

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

Houston Food Market,

Appellant,

v.

Case Number: C0211058

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification against Houston Food Market (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant on September 17, 2018.

AUTHORITY

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

CASE CHRONOLOGY

By letter dated August 28, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in February 2018 through July 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant

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

Appellant, through counsel, responded to the charges in a letter dated September 10, 2018, that declined a CMP. The Retailer Operations Division notified Appellant by letter dated September 17, 2018, that the firm was permanently disqualified from participation as a SNAP retailer in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter dated September 28, 2018, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. No subsequent correspondence was received.

STANDARD OF REVIEW

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

CONTROLLING LAW

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

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

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

7 CFR §278.6(i) states: “FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.”

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

SUMMARY OF THE CHARGES

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

1. There were an unusual number of transactions ending in a same cents value.
2. Multiple transactions were made from individual benefit accounts in unusually short time frames.
3. Excessively large purchase transactions were made from recipient accounts.

APPELLANT’S CONTENTIONS

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

- The firm is 4,800 SF and includes a large meat counter, meat display cases, and storage areas. There is a butcher onsite every weekday from 9 AM-5 PM;
- The firm is in a poor area with a very high crime rate. Many residents do not own vehicles so walk or bike to the store. If they do have a vehicle, it is shared by several adults. Many households have multiple minor children and receive more 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits. Residents likely buy all of their meat each month as there are no grocery stores nearby that sell meat with the closest store being a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) located 0.9 miles away;
- Appellant provided an example of a resident who lives two blocks away with six children and no vehicle. She usually buys most of her meat each month at the firm because she can walk to it. She sometimes shops more than once per day or family

members will shop on the same day at different times as walking limits what can be carried or other members may want to choose their own food;

- The owner and three others are the only cashiers and all are mature adults. The owner has given verbal instructions to the other cashiers and had them watch the SNAP video and the Training Guide. All are well-versed in SNAP rules and know what can and cannot be purchased using SNAP and that benefits cannot be traded for cash or other consideration. They also know that non-household members are not allowed to use a certain household's EBT card. The owner has never seen any of the other cashiers allow such purchases and has never knowingly allowed such purchases himself. The owner and other cashiers as well as the owner's separated wife have submitted affidavits stating they have no knowledge of any violations;
- The firm is not engaging in trafficking. The same cents violations are because many common items are priced at even dollar amounts so nobody has to mark each item with the price or deal with price-checking and making change on cash sales. Photos submitted show signage listing even dollar prices for food and non-food items. Additionally, many national vendors price their items in even dollar amounts or at multiple items for an even dollar amount. An item priced at \$0.59 or two for \$1.00 will almost always result in the customer buying two. Customers also buy a lot of meat and the firm offers value packs at \$35.00, \$40.00, \$80.00, and \$100.00. Almost half of the transactions listed are for the same amounts as the value packs. The firm sells many value packs every week and sometimes more than one per day. Clerks also may round down totals that are nine cents or less to the even dollar for recognized customers. This also helps with the daily sales reporting which is done by hand;
- There is nothing the firm can do if a customer wants to make multiple purchases of eligible items using SNAP. Customers may forget one or two items after checking out and return to make another purchase. Also, different family members may shop on the same day using the same card. Since many customers walk they must make multiple trips since they can only carry so much food in one trip;
- The excessively large transactions amount to less than 18 per month and since the firm is the only grocery with a meat market and butcher, these are not excessive. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The 17 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) reflect the two to three sales each month of the large family value pack that includes 80 pounds of meat;
- The firm has seen a drop in sales the last couple of years due to increased competition from newer and nicer stores in the more gentrified areas of the neighborhood even though they don't sell meat. The firm survives because of the people in the immediate area who do not have transportation and rely on the firm for their meats and other foods. Because of the lack of revenue, the firm cannot afford to pay the CMP; and,
- The owner and employees depend on the firm's revenues to support themselves and their families and have sworn they never knowingly violated any rules or regulations. The firm also serves an important role for nearby SNAP recipients as it is the only store selling affordable good-quality meat within about a mile. Accordingly, it is requested that the charges be dismissed.

