices and photos of food stock.

With regard to these contentions, the food stock and facilities of the Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at convenience stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. The Appellant contends that the large transactions are not the result of trafficking of SNAP benefits. However, it is rare for a convenience store such as Houston Ave Ent 2017 Llc to have purchases like those included in Attachment 2 to the Charge Letter. This Attachment cites 452 EBT transactions during the six month period of investigation **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

The store visit report and photos of October 15, 2018 indicate that there were no signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals, no evidence of meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices, and no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers. In addition, there were no expensive (costing \$5.00 and above) staple foods in stock.

The Appellant provided several food stock photos in support of its contention that it offers a variety of foods at various prices. However, the photos provided by the Appellant appear to be contrived in an effort to support its contentions. The FNS store visit report and photos of October 15, 2018 show that Houston Ave Ent 2017 Llc offers a minimal stock of SNAP eligible

foods with no fresh or frozen meats, poultry, or seafood, no frozen fruits or vegetables, a minimal variety and amount of canned vegetables/fruits, and only a few apples as its fresh produce stock. In fact, most of the store's shelves were scantily filled or empty and stocked only a few food items. The store's coolers were primarily stocked with alcoholic beverages and drinks. The store visit inventory report and photos also show no expensive eligible foods in stock that would account for these large amounts as well as showing the store has limited checkout counter space and no shopping carts and only one hand-held basket in which to transport the large number of items required to make up these large transaction amounts. Without these, it is unlikely that such large dollar value transactions could be for actual food purchases and more likely they are trafficking.

The record shows that there are 13 SNAP authorized retailers (including a supermarket) located within a 1.0 mile radius of Houston Ave Ent 2017 Llc that can meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than Houston Ave Ent 2017 Llc and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store. An analysis of the shopping patterns for all of the SNAP households listed in this Attachment shows that the majority of the households shopping at Houston Ave Ent 2017 Llc have access to transportation and that all are regularly shopping at a variety of larger stores, including super stores and/or supermarkets, located nearby and at several miles distance from the Appellant's location. While Houston Ave Ent 2017 Llc does offer some staple food items, SNAP recipients are already shopping at other larger SNAP retailers located in proximity to the Appellant's business offering a greater quantity and variety of products, including fresh meats/seafood and produce, at lower prices. Therefore, the store has nothing to attract SNAP customers as there are no special or custom services offered.

5 U.S.C. § 552 (b)(7)(E).

Lastly, the case record documents that the Retailer Operations Division conducted a detailed analysis of four SNAP households identified in the Charge Letter to analyze their shopping patterns at Houston Ave Ent 2017 Llc compared to their shopping patterns at other SNAP authorized stores. Each of these households had access to, and shopped at larger stores including super stores and/or supermarkets. It is obvious that these SNAP households had transportation available to them to reach these other authorized stores. However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at Houston Ave Ent 2017 Llc **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of shopping at the larger stores where they conducted much smaller SNAP purchases. It is highly unlikely that a convenience store with minimal staple foods would have legitimate SNAP transactions greater than these larger and better stocked stores.

The burden to disprove trafficking rests with the Appellant. In this matter, insufficient evidence was advanced to support the contention. No itemized cash register receipts were provided. No vendor invoices to document eligible items sufficient to cover the Appellant's SNAP redemptions were provided. No customer statements were provided to explain the shopping behaviors of flagged households at the Appellant. No Federal or state business tax submissions were advanced. No business banking records were provided.

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the Charge letter. Therefore, based on this empirical data, and in the absence of credible evidence for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation. Nevertheless, transactions having such characteristics do sometimes have valid explanations that support that they were the result of legitimate purchases of eligible food items, and this is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, however, the Retailer Operations determined that the Appellant’s contentions did not outweigh the evidence. Assertions that the firm has not violated program regulations, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations.

In summary, the store’s layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding those of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts and/or hand-held baskets support the Retailer Operations Division’s determination. It is not plausible that the store’s customers are carrying large amounts of food around the store without the benefit of shopping carts and/or hand-held baskets. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on the preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 2 are more likely than not the result of trafficking in SNAP benefits.

Denial of Charges

Regarding the Appellant’s argument that it denies the trafficking allegations, this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is, as noted above, to determine whether the Appellant demonstrates by a preponderance of the evidence that the permanent disqualification should be reversed. In this case, therefore, if the Appellant demonstrates by a preponderance of the evidence that trafficking did not occur in the Appellant’s firm, then trafficking will be considered not to have occurred 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.