Appellant submitted affidavits from the owner, his spouse, and his cashiers; a copy of the firm's business application; a property appraisal; seven undated color photos of the firm's exterior and

meat cases; two pages of maps showing nearby groceries; two undated color photos of nearby houses; 24 undated color photos of store pricing; four undated color photos of value pack meat prices; and a copy of the firm's daily sales summary sheet in support of these contentions.

ANALYSIS AND FINDINGS

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

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

Store Background and FNS Store Visit

FNS initially authorized the firm on April 23, 2013. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a March 22, 2018, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a good-sized small grocery store offering a limited quantity and variety of staple foods and carrying no other unique items or offering any distinctive services. There were little or no ethnic or specialty food items.
- The store visit report and photos showed no shopping carts or hand baskets for customer use thus severely limiting the amounts of food that could be moved to the checkout.
- No bundles, case sales, bulk items, or other sales were evident that would explain the unusual transactions and no cased items were available for purchase except for canned/bottled drinks.
- The store visit report specifically noted that the firm was not a specialty store and that there were no fruit and vegetable boxes for sale. The firm did offer five different meat packages ranging in price from \$16.99-\$44.99.
- The checkout area was a night window set into a security wall with an area approximately 2.0 feet wide and 1.0 foot deep for customers to place their purchases

that would make it problematic to process large orders. The checkout counter had a cash register, no optical scanner, and a POS terminal as confirmed by the cashier.

- The firm had a limited stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in soda, snacks, single serving Ramen noodle soups, and other drinks as well as many ineligible items.
- There were two large meat display cases, one of which was empty, and a butcher area in the rear. The butcher area contained a commercial slicer, a meat saw, and a commercial scale. The meat saw was unplugged, had the safety plate removed, and appeared to be either inoperable or not frequently used. There were five hanging signs listing the meat packages available ranging in price from \$16.99-\$44.99.
- The firm had limited quantities and varieties of fresh unprocessed meat, no fresh unprocessed seafood, limited quantities and varieties of frozen unprocessed meat, no frozen unprocessed seafood, limited quantities and varieties of processed meats (canned meat, poultry, fish; deli meat-ham and salami only, hot dogs, sausages, and jerky), no bacon, no packaged lunch meats, no frozen entrees, no frozen dinners, eight cartons of eggs, an extremely limited selection of fresh fruit and vegetables (four lettuce, three bananas, 12 apples, 10 onions, one small bag of potatoes, 14 small loose potatoes, and green peppers), no frozen fruits or vegetables, no packaged nuts, an extremely limited selection of canned soups, a very limited quantity and variety of canned and packaged staple food items, one deli cheese, no packaged cheese, no yogurt, no sour cream, no butter, two canned milk, fresh milk, single serving milk drinks, several margarine, eight bread, no rolls, no pitas, five packages of tortillas, no tostadas, no corn meal, flour, sugar, rice, dried beans, cold cereal, single serving cold cereal, seven packages of hot cereals, many single serving Ramen noodle soups, canned pasta, dry pasta, dry noodles, single serving mac&cheese, mac&cheese, baking mixes, cooking oil, coffee, no tea, no cocoa, no baby foods, no baby juices, no baby cereals, no infant formula, and no expensive staple food items other than the five meat packages priced from \$16.99 to \$44.99.
- Ineligible items included: tobacco, alcohol, lottery, household products, paper products, pet products, auto products, health and beauty items, two ATMs, hot drinks, incense, clothing, and five gambling video games while accessory foods included: candy, spices, condiments, cooking oil, sugar, snacks, single serving ice cream, baking mixes, coffee, and un/carbonated drinks.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- The firm's hours of operation were open 24/7 per the store cashier. The cashier also stated that the firm did take phone orders, did not take online grocery orders; did not deliver groceries; did not round price totals up/down, and did not have an unusual pricing structure with most product prices not ending in .x9 cents.
- Most food items were priced with all visible food prices ending in .x9 cents except for a very few items priced differently such as some single serving drinks priced at two for \$3.00, one brand of margarine priced at \$2.00, Hamburger Helper priced at \$2.25, and three meat packages (Family Meat package #1, Family Meat package #2, and the Value Meat package) all priced at \$34.00. The FNS store visit report was completed in conjunction with the store cashier and specifically stated that most of the food prices ended in .x9 cents. A price ending in .x9 cents is the most common pricing structure for

stores of this type. This fact was also supported by the many store visit photos showing staple foods, accessory foods, and ineligible items all with prices ending in .x9 cents.