No Prior Violations

The Appellant contends that the owner prides himself on operating the establishment by the law with respect to the products he sells and the services he offers his customers. For example, the Appellant passed an undercover compliance visit concerning the purchase of tobacco products by an under-aged individual. This is the first time that the Appellant has been cited for SNAP violations. In support of its contentions, the Appellant provided FNS with a letter dated November 13, 2018 from the Georgia Department of Revenue Alcohol & Tobacco Division

regarding an undercover compliance visit. However, a record of participation in the SNAP with no previously documented violations does not constitute valid grounds for mitigating the impact of the present serious determination of trafficking. While the results of the Appellant's tobacco compliance visit are commendable, they have no bearing on the present case of SNAP trafficking.

Customer Hardship

The Appellant contends that a permanent SNAP disqualification will impose a hardship to area customers as there are limited grocery alternatives. 7 CFR § 278.6(f) of the SNAP regulations provides for civil money penalty assessments in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs. However, this regulation also sets forth the following specific exception to such assessments there under: "A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification". Therefore, since this case involves a permanent disqualification action, the civil money penalty provision is not applicable to the present case.

No Warning Provided

The Appellant contends that FNS did not previously advise it of the possibility that violations were occurring at the store and the possible consequences of violating the regulations. 7 CFR § 278.6(d)(2) and (3) of the SNAP regulations provides that "The FNS office making a disqualification or penalty determination ... shall consider ... any prior action ... to warn the firm about the possibility that violations are occurring..." The citation simply requires FNS to consider any prior warnings when determining a sanction. It does not require FNS to give such warnings. FNS did not consider prior actions to warn the Appellant about the possibility that violations were occurring because there were no prior warnings during the review period. The evidence considered by the Retailer Operations Division included the raw data of questionable transactions and information obtained during the aforementioned store visit conducted on October 15, 2018.

Reconsideration of Imposed Penalty

The Appellant contends that a permanent SNAP disqualification is a harsh penalty. The Appellant requests that FNS reverse its decision to permanently disqualify the firm from the SNAP as it did not intentionally violate the SNAP regulations. Or in the alternative, the Appellant requests that FNS issue the firm a Warning Letter or impose a shorter period of SNAP disqualification.

However, the Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that "... a disqualification ... shall be permanent upon ... the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards ...". In keeping

with this legislative mandate, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked.

CIVIL MONEY PENALTY

The Appellant requests that FNS impose a civil money penalty in lieu of a permanent SNAP disqualification as the owner was “not aware of, did not approve of, did not benefit from, and/or was not in any way involved in” any conduct that constituted trafficking as defined in the SNANP regulations, nor has he or does he approve of any such conduct.

In the November 13, 2018 Charge Letter the Appellant was informed by the Retailer Operations Division that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000 in lieu of permanent disqualification of a firm for trafficking. Per Section 278.6(i) of the SNAP regulations, four criteria must be met in order to be considered for a trafficking civil money penalty. If requesting a trafficking CMP, an Appellant must meet each of the four criteria listed and provide the documentation as specified within ten days of the Appellant’s receipt of their Charge Letter. As specified in 7 CFR § 278.6(i), in determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following four criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in 7 CFR § 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 violations(s) occurred prior to the occurrence of violations cited in the Charge Letter;

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in 7 CFR § 278.6(i)(2); and

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.

If the Appellant’s request for a trafficking CMP and the required documentation are not submitted on time, it will lose its right for any further consideration for a trafficking CMP. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) 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**, the firm shall not be eligible for such a penalty”. The regulations do not provide the agency discretion to extend the time within which documentation and evidence in support of a trafficking civil money penalty may be submitted.

In the request for administrative review of January 7, 2019 (i.e., **past the required 10 day timeframe to request consideration for a civil money penalty in lieu of permanent disqualification for trafficking**), the Appellant requested consideration of a civil money penalty in lieu of permanent disqualification. However, the Appellant provided no supporting documentation in support of its request.

The Retailer Operations Division determined that Appellant was not eligible for a trafficking

civil money penalty in lieu of a disqualification under 7 CFR § 278.6(i) because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. 5 U.S.C. § 552 (b)(7)(E).

Therefore, the Retailer Operations Division's decision not to impose a civil money penalty in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

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

The record has yielded no indication of error or discrepancy in the reported findings by the Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Therefore, the decision to impose a permanent disqualification from participation in the SNAP against Houston Ave Ent 2017 Llc is sustained.

RIGHTS AND REMEDIES

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

Under the Freedom of Information Act, FNS is releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

LORIE L. CONNEEN
Administrative Review Officer

May 2, 2019