- The FNS store visit report listed the four most expensive food items costing more than \$5.00 for sale in the store as being the BBQ Meat package priced at \$44.99, the Family Meat package #1 priced at \$34.00, the Family Meat package #2 priced at \$34.00, and the Value Meat package priced at \$34.00. There also was a Lunch Box package priced at \$16.99. This listing of the most expensive items was provided by the store cashier during the store visit.
- The firm was not a WIC vendor.
- The store visit photos and report showed many empty or marginally stocked shelves, coolers, freezers, etc. The photos also showed dust on canned and packaged goods and thick frost in the chest freezers indicative of a slow turnover of stock.
- The quantity and variety of the store's staple food inventory was less than that seen during the previous FNS store visit on March 28, 2013.
- It also is noted that the firm had insufficient inventory in the dairy staple foods category making the firm ineligible for authorization as a SNAP retailer under Criterion A.

Unusual numbers of transactions ending in a same cents value

This attachment lists 126 transactions ending in the same cents value of .00 cents. Transaction amounts include 67 transactions **f 5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. They also include an unusually high number of transactions for the exact same dollar amount such as: 17 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** none of which are supported by store inventory or pricing. 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 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 same cents high dollar transactions is irregular and suspicious for this type store.

Appellant contends the same cents transactions are because many common items are priced at even dollar amounts so nobody has to mark each item with the price or deal with price-checking and making change on cash sales. Photos submitted show signage listing even dollar prices for food and non-food items. Additionally, many national vendors price their items in even dollar amounts or at multiple items for an even dollar amount. An item priced at \$0.59 or two for \$1.00 will almost always result in the customer buying two. Customers also buy a lot of meat and the firm offers value packs at \$35.00, \$40.00, \$80.00, and \$100.00. Almost half of the transactions listed are for the same amounts as the value packs. The firm sells many value packs every week and sometimes more than one per day. Clerks also may round down totals that are nine cents or less to the even dollar for recognized customers. This also helps with the daily sales reporting which is done by hand.

The inventory report and photos from the 2018 FNS store visit show the firm offered a limited stock of staple foods that included few expensive staple food items on the day of the visit making it questionable that such a large number of high dollar SNAP transactions could be for legitimate

food purchases. The visit report, completed in conjunction with the store cashier, specifically notes that the firm's pricing structure has the majority of food prices ending in .x9 cents and that the firm does not round price totals up or down. The firm's pricing structure is further supported by the many store visit photos showing staple foods, accessory foods, and ineligible items all with prices ending in .x9 cents. The purchase of several items with prices ending in .x9 cents would most likely not result in a total ending in a same cents value of .00 cents as multiples of nine seldom have a value ending in this amount making it statistically impossible that this many store transactions would end in this amount with legitimate food purchases. This is further supported by a number of high dollar value transactions in the third Attachment that end in .09 cents or less that were not rounded to .00 cents. Most significantly though is the fact that the FNS store visit photos show only five meat packages with three priced at \$34.00, one priced at \$44.99, and the fifth priced at \$16.99. There are no packages at any of the prices alleged by Appellant (5 U.S.C. § 552 (b)(6) & (b)(7)(C)). Additionally, the signage in Appellant's photos taken after the review period for the meat packages looks much newer than the signage in the FNS store visit photos taken during the review period. Appellant's photos of handwritten signs with prices ending in .50 or .00 cents are also not evident in the FNS photos. These facts refute Appellant's contentions and strongly suggest that its photos were fabricated in an attempt to lend credibility to its contentions and thereby avoid the permanent disqualification. That the photos were fabricated is further supported by an FNS photo showing cartons of eggs with \$2.49 written on the carton itself as does the photo submitted by Appellant, but Appellant's photo also shows a new sign on the display case stating that eggs are \$2.50.

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.

Multiple transactions in unusually short time frames

This Attachment documents 159 individual transactions in 68 sets of two or more transactions conducted by 50 different households in a short period of time. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The dollar amounts of subsequent transactions in each set are substantial and nearly equal or exceed the dollar amount of the initial transaction in 53 of the 68 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). One set is comprised of five individual transactions, five sets are comprised of four transactions, and 10 sets are comprised of three transactions while the remaining 52 sets are comprised of two individual transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by store inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends there is nothing the firm can do if a customer wants to make multiple purchases of eligible items using SNAP. Customers may forget one or two items after checking out and return to make another purchase. Also, different family members may shop on the same day using the same card. Since many customers walk they must make multiple trips since they can only carry so much food in one trip.

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of a small grocery store's stock and facilities and are thus indicative of trafficking. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out or of household members/friends shopping together and making separate purchases as 53 of the 68 sets occur 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The transaction sets also do not contain the characteristics of a household returning later in the day or sending their child to purchase a forgotten item or two as all of the sets have subsequent transactions in amounts exceeding 5 U.S.C. § 552 (b)(6) & (b)(7)(C) with 59 of the 68 sets having subsequent transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C), far more than the cost of a forgotten item or two.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that subsequent transaction dollar amounts are substantial in these transaction sets and that all of the sets in this Attachment 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average small grocery store SNAP transaction amount in Harris County during the review period was \$21.07. These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby like type grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review.

The Retailer Operation Division's analysis of the shopping patterns for households listed in this Attachment shows that they have ready access to transportation as evidenced by their shopping at a variety of larger food stores located nearby and at a distance from Appellant's location, including a variety of super stores and supermarkets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Other households had similar shopping patterns which brings- up the question of why would households who are regularly shopping at numerous larger and better stocked stores, both nearby and at a distance, elect to conduct multiple purchases at a minimally stocked small grocery store that carries no unique foods or offers any special services. Appellant's contentions fail to offer any explanation or rationale for these unusual and suspicious shopping patterns. Common sense dictates that it is improbable that households with limited cash resources would choose to travel these distances if their purchases consisted solely of eligible food items that could be purchased at any of the super stores, supermarkets, or other larger stores they were already regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant business and the multiple transactions were attempts by to obscure trafficking by dividing a large dollar value transaction into a series of smaller dollar value transactions. This is a method used by stores to avoid high dollar transactions that cannot be

supported. This is further supported by the fact that 28 of the 50 households in this Attachment shopped at a super store or supermarket within one day of conducting multiple transactions at the Appellant firm.

SNAP benefit transactions involving legitimate food purchases require many steps: 1) the customer waiting for the previous customer to pick-up their purchases and leave the checkout area; 2) the customer making multiple trips bringing items to the checkout counter for large purchases since the firm 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 involves 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 legitimate large SNAP purchases. One can readily surmise that while such transactions may be completed in succession, performing these processes on large transactions is not done rapidly. The amount of time required is generally proportional to the dollar amount of the transaction; typically, the larger the dollar amount the longer the time period between transactions. The limited counter space as well as manually key-entering lengthy EBT card numbers adds additional time to transactions.

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

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

High Dollar Value Transactions

This Attachment lists 176 individual EBT transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The substantial number of high dollar transactions is uncharacteristic for a grocery store offering a limited stock of staple foods and calls into question the legitimacy of these transactions. The transactions are also substantially higher than the average SNAP transaction amount of \$21.07 for this store type in Harris County. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores, located nearby as well as at a distance from Appellant's location, that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the Appellant firm. These high dollar transactions remain questionable when considering the proximity of other stores that would be better shopping options for consumers. Based on their shopping patterns, transportation does not appear to be an issue for these households. Yet, these recipients continue to shop and spend suspicious high dollar amounts at the Appellant firm, where the eligible food stock is limited, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of their purchases at larger food stores. Statistically, one-third of the households in this Attachment shopped at a super store or supermarket the same day as conducting a large dollar transaction at the Appellant firm while more than half of the households shopped at a super store or supermarket within one day of conducting a large dollar transaction.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for Harris County small grocery stores during the review months and at the Appellant firm is significant. Appellant's SNAP transaction dollar amount is approximately half that of Harris County small grocery stores while its total SNAP transaction count **5 U.S.C. § 552 (b)(7)(E)** than the County average and its average SNAP transaction dollar volume **5 U.S.C. § 552 (b)(7)(E)** larger than the County average. The unusually high number of SNAP transactions combined with the unusually low average SNAP transaction dollar amount is an indication the firm may be dividing larger transactions into multiple smaller transactions in an effort to circumvent detection as previously discussed. A comparison of Appellant's SNAP redemptions to that of nearby like type stores having redemptions for the review period shows that none exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant firm even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is further indication that the transactions in this Attachment do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

The firm also had irregular SNAP transaction data compared to like type stores in Harris County. A comparison of Appellant's redemption data to Harris County small grocery stores using ten dollar increments shows that Appellant's transaction count and dollar volume significantly exceed the average of like type stores in all ranges **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** which point transactions stop. The Appellant firm also has unusual spikes in the number and dollar

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

Appellant contends the excessively large transactions amount to less than 18 per month and since the firm is the only grocery with a meat market and butcher, these are not excessive. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The 17 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) reflect the two to three sales each month of the large family value pack that includes 80 pounds of meat.

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

Information obtained during the FNS store visit on March 22, 2018, shows that the Appellant firm offers a limited quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Much of the inventory for sale consists of inexpensive snacks, candy, condiments, drinks, and single serving foods as well as many ineligible items. The fact that tobacco, alcohol, lottery, household products, paper products, pet products, auto products, health and beauty items, two ATMs, hot drinks, incense, clothing, and five gambling video games are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts. Additionally, Appellant's contentions relating to the meat value pack prices were discredited previously in this decision and therefore provide no explanation for the high dollar transactions listed in this Attachment.

Higher food prices make it even more unlikely that SNAP recipients, with very limited food benefits, would want to spend a considerable part of their benefits in a store that does not address all of their food needs when they are already shopping at larger, fully-stocked stores that would offer a greater variety of foods at lower prices. Many of these stores also offer store brand products at lower prices, weekly specials, and have shopping carts and checkouts with built-in scanners and conveyor belts to facilitate processing purchases quickly. 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 months. The firm has an extremely small checkout area and no shopping carts thereby making it difficult to facilitate the great quantities of eligible food items required to make up these large dollar

transactions. Therefore, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of carts and more likely that the amounts were contrived.

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

Other Contentions

Regarding Appellant's denial of trafficking, the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division and is limited to what circumstances were at the basis of the action at the time such action was made. In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. When the store owner signed the certification page of the SNAP retailer authorization application to become a SNAP retailer in 2013 and again when he applied for reauthorization in 2018, he confirmed he understood and agreed to abide by program rules and regulatory provisions. He also agreed to accept responsibility on behalf of the firm for violations of the SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. Additionally, a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

Appellant's contentions relating to the firm being located in a low income neighborhood is not contested as most SNAP retailers are located in similar neighborhoods. While the neighborhood has many smaller older houses, many of them are boarded-up while almost all of the occupied houses have at least one car parked in front. There is also a newly constructed six story apartment complex with a parking garage only steps from Appellant's location. The claim that many residents have no transportation has been disputed as the household transaction evidence shows households regularly shopping at much large stores, both nearby and at a distance. That many of the large stores include super stores and supermarkets that have fully stocked meat departments, as well as meat specialty stores, also refutes Appellant's claim that households buy a lot of meat at the firm. That all of the cashiers are mature adults has no bearing on the matter under review as there is no evidence that this demographic is less likely to violate SNAP rules and regulations than other groups. The employee affidavits provide no probative value as even if the clerks had trafficked SNAP benefits, they would be unlikely to admit to it.

The owner and the firm were charged with trafficking based on a computer analysis of the store's transactions for the review period. The charges do not derive from the use of a confidential informant or independent investigator who visited the store and made illegal purchases to support findings of trafficking, but by a computer program used by SNAP Administrators. While traditional undercover operations are still in use by USDA, for many years federal regulations have also authorized the use of evidence consisting of EBT transaction data in investigations of SNAP retail stores to determine if trafficking is occurring and U.S. District Courts have long upheld the validity of EBT transaction data.

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

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

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

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

CIVIL MONEY PENALTY

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because Appellant failed to submit any evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

Based on the above discussion and the evidence under review, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division’s decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7

CFR §278.6(i). Additionally, Appellant declined the trafficking CMP as the firm did not have sufficient resources to pay it.

CONCLUSION

The Retailer Operations Division presented a case that Appellant has likely trafficked in SNAP benefits. Their analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in three Attachments of EBT transaction data, the inadequacy of the store's staple food stock as observed during the store visit to support large transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type and larger stores in 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. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a trafficking CMP according to Section 278.6(i) of the SNAP regulations.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

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

ROBERT T. DEEGAN
Administrative Review Officer

April 1, 2